MABO'S UNFINISHED BUSINESS: THE CROWN'S FIDUCIARY DUTY TO TRADITIONAL OWNERS

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Abstract

This article briefly reviews some leading Australian decisions concerning whether fiduciary duties apply to governments when dealing with traditional owners and their land. Reference is made to relevant decisions in Canada, the USA, and New Zealand, and to the impact, if any, of constitutional and treaty recognition of Indigenous land rights.

I MABO V QUEENSLAND (NO 2)[1]

In the *Mabo* litigation, five plaintiffs from Murray Island in the Torres Straits issued proceedings in the original jurisdiction of the High Court in May 1982. Amongst other relief, they sought declarations that Australian common law, upon and since colonization in 1879, recognised their traditional rights and interests in specified areas of land and surrounding reefs and seas.[2] They claimed that these traditional rights and interests had not been extinguished upon colonization and the introduction of British common law, nor by government conduct through to 1982. The plaintiffs sought declarations about the existence and nature of their traditional rights to the claimed areas, and injunctions to restrain Queensland from unlawfully impairing or extinguishing those rights, or their exercise, by the traditional owners. Damages arising from infringement of the claimed rights were sought against Queensland, and an injunction to restrain the Queensland government from issuing DOGITs over the Murray Islands.[3]

A *Fiduciary Pleaded*

In 1984, with pleading squabbles still underway, three judicial initiatives triggered amendments to the claim to include a new cause of action seeking declarations of a fiduciary duty owed by the Crown to the plaintiffs as traditional owners of land on Mer. First, the Canadian Supreme Court handed down *Guerin v The Queen*[4] — a landmark decision that governments, when dealing with native title land, owed Indian tribes fiduciary duties. In *Guerin*, Dickson J said:

> [W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[5]

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

[2] Bryan Keon-Cohen, *A Mabo Memoir: Island Kustom to Native title* (Zemvic Press, 2nd ed, 2013) ch 2.3, 53–6 ('*A Mabo Memoir*'); *Mabo & Others v Queensland & The Commonwealth: Statement of Claim, 30/5/1982*, at National Library of Australia, MS 9518, MC PAN vol 2, document 1 ('NLA MS 9518').

[3] *A Mabo Memoir* (n 2) 41–2, concerning Deeds of Grant in Trust, i.e. DOGITS.

[4] (1985) 13 DLR (4th) 321 ('*Guerin*').

[5] *Guerin* (n 4) 341.

Second, also in 1984, the Australian High Court decided *Hospital Products Ltd v United States Surgical Corporation,*[6] where Mason J (in dissent) also issued a ruling on fiduciary duty considered to be very significant in Australian law. His Honour stated, 'the critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense'.[7]

According to Mason J, such a relationship thereby gives 'the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his [or her] position'.[8]

A third factor were observations by Deane J in 1988 in *Mabo (No 1)* where His Honour suggested that when the Queensland Governor set aside land on Murray Island as an Islander reserve in 1912, that development was unlikely to 'defeat specific traditional proprietary rights and interests' and might amount to 'the recognition of a fiduciary relationship' between Islanders and Queensland.[9]

Thus, the plaintiffs' legal team, led by Ron Castan AM QC, in February 1989, amended the statement of claim to plead a new cause of action: breach of fiduciary duty owed to the plaintiffs and their family groups, by the relevant Crown, the Queensland government.[10] The plaintiffs sought a declaration that the Crown was under a fiduciary obligation with respect to their traditional land rights and that impairment of those rights would constitute a breach of that obligation.[11] Equitable damages and restraining orders were also sought but not pursued before the High Court since no evidence going to damages was presented at the trial of facts.[12]

B *Final Argument: High Court*

On this basis, the final argument occurred before the full High Court in May 1991. As to the issue of fiduciary duty, Ron Castan referred to the 'landmark description of the general characterisation of fiduciary obligation'[13] by Mason J, mentioned above. Castan submitted that a fiduciary obligation arose with respect to the plaintiffs' areas from the 'Crown's interest in the islands and its capacity to act in ways which would affect the interests of the Islanders in the land' and that the 'fiduciary obligations do not fetter the legislative power' but that 'they do limit the way in which the power otherwise granted, for example under Crown land legislation, can be exercised'.[14] Queensland submitted, unsurprisingly, that no such obligation arose.[15]

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[6] (1984) 156 CLR 41 ('*Hospital Products*').
[7] Ibid 96–7, affirmed at 68–70 (Gibbs CJ), 116 (Wilson J), 142 (Dawson J); *Breen v Williams* (1996) 186 CLR 71, 92–3 (Dawson and Toohey JJ). See subsequent cases mentioned at Richard Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 4th ed, 2019), 769–70. See also Plaintiffs Comprehensive Written Submissions, at NLA MS 9518, MC vol 63, ch 8, pp 6, 10–11 ('*Plaintiffs H. Crt. Submissions*').
[8] *Hospital Products* (n 6) 96–7.
[9] *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 228 ('*Mabo (No 1)*'); *A Mabo Memoir* (n 2) 191.
[10] See Amended Statement of Claim, ordered by Moynihan J on 22nd February 1989 at *A Mabo Memoir* (n 2) 191.
[11] *Mabo (No 2)* (n 1).
[12] *A Mabo Memoir* (n 2) 191, 399–400, 409; *Plaintiffs H. Crt. Submissions* (n 7) Ch 8. See also relief sought in the statement of claim at *Mabo (No 2)* (n 1) 4–5 and questions for the consideration of the Full Court ordered by Mason CJ on 20 March 1991 at *Mabo (No 1)* (n 9) 6–7.
[13] Bartlett (n 7) 769.
[14] *Mabo (No 2*) (n 1). See also *Plaintiffs H. Crt. Submissions* (n 7) 1–14.
[15] For an account of the hearing, see *A Mabo Memoir* (n 2) 397–419; Bryan Keon-Cohen, 'The Mabo Litigation: A Personal and Procedural Account' (2000) 24(3) *Melbourne University Law Review* 893.

C *Mabo (No 2) Judgments on Fiduciary Duty*

In brief, save for substantial approval from Toohey J,[16] and brief support from Deane and Gaudron JJ,[17] this claim was rejected by a majority of 4/3. Mason CJ and McHugh J in a joint judgment, rejected, on their own, and Brennan J's behalf, any such fiduciary accountability, and claimed the support of Dawson J.[18]

Toohey J alone considered this issue in detail. His Honour found the existence of an enforceable fiduciary or trust relationship between the Meriam people and the Queensland government on two bases. First:

> If the Crown in right of Queensland has the power to alienate … the Meriam people's … traditional title and if … their title … is inalienable except to the Crown, then this power and corresponding vulnerability give rise to a fiduciary obligation on … the Crown. … The fiduciary obligation arises … out of the *power* of the Crown to extinguish traditional title … it does not depend on an exercise of that power.[19]

Second, His Honour continued, if, contrary to the above view, the Crown-Meriam relationship:

> [W]ith respect to traditional title alone were insufficient … both the course of dealings by the Queensland Government with respect to the islands since annexation[20] … and the exercise of control over or regulation of the Islanders themselves by welfare legislation[21] … would certainly create such an obligation…[22]

The Crown's fiduciary obligation, Toohey J continued, was 'in the nature of … a constructive trustee'[23] and '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'.[24]

These statements represented important new developments in Australian law, aimed at providing some legal protection to vulnerable communities against oppressive governments.

1 *Extinguishment and Fiduciary Duty*

Brief reference only is made here to some further aspects of this *Mabo (No 2)* ruling. Deane and Gaudron JJ, in a joint judgment, concluded that extinguishment by exercise of the Crown's power to alienate traditional lands would attract equitable protection. They considered that such infringement or extinguishment would be 'wrongful' because the Crown's power entailed a deviation from the 'principle of the common law that pre-existing native title rights are respected and protected'.[25] They added that the unique power to bring about extinguishment dictated that damages, declaratory relief or

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[16] See *Mabo* (*No 2*) (n 1) 204.
[17] Ibid 112–13.
[18] Ibid 15–16.
[19] Ibid 203 (Toohey J) (emphasis in original).
[20] Ibid, citing creation of reserves in 1882 and 1912 and appointment of trustees in 1939.
[21] Ibid, citing *Native Labourers' Protection Act 1884* (Qld)*, Torres Strait Islanders Act 1939* (Qld) establishing an Island Court and a form of 'local government' and *Community Services (Aborigines) Act 1934* (Qld).
[22] Ibid.
[23] Ibid 204, citing *Guerin* (n 4) 361 (Wilson J).
[24] Ibid.
[25] *Mabo (No 2)* (n 1) 100, 112–13 (Deane and Gaudron JJ).

a remedial constructive trust be available to protect native title from the actions of the Crown.[26] Dawson J, in dissent, rejected any fiduciary obligation but this conclusion was founded on a false premise: i.e., that native title did not exist.[27]

2 *Surrender of Native Title*

As to surrender of native title, the High Court declared a power unique to the Crown to accept a surrender of native title. Brennan J concluded 'once the Crown acquires sovereignty and the common law becomes the law of the territory, the Crown's sovereignty over all land in the territory carries the capacity to accept a surrender of native title'.[28]

This power aligns with the ruling that traditional owners can dispose of their native title only to the Crown, thus compromising its commercial value.[29] Dicta from the majority in *Mabo (No 2)* recognised that a fiduciary obligation of the Crown could attach to such a surrender.[30] Bartlett observes:

> The imposition of a prohibition on alienation and the concomitant power of the Crown to accept a surrender is a … unique disability imposed on native title holders to serve the Crown interest in controlling the alienation of land. It provides a glaring instance of a circumstance where fiduciary accountability should be imposed. The extraordinary power of the Crown over reserve lands (especially in Western Australia) set apart for Aboriginal people must be similarly regarded.[31]

3 *Legislative Power to Deny Fiduciary Obligation*

In *Mabo (No 2)* the plaintiffs made no submission that any fiduciary obligation could restrain the government's legislative power. In Australia, 'sovereignty carries the power to … extinguish private rights and interests in land'.[32] Further, legislation cannot be struck down as contrary to a fiduciary obligation, i.e. 'the doctrine of the sovereignty of Parliament means that the courts must accept as binding law statutes enacted by parliamentary process'.[33] Toohey J, however, in *Mabo (No 2),* stated:

> A fiduciary obligation on the Crown does not limit the legislative power of the Queensland Parliament, but legislation will be a breach of that obligation if its effect is adverse to the interests of the title-holders, or if the process it establishes does not take account of those interests.[34]

On this issue, the majority in *Mabo (No 2)* — Mason CJ, McHugh, Brennan, and Dawson JJ — 'failed to find any fiduciary obligation with respect to the power to alienate, but the nature of that majority and (no subsequent High Court ruling) render any final conclusions as to the denial of such an obligation tentative'.[35]

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[26] Ibid 113, 119; Bartlett (n 7) 777.
[27] Ibid 168–9 (Dawson J); Bartlett (n 7) 784.
[28] Ibid 60 (Brennan J); Bartlett (n 7) 773.
[29] In contrast to the USA doctrines, see Bartlett (n 7) 773.
[30] *Mabo (No 2)* (n 1) 60, where Brennan J (Mason CJ, McHugh J agreeing) stated: 'If native title were surrendered to the Crown in the expectation of a grant of tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation'. See also Bartlett (n 7) 781.
[31] Bartlett (n 7) 776.
[32] *Mabo (No 2)* (n 1) (Brennan J).
[33] *Wik v Queensland* [1996] 63 FCR 450, 694–5 (Drummond J), affirmed in the High Court in *Wik Peoples v Queensland* 187 CLR 1, 256 (Kirby J); 135 (Gaudron J), 131 (Toohey J) ('*Wik*'). See also Mason CJ in *Coe v Commonwealth* (1993) 118 ALR 193, 204; Bartlett (n 7) 785.
[34] *Mabo (No 2)* (n 1) 205 (Toohey J).
[35] Bartlett (n 7) 780. See also *Re Wadi Wadi People's Native Title Application* (1995) 129 ALR 167, where French J, as President of the National Native Title Tribunal, rejected Toohey J's opinion in *Mabo (No 2)* with respect to the exercise of the power of alienation of land giving rise to a breach of fiduciary obligation. In regard to a grant made in 1817 by the NSW

II FURTHER AUSTRALIAN CASES[36]

Australian courts since *Mabo (No 2)* have, in contrast to those in Canada, have demonstrated a reluctance to find a fiduciary obligation imposed upon the Crown with regard to dealings with both traditional owners and their land, and Indigenous peoples generally where, for example, non-economic interests are concerned such as loss suffered by Stolen Generation claimants,[37] or where liability may be established in tort or contract, as in a doctor-patient relationship.[38] Three only of several significant cases, focusing only on traditional owners, are briefly mentioned below.

A *Wik Peoples v Queensland*[39]

In *Wik,* fiduciary obligation was argued as a basis for imposing a constructive trust in favour of the native title claimants over their traditional land. The plaintiffs succeeded on other grounds, and the majority did not consider this issue. The minority, however — Brennan CJ, McHugh and Dawson JJ — rejected this argument. Brennan CJ dismissed any generally applicable fiduciary obligation, saying:

> I am unable to accept that a fiduciary duty can be owed by the Crown to the holders of native title in the exercise of a statutory power to alienate land whereby their native title … is liable to be extinguished without their consent and contrary to their interests.[40]

Brennan CJ confirmed the power to extinguish native title[41] but supported the existence of a fiduciary obligation on a surrender, referring to the acceptance of a surrender in *Guerin*, where the 'statutory scheme' and the 'subsequent dealing with the land imposed on the Crown' a fiduciary duty.[42]

B *Bodney v Western Airport Corp. Pty. Ltd* [43]

This case concerned the grant and compulsory acquisition of land claimed to be subject to native title. The claimants emphasised a 'general' fiduciary or trust relationship owed by the Crown so 'as to

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Governor, he stated that compliance with a fiduciary duty 'in my opinion, does not as a general rule, condition the validity of legislative and executive acts'. See also *Mabo (No 2)* (n 1) 187; Bartlett (n 7) 778.

[36] See generally for cases since *Mabo (No 2)*: Kirsty Gover, 'The Honour of the Crown: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(3) *Sydney Law Review* 339, 365–6; John O'Connell, 'A Case for Recognition: A Fiduciary Relationship Between the Crown and Indigenous Australians' (2021) 18(2) *Canberra Law Review* 233; Bartlett (n 7) 2. In *Thorpe v Commonwealth* (1997) 71 ALJR 767, 777, Kirby J stated 'whether a fiduciary duty is owed by the Crown to Indigenous people of Australia remains an open question. This Court has simply not determined it. Certainly, it has not made an adverse determination to the proposition. On the other hand, there is no holding endorsing such a fiduciary duty.' See also *Williams v The Minister (Aboriginal Land Rights Act 1983)* (1994) 35 NSWLR 497, 511 where Kirby J held that the NSW Aborigines Welfare Board was under a fiduciary duty to provide for the plaintiff's 'custody, maintenance and education.' For further discussion, see Stephen Gray, 'Holding the Government to Account: The 'Stolen Wages' Issue, Fiduciary Duty and Trust Law' (2008) 32(1) *Melbourne University Law Review* 115, 133–5.

[37] *Cubillo v Commonwealth* (2000) 174 ALR 97, 508 [1307]; *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331; *Collard v Western Australia* [2013] WASC 455**.**

[38] *Breen v Williams,* (1996) 186 CLR 71, 94 (Dawson and Toohey JJ), 110 (Gaudron and McHugh JJ). See also Bartlett (n 7) 770.

[39] *Wik* (n 33).

[40] Ibid 96.

[41] See *Wik* (n 33) 84 (Brennan CJ): 'its weakness is that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant.' More recent High Court cases have favoured the requirement of 'clear and plain intention' by the Crown to extinguish: see, eg, *Akiba v Commonwealth* (2013) 250 CLR 209.

[42] *Wik* (n 33) 96. See also Bartlett (n 7) 778, 781.

[43] (2000) 180 ALR 91 ('*Bodney*'); Bartlett (n 7) 779–80.

protect the Indigenous people',[44] and relied on Canadian,[45] US[46] and New Zealand[47] authorities that considered such a general obligation in the particular constitutional circumstances in those jurisdictions. The general obligation, however, is dependent upon those circumstances: Canada — *Constitution Act 1982* s 35(1); USA — the domestic dependant status of Indian tribes;[48] New Zealand — the Treaty of Waitangi 1840.

Lehane J concluded that the authorities addressing such a general obligation did not support 'a fiduciary duty of the kind' contended for and that the 'tendency of … High Court (authority) is against the existence of such a duty'.[49] However, Lehane J added:

> [C]ircumstances (may) 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 (my conclusion) mean that where, in particular circumstances, a duty of that kind is breached (or a breach is threatened) a constructive trust might not appropriately by imposed.[50]

C *Northern Territory v Griffiths*[51]

In *Griffiths,* the court ruled that any fiduciary obligation allegedly owed by the Crown to a claim group was displaced by the *Native Title Act 1993*.[52] The Court referred to discussion of fiduciary duty in *Mabo (No 2)* and concluded:

> The observations of Brennan J and Deane and Gaudron JJ in *Mabo (No 2)* are equivocal. And in *Wik*, … Brennan CJ stated (at 194) that where the Crown extinguishes native title under statutory authority, the Crown is under *no* duty to exercise the power of extinguishment in the native title holders' interests.[53]

The High Court stated that observations of the majority in *Mabo (No 2)* 'tend against the conclusion that fiduciary obligations exist'.[54]

III THE CONSTITUTIONAL FACTOR

The Question whether the Crown owes fiduciary duties to Indigenous communities and in what circumstances, if any, has been much discussed in former British colonies, most relevantly in Canada and New Zealand. There, notions of, 'The Honour of the Crown,' impact of constitutional provisions, and executing treaties with Indigenous groups are seen as very relevant context when the courts determine whether a fiduciary duty applies.

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[44] *Bodney* (n 43) 111 [50]; Bartlett (n 7) 779.
[45] *R v Sparrow* (1990) 70 DLR (4th) 385, 409 (Dickson CJC) ('*Sparrow*'); *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 ('*Delgamuukw*').
[46] *Pyramid Lake Paiute Tribe of Indians v Morton* 354 Supp 252 (1973) 256–8.
[47] *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 306; *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 24.
[48] See *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831) 17 where Marshall CJ ruled, famously: that Indian tribes 'may, more correctly perhaps, be denominated domestic dependant nations … in a state of pupillage' and that '[t]heir relation to the United States resembles that of a ward to his guardian'.
[49] *Bodney* (n 43) 116 [66].
[50] Ibid.
[51] (2019) 269 CLR 1 ('*Northern Territory v Griffiths*').
[52] Ibid 73 [126].
[53] Ibid 75 [129].
[54] Ibid 75 [130].

A *Canada: Constitution Act 1982 s 35(1)*

In Canada, the revised 1982 *Constitution* states, at s 35(1) 'the existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed.' Thus, following *Guerin,* decisions in Canada concerning Indigenous rights and fiduciary duties have been justified on constitutional grounds, and have maintained, and strengthened, the *Guerin* rulings. In *Sparrow,* the Judges speaking for the Full Court discussed the constitutional protection afforded Indian rights by s 35(1), and a resulting 'burden (cast upon the government) of justifying any legislation that has some negative effect on any Aboriginal right protected under s 35(1)'.[55] In this context, the Court stated:

> The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship grounded in history and policy, between the Crown and Canada's aboriginal peoples.[56]

O'Connell states, regarding s 35(1):

> This simple yet powerful provision … has been instrumental in the furtherance of indigenous rights in Canada, including the Canadian judicial system's recognition of a fiduciary relationship between the Crown and Indigenous Canadians.[57]

B *Australia: The Way Ahead?*

1 *Constitutional Reform?*

The question arises: could, or is it likely, that Australian courts might recognise a fiduciary obligation between the Crown and Indigenous people? As indicated above, Australian courts to date have resisted extending the principles of fiduciary law to embrace Indigenous-Crown relations.[58] The above authorities suggest that judicial reform is highly unlikely, without a 'systemic or paradigmatic shift such as the implementation of Indigenous constitutional recognition'.[59]

The Australian Constitution contains no clause such as Canada's s 35(1). The only references to Indigenous Australians – ss 51(26) and s 127, both removed by referendum in 1967 — said nothing about protecting Indigenous rights, let alone imposing fiduciary duties upon the Commonwealth Crown. Current resistance to Constitutional reform concerning Indigenous Australians seems likely to continue for some time following the Voice referendum failure of October 2023.[60]

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[55] *Sparrow* (n 45) 436.
[56] Ibid. See also *R v Adams* [1996] 3 SCR 101; *Delgamuukw* (n 45); Bartlett (n 7) 779.
[57] See O'Connell (n 36) 242, citing *R v Sparrow* [1990] 1 SCR 1075, 1108; *Mabo (No 2)* (n 1) 166.
[58] Gover (n 36) 365. See also Gray (n 36) 130. See however *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136, [1006], [994]–[1011]. Gray J accepted that a fiduciary relationship existed between the plaintiff (an Aboriginal man removed from his parents as a child) and the S.A. Aborigines Protection Board, being the plaintiff's statutory legal guardian: at [994]–[1011]. Gray J also found that 'as an emanation of the State, legal responsibility falls on the State with respect to these breaches (of duty)': at [994]–[1011].
[59] O'Connell (n 36) 239.
[60] See Shireen Morris, *Broken Heart: A True History of the Referendum* (La Trobe University Press, 2024); Thomas Mayo, *Always Was Always Will Be* (Hardie Grant Explore, 2024); David Hume and George Williams, *People Power: How Australian Referendums Are Lost and Won* (UNSW Press, 2024).

As to constitutional reform, attention therefore must turn to the States and Territories. The Constitutions of the six states and two territories differ in regard to their recognition of Indigenous peoples within their jurisdictions, but none provide, it is suggested, a firm basis upon which courts might rely to establish fiduciary duties owed by the state/territory 'Crowns.'

The Constitutions of Western Australia, the Northern Territory and the A.C.T. all fail to mention their Indigenous peoples.[61]

The Tasmanian[62] and Queensland[63] Constitutions, in their preambles, 'acknowledge' their Indigenous peoples as 'traditional and original owners' (Tasmania) or mention sharing their lands (Queensland). It is doubted that such language, of itself, establishes any obligations, fiduciary or otherwise, or provides a firm basis for judicial discovery of any fiduciary obligation of the Crown in right of the government of these states. In short, much honouring but little of substance.

The constitutions of South Australia,[64] NSW[65] and Victoria[66] contain similar 'recognition' immediately negated by 'no force or effect' provisions. This formulation would seem to negate any argument of supporting a fiduciary duty upon the respective Crowns. Such language provides no protection for the rights of Indigenous Peoples in Australia, in stark contrast to the 'honourable' simplicity of the Canadian Constitution 1985 s 35(1).

2 *Treaties?*

In the USA, Canada and New Zealand, treaties between Indigenous communities and colonizers — eg, the Treaty of Waitangi 1840 — have been an important element, involving the 'Honour of the Crown', supporting judicial rulings imposing fiduciary duties.[67] In Australia, at the federal level, following the disastrous failure of the Voice referendum, the Prime Minister's undertaking at the Garma Festival in July 2023 that his government would implement the Uluru Statement from the Heart 'in full', including establishing a Makarrata Commission to pursue 'Voice, Treaty Truth' has stalled. There

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[61] See *Constitution Act 1889* (WA); *Northern Territory (Self Government) Act 1978* (Cth); *Australian Capital Territory (Self Government) Act 1988* (Cth).

[62] The *Constitution Act 1934* (SA) preamble 'acknowledges the Aboriginal people as Tasmania's First People and the traditional and original owners of Tasmanian lands and waters; recognises the enduring spiritual, social, cultural and economic importance of traditional lands and waters to Tasmanian Aboriginal people…'

[63] The *Constitution of Queensland 2001* (Qld) preamble 'honour(s) the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community…'

[64] *Constitution Act 1934* (SA) s 2, headed 'Recognition of Aboriginal Peoples' states in s 2(1)(b) that the 'governance' of South Australia was established 'without proper and effective recognition, consultation or authorisation of Aboriginal peoples of South Australia', and 'recognises Aboriginal peoples as traditional owners and occupants of land and waters' in the state. S 2(3) states 'the Parliament does not intend this section to have any legal force of effect'.

[65] *Constitution Act 1902* (NSW) s 2, headed 'Recognition of Aboriginal People' 'recognises', at s 2(2), 'Aboriginal people, as the traditional custodians and occupants of the land in New South Wales' avoiding the word 'ownership.' Clause 3 negates any legal impact in fulsome terms: s 2(3) — 'nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales'.

[66] The *Constitution Act 1975* (Vic) s 1A, headed 'Recognition of Aboriginal People' acknowledges at s 1A(1): 'that the events (establishing the colony) occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria' and '(2) …Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established …' It then follows a 'no force or effect' section: s 1A(3) — 'the Parliament does not intend this section – to create in any person any legal right or give rise to any civil cause of action; or to affect in any way the interpretation of this Act or of any other law in force in Victoria'.

[67] See *Te Runanga v Attorney General* [1993] 2 NZLR 301, 306 (Cooke P): 'in New Zealand, the Treaty of Waitangi is a major support for [a fiduciary] duty'; Gover (n 36) 358.

is little indication that this commitment to 'Treaty and Truth' will be met by the current federal government.

As to the States and Territories, Queensland enacted treaty legislation, with bi-partisan support, in May 2023.[68] Despite the opposition abandoning that support, this initiative is progressing.[69] In Victoria, treaty initiatives are being actively pursued, also pursuant to legislation.[70] Should a treaty – or treaties – be executed in for example, Victoria, the impact upon current judicial reluctance to impose fiduciary duties upon the Crown when dealing with Indigenous people may, or may not, be significant. That will be another interesting story.

IV CONCLUSION

While *Mabo (No 2)* opened the door to whether fiduciary duties apply to the Crown in its dealings with traditional owners, Australian courts have since resisted extending fiduciary principles to Indigenous-Crown relations. This contrasts with other jurisdictions such as those in Canada, the USA, and New Zealand, where constitutional and treaty recognition of Indigenous rights have played a crucial role in the finding of fiduciary obligations. The recent failure of the Voice referendum and the lack of significant constitutional reform or treaty recognition in Australia further diminishes the likelihood of judicial reform in this area. However, emerging state-based treaty initiatives, such as those in Queensland and Victoria, may signal future shifts. Ultimately, Mabo's legacy in relation to fiduciary obligations remains unfinished, with the path forward likely dependent on further legal or political developments.

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[68] See Queensland Government Response to Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (Qld), *Treaty Advancement Committee Report* (Report, October 2021); Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (Qld), *Queensland Government Response to the Treaty Advancement Committee Report* (Report, 2021); Department of the Premier and Cabinet (Qld), 'Historic Path to Treaty legislation Passes Parliament' (Media Statement 97711, 10 May 2023).

[69] 'Path to Treaty', *Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts* (Web Page, 21 March 2023) <https://www.dsdsatsip.qld.gov.au/our-work/aboriginal-torres-strait-islander-partnerships/reconciliation-tracks-treaty/tracks-treaty/path-treaty>.

[70] See *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic); *Treaty Authority and Other Treaty Elements Act 2022* (Vic). Entities pursuing treaty-making in Victoria include the First Peoples' Assembly, Yoorook Justice Commission, a Treaty Authority (to oversee and facilitate negotiations), a Treaty Negotiation Framework and a Self-Determination Fund. See the Victoria State Government and First Peoples – State Relations, *Advancing the Victorian Treaty Process Annual Report 2022–23* (Report, 2023).