The fiduciary duty

THE NEXT STEP FOR ABORIGINAL RIGHTS?

Justin Malbon

Can the common law limit the power of government to arbitrarily and unfairly exercise its power over Aboriginal people?

Mabo came as a shock for many people. This is not surprising in some ways; school history books told us of brave explorers traversing an empty continent and, in a perverse moral inversion, lauded the squatters (who were after all breaking the law) while ignoring the impact on Aborigines of losing their land. We were told that Aboriginal people had no rights other than those we had the good grace to give them.

So it is hardly surprising that people were shocked when the High Court found that the common law recognised native title. But if the High Court had ruled otherwise, it would have properly outraged Aboriginal and Torres Strait Islander people and totally surprised the small band of lawyers, historians and others who are interested in issues concerning the recognition of native rights.

Before *Mabo*, Australia was the odd one out as a former British colony that had not recognised native rights. The US Supreme Court recognised the Indians as members of domestic dependent nations over a century ago. The Canadian Supreme Court divided on the issue in 1972, and then emphatically recognised native rights in the 1984 decision of *Guerin v The Queen* [1984] 2 SCR 335. The New Zealand Court of Appeal made rulings recognising native rights during the last decade (see *Te Weehi v Regional Fisheries Officer* (1986) 6 NZAR 114 and *New Zealand Maori Council v Attorney-General* [1987] NZLR 641). *Mabo* offered the High Court the opportunity to align the Australian common law with other common law countries. Predictably, the Court took the opportunity.

Mabo's limitations

The *Mabo* decisions are a significant first step towards the common law recognition and protection of native rights, but do not provide adequate protection against the arbitrary and unfair exercise of government power. *Mabo v Queensland (No.2)* (1992) 175 CLR 1 specifically acknowledges the power of the government to extinguish native title without compensation – no matter how arbitrary or unfair the act of extinguishment. The primary constraint on governments is the *Racial Discrimination Act 1975* (Cth). The Commonwealth Government can amend or repeal this statute, thereby removing a significant restraint on the ability of State and Territory governments to arbitrarily exercise their powers over indigenous Australians. The recent horse trading in the Commonwealth Parliament over the *Native Title Bill* illustrated the *Racial Discrimination Act*'s vulnerability, despite Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights. Had the Federal Opposition been more politically adept, history might have been different and the principles underlying the *Racial Discrimination Act* seriously undermined.

The next step which must be taken to align the Australian common law with other common law countries on the recognition of indigenous rights is to limit the capacity of governments to arbitrarily and unfairly use their power over indigenous Australians. This can be achieved by establishing an equitable duty on government towards indigenous Australians. An action instigated in the Federal Court by the Wik people in northern

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Queensland may eventually offer the High Court the opportunity to rule on the existence and nature of the duty. It is likely, given the hints and observations of the High Court in *Mabo (No.2)*, that the Court will find that some form of fiduciary duty rests on government. Consequently, the questions are:

- what is the possible basis for the fiduciary duty;
- what is its possible scope; and
- what steps should government take now to avoid breaching a potential fiduciary duty?

What is the possible basis for the fiduciary duty?

In *Mabo (No. 2)* most judges entertained the possibility that the government owes a fiduciary duty to indigenous people. Brennan J (with Mason CJ and McHugh J agreeing) did not consider the issue in any detail, however he thought that a fiduciary duty may arise after indigenous people surrender their title to the Crown (at 60). The proposition that a fiduciary duty arises on surrender, resembles the Canadian position reached by Dickson J (with Beetz, Chouinard and Lamer JJ agreeing) in *Guerin*, holding that the fiduciary duty arises on surrender of native title to the Crown, being duty based on the aborigines' pre-existing title to the land (at 383).

In *Mabo (No. 2)* Deane and Gaudron JJ described the duty as allowing a remedy based on a 'remedial constructive trust' (at 113). They saw that the trust is based on the common law principle that 'pre-existing native rights are respected and protected'. This proposition makes a lot of sense as there is little point in having a legal right that is unenforceable.

Toohey J also based the remedy on a constructive trust. He found that the duty arises 'out of the power of the Crown to extinguish traditional title' but does not depend on the Crown exercising that power (at 203). He described the Crown's power to destroy or impair the interests of indigenous people as extraordinary. He considered that it was sufficient to attract regulation by equity to ensure that the Crown does not abuse its powers.

Toohey J's position is more in line with the common law of the United States. The main architect of the common law principles regarding indigenous rights in the United States is the great jurist Chief Justice Marshall. Over a century ago he found that the common law recognised the Indian tribes as domestic dependent nations (*Cherokee Nation v Georgia* (1831) 30 US 1 at 17). He did this at a time when the chauvinism of the Southern States against the Indians was intense and the concerns of the Federal Government about them were, at best, largely apathetic. Marshall CJ, on the other hand, respected the rights of the Indian nations and described the Federal Government's obligation as being a relationship resembling that between a ward and a guardian.

The conduct of the British settlement of Australia differs, of course, from that of its conduct in North America. There is, however, plenty of evidence of the Crown's awareness of its obligations to the Aboriginal people and its attempts to meet its obligations. The British Government was well aware of the atrocities committed on Aboriginal people, particularly after receiving the findings of the 1837 Commons Select Committee on the Aboriginal people of the Empire.[1] Through the Colonial Office, the Government took active measures to meet its obligation to protect the interests of the Aboriginal people.

There are numerous examples of the measures taken by the Imperial Crown to protect native rights. They include the Letters Patent relating to the establishment of the colony of South Australia which disclaimed any intent to affect 'the rights of any Aboriginal natives' to the 'actual occupation or enjoyment' of the lands they possessed. Another example is the Royal Instructions issued in 1860 which enjoined the Governor of Queensland to protect the Aborigines 'in the free enjoyment of their possessions'. Yet another example is the Imperial policy of creating reserves for Aborigines which was pursued in Port Philip and South Australia in the 1840s.[2]

Internal Colonial Office memoranda repeatedly referred to the Imperial Government's recognition of the continuing legal right of Aborigines to their land. The memoranda referred to the intention not to allow pastoral leases to 'exclude the natives' from their land, to the 'mutual rights' of pastoralists and Aborigines to land and to the opinion that the *Sale of Waste Lands Act 1842* (Imp.) did not provide the colonies with the power to extinguish native customary rights. The measure of the Imperial Government's recognition of its obligations to Aboriginal people is also shown by the intervention of the Colonial Office in 1850 to ensure that colonial pastoral regulations expressly recognised Aboriginal rights.[3]

A great deal of the Imperial concern was over the impact the taking of land was having on Aboriginal people and their continuing right to use pastoral lands. The Imperial Government attempted to regulate the impact of land acquisition by maintaining the legal control over the sale and leasing of land which it had held since the beginning of colonisation. The Imperial Crown's ultimate legal control was confirmed in the *Sale of Waste Lands Act*. Ultimately, however, the Imperial Government could not sustain its protection of Aboriginal people by controlling the sale and leasing of land. The restrictive grant of power to the Colonial Governments to dispose of land under the *Waste Lands Act* was greatly resented in the Colonies and led to a sustained political campaign for greater independence. This was granted to the Colonies through the Colonial Constitution Acts of 1855 and the repeal of the *Sale of Waste Lands Acts* of 1842 and 1846.

One argument that confirms that the Imperial Crown did not abandon the Aborigines at that point is a largely ignored provision in the Colonial Constitution Acts of 1855. Section 2 of the *New South Wales Constitution Act 1855*, for example, stated in part that nothing in the Constitution should be taken to affect 'any Engagement made by or on behalf of Her Majesty, with respect to any Lands situate in the said Colony, in Cases where such Contracts, Promises, or Engagements' were made before the commencement of the *Constitution Act*. Another part of s.2 protected the interests of the squatters. The section in the *New South Wales Constitution Act* has since been repealed, but a similar provision remains today in the *Queensland Constitution* (s.30). It is possible, although it is not investigated here, that the New South Wales legislature did not have the power to repeal the provision.

The meaning of the phrase 'Contracts, Promises, or Engagements' in this context is controversial. Dawson J believes that the rights referred to in the phrase have long since been exhausted (*Mabo v Queensland (No. 1)* (1988) 166 CLR 186 at 239). He relied on a comment of Isaacs J in *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 454 for this assertion, Isaacs J having simply stated that the provision 'long ago became exhausted' without offering any further explanation. On the other hand, on the basis of the policy and attitudes of the Colonial Office at the time the provision was inserted in the Constitution Acts, Reynolds believes that the provision was clearly designed to protect the interests of Aboriginal people.[4]

Whatever the position on the constitutional protection of native rights through the *Constitution Act* of 1855, it is clear that

the Imperial Government was aware of, and very concerned about, Aboriginal people. The Government accepted a general responsibility for Aboriginal people that was reflected in Colonial Office policy and the legal measures it instigated to protect the Aboriginal interests. A modern legal expression of that responsibility is the 'fiduciary duty' owed by government to the indigenous people of Australia.

The duty originally resided with the Imperial Crown because it was the sovereign power that acquired the territory of the Aborigines. The duty eventually shifted to the Federal Government when Australia assumed independence from Britain. The power over indigenous people in Australia that once resided with the Imperial Government now resides with the Federal Government and is exercisable under its implied powers of nationhood.[5]

What is the possible scope of the duty?

Assuming the High Court finds that a fiduciary duty exists, what is the possible scope of the duty?

In his limited consideration of the matter, Brennan J appeared to align himself with Dickson J in *Guerin*. Dickson J held there that the duty arose after the aborigines surrendered their title to the Crown. He deliberately avoided describing the full dimensions of the title on which the duty is based or specifying the full range of remedies a breach of the duty invoked, because he considered that the title is *sui generis*.

Deane and Gaudron JJ stated that a remedy can be provided for a breach of a 'remedial constructive trust' (*Mabo (No. 2)* at 113) and Toohey J stated that it would be for a breach of a constructive trust. Deane and Gaudron JJ proposed that the constructive trust be modified to reflect the 'incidents and limitations of the rights under the common law native title' (at 203).

Basing the remedy for the arbitrary use of government power on a constructive trust, even if modified to take account of the circumstances of the relationship between the government and indigenous people as Deane and Gaudron JJ suggest, is in my view inappropriate. Considerable caution should be taken when considering the nature of the duty owed by government to the members of the community it governs. As Isaacs J pointed out in *Williams v Attorney-General (NSW)*, the duty of the Crown to protect the interests of the community is a duty 'which resides with the Crown as the representative of the whole community, and not in the Crown in its parental character' (at 434). A significant obligation of government, therefore, is to work for the benefit of the whole community. This is essentially a political obligation which is legally unenforceable and is not an obligation founded on a fiduciary duty.

The duty owed by the government to Aboriginal people is not based on its duty as representative of the whole community; it arises from its 'parental character'. Nor is the duty based on a strictly private law relationship. The duty has public law dimensions because it is based on the acquisition of territory and the government's extraordinary power over the original inhabitants of the territory. Basing the duty on a constructive trust, even if modified as Deane and Gaudron JJ suggest, tends to give insufficient attention to the public law dimensions of the duty. It tends to ground the duty too heavily on private law requirements and remedies and places unnatural limits on the scope of the duty.

The fiduciary duty owed to indigenous people arises from the obligation of the nation acquiring territory to ensure the interests of the original inhabitants of that territory are protected (*Cherokee Nation v Georgia*). The consequence of territorial acquisition is that the acquiring nation gains overwhelming power to extinguish the interests of the indigenous people and exercise power over all other aspects of their lives. The fiduciary duty would prevent the government exercising that power in an arbitrary and unfair way.

Legal protection of the indigenous rights requires a flexibility of approach because the native rights are *sui generis* (in a class by themselves) and describing them with the language of the common law is 'inherently difficult'.[6] In addition, giving literal expression to the rights may greatly limit the capacity of the government to fulfil its obligation to govern for the benefit of the whole community. Consequently, the government's duty to the indigenous people needs to be considered within the context of its obligation to the whole community. This will inevitably require a balancing of interests. This exercise has a parallel to the approach the High Court used when considering whether the Federal Government used proportional measures in legislation that constrained free speech.[7] Similarly, when considering whether there is a breach of fiduciary duty, the courts could consider the reasonableness (and possibly the proportionality) of government measures that affect indigenous rights.

In summary:

- the duty owed by government to indigenous people is based on its overwhelming power over indigenous people;
- it is a general duty to exercise that power in a way that is not arbitrary and unfair;
- the duty to indigenous people will need to be considered in the context of the government's general obligation to the people it represents; and
- the scope of the duty should be made out on a case by case basis.

What steps should government take now?

It is reasonable to assume on the basis of the comments of the majority of the High Court judges in *Mabo (No.2)* that if the Court is offered the opportunity to consider whether government owes a fiduciary or trust duty to indigenous people in Australia, it would find that a duty exists. It is also worth noting that the statute of limitations usually cannot be invoked by a trustee against its beneficiary in relation to the subject matter of the trust, and therefore the government may not be able to invoke the statute against the indigenous beneficiaries.[8] Consequently, Australian governments are well advised to ensure that their present conduct does not offend the potential fiduciary or trust duty owed to indigenous people.

Meeting the duty would require taking reasonable steps to ensure that it does not exercise its powers over indigenous people in an arbitrary or unfair way. Complying with the *Racial Discrimination Act* as it was originally enacted would remove a great deal of arbitrariness in government behaviour. Steps taken to attain a comprehensive reconciliation of the claims and interests of indigenous Australians would also amount to positive steps to meet any claims for damages for the wrongful dispossession of indigenous groups.

Ultimately the courts do not have the capacity to attain a comprehensive settlement or reconciliation between indigenous and non-indigenous Australians. The courts can, however, prompt the political process by finding that a fiduciary duty exists between government and the indigenous people. But the process of peace, order and good government is best achieved if the government takes the initiative and deals with indigenous people and their interests on the basis of mutual respect and works assiduously to ameliorate the great wrongs done in the past, and assists indigenous people to determine their destiny in Australia.

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acknowledgment of the situation the DSS had created for the client, may best explain the client's consent to resolution.

A final blow for the client came when the agreement giving effect to the resolution was drawn up. Unfortunately, the SSAT in its initial decision (although favourable to the client) failed to give actual reasons for its decision. This meant that the AAT mediator lacked the power to include the DSS acknowledgment of its fault, and a denial of client fault, in the AAT official decision, although this information can be found if one can access the client's file.

Issues

The process raises a number of issues with respect to the DSS and mediation.

First, a *Mediation Kit* was mentioned at the hearing prior to the mediation conference, but this did not materialise, so neither party was able to become familiar with the general aims and procedure of the mediation process. Clearly, if the mediation process is to address the issue of power imbalance mentioned above, such basic information should be readily available.

Additionally, the SSAT needs to be aware that a failure to provide *reasons* for its decisions could disadvantage parties who later participate in a mediation process at the AAT level. The provision of such reasons means that the AAT has the power to include them in an agreement reached at a mediation conference.

Interestingly, the mediator, in commenting on the mediation process occurring for the first time in Adelaide, also suggested that DSS offices outside the more populous States need further information and training in the area of mediation. Perhaps the Department could consider sending Adelaide staff interstate for familiarisation with this process.

Conclusion

Although mediation between the DSS and clients should not be discouraged as it can achieve quick, effective and cheap resolutions when properly managed, the other realities of mediation should not be ignored. In the social security context mediation takes place between a very powerful bureaucracy and an individual with scarce resources. As a result there will be a risk that the DSS can utilise the mediation process to further wear down the client who has already progressed through a number of tiers of the appeal system. To work fairly for the client the mediation process must have built into it some minimum standards which are observed by the DSS uniformly around the nation.

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References

1. Reynolds, H., 'The *Mabo* Judgment in the Light of Imperial Land Policy', (1993) 16 *UNSW LJ* 27 at 30.
2. Reynolds, above, p.31.
3. Reynolds, above, pp.34-37.
4. Reynolds, above, p. 39.
5. See Blumm, M.C. and Malbon, J., 'Aboriginal Title, the Common Law and Federalism' in M.P. Ellinghaus, A.J. Bradbrook and A.J. Duggan (eds), *The Emergence of Australian Law*, Butterworths, 1989, at pp.39-41.
6. See Lord Sumner *Re Southern Rhodesia* [1919] AC 211 (PC) at 233. See also *Guerin v The Queen* [1984] 2 SCR 335 per Dickson J who referred to the constant problem arising 'from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from the general property law' (at 382).
7. See *Australian Capital Television Pty Ltd v Commonwealth* (No.2) (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
8. See *County of Oneida v Oneida Indian Nation* (1985) 470 US 266.

NOTICES

DISABILITY DISCRIMINATION

The Federal Government has recently completed a Legal Aid Impact Statement on the *Disability Discrimination Act*. This revealed the need for specialist disability centres, operating in each State of Australia.

These Centres will provide legal advice relating to issues arising from the *Disability Discrimination Act,* and provide community legal education in the area. They are expected to open in May 1994. For further information, please contact the Federation of Community Legal Centres in your State.

VOLUNTEERS NEEDED

The St Kilda Legal Service needs volunteers on Thursday evenings. Experience in criminal law and family law preferable. Also needed - a solicitor to take on a supervisory coordinating role.

If interested, please contact Suzy Fox or Anthea Teakle on tel (03) 534 0777.

BUSH HERITAGE

Governments can be lobbied to protect valuable pieces of Crown land but many areas in private hands are being increasingly threatened by inappropriate development. The Australian Bush Heritage Fund, a national non-profit organisation, was established to purchase privately owned land in areas of high conservation value.

The inspiration for Bush Heritage came from large land acquisition groups in the US and the UK although buying up land in Australia to preserve it is not new. Many groups have been raising funds to save special areas which may be threatened. Bush Heritage has now established a national approach to this type of nature conservation.

A nationally registered company with its own tax deductibility status, it is governed by a Board of Directors and has a scientific advisory panel to oversee the identification and management of areas of high ecological significance. The organisation already has more than 2000 financial supporters.

The Fund has so far acquired 241 hectares in the Liffey Valley in Tasmania abutting the World Heritage area and 8.17 hectares of fan palm forest in the Palm Valley area of Queensland's Daintree rainforests.

To help, contact:
The Australian Bush Heritage Fund
102 Bathurst St
Hobart, 7000
tel 002 31 5475, fax 002 31 2491