

# A CRITIQUE AND ANALYSIS OF THE FIDUCIARY CONCEPT IN *MABO v QUEENSLAND*\*

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*[In the Mabo decision, Justice Toohey found that the Crown owed fiduciary obligations to Aborigines. This article examines this concept, drawing on the Canadian and American experience where such a fiduciary relationship is well established. The article looks at the possible source of such a relationship, the interests which it may protect, the nature of the obligations that it may encompass, and its potential role in the protection of Aboriginal rights.]*

## INTRODUCTION

The decision of the Australian High Court in *Mabo v Queensland*<sup>1</sup> has stirred a volatile debate not only about how reconciliation between Aboriginal and non-Aboriginal Australians can be achieved, but also about the role of the High Court generally. This agitation was caused by the Court's recognition of native title for the first time in Australia's history. The focus of this article is on a much less talked about, but just as provocative aspect of the case — the finding by Toohey J in the minority that the Crown, in the right of Queensland, owes fiduciary obligations to the Meriam people to protect native title. Toohey J's formulation is novel, at least to the extent that it imports for the first time in Australia a fiduciary relationship between the Crown and Aborigines. This article aims to deal with some of the plethora of questions raised from this application of the fiduciary concept. The issue is currently before the Federal Court in a case in which the Wik people claim that the Queensland government has breached fiduciary obligations owed to them.<sup>2</sup>

The article is divided into four parts. The first part will examine the source or basis of the fiduciary relationship. Part II of the article will consider the scope of the proposed relationship, that is the fiduciary obligations which arise, and the extent of equitable protection. Part III will deal with the issue of enforcement of fiduciary obligations and remedies for breaches of fiduciary obligations. Finally, Part IV will look at the merits of this application of the fiduciary concept from several perspectives: the role of equity; the role of the judiciary; the interests of Australian Aborigines; and the role of the fiduciary concept after the enactment of the Native Title Act 1993 (Cth).

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<sup>1</sup> (1992) 175 CLR 1 (*Mabo*).

<sup>2</sup> *The Wik Peoples v The State of Queensland*, No QG 104 of 1993 (*Wik*).

## I THE SOURCE OF THE FIDUCIARY RELATIONSHIP

This part considers the rationale for finding a fiduciary relationship between the Crown and Aboriginal people. First, Toohey J's reasoning on this point will be outlined. Second, this reasoning will be analysed with reference to equitable principles regarding the fiduciary concept, with the aim of assessing whether a fiduciary relationship in this context is in conformity with those principles. Third, the special issues that arise in finding the existence of fiduciary obligations of the Crown will be considered. Finally, comparisons will be made with the rationales for the Canadian and American indigenous trust<sup>3</sup> doctrines.

A *Toohey J's Reasoning*

Toohey J starts by citing the test proposed by Mason J (as he then was) in *Hospital Products v United States Surgical Corporation*:

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. The relationship between the parties is therefore one which 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 position.<sup>4</sup>

There are two stages to this test: an undertaking or agreement by one party to act in the interests of another; and the weaker party's resulting vulnerability which arises from the stronger's special opportunity to exercise power or discretion. Applying this formulation to the facts of the *Mabo* case, Toohey J finds that the first limb of the test may be satisfied by an undertaking that is 'gratuitous' or 'officially assumed without request',<sup>5</sup> and that this requirement was met by the 'course of dealings by the Queensland government with respect to the lands since annexation',<sup>6</sup> namely the 'policy of "protection" by government [that emerged] from the legislation, ... as well as by executive actions such as the creation of reserves ... [which indicate] that a government will take care when making decisions which are potentially detrimental to Aboriginal rights'.<sup>7</sup>

The second stage of the test — the vulnerability requirement — is satisfied by the power of the Crown to extinguish traditional title by alienating the land

<sup>3</sup> The term 'trust' is used by courts and lawyers in a variety of senses. It may refer to anything from an 'express trust' legal relationship to which well-developed legal principles are applicable, to a relationship which merely resembles or is analogous to such a trust in some manner and which is not subject to the full scope of trust principles: Professor Austin Scott, *The Law of Trusts* (3rd ed, 1967) 2. It will be in the latter 'loose' sense that 'trust' will be used throughout this essay.

<sup>4</sup> (1984) 156 CLR 41, 96-7 (*Hospital Products*).

<sup>5</sup> *Mabo* (1992) 175 CLR 1, 200, citing Paul D Finn, *Fiduciary Obligations* (1977) 201.

<sup>6</sup> *Mabo* (1992) 175 CLR 1, 203.

<sup>7</sup> *Ibid* 201.

interests of the Meriam people.<sup>8</sup> However, Toohey J is of the opinion that this vulnerability alone is sufficient to create fiduciary obligations:

The 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. The fiduciary relationship arises, therefore out of the power of the Crown to extinguish traditional title by alienating the land or otherwise.<sup>9</sup>

Toohey J also draws analogies from the Canadian cases that recognise a trusteeship between the Crown and First Nation Canadians<sup>10</sup> and distinguished the case from the 'political trust' cases.<sup>11</sup>

The other members of the High Court do not deal extensively with the issue of a fiduciary relationship. Brennan J shows no interest in any expansive role for an ongoing fiduciary duty. He considers only one restrictive case, which resembles an estoppel:

If native title were surrendered to the Crown in expectation of a grant of a tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation.<sup>12</sup>

The joint judgment of Deane and Gaudron JJ is silent as to the existence of any fiduciary relationship, but does acknowledge the possibility of the imposition of a remedial constructive trust as an appropriate form of relief in some circumstances.<sup>13</sup> The dissenting judgment by Dawson J is the only judgment which expressly denies the existence of a fiduciary relationship.<sup>14</sup>

#### B *Critique of the Basis and Source of the Fiduciary Concept in Mabo — Equitable Principles*

Mason J's test in *Hospital Products* must be considered within the context of the various debates and uncertainty about the law of fiduciaries. Like Toohey J many commentators have consistently asserted that there is no unified fiduciary principle — no set of guiding criteria to determine when a fiduciary relationship

<sup>8</sup> Ibid 203.

<sup>9</sup> Ibid.

<sup>10</sup> See below n 72.

<sup>11</sup> See below nn 65-7.

<sup>12</sup> *Mabo* (1992) 175 CLR 1, 60.

<sup>13</sup> Ibid 113. Note that there are two competing theories about the nature of constructive trusts: institutional and remedial. The remedial constructive trust is imposed to remedy unjust enrichment or unconscionability, and need not be associated with a fiduciary relationship. This theory prevails in Canada, and was applied by Deane J in *Hospital Products* (1984) 156 CLR 41, 122-5, where he found a constructive trust based on unconscionability but no fiduciary obligation. Deane J's finding of a constructive trust in *Mabo* appears to be of the same nature, as there is no reference to a fiduciary obligation. For a discussion of the remedial as compared to institutional theories of constructive trusts, see Jonathan Gill, 'A Man Cannot Serve Two Masters: The Nature, Existence and Scope of Fiduciary Duties' (1989) 2 *Journal of Contract Law* 115, 116-9.

<sup>14</sup> *Mabo* (1992) 175 CLR 1, 163-70. See below n 141 and accompanying text.

exists.<sup>15</sup> Nevertheless, there is an abundance of academic writing and case law which can be used as a starting point in considering the extent to which Toohey J's formulation is consistent with equitable principles.<sup>16</sup>

It will be argued that Toohey J's invocation of the 'undertaking' test is both strained and inappropriate, and therefore an alternative rationale must be found. The relationship between the Crown and Aborigines also lacks some of the other commonly advocated criteria for fiduciary obligations, although none of these elements are essential.<sup>17</sup> A more appropriate basis for the finding of fiduciary obligations is the special vulnerability and nature of native title — derived from historic possession, yet subject to arbitrary extinguishment at common law. This basis for finding fiduciary obligations is not inconsistent with equitable principles, and has the support of several recent Canadian cases. In addition, public policy reasons can support the finding of a fiduciary relationship.

(i) *An Undertaking to Act in the Interests of Another*

The undertaking by one party to act for another is an essential part of Mason J's test in *Hospital Products*, and has been advocated by Professor Finn as the sole indicium of a fiduciary: a fiduciary 'is, simply, someone who undertakes to act for or on behalf of another in some particular matter or matters .... It is this [undertaking] which imports the fiduciary stamp.'<sup>18</sup> This test was originally proposed in an early seminal article 'The Fiduciary Principle' by Professor

<sup>15</sup> Ibid 200. It has been said that '[t]he fiduciary relationship is a concept in search of a principle.'; Sir Anthony Mason, 'Themes and Prospects' in Paul Finn, *Essays in Equity* (1985) 242, 246. See also: Gill, above n 13, 115; Paul Finn, 'Contract and the Fiduciary Principle' (1989) 12 *University of New South Wales Law Journal* 76, 85, 87; Donovan Waters, 'The Fiduciary Relationship' (1988) 18 *University of Western Australia Law Review* 42, 45; Malcolm Cope, *Constructive Trusts* (1992) 1984; Maurice Gautreau, 'Demystifying the Fiduciary Mystique' (1989) 68 *Canadian Bar Review* 1.

<sup>16</sup> See, eg, Ashley Black, 'Dworkin's Jurisprudence and *Hospital Products*: Principles, Policies and Fiduciary Duties' (1987) 10 *University of New South Wales Law Journal* 8; Finn, 'Contract and the Fiduciary Principle', above n 15; Paul Finn, 'The Fiduciary Principle' in Timothy Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1; Gautreau, above n 15; Gill, above n 13; Peter Johnston, 'The Repeals of Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust' (1989) 19 *University of Western Australia Law Review* 318; Mason, above n 15, 242; E Mabry Rogers and Stephen B Young, 'Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanours Implies a Fiduciary Standard' (1975) 63 *Georgetown Law Journal* 1025; L Sealy, 'Fiduciary Relationships' [1962] *Cambridge Law Journal* 69; J Shepherd, 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 *Law Quarterly Review* 51; Waters, 'The Fiduciary Relationship', above n 15; D Waters, 'New Directions in the Employment of Equitable Doctrines: The Canadian Experience' in Timothy Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 411; Ernest J Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1; Cope, above n 15; Finn, *Fiduciary Obligations*, above n 5; Heydon, Gummow and Austin, *Cases and Materials on Equity and Trusts* (4th ed, 1993); *Frame v Smith* (1987) 42 DLR (4th) 81; *Guerin v The Queen* (1984) 13 DLR (4th) 321; *Hospital Products* (1984) 156 CLR 41.

<sup>17</sup> For example, the Aborigines have not reposed any 'trust' or 'confidence' in the Crown. For an outline of other advocated criteria for a fiduciary relationship, see Shepherd, 'Towards a Unified Concept of Fiduciary Relationships', above n 16.

<sup>18</sup> Finn, *Fiduciary Obligations*, above n 5, 201. However, Finn has more recently described this test as unhelpful and has developed a different formulation of the fiduciary principle: 'a person will be in a fiduciary relationship with another when and insofar as that other is entitled to expect that [s]he will act in that other's or in their joint interests to the exclusion of his [or her] own several interests.': see Finn, 'The Fiduciary Principle', above n 16, 54.

Austin Scott.<sup>19</sup> Although Toohey J purports to apply this test, the reasoning which he uses to find that the source of the fiduciary relationship was a historical undertaking of a ‘policy of “protection”’ by the Queensland Government is problematic.

The difficulty with Toohey J’s analysis essentially arises from the fact that it does not reflect or sit well with historical reality. A prevalent interpretation of the historical relationship between the government and Aborigines is that the Crown has not protected, but rather has abused Aboriginal rights and interests — that there was no *effective* ‘policy of protection’.<sup>20</sup> In any case, any ‘policy of “protection” ... [that emerged] from legislation ... [and] executive actions’<sup>21</sup> that can be found arguably did not constitute an ‘undertaking’ to be a fiduciary. The actions of the Crown were gratuitous and discretionary — not amounting to a commitment to be bound by fiduciary obligations.

As noted by Toohey J, there is nothing problematic *per se* in finding either a self-appointed fiduciary, or a gratuitous undertaking to be the source of fiduciary obligations.<sup>22</sup> The existence of a fiduciary relationship is not dependant upon the existence of any consideration or contract. It is interesting to note however, that it has been argued that the basis of the trust relationship with the indigenous population in Canada and America lies in the exchange of an undertaking by the Crown to protect the Indians for an undertaking by the Indians to remain at peace with the settlers.<sup>23</sup> There may be evidence that the same type of exchange occurred in certain parts of Australia.<sup>24</sup>

<sup>19</sup> Austin Scott, ‘The Fiduciary Principle’ (1949) 37 *California Law Review* 539, 540. Note also that this was the basis of the test used by the Court of Appeal in *US Surgical Corporation v Hospital Products* [1983] 2 NSWLR 157. For a comment on the influence of this theory, see Shepherd, ‘Towards a Unified Concept of Fiduciary Relationships’, above n 16, 64-8.

<sup>20</sup> See, eg, Johnston, ‘The Repeals of Section 70’, above n 16. There are however numerous examples of measures taken by the Imperial Crown to protect native rights. For a comprehensive analysis of such measures in South Australia, see Julie Cassidy, ‘A Reappraisal of Aboriginal Policy in Colonial Australia: Imperial and Colonial Instruments and Legislation Recognising the Special Rights and Status of the Australian Aborigines’ (1989) 10 *Journal of Legal History* 365. She argues that the Imperial Crown recognised and sought to protect Aboriginal Rights although dishonestly on the part of the Colonisation Commission in any event led to the dispossession of the Aboriginal people of Australia. See also Justin Malbon, ‘The Fiduciary Duty — The Next Step for Aboriginal Rights?’ (1994) 19(2) *Alternative Law Journal* 72, 73-4. See also Henry Reynolds, ‘Mabo and Pastoral Leases’ (1992) 2(59) *Aboriginal Law Bulletin* 8 in which Reynolds examines the historical documents of the British Colonial Office between 1836 and 1855, and argues that the Office was ‘aware of the competing concept of native title and sought to weave it into policy crafted for the Australian colonies.’ This included an obligation to preserve traditional rights when granting pastoral leases.

<sup>21</sup> *Mabo* (1992) 175 CLR 1, 201.

<sup>22</sup> See above n 5 and accompanying text.

<sup>23</sup> See, eg, Brian Slattery, ‘First Nations and the Constitution: a Question of Trust’ (1992) 71 *Canadian Bar Review* 261, 289-90; W McMurty and A Pratt, ‘Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective’ [1986] 3 *Canadian Native Law Review* 19, 31. For a critique of the contractual theory of fiduciary relationships, see Shepherd, ‘Towards a Unified Concept of Fiduciary Relationships’, above n 16, 64-8.

<sup>24</sup> See Cassidy, above n 20, 366: ‘[T]he colony of South Australia was based on the dire need to avoid the conflicts and depredation which had occurred in practice during the settlement of the other Australian states’.

Taking its plain meaning, an ‘undertaking to act in the interests of another’ would seem to imply that the undertaker had consented to, agreed to, or voluntarily assumed the role of a fiduciary:

The supervision of equity begins at the point where it can be proved that a person has, by his own undertaking, *consented* to act in a particular matter in a capacity other than his own principle — where he has undertaken ‘to act in the interests of another person’.<sup>25</sup>

However, it is not clear that there was consent of the Crown to be bound by fiduciary obligations. Rather, it would seem that the Crown merely acted in the interests of the Aborigines as appropriate — with discretion not only to decide what those interests were, but also to determine when they were to be subordinated to other interests. In light of the flagrant disregard of Aboriginal rights and the ‘national legacy of unutterable shame’<sup>26</sup> which has characterised the Crown’s dealings with Aboriginal Australians, an *ex post facto* analysis shows that the actions of the Crown were not actually underlain with any real commitment to be bound by fiduciary obligations.

Despite the ‘plain meaning’ of an ‘undertaking’, ‘a fiduciary responsibility, ultimately, is an imposed not an accepted one’.<sup>27</sup> The finding of such an undertaking is a question of fact.<sup>28</sup> The factors leading to such an imposition will probably involve what the alleged fiduciary has agreed to do, but will also involve considerations of public policy.<sup>29</sup> The question then is — what is the scope for implying or inferring an undertaking to act for or on behalf of another?<sup>30</sup> In arriving at this question, it would seem that we have not progressed very far from the initial question — when will equity impose fiduciary obligations?

It is evident that in the absence of an express or intended undertaking by the alleged fiduciary, the finding of fiduciary obligations will be based primarily on other criteria. In such cases, it is preferable to focus not on constructing an artificial undertaking, but to expressly recognise alternative rationales for imposing fiduciary obligations. These may be any of a range of factors prevalent in equitable discourse: reliance, trust, confidence, special disability, vulnerability, abuse of power, unjust enrichment etc.<sup>31</sup> This argument was made by

<sup>25</sup> Finn, *Fiduciary Obligations*, above n 5, 201-2. (Emphasis added.) However, note Finn’s modification of this formulation in his 1989 essay ‘The Fiduciary Principle’, above n 16.

<sup>26</sup> *Mabo* (1992) 175 CLR 1, 104 (Deane and Gaudron JJ).

<sup>27</sup> Finn, ‘The Fiduciary Principle’, above n 16, 54. That the consensual basis will not always be present is most clearly illustrated by the constructive trust imposed for reasons of unconscionability or unjust enrichment. The constructive trustee is a fiduciary: See Heydon, Gummow and Austin, above n 16, 215.

<sup>28</sup> See Finn ‘The Fiduciary Principle’ above n 16, 49-50; Finn, *Fiduciary Obligations*, above n 5, 201.

<sup>29</sup> Finn, *Fiduciary Obligations*, above n 5, 249.

<sup>30</sup> The existence of such an implied undertaking was determined as a question of fact by Deane J in *Moorgate Tobacco Co Ltd v Philip Morris Limited* (1984) 156 CLR 414, 436.

<sup>31</sup> See Finn, *Fiduciary Obligations*, above n 5, 249; Shepherd, ‘Towards a Unified Concept of Fiduciary Relationships’, above n 16, 67.

Shepherd in a 1981 analysis of the criteria for a fiduciary relationship. He traced the ‘undertaking’ test back to nineteenth century notions of quasi-contract and restitution, and argued that this contract analogy failed in the absence of an express acceptance by not providing a rationale for implying acceptance, and thus falling back on general principles of equity.<sup>32</sup>

In any case there is another reason why focusing on an ‘undertaking’ as the source of obligations is inappropriate. It would be inequitable to find fiduciary obligations owed by the Crown in the right of Queensland to the Meriam people arising from the creation of reserves and other protective measures undertaken many years ago, and yet fail to impose such obligations in other areas of Australia where native title existed, but there had been no identifiable protective policy, and perhaps flagrant disregard of Aboriginal interests.<sup>33</sup> This is tacitly recognised by Toohey J who held that the special nature of Aboriginal title and its vulnerability provide a distinct source of a fiduciary relationship.

(ii) *An Alternative Rationale: Vulnerability and Public Policy*

The search for an alternative rationale for the imposition of fiduciary obligations reveals both the absence and inapplicability of some of the traditional fiduciary criteria in this context. The existence of confidence or trust reposed in one party by another is a commonly asserted essential criterion for the finding of a fiduciary relationship. It focuses on the reliance one party places upon the other because of the trust placed in that other.<sup>34</sup> Such confidence or trust is blatantly absent in the relationship between the Crown and Aborigines. It is clear, however, that an actual relation of confidence — the fact that one person subjectively trusted another — is neither necessary for, nor conclusive of, a fiduciary relationship.<sup>35</sup>

Another rationale that is commonly advocated, but inappropriate in this context, is that the purpose of the relationship is to act *solely* in the interests of the beneficiary, or put in another way — where a person ‘has undertaken to act in

<sup>32</sup> Shepherd, ‘Towards a Unified Concept of Fiduciary Relationships’, above n 16, 64-8. Also note that, similarly, an undertaking alone, in the absence of additional equitable criteria will not be sufficient to give rise to fiduciary obligations, as the case of the basic contract demonstrates.

<sup>33</sup> ‘Given the vulnerable and inalienable nature of Aboriginal title as recognised in common law, specific promises should not be necessary to create a fiduciary relationship to govern the imbalance of power’: Kent Roach, ‘Remedies for Violations of Aboriginal Rights’ (1992) 21 *Manitoba Law Journal* 498, 520.

<sup>34</sup> Finn, ‘The Fiduciary Principle’, above n 16, 48. See, eg, *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1; *Lloyds Bank Ltd v Bundy* [1974] 3 All ER 757, 767 (Sachs J); *Tate v Williamson* (1866) LR 2 Ch App 55, 61; *Coleman v Myers* [1977] 2 NZLR 225, 325 (Woodhouse J). ‘US authority is legion which emphasises this point’: Finn, ‘Contract and the Fiduciary Principle’, above n 15, 85. It is considered an essential element by Shepherd: ‘Towards a Unified Concept of Fiduciary Relationships’, above n 16, 61.

<sup>35</sup> See Gibbs CJ in *Hospital Products* (1984) 156 CLR 41, 69; Heydon, Gummow and Austin, above n 16, 219; Waters, ‘The Fiduciary Relationship’, above n 15, 54; Gautreau, above n 15, 3, 9; R Flannigan, ‘Fiduciary Obligation in the Supreme Court’ (1990) 54 *Saskatchewan Law Review* 45, 61. Note that the lack of trust here lends support to the view that the reasoning based on an ‘undertaking’ that was not explicit or intended, is inappropriate. In the absence of something else, there would appear to be no reason for equity to step in and enforce a gratuitous and unintended undertaking that had not been relied on, was not the result of the acceptance of the ‘trust’ of the other party, and did not induce any change of position.

the interests of another and not in his own'.<sup>36</sup> This was the basis of the test used by the Court of Appeal in *Hospital Products* and adopted by the majority of the High Court.<sup>37</sup> The preferable view is that of Mason J who specifically dissented on this point: 'entitlement to act in one's own interests is not an answer to the existence of a fiduciary relationship, if there be an obligation to act in the interests of another'.<sup>38</sup>

Returning to basic principles of equity, — 'conscience and good faith'<sup>39</sup> — it is the special *vulnerability* of native title to extinguishment by the Crown that should attract the fiduciary label, regardless of any past promise by the Crown to provide protection. 'The exercise of a power or a discretion which will affect the interests of [another] person in a legal or practical sense' is the second limb of Mason J's test in *Hospital Products*,<sup>40</sup> and Toohey J suggests that this vulnerability alone is the touchstone of a fiduciary relationship.<sup>41</sup>

The existence of one party's power and discretion to act in a manner affecting another and the vulnerability that necessarily exists in such situations has been a fundamental element for the finding of fiduciary obligations.<sup>42</sup> While it is generally said that the existence of vulnerability alone is insufficient to create a fiduciary relationship,<sup>43</sup> there is also support for the opposite view — that vulnerability, and the exercise of power and discretion that might take advantage of that vulnerability is the essence of a fiduciary relationship. Professor Weinrib wrote in 1975: 'The hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of another';<sup>44</sup> and 'the fiduciary obligation is the law's blunt tool for the control of discretion.'<sup>45</sup>

This view has had judicial support in Canada in several recent cases. Wilson J in the minority in *Frame v Smith*<sup>46</sup> found that fiduciary obligations were owed by a custodial parent to a non-custodial parent on the basis of the following test:

- (1) The fiduciary has the scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.<sup>47</sup>

<sup>36</sup> McLelland J in the Court of Appeal decision in *Hospital Products*, as cited in the judgment of Gibbs CJ in the High Court: (1984) 156 CLR 41, 69.

<sup>37</sup> *Ibid* 71-2.

<sup>38</sup> *Ibid* 99.

<sup>39</sup> Waters, 'The Fiduciary Relationship', above n 15, 51.

<sup>40</sup> (1984) 156 CLR 41, 96-7.

<sup>41</sup> See above n 9.

<sup>42</sup> Finn, 'Contract and the Fiduciary Principle', above n 15, 85.

<sup>43</sup> *Ibid* 85; J Shepherd, *The Law of Fiduciaries* (1980) 87; Finn, 'The Fiduciary Principle', above n 16, 32; Flannigan, above n 35, 65.

<sup>44</sup> Weinrib, above n 16, 7.

<sup>45</sup> *Ibid* 4.

<sup>46</sup> (1987) 42 DLR (4th) 81 (*Frame*).

<sup>47</sup> *Ibid* 99. The test was approved in: *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 28-9 (La Forest J), 62 (Sopinka J); *Canson Enterprises Ltd v Bough-*



Drawing on this case, the thesis of Richard Bartlett is that: 'the exercise of discretion or power over property, above and beyond that to which people are usually subject, leads to accountability at law' and the imposition of a fiduciary relationship.<sup>48</sup> Thus, he limits the large range of cases in which fiduciary relationships might be imposed by qualifying the test of vulnerability in two ways: it is *special or peculiar* vulnerability of *proprietary* interests.

Before the passing of the Native Title Act 1993 (Cth) which provides for compensation for extinguishment of native title and limits the power of the Federal and State governments to extinguish Native Title,<sup>49</sup> this qualified test appeared to have been satisfied in the case of Aborigines and the Crown. At common law, native title is extinguishable at the discretion of the Crown. In the absence of the Racial Discrimination Act 1975 (Cth), or the finding of a fiduciary relationship, no compensation for extinguishment is owed at common law.<sup>50</sup> Unlike any other interest in land, which is only able to be acquired for a public purpose on payment of just terms,<sup>51</sup> native title was therefore 'peculiarly vulnerable'.

Given that the native title legislation now provides a scheme for ensuring accountability of the Crown with regards to its dealings with native title, the test put forward by Bartlett may no longer be satisfied — there may no longer be special vulnerability of proprietary interests. In the *Frame* case, the majority did not uphold a fiduciary obligation because a comprehensive scheme had been devised by the legislature for maintaining accountability at law. In relying on the *Frame* case, Bartlett noted that no such scheme for accountability at law with regard to Indian land title existed in Canada.<sup>52</sup>

The native title legislation may to a great extent have made common law native title claims redundant, and it is perhaps only in the absence of the legislation that a fiduciary relationship with regards to native title would be important.<sup>53</sup> However, there is still scope for the application of Bartlett's analysis to find fiduciary obligations owed by the Crown to Australian Aborigines. To the extent that the legislation may leave native title vulnerable or falls short of providing the sort of protection that would be provided by a fiduciary relationship then it would not be a comprehensive scheme for maintaining accountability, and the fiduciary obligations should subsist. Fiduciary obligations would

*ton and Co* (1991) 85 DLR (4th) 129, 155 (McLachlin J, with Lamer CJC and L'Heureux-Dube J concurring); *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 488-9 (McLachlin J).

<sup>48</sup> Richard Bartlett, 'The Fiduciary Obligation of the Crown to the Indians' (1989) 53 *Saskatchewan Law Review* 301.

<sup>49</sup> For a discussion of the provisions of the Native Title Act 1993 (Cth), see below Part IV(A) 'The Fiduciary Concept and the Native Title Act'.

<sup>50</sup> See below n 121ff.

<sup>51</sup> *Mabo* (1992) 175 CLR 1, 214 (Toohey J) citing, eg, Lands Acquisition Act 1989 (Cth) Pt VII; Land Acquisition (Just Terms Compensation) Act 1991 (NSW) Pt 3; Land Acquisition and Compensation Act 1986 (Vic) Pt 3; Acquisition of Land Act 1967 (Qld) Pt IV; Land Acquisition Act 1969 (SA) Pt IV; Public Works Act 1902 (WA) Pt III; Lands Resumption Act 1957 (Tas) Pt IV; Lands Acquisition Act 1978 (NT) Pt VIII.

<sup>52</sup> Bartlett, above n 48, 302.

<sup>53</sup> See below Part IV(A) 'The Fiduciary Concept and the Native Title Act'.

also apply in the event that the native title legislation were ever repealed, and with regards to extinguishment of native title before the coming into force of the Racial Discrimination Act 1975 (Cth) which is not covered by the new legislative scheme.<sup>54</sup>

Justin Malbon argues that an equitable duty on government towards indigenous Australians in the form of fiduciary obligations exists and 'is based on [the government's] overwhelming power over indigenous people'.<sup>55</sup> Noting that at common law native title can be extinguished without compensation, and that the protection provided in the Racial Discrimination Act 1975 (Cth) and the Native Title Act 1993 (Cth) can be amended or repealed, he finds that a fiduciary relationship exists to 'limit the capacity of governments to arbitrarily and unfairly use their power over indigenous Australians'.<sup>56</sup>

Even if 'special vulnerability' is too broad a test to be accepted, and something else is required to find a fiduciary relationship, issues of public policy arising from the unique relationship between the Crown and the Aborigines may be used as an additional rationale. Public policy is an element of legal reasoning in both equity and common law.<sup>57</sup> It could be argued that it is unjust for the conquerors of land to dispossess traditional occupants of the land, that Aboriginal culture which is linked to the land should be protected, or that the 'honour' of the Crown (enforceable by fiduciary obligations) is essential to reconciliation between Aboriginal and non-Aboriginal Australians. Although the idea that public policy alone could be the source of obligations would be subject to criticism of excessive judicial activism,<sup>58</sup> public policy could be used in combination with 'special vulnerability' to find fiduciary obligations.

The broader implications of a test based on 'special vulnerability' and public policy in the non-Aboriginal context must not be overlooked. The potential scope of the concept depends on the criteria that would regulate 'special vulnerability' — the types of interests relevant, and the extent of vulnerability. It is in the public law arena, where the relationship between certain groups in society and the government is involuntary, and there is therefore no scope to apply the more traditional rationales for fiduciary relationships — for example, trust, undertaking — that the concept may be particularly relevant in the protection of rights and interests.

In the statement of claim of the Wik people in the current case before the Federal Court, the plaintiffs claim that the fiduciary relationship between the State of Queensland and the Wik Peoples arose *inter alia* from certain facts and circumstances including the power of the Queensland to extinguish or impair native title, the 'course of dealings' by Queensland with respect to the land in

<sup>54</sup> *Ibid.*

<sup>55</sup> Malbon, 'The Fiduciary Duty — The Next Step for Aboriginal Rights?', above n 20, 74.

<sup>56</sup> *Ibid.* 72.

<sup>57</sup> Finn, *Fiduciary Obligations*, above n 5, 249.

<sup>58</sup> See below n 148.

issue, and the assumption of responsibility by Queensland to protect the interests of the Wik peoples.<sup>59</sup>

### C *The Crown as a Fiduciary*

The special position of the Crown in society gives rise to both reasons to support and to negate the finding of fiduciary obligations. In favour of finding fiduciary obligations is the idea advanced in various forms by thinkers of different times and cultures, that political power is essentially a matter of trust.<sup>60</sup> The theory of the influential English philosopher John Locke was that a governmental trust binding the government to fiduciary obligations to act for society's benefit arose from the social compact.<sup>61</sup> By analogy, the Crown is really the employee of the populace.

Although the theory bases the trust on the social compact — that is, on the consent of the people concerned, Locke finds the ultimate basis of the trust in the Law of Nature discoverable by reason. Therefore, arguably even if the social compact idea was dropped from Locke's thesis, to take account of the fact that the Aborigines have not consented to the powers of the Crown, it would still support a trust over political power.<sup>62</sup>

Against the finding of fiduciary obligations owed by the Crown to Aborigines is the argument that the existence of fiduciary duties exclusively in favour of a particular group in society is repugnant to the idea of the state obliged to act in the interests of the community at large.<sup>63</sup> The problem stems from the nature of the fiduciary obligations — to act in the interests of the beneficiary, to the exclusion of the interests of the fiduciary, or put in another way — to avoid conflicts of interest. However, a fiduciary relationship may take a variety of forms, and there may be limited fiduciary obligations tailored to meet particular contexts.<sup>64</sup>

Another difficulty in trying to establish the Crown as a fiduciary is that, to the extent to which the relationship may depend upon an 'undertaking' by the Crown, it is inhibited by the 'political trust' doctrine. Any rights created, or obligations 'undertaken' by the legislative or administrative function of the government do not give rise to legal obligations of the Crown, but are merely 'sacred political obligation(s) in the execution of which the State must be free from judicial control'.<sup>65</sup> This principle was argued by the Crown in *Mabo*, and

<sup>59</sup> *Wik*, Statement of Claim, 22, 30, 39, 55-6, 60, 63-4.

<sup>60</sup> See Slattery, 'First Nations and the Constitution: a Question of Trust', above n 23, 265, referring to Vaclav Havel's essay 'Politics and Conscience'.

<sup>61</sup> John Locke, *Two Treatises of Government* (P Laslett (ed), 1965) cited in Slattery, 'First Nations and the Constitution: A Question of Trust', above n 23, 267. See also in support: Shepherd, *The Law of Fiduciaries*, above n 43, 26-8; Rogers and Young, above n 16, 1025-30. Cf Finn, *Fiduciary Obligations*, above n 5, 214-5.

<sup>62</sup> Slattery, 'First Nations and the Constitution: a Question of Trust', above n 23, 267.

<sup>63</sup> L. Green, 'Trusteeship and Canada's Indians' (1976) 3 *Dalhousie Law Journal* 104, 121; *Canada v Ontario* [1910] AC 637, 646

<sup>64</sup> See below nn 92-3.

<sup>65</sup> *St Catherine's Milling and Lumber Co v R* (1887) 13 SCR 577, 649 (Taschereau J).

has been applied often in this context to deny that statutes have given rise to any rights of indigenous people enforceable against the Crown.<sup>66</sup> The problem is overcome if an interest protected by a fiduciary relationship can be found independent of statute, as recognised by Toohey J.<sup>67</sup>

The scope of this article does not allow a full analysis of the imposition of fiduciary obligations on the Crown. Nevertheless, a brief analysis shows that some of the arguments against finding the Crown to be a fiduciary can be overcome.

#### D *Comparative Study — The Source of the Canadian and American Indigenous Trusts*

##### (i) *Canada*

The use of the trust doctrine in the context of the dealings of the Crown with indigenous peoples in Canada is relatively recent. Before *Guerin v The Queen*<sup>68</sup> in 1985, any recognition by the courts of fiduciary duties owed to Indians generally had been characterised as political or moral, rather than legal and enforceable.<sup>69</sup>

The landmark decision of *Guerin* does not make clear the source of the fiduciary relationship in Canada. In that case the Musqueam Indians surrendered a portion of their reserve land to the Crown so that it could be leased to a third party as prescribed by a statutory scheme. The Crown in turn leased the land on terms which it believed were of benefit to the Indians, but these terms were not as attractive as those the Indians had been lead to believe they would receive upon surrender. There is no clear majority decision, and three different rationales were recognised for the finding of fiduciary obligations. Each judgment relies on a rationale which would be applicable to only a limited number of cases.

The leading judgment of Dickson J with whom Beetz, Chouinard and Lamer JJ concurred, found that the relationship arose from the nature of Indian title, and the statutory scheme that dealt with the surrender of the otherwise inalienable land to the Crown.<sup>70</sup> The fiduciary relationship thus depended not only upon

<sup>66</sup> See, eg, *Tito v Waddell [No 2]* [1977] Ch D 106. For a full analysis of cases on this issue, see Green, above n 63. Australian cases which have explicitly denied the existence of fiduciary obligations owed to Aborigines can be distinguished on this ground: see, eg, *Director of Aboriginal and Islanders Advancement v Peinkinna* (1978) 17 ALR 129; *Northern Land Council v Commonwealth [No 2]* (1987) 75 ALR 210. See Heather McRae, Garth Nettheim and Laura Beacroft, *Aboriginal Legal Issues — Commentary and Materials* (1991) 115-6.

<sup>67</sup> *Mabo* (1992) 175 CLR 1, 201-2. Toohey J's application of this principle is flawed because he bases the existence of the enforceable fiduciary obligations not only on independent native title, but also on the undertaking of the Crown. This criticism can also be made of the same reasoning used by Dickson J in *Guerin v The Queen* (1984) 13 DLR (4th) 321. See Bartlett, above n 48, 321.

<sup>68</sup> (1984) 13 DLR (4th) 321.

<sup>69</sup> See Green, above n 63; John Hurley, 'The Crown's Fiduciary Duty and Indian Title: *Guerin v The Queen*' (1985) 30 *McGill Law Journal* 559, 561.

<sup>70</sup> For criticism of Dickson J's judgment, see Hurley, above n 69, 566-7; Darlene Johnston, 'A Theory of Crown Trust Towards Aboriginal People' (1986) 18 *Ottawa Law Review* 307, 314-7; Bartlett, above n 48, 313-23.

Indian title, but also on the Indian Act<sup>71</sup> and surrender. Toohey J attempted to apply this reasoning in *Mabo*, finding that the main element of the statutory scheme was the inalienability of Indian title except upon surrender to the Crown, which was a feature of native title regardless of any legislation.<sup>72</sup>

Wilson J, with whom Ritchie and MacIntyre JJ concurred, found that the legislation was not essential to the existence of the fiduciary relationship, but nevertheless relied on the fact that the land was reserve land.<sup>73</sup> Estey J based his decision on the law of agency. Subsequent Canadian cases have not discussed the source of fiduciary obligations in depth, but have tended to ignore these limitations. Fiduciary obligations have been found with respect to non-reserve land<sup>74</sup> and in circumstances other than surrender.<sup>75</sup>

It is now clear in Canada after *Sparrow v R*<sup>76</sup> that there is a general trust relationship between the Crown and all Native Canadians regardless of legislation. It was held in that case that the fiduciary relationship between the Crown and Indians is relevant to the interpretation of s 35(1) of the Canadian Constitution,<sup>77</sup> and therefore imports restraint on the exercise of sovereign power. Specifically, the case lays down a standard of justification that must be met to legitimise any infringement of Aboriginal rights. The court was brief in its explanation of the source of the relationship saying no more than: '[t]he *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constitute the source of such a fiduciary obligation.'<sup>78</sup> The latter part of this formulation is similar to the 'undertaking' approach and the 'policy of protection' that emerges from the 'executive and legislative history' of Australia relied on by Toohey J in *Mabo*.<sup>79</sup>

(ii) *The United States of America*

The origin of the fiduciary obligation between the government and indigenous peoples in the United States can be traced back to the decisions of Marshall J in *Cherokee Nation v Georgia*<sup>80</sup> and *Worcester v Georgia*<sup>81</sup> over 160 years ago.<sup>82</sup> In the first of these cases, Marshall J found that the Indians may be described as 'domestic dependent nations ... in a state of pupilage [*sic*]' and concluded that

<sup>71</sup> RSC 1952, c 149.

<sup>72</sup> *Mabo* (1992) 175 CLR 1, 202-3.

<sup>73</sup> *Guerin v The Queen* (1984) 13 DLR (4th) 321, 356-7.

<sup>74</sup> *Ontario (A-G) v Bear Island Foundation* (1991) 83 DLR (4th) 381.

<sup>75</sup> In *Kruger v the Queen* (1985) 17 DLR (4th) 591 fiduciary obligations were held to apply with regard to the expropriation of traditional land by the Canadian government: see below n 111 and accompanying text.

<sup>76</sup> *R v Sparrow* [1990] 3 CNLR 160.

<sup>77</sup> 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.': Constitution Act 1982 (Can) s 35(1).

<sup>78</sup> *R v Sparrow* [1990] 3 CNLR 160, 180.

<sup>79</sup> *Mabo* (1992) 175 CLR 1, 201.

<sup>80</sup> 30 US (5 Pet) 1 (1831).

<sup>81</sup> 31 US (6 Pet) 515 (1832).

<sup>82</sup> For an outline of the nineteenth century US trust cases, see Reid Chambers, 'Judicial Enforcement of the Federal Trust Responsibility to Indians' (1975) 27 *Stanford Law Review* 1213.

'their relation to the United States resembled that of a ward to his guardian.'<sup>83</sup> Marshall J did not articulate the source of the fiduciary relationship, and it is apparently derived from his own moral judgment about the role a nation should play towards its indigenous population.<sup>84</sup>

The trust doctrine was initially applied only to justify the plenary power of Congress,<sup>85</sup> and it was not until later that the notion of guardianship was applied as a source of enforceable duties.<sup>86</sup> The more modern cases, however, do not refer back to 'guardianship' as the source of obligations, but rather to the power and control of the United States government and the position of vulnerability of the Indians.<sup>87</sup> This was clarified in the 1983 US Supreme Court decision of *United States v Mitchell*<sup>88</sup> which recognises two distinct sources of the fiduciary relationship. The first source is express statutory obligation. The second is government assumption of control over property: 'a fiduciary relationship necessarily arises when the government assumes such elaborate control over forests and property belonging to Indians'.<sup>89</sup> This is similar to the idea that exceptional power over property gives rise to fiduciary obligations.<sup>90</sup>

The willingness of American and Canadian courts to find fiduciary obligations in this context should be persuasive in Australian courts. Neither rely on any treaty, statute or historical event peculiar to that jurisdiction, but on the relationship between the Crown and the indigenous population generally, and are therefore applicable to the Australian context.<sup>91</sup> In Canada, the loose rationale is an 'historical undertaking', while in America it is the powers of the government. The approach taken by Toohey J is similar to the Canadian approach, while the American approach is similar to that argued for in this article.

## II THE SCOPE AND NATURE OF THE FIDUCIARY RELATIONSHIP

The classification of a relationship as fiduciary in nature does not bring into play a series of fixed rules and principles. A fiduciary relationship may take a

<sup>83</sup> 30 US (5 Pet) 1 (1831), 17.

<sup>84</sup> Marshall was noted for his judicial activism and recourse to first principles: Note, 'Rethinking the Trust Doctrine in Federal Indian Law' (1984) 98 *Harvard Law Review* 422, 425.

<sup>85</sup> For example, in finding that Indians were subject to US criminal law: *United States v Kagama* 118 US 299 (1886); and that Congress could unilaterally abrogate treaty rights: *Lone Wolf v Hitchcock* 187 US 553 (1903). See Johnston, 'A Theory of Crown Trust Towards Aboriginal People', above n 70, 321-2.

<sup>86</sup> See, eg, *Lane v Pueblo of Santa Rosa* 249 US 110 (1919); *Cramer v United States* 261 US 219 (1923); *United States v Creek Nation* 295 US 103 (1935). See Johnston, 'A Theory of Crown Trust Towards Aboriginal People', above n 70, 321-8; Bartlett, above n 48, 309.

<sup>87</sup> Bartlett, above n 48, 309.

<sup>88</sup> 103 S Ct 2961 (1983). See Kimberly Ellwanger, 'Money Damages for Breach of the Federal Indian Trust Relationship after Mitchell II — *United States v Mitchell* 103 S Ct 2961 (1983)' (1984) 59 *Washington Law Review* 675.

<sup>89</sup> 103 S Ct 2961 (1983), 2972.

<sup>90</sup> See above nn 48-51.

<sup>91</sup> Note that Crown responsibilities to Maoris in the nature of fiduciary duties have also been recognised in New Zealand relying on the Treaty of Waitangi: *New Zealand Maori Council v A-G* [1987] 1 NZLR 641.

variety of forms and give rise to a variety of obligations.<sup>92</sup> A limited fiduciary relationship may exist: a person 'may be in a fiduciary position *quoad* a part of his activities and not *quoad* other parts: each transaction, or group of transactions must be looked at'.<sup>93</sup>

There are numerous questions to be answered about the scope and nature of a fiduciary relationship between the Crown and Aborigines. The scope of this article is limited here to the consideration of three issues only: the types of interests protected; the applicability of fiduciary obligations on the legislature; and the particular obligations that might apply.

Toohy J's judgment in *Mabo* only briefly considered the content and scope of obligations owed:

To the extent that a person is a fiduciary he or she must act for the benefit of the beneficiaries .... The obligation of 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 title-holders .... 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 ... extinguishment [of native title] would involve a breach of fiduciary obligation owed by the Crown to the Meriam people.<sup>94</sup>

#### A *The Types of Interests Protected*

It is clear that Toohy J only recognises native title as the relevant interest to be protected, and that not all dealings with the Meriam people will be subject to regulation. The Meriam people sought only a declaration of a fiduciary obligation to 'protect their rights and interests in the Murray Islands'<sup>95</sup> and thus a general fiduciary relationship was not pleaded.

In both Canada and America, a general trust relationship extending beyond land is recognised.<sup>96</sup> The existence of a more extensive general fiduciary relationship or a number of specific fiduciary obligations depends upon the basis

<sup>92</sup> Cope, above n 15, 84-5.

<sup>93</sup> *New Zealand Netherlands Society "Oranje" Incorporated v Kuys* [1973] 1 WLR 1126, 1130 (Lord Wilberforce) explicitly affirmed in *Hospital Products* (1984) 156 CLR 41, 99 (Mason J), 123 (Deane J) and 73 (Gibbs J).

<sup>94</sup> *Mabo* (1992) 175 CLR 1, 204-5.

<sup>95</sup> *Ibid* 199.

<sup>96</sup> For Canada, see: Slattery, 'First Nations and the Constitution: a Question of Trust', above n 23; Clay McLeod, 'The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past' (1992) 30(4) *Alberta Law Review* 1276; McMurty and Pratt, above n 23; and Hurley, above n 69. For America, see: Note, above n 84; and Ellwanger, above n 88. The American Supreme Court recognised in the *United States v Mitchell* 103 S Ct 2961 (1983) the 'undisputed existence of a general trust relationship' between the Indians and the United States. In the *Sparrow* case [1990] 3 CNLR 160, the Canadian Supreme Court recognised a general fiduciary relationship:

The government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship is trust like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

of the relationship. A fiduciary relationship limited to the protection of interests in land is the logical result of finding that the obligations arise out of the special nature of native title. A general fiduciary relationship would perhaps follow from the 'guardianship' rationale<sup>97</sup> and from the idea that the fiduciary relationship arises out of a public law limitation on political power in light of the historical relationship between the two parties.<sup>98</sup> If the fiduciary obligations are based upon moral principles recognising the need to protect the autonomy of Aborigines, the right to self-government and autonomy are potentially within the scope of interests protected by the fiduciary relationship.<sup>99</sup>

The two rationales for the existence of a fiduciary obligations owed by the Crown to Aborigines considered above — 'special vulnerability' and an 'undertaking' or historical 'policy of protection' — could be applied to give rise to a general fiduciary relationship in the Australian context. It could be argued that Aboriginal culture and welfare which is linked to native title is vulnerable, and that this vulnerability has arisen from the exercise of the Crown's powers at the time of conquering Australia which disrupted and continues to disrupt traditional lifestyles. Alternatively, it could be argued that the 'policy of protection' undertaken by the Crown extended to the provision of welfare.<sup>100</sup> There are strong public policy reasons for the finding of a general fiduciary relationship or a number of specific fiduciary obligations for the protection of all Aboriginal interests.

#### B *The Application of Fiduciary Obligations to the Legislature and the Executive*

Toohy J found that although the fiduciary obligation did not limit the power of the legislature, the legislature could still breach its fiduciary obligations.<sup>101</sup> This violates the basic constitutional principle of parliamentary sovereignty. While the constitutional law significance of this finding is well beyond the scope of this article, a few thoughts may be gleaned from overseas experience. In the United States, it was not until the 1977 case of *Delaware Tribal Business Comm v Weeks*,<sup>102</sup> that it was made clear that Congress, the appropriate legislative arm of government, was subject to judicial review in this area.<sup>103</sup> In Canada, the

<sup>97</sup> Hurley, above n 69.

<sup>98</sup> Slattery, 'First Nations and the Constitution: a Question of Trust', above n 23.

<sup>99</sup> Note, above n 84.

<sup>100</sup> Note that in *Mabo*, Toohy J, in reference to the 'policy of "protection"', considers not only protection of the land, but also the 'regulation of Islanders themselves by welfare legislation' and 'the appointment of a school-teacher and adviser': (1992) 175 CLR 1, 203, 201.

<sup>101</sup> *Mabo* (1992) 175 CLR 1, 204-5.

<sup>102</sup> 430 US 73 (1977). See Johnston, 'A Theory of Crown Trust Towards Aboriginal People', above n 70, 323.

<sup>103</sup> Cf Chambers, 'Judicial Enforcement of the Federal Trust Responsibility to Indians,' above n 82.



*Sparrow* case,<sup>104</sup> by importing the fiduciary concept into the Constitution Act 1982 s 35(1), renders legislation liable to judicial review.<sup>105</sup>

Judicial review of legislation in Canada and America is more common both because of the existence of Bills of Rights and specific constitutional provisions, and because of judicial activism. In Australia, there has been historical reluctance by the courts to review legislation on such bases. However, a recent trend of the Australian High Court is to allow greater scope for review. For example, the 1992 *Political Advertising* case<sup>106</sup> found an implied right of freedom of political speech in the Australian Constitution.

In the *Wik* case, the Wik peoples claim that certain executive acts of the Queensland government, such as land grants and contractual agreements, are invalid, unenforceable and of no force or effect.<sup>107</sup>

### C *The Particular Fiduciary Obligations that may Apply*

There are two fundamental obligations of a fiduciary: a duty to avoid a conflict of interests and a duty not to profit from the fiduciary position.<sup>108</sup> The particular duties of a relationship depend upon its circumstances and nature.

A problem for any government trusteeship is the potential for conflict of interest situations to arise. Toohey J was unclear as to the applicability of the conflict rule:

A fiduciary has an obligation not to put himself or herself in a position of conflict of interest. But there are numerous examples of the Crown exercising different powers in different capacities.<sup>109</sup>

Toohey J did not elaborate any further as to what he meant by this statement, but it seems that he was suggesting that the Crown could avoid conflict of interest situations by 'exercising different powers in different capacities' — for example, by employing different governmental departments to deal with the otherwise conflicting interests.

In the current *Wik* case, the Wik people claim that Queensland by reason of the existence of a fiduciary relationship, was under an obligation to the Wik peoples in respect of dealings with the land in issue to not put itself in a position of conflict of interests, and that this obligation has been breached.<sup>110</sup>

<sup>104</sup> *R v Sparrow* [1990] 3 CNLR 160.

<sup>105</sup> See above n 76 and accompanying text.

<sup>106</sup> *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

<sup>107</sup> *Wik*, Statement of Claim of the Wik peoples, eg, para 58(a).

<sup>108</sup> *Boardman v Phipps* [1967] 2 AC 46; *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378.

<sup>109</sup> *Mabo* (1992) 175 CLR 1, 205.

<sup>110</sup> *Wik*, Statement of Claim, 23. The other obligations in respect of dealings with the land in issue claimed by the Wik peoples as arising from the existence of the fiduciary relationship include: to consult with, ascertain the wishes of and seek the consent of the Wik peoples to any proposed action; to act for the benefit of the Wik peoples and not for its own benefit or for the benefit of any third person; to ensure that the Aboriginal title was not impaired or destroyed without consent or otherwise contrary to the interests of the Wik peoples; to account for any profits made as a consequence of the breach of fiduciary obligations; not to make any profits or

The Crown's duty to avoid a conflict has been assumed to apply to the indigenous trust in North America, albeit in a limited way. In *Kruger v The Queen*<sup>111</sup> the Canadian government on the advice of the Department of Transport expropriated traditional land for the purpose of building an airport. It was argued that the Crown was in breach of duty since its interest in expropriating the land was in conflict with its obligation to ensure adequate compensation for the dispossessed Indians.

All three judges assumed without comment that the duty to avoid a conflict of interests applied, however only Heald J found that a conflict did exist. He found that the duty would have been fulfilled if 'careful consideration and due weight'<sup>112</sup> had been given to the interests of the Indians. The finding of Heald J echoes findings made in American cases on this issue which have subjected 'the government action to close judicial scrutiny to ensure that in the resolution of the conflict the government has given appropriate weight to the fiduciary duty owed to the Indians'.<sup>113</sup> Therefore, despite the unavoidability of conflict for the government, the North American courts have still applied the duty, adapting it to a more appropriate form.

These decisions point to the possibility that although fiduciary obligations may be found, they can be interpreted in such a way as to minimise their impact. This is illustrated by the decision of the Supreme Court of British Columbia in *Delgamuukw v British Columbia*,<sup>114</sup> in which the fiduciary obligation found was merely to 'permit Aboriginal use of the land ... until such time as the land is dedicated to another purpose'.<sup>115</sup> The fact that Toohey J took care to distinguish *Delgamuukw* indicates that Toohey J's conception of the fiduciary relationship is not insubstantial.<sup>116</sup>

Another application of trust obligations in both Canada and America has been to impose rules of interpretation of treaties and legislation which favour Aborigines.<sup>117</sup> In America, the fiduciary relationship has been applied to impose positive duties on the government to act on behalf of the Native Americans,<sup>118</sup>

derive benefits at the expense of the Wik peoples; and not to permit any extinguishment or impairment of the Aboriginal title of the Wik peoples.

<sup>111</sup> (1985) 17 DLR (4th) 591.

<sup>112</sup> *Ibid* 623.

<sup>113</sup> Johnston, 'A Theory of Crown Trust Towards Aboriginal People', above n 70, referring to *Pyramid Lake Paiute Tribe v Morton* 354 F Supp 252 (DC) (1973); *Navajo Tribe of Indians v United States* 364 F 2d 320 (1966); *Nevada v United States* 103 S Ct 2906 (1983).

<sup>114</sup> [1991] 3 WWR 97.

<sup>115</sup> *Ibid* 482.

<sup>116</sup> *Mabo* (1992) 175 CLR 1, 204-5.

<sup>117</sup> Patrick Macklem, 'First Nations Self-Government and the Borders of the Canadian Legal Imagination' (1991) 36 *McGill Law Journal* 382, 442; Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 *Canadian Bar Review* 727, 731.

<sup>118</sup> See, eg, *Joint Tribal Council of the Passamaquoddy Tribe v Morton* 528 F 2d 370 (1st Cir, 1975), 379 (affirmative federal duty to investigate and take action to protect Indian's right of occupancy); *White v Califano*, 437 F Supp 543 (DSD, 1977), 555 (affirmative federal duty to pay hospital costs of an indigent Sioux when tribal court committed the Sioux to a state hospital); both cited in Ellwanger, above n 88, 675. Also argued for in Canada (obligation to secure an adequate standard of subsistence, housing, health, and education): see Hurley, above n 69, 595.

and to check the authority of governmental officials.<sup>119</sup> It has been argued that it should be applied to modify the rules which disadvantage indigenous persons in proving traditional rights from evidence based on oral history.<sup>120</sup> These developments are relevant to the potential scope of fiduciary obligations in the Australian context.

### III REMEDIES — ENFORCEMENT OF THE FIDUCIARY OBLIGATIONS

Perhaps the most important aspect of the existence of a fiduciary relationship is the remedies which may arise in the event that fiduciary obligations are breached. Liability for impairment or extinguishment of native title — in the opinion of Toohey J a clear example of a breach of fiduciary obligations — is not clearly established after *Mabo*. It has generally been accepted that the Racial Discrimination Act 1975 (Cth) will render any state legislation extinguishing native title without compensation invalid.<sup>121</sup> On this view, compensation would be available for extinguishment since 1975 as long as this legislation remained in force. The Native Title Act 1993 (Cth) now provides for compensation for extinguishment and impairment of native title.<sup>122</sup> Compensation depends upon the existence of legislation and therefore the goodwill of the Crown.

On the question of liability for extinguishment at common law in the absence of the Racial Discrimination legislation, the members of the Court in *Mabo* took different views. The majority (Mason CJ, Brennan, Dawson and McHugh JJ) found that no compensation claim would be available on extinguishment of native title,<sup>123</sup> while the minority (Deane, Gaudron and Toohey JJ) found a presumption in favour of compensation.<sup>124</sup> Toohey J based this right on the fiduciary concept.<sup>125</sup>

Other than providing for liability independent of the goodwill of the Commonwealth government, the fiduciary concept may play a part in avoiding the effects of the relevant limitations periods to which Deane and Gaudron JJ found the compensation claims to be subject.<sup>126</sup> The Statute of Limitations does not generally apply as between trustee and beneficiary.<sup>127</sup> This would mean that

<sup>119</sup> See, eg, *Morton v Ruiz* 415 US 199 (1974), 236 (agency promulgation of standards required for fair management of off-reservation gratuities): cited in Ellwanger, above n 88, 675.

<sup>120</sup> See Macklem, above n 117. For an outline of the evidential difficulties in *Mabo*, see Brian Keon-Cohen, 'Some problems of Proof: The Admissibility of Traditional Evidence' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) 185.

<sup>121</sup> *Mabo* (1992) 175 CLR 1, 214, 216 (Toohey J).

<sup>122</sup> See discussion below in Part IV(A) 'The Fiduciary Concept and the Native Title Act'.

<sup>123</sup> *Mabo* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J); 63ff (Brennan J) and 133-4 (Dawson J).

<sup>124</sup> *Ibid* 90-4, 110-2 (Deane and Gaudron JJ) although only where the extinguishment occurred without legislative authority in circumstances in which the intention to extinguish native title was not illustrated in clear and unambiguous words: see Stephenson and Ratnapala above n 120, 111-2, 29-30.

<sup>125</sup> *Mabo* (1992) 175 CLR 1, 199-205.

<sup>126</sup> *Ibid* 112.

<sup>127</sup> *County of Oneida v Oneida Indian Nation* (1985) 470 US 266. See Brian Keon-Cohen, 'Case Note: *Eddie Mabo and Ors v The State of Queensland*' (1992) 2(56) *Aboriginal Law Bulletin* 22, 23; Justin Malbon, 'The Implications of *Mabo v Queensland (No 2)*' (1992) 2(57) *Aborigi-*

Aboriginal claimants who could prove they are the descendants of people who had native title that was extinguished many years ago may have a right of action against the Crown.

The possibility of the invalidation of legislation which conflicts with the Crown's fiduciary obligations following judicial review as a remedy has already been discussed.<sup>128</sup>

The types of remedies available for breach of fiduciary obligations are numerous and varied. Other than equitable compensation for loss suffered,<sup>129</sup> they include an account of profits,<sup>130</sup> a mandatory or negative injunction, and a constructive trust.<sup>131</sup> An account of profits could be applied to recover the profits that the Crown had made by using the land itself, or had obtained in exchange for the granting of a leasehold or freehold title. A difficult issue is whether mining royalties could be accounted for. Even if native title does not extend to ownership of minerals,<sup>132</sup> it could be argued that the Crown has profited from its position by granting access to traditional land for the purpose of mining.

A negative injunction could be effectively used to give Aborigines a right of veto over development.<sup>133</sup> A positive injunction could be granted to order the Crown to consult with and negotiate in good faith with Aborigines about proposed dealings with traditional land.

A constructive trust could be awarded to recognise continued beneficial ownership by Aborigines, and to restore or retain Aboriginal possession. However, a constructive trust will not be imposed against an innocent third party — a *bona fide* purchaser for value without notice. This means that in most cases where native title has been impaired by Crown grants to third parties, no proprietary remedy will be available, the only remedy being compensation from the Crown. It could be argued that mining companies that have lobbied both the government and the public to obtain valid title from the Crown do not receive without notice of the Aboriginal interests and could therefore be subject to the imposition of a constructive trust. In the *Wik* case, the Wik peoples claim that Comalco knowingly induced, assisted or participated in the breach of fiduciary obligations by Queensland, and therefore is a constructive trustee for the Wik peoples. As a result, it is claimed that Comalco must account for profits, and that the mining

*nal Law Bulletin* 7, 8; Justin Malbon, 'Delivering Justice' (1993) 3(62) *Aboriginal Law Bulletin* 9, 10. See also Malbon, 'The Fiduciary Duty — the Next Step for Aboriginal Rights?', above n 20, 74: '[T]he 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.'

<sup>128</sup> See above Part II(B) 'The Application of the Fiduciary Obligations to the Legislature and Executive'.

<sup>129</sup> See, eg, *Commonwealth Bank v Smith* (1991) 102 ALR 453.

<sup>130</sup> See, eg, *Lister v Stubbs* (1890) 45 Ch D 1.

<sup>131</sup> Note that Gaudron and Deane JJ found in *Mabo* that a constructive trust may be available as an appropriate remedy: see above n 13.

<sup>132</sup> Note that the existence of native title depends on continuous occupation and enjoyment. Enjoyment of minerals is probably not a part of aboriginal lore. In any case, such title would have been extinguished by mining legislation which contains provisions that minerals are the property of the Crown: see Stephenson and Ratnapala, above n 120, 37.

<sup>133</sup> A term of the Eva Valley Statement (August 1993): see below n 142 and accompanying text.

agreement reached between Comalco and Queensland is invalid and unenforceable.<sup>134</sup>

Rather than concentrating on corrective justice by the payment of compensation, equity has the ability to be flexible and innovative and to devise remedies most appropriate to the circumstances. For example, Kent Roach argues that the court's flexible equitable remedial powers should be utilised to facilitate negotiations between the Crown and the Aborigines by the imposition of a duty to negotiate or bargain in good faith.<sup>135</sup> Furthermore, the discretionary nature of equitable relief ensures the balancing of affected interests and not ordering remedies that are impractical or unduly harsh.

#### IV CONCLUSION — MERITS OF THE FIDUCIARY CONCEPT IN *MABO* — DIFFERENT PERSPECTIVES

##### A *The Fiduciary Concept and the Native Title Act*

The Native Title Act 1993 (Cth) provides for the protection of native title and a mechanism of accountability with regards to the Crown's dealings with native title which does not exist under Common Law. Essentially, the legislation provides for compensation for the extinguishment and impairment of the rights and interests of native title holders, and imposes limitations on the types of acts which the Crown can commit with regards to native title.

Native title holders are entitled to compensation for the effect of the validation of *past* acts on their rights. Compensation will be on 'just terms' where native title is extinguished by validation of past acts (ss 17, 20 and 51). Where native title is impaired but not extinguished, compensation will be payable where freeholders would have received compensation. This will be assessed under the same regime as is applicable to freeholders (ss 17, 20, 51(3) and 240).

Native title holders are entitled to 'just terms' compensation for any *future* extinguishment of their rights and interests, and compensation as would be payable to ordinary title holders for impairment of rights and interests (ss 23(4) and 51(3)).

The dealings by the Crown in relation to native title after the coming into force of the legislation are limited so as to protect native title.<sup>136</sup> The 'non-extinguishment principle' operates except in the case of voluntary surrender of native title (s 21) or in the case of compulsory acquisition of native title (s 238). The principle provides that acts and grants will not extinguish native title. Where

<sup>134</sup> *Wik*, Statement of Claim of the Wik Peoples, paras 57A-61. The other remedy claimed by the Wik peoples includes an account of profits made and benefits derived in consequence of the breaches of fiduciary obligations by Queensland.

<sup>135</sup> Roach, above n 33, 521-6. Note that the Native Title Act 1993 (Cth) Part 2, Div 3, Sub-div B provides for a right to negotiate in certain circumstances: see discussion below: Part IV(A) 'The Fiduciary Concept and the Native Title Act'.

<sup>136</sup> The Act applies to new legislation made after 1 July 1993 and in relation to other acts and grants made after 1 January 1994.

there is a conflict between the rights and interests under native title and those granted by government, the act or grant will be valid and prevail, but native title will again have full effect once those interests expire.

The Act limits the type of acts that can occur to affect native title to 'permissible future acts' defined in section 235. A 'permissible future act' is an act that can be done over ordinary title land, and which affects native title holders in the same way or in no worse way than it affects ordinary title holders (s 235(2)).

An additional limitation of the Crown's power with regard to native title is that for certain 'permissible future acts' native title holders have a 'right to negotiate' before such an act can be taken. The acts to which a right to negotiate apply are acts relating to mining, the compulsory acquisition of native title for the purpose of making a grant to a third party and any other acts approved by the Commonwealth Minister (s 26). Sections 26 to 44 contain detailed provisions relating to the right to negotiate. The right is not equivalent to a veto. If the parties cannot reach agreement then any party can apply to the National Native Title Tribunal or the recognised State or Territory body for a determination of whether the act may go ahead (ss 27 and 35). Either the Commonwealth or relevant State government has the power to override the decision of the tribunal (ss 42(1)-(3)).

The new legislation definitely limits the Crown's power in its dealings in respect of native title interests, and therefore to some extent reduces the vulnerability of native title and the importance of the need to find the existence of fiduciary obligations to limit the Crown's extensive and arbitrary powers at common law. However, there is still a significant role for the application of the fiduciary concept to native title interests. First, the legislation probably does not apply to acts of the Crown prior to the coming into force of the Racial Discrimination Act 1975 (Cth). The act only applies to 'past acts' and 'future acts'. A 'past act' as defined in s 228 is an act made before the coming into effect of the Native Title Act 1993 (Cth) which 'apart from [the] Act was invalid to any extent, but it would have been valid ... if the native title did not exist' (s 228(2)(b)). The only past acts that may be invalid are those made after the coming into force of the Racial Discrimination Act 1975 (Cth). At common law and in the absence of the Racial Discrimination Act 1975 (Cth), the majority of the High Court in *Mabo* held that native title could validly be extinguished. Therefore, there is scope for the application of the fiduciary concept to acts made in relation to native title before 1975.

The fiduciary concept would of course also have a significant role to play if the Native Title Act 1993 (Cth) were ever repealed. The concept is also important to the extent that it may provide obligations and limitations on the Crown which are not equalled by the legislation. For example, it may be that the quantum of compensation payable pursuant to a breach of fiduciary duty may be more than that provided for under the new legislation.

## B *Aboriginal Interests*

Aboriginal groups will, and indeed have already begun to,<sup>137</sup> expand the ideas espoused by Toohey J relating to the Crown's fiduciary duties towards indigenous people. As outlined above, the concept provides additional protection of native title, and subjects the Crown's activities to judicial review over and above the Racial Discrimination Act 1975 (Cth) and the Native Title Act 1993 (Cth).

However, the concept has been criticised from the Aboriginal perspective as being demeaning, and as legitimising and maintaining an hierarchical and paternalistic relationship between the Crown and Aborigines.<sup>138</sup> This concern can be understood when considering the early American decisions which described the Indians as 'domestic dependant nations ... in a state of pupillage', and which effectively used the 'guardian' relationship as a source of plenary power over the Native Americans.<sup>139</sup> However, the nature of the fiduciary concept in the modern Aboriginal rights context need not carry these connotations of dependency and incapacity, or the result that the Aborigines are at the mercy of the discretion of the Crown. For example, it was the lack of consultation with Aboriginal groups that constituted the breach of the fiduciary obligations in the *Guerin*<sup>140</sup> case.

Although a fiduciary relationship will subject the discretionary actions of the Crown over native title to judicial review, it will not go so far as to effectively place that control in the hands of the Aborigines. Any infringement of native title will ideally, but not necessarily, require the consent of the affected Aborigines. 'Failing [a voluntary agreement], the ... Crown would have the power to make its own determination, subject to the supervision of the courts, which could enforce the fiduciary duties and grant appropriate remedies.'<sup>141</sup> Thus, the fiduciary concept does not meet the current demands of the Aborigines that they should have a right of veto over any development on traditional lands.<sup>142</sup> Nevertheless, it is undeniable that it offers additional protection to Aboriginal interests by subjecting the government to the scrutiny of the fiduciary standard.

## C *The role of Equity and the Judiciary and the likelihood of acceptance of the concept*

At this stage we can only speculate as to the probability of success of the court finding that a fiduciary relationship exists between the Crown and Aboriginal peoples in Australia. On one hand, the rejection by the majority in *Mabo* of any right to compensation for extinguishment of native title is perhaps a tacit rejection of any fiduciary concept which would involve such compensation.

<sup>137</sup> See above re the claim of the Wik people at nn 2, 59, 107, 110, 134 and accompanying text.

<sup>138</sup> Macklem, above n 117, 412-4.

<sup>139</sup> See the 'Marshall' cases, above nn 80-4.

<sup>140</sup> (1984) 13 DLR (4th) 321.

<sup>141</sup> Slattery, 'First Nations and the Constitution: a Question of Trust', above n 23, 291-2.

<sup>142</sup> As claimed in The Eva Valley Statement (August 1993).

However, the judgments of Brennan, Mason, and McHugh JJ fail to deal with the issue. Dawson J rejects the idea because he finds that it would be dependent on the existence of native title, a line of reasoning which can no longer be relied upon given the majority finding that native title does exist.<sup>143</sup> In 1987, in *Northern Land Council v Commonwealth (No 2)*,<sup>144</sup> the High Court left open the question as to whether Aboriginal title, if it existed, would create a fiduciary relationship.

In the 1993 case of *Coe v Commonwealth*,<sup>145</sup> the plaintiffs, relying on the *Guerin* case and the observations of Toohey J in *Mabo*, pleaded that there had been a breach of fiduciary obligations owed by the State of New South Wales to the Wiradjuri people. Mason CJ struck out the claims with respect to the fiduciary obligations on the basis that they were riddled with uncertainties and inadequacies. In doing so he did not make a decision as to the correctness of the statements made by Toohey J in *Mabo*, or the application of the reasoning used in *Guerin* in the Australian context. The issue will be tested in the current claim of the Wik people in Queensland which is based squarely on the fiduciary concept.<sup>146</sup>

Two major arguments can be adduced against the recognition of enforceable fiduciary duties in this context. The first argument already canvassed above relates to constitutional law — that the undertaking of a managerial role in supervising the relations between the Crown and the Aborigines by the courts through enforcement of fiduciary obligations would be a contravention of the principle of Parliamentary Sovereignty. However, the High Court has been willing to imply at least limited fundamental rights into the Constitution.<sup>147</sup> Perhaps the nature of the relationship between the Crown and Aboriginal Australians could be found to be such a fundamental aspect of the Australian Nation as to have constitutional status. Alternatively, this constitutional problem could be avoided by finding a *presumption* that the Crown must act honourably (requiring specific legislation to rebut the presumption). This would still be a cogent means of protecting Aboriginal rights, as it would be politically difficult to pass such legislation, and the executive would be bound by fiduciary duties unless expressly relieved.

A second criticism which has been aimed at the recognition in *Mabo* of native title, which would also apply to the recognition of fiduciary obligations, is that of excessive 'judicial activism' — the declaration of new principles of law based on political considerations which should properly be left to the political process.<sup>148</sup> Opinion about this will depend upon whether one has more faith in the current Australian High Court than in the political process. However, 'judicial

<sup>143</sup> *Mabo* (1992) 175 CLR 1, 163-7.

<sup>144</sup> (1987) 75 ALR 210, 215. See McRae, Neittheim and Beacroft, above n 66, 115.

<sup>145</sup> (1993) 118 ALR 193.

<sup>146</sup> *Wik*: see above nn 2, 59, 107, 110, 134 and accompanying text.

<sup>147</sup> See above n 106ff.

<sup>148</sup> See, eg, Peter Durack, Ron Bruton and Tony Rutherford (eds), *Mabo and After* (1993) 1-12, 27-34; Stephenson and Ratnapala, above n 120, 48-62.



activism' is an inherent part of Equity jurisprudence. Equity has the jurisdiction not only to rework existing doctrines to apply in different contexts, but to recognise new interests and remedies in response to social needs. The finding of a fiduciary relationship in this context — arising out of circumstances of exceptional vulnerability and supported by public policy — could find support in the fluid law of fiduciaries. The potential scope and nature of such a relationship could be shaped to an appropriate form, drawing on the experience of North American jurisprudence.