

# HOLDING THE GOVERNMENT TO ACCOUNT: THE 'STOLEN WAGES' ISSUE, FIDUCIARY DUTY AND TRUST LAW

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*[This article examines whether trust or fiduciary law provides potential 'stolen wages' plaintiffs with a strong basis for a claim over money in bank accounts that previous governments held on the plaintiffs' behalf. It also considers the broader issue of whether governments owed a fiduciary duty flowing from their obligations under general 'protective' legislation to prevent such workers from being exploited and underpaid. It is argued that potential stolen wages plaintiffs have a strong claim in trust, and that an argument based on fiduciary duty, whilst weaker than that based on trust law, is more likely to succeed than in the previous types of cases in which indigenous plaintiffs have unsuccessfully argued fiduciary duty in the Australian courts.]*

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## I INTRODUCTION

The purpose of this article is to consider whether governments owe legally enforceable trust or fiduciary duties to potential 'stolen wages' plaintiffs in Australia. It will do so in the context of recent public debate about the possibility of a legal or political settlement of the issue. The most significant impetus for such debate was the release in December 2006 of a report by the Senate Standing Committee on Legal and Constitutional Affairs on Indigenous stolen wages

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entitled *Unfinished Business: Indigenous Stolen Wages* ('*Stolen Wages Report*').<sup>1</sup> Shortly after the report was released, a group of workers from Daguragu (Wave Hill) cattle station in the Northern Territory was reported as having 'expressed interest in a test case to recover their stolen wages.'<sup>2</sup> In Queensland, where the government has established a much criticised compensation scheme,<sup>3</sup> workers are reported to be 'contemplating recourse to the courts'.<sup>4</sup>

The term 'stolen wages' refers primarily to allegations of 'earnings withheld from Aboriginal workers throughout the twentieth century'.<sup>5</sup> In various jurisdictions around Australia, money earned by Aboriginal workers was withheld and kept in government-controlled trust accounts. These trust accounts were established under 'protective' legislation.<sup>6</sup> Their ostensible purpose was benevolent and paternalistic, being to ensure that 'unsophisticated' or 'uncivilised' Aboriginal workers saved a portion of their wages. These workers and their descendants allege that governments abused their positions as trustees of these accounts, keeping the money for their own purposes rather than repaying it to the beneficiaries.

The *Stolen Wages Report* undertook a preliminary investigation into this question of 'wages' withheld in trust. Its terms of reference also included other government entitlements, in particular social security benefits such as child

<sup>1</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006).

<sup>2</sup> Thalia Anthony, 'Unmapped Territory: Wage Compensation for Indigenous Cattle Station Workers' (2007) 11(1) *Australian Indigenous Law Review* 4, 4, which also refers to ABC Radio Alice Springs, 'Indigenous Stolen Wages with Maurie Ryan', *Barry Nicholls*, 11 December 2006. The workers concerned also said that they were 'willing to testify that they were denied wages and provided with the poorest quality rations': at 4.

<sup>3</sup> In May 2002, the Beattie government established a compensation scheme offering \$2000 each to Aboriginal people under 50 years old and \$4000 for those older, with a total projected payout of \$55.4 million. Individuals accepting the offer were required to sign a letter of acceptance giving up their rights to sue the government on this issue. The offer was widely criticised by Aboriginal people, and was condemned by the Human Rights Equal Opportunity Commission's Social Justice Commissioner, Dr William Jonas, as being 'insultingly low.' By late 2006, only half of the estimated 16 400 claimants had applied for payment and \$20 million of the \$55.5 million had been allocated: see Stuart Rintoul, 'Lawsuit on Stolen Wages', *The Australian* (Melbourne), 14 October 2006, 9. See also Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (2006) 20.

<sup>4</sup> According to Kidd, above n 3, 21, counsel in Queensland have advised that a strong case could be made for legal accountability for the thousands of savings accounts run by previous governments, and misuse of Welfare Fund money for other than general welfare projects could be grounds for action and a direction to repay lost funds.

The New South Wales government has also established a scheme known as the Aboriginal Trust Fund Repayment Scheme. According to the *Stolen Wages Report*, the NSW scheme has generally 'been better received than the Queensland Government's reparations offer': see *Stolen Wages Report*, above n 1, 114.

<sup>5</sup> Victoria Haskins, '& So We Are "Slave Owners"!': Employers and the NSW Aborigines Protection Board Trust Funds' (2005) 88 *Labour History* 147, 147.

<sup>6</sup> For example in the Northern Territory, s 41(1) of the *Wards' Employment Ordinance 1953-1959* (Cth) gave the Director of Welfare the power to require an employer to pay to the Director or to an authorised welfare officer a portion of the wages of an employed ward. The Director then paid this money into a trust account to be opened by the Director at the nearest branch of the Commonwealth Savings Bank: s 41(3). Under s 41(3A), the trust account was to be called the 'Wards' [sic] Trust Account'. Under s 41(6), moneys were deemed to be the property of the ward. However, under s 41(7) the moneys could only be spent by the ward with the approval of the Director or an authorised welfare officer.

endowment, maternity allowance, unemployment benefits, aged or invalid pensions, and workers compensation.<sup>7</sup> The Senate Standing Committee on Legal and Constitutional Affairs received ‘compelling evidence’ indicating that governments ‘systematically withheld and mismanaged Indigenous wages and entitlements over decades.’<sup>8</sup>

However, the term ‘stolen wages’ is not confined to the question of moneys withheld in trust. It also refers to the question of underpayment or non-payment of wages,<sup>9</sup> which was often authorised by legislation. For example, the Northern Territory regulations under the *Aboriginals Ordinance 1918–1933* (Cth) exempted country employers from paying wages to their Aboriginal employees where they could prove to the Chief Protector that they were maintaining those employees’ ‘relatives and dependants’.<sup>10</sup> It has also been argued that governments failed to ensure that employers of Aboriginal people fulfilled their legislative obligations, thereby allowing pastoral stations ‘to provide rations rather than wages in order to avoid [the governments’] own welfare responsibilities; ... failing to inspect stations; and ... failing to enforce protective regulations.’<sup>11</sup>

Part II of this article will consider whether the law of trusts will assist potential stolen wages plaintiffs seeking an accounting of or compensation for wages and other entitlements allegedly misappropriated by the government. The article will argue that such plaintiffs have a strong case. The most significant result of such proceedings might be that governments — rather than individual plaintiffs — would be required to produce a historical account of these trusts.

Part III of the article will consider whether governments owed fiduciary duties to indigenous workers and whether any such duties were breached. At its narrowest, a fiduciary duty might extend only to the question of mismanagement of trust account moneys. More broadly, it has recently been argued that fiduciary duties might extend to the positive obligation of ensuring that employers paid employees and adhered to the conditions prescribed under ‘protective’ legisla-

<sup>7</sup> *Stolen Wages Report*, above n 1, 1, 29–40. Prior to 1966, social security legislation permitted various pensions and allowances to be paid to controlling authorities or institutions rather than directly to the pensioner. For example, the *Social Services Consolidation Act 1947* (Cth) s 47 stated in relation to age and invalid pensions:

Where, in the opinion of the Director-General, it is desirable to do so, he may direct that payment of the pension of an aboriginal native of Australia shall be made, on behalf of the pensioner, to an authority of a State or Territory controlling the affairs of aboriginal natives, or to some other authority or person whom the Director-General considers to be suitable for the purpose ...

In practice, pensions were often paid directly to missions or pastoralists, who used the money for their own purposes: see, eg, C M Tatz, *Aboriginal Administration in the Northern Territory of Australia* (PhD Thesis, Australian National University, 1964) ch 5.

<sup>8</sup> *Stolen Wages Report*, above n 1, 4.

<sup>9</sup> The *Stolen Wages Report* notes that ‘the term “stolen wages” is an ambiguous term’ but that for the purposes of the report it ‘refers to all wages, savings, entitlements and other monies due to Indigenous people during the periods where governments sought to control the lives of Indigenous people’: *ibid* 3.

<sup>10</sup> Under reg 14 of the *Aboriginals Ordinance Regulations 1918–1933* (Cth), ‘where it is proved to the satisfaction of the Chief Protector that the grantee of the licence is maintaining the relatives and dependants of any aboriginal employed by him, the Chief Protector may exempt the grantee from the payment of any wages in respect of that aboriginal.’

<sup>11</sup> Anthony, above n 2, 17.

tion, or even to a more general duty of ‘ensuring the general welfare of Indigenous workers’.<sup>12</sup> However, it will be suggested that these broader fiduciary obligations are far less likely to be recognised in Australian courts, despite the recent decision in *Trevorrow v South Australia [No 5]* (*Trevorrow*) providing some support for the existence of such general obligations.<sup>13</sup>

## II STOLEN WAGES PLAINTIFFS AND THE LAW OF TRUSTS

A trust is a type of fiduciary relationship ‘under which one party, the trustee, holds property for the benefit of another party, the beneficiary.’<sup>14</sup> In order for an express trust to exist, it must be shown that there was an intention to create a trust; that the subject matter of the trust is sufficiently certain; and that the object, or intended beneficiary, is specified with sufficient certainty.<sup>15</sup> Together, these requirements are known as the ‘three certainties’.<sup>16</sup>

It seems relatively easy for stolen wages claimants to satisfy the second and third certainties. The subject matter of the trust is that part of the claimants’ wages that was withheld on trust. Legislation such as the *Wards’ Employment Ordinance 1953–1959* (Cth) clearly specified that ‘such portion’ of an Aboriginal employee’s wages was to be withheld and kept in a ‘Wards’ [sic] Trust Account.’<sup>17</sup> Governments in at least some jurisdictions kept records indicating how much was held in each individual’s account.<sup>18</sup>

Similarly, the object of the trust is the intended beneficiary, or Aboriginal employee. Where trust account records were kept, and particularly where the names of individual account holders were specified, the requirement for ‘list certainty’,<sup>19</sup> which is the requirement that all beneficiaries in a trust are ascertainable, would appear to be satisfied.

The most difficult of the three certainties for stolen wages claimants to establish is that there was an intention to create a trust. Stolen wages plaintiffs would need to establish that the creator of the trust — that is, the government — had the intention to create a legally enforceable trust when it passed legislation creating Aboriginal Trust Accounts.

<sup>12</sup> Ibid 17.

<sup>13</sup> (2007) 98 SASR 136, 343–8 (Gray J).

<sup>14</sup> Peter W Hogg and Patrick J Monahan, *Liability of the Crown* (3<sup>rd</sup> ed, 2000) 257.

<sup>15</sup> See *Knight v Knight* (1840) 3 Beav 148, 172–3; 49 ER 58, 68 (Lord Langdale). See further P D Finn, *Fiduciary Obligations* (1977) 16.

<sup>16</sup> Denis S K Ong, *Trusts Law in Australia* (3<sup>rd</sup> ed, 2007) 74.

<sup>17</sup> *Wards’ Employment Ordinance 1953–1959* (Cth) ss 41(1), (3A). See also above n 6.

<sup>18</sup> In the Northern Territory in 1955, for example, a total of £16 549 was held in trust accounts in the Northern Division alone. Most of this money (£13 458) was held in accounts with balances under £50. The amount held in trust accounts far outweighed the amount held in savings accounts (£6216). In 1957, the total held in the Aboriginals Trust Account was £33 575 12s 7d. Of this amount, £11 002 was held in 74 individual savings accounts on behalf of wards with credit balances in excess of £50: see Letter from J C Archer to the Secretary, Department of Territories, 15 October 1955, in *Employment of Aborigines in the Northern Territory* (Australian Archives, A452, 1955/668, AAC, Canberra). In Queensland on the other hand, according to Sanushka Mudaliar, individual accounts were not normally kept: see Sanushka Mudaliar, ‘Stolen Wages and Fiduciary Duties: A Legal Analysis of Government Accountability to Indigenous Workers in Queensland’ (2003) 8(3) *Australian Indigenous Law Reporter* 1, 5.

<sup>19</sup> The ‘list certainty’ test is set out in *Inland Revenue Commissioners v Broadway Cottages Trust* [1955] Ch 20.

At first glance, this argument appears straightforward. Legislation establishing Aboriginal trust funds in the Northern Territory, like equivalent legislation in Queensland and in other Australian jurisdictions, consistently used the terms ‘Trust Fund’ and ‘Trust Account’ to describe the funds into which the moneys were paid. The legislation described the moneys as being for the account holders’ ‘protection and care’. The Chief Protector or Director of Welfare had legal title to the money in the accounts, but was supposed to act on behalf of or for the benefit of the employee.<sup>20</sup>

It is true that where a trust is created by statute ‘normally the use of the word trust would make [it] clear that a trust has been created.’<sup>21</sup> However, it is far from clear that this general rule is applicable where the trust relationship alleged is with the Crown. Case law indicates that in some situations the courts will regard the Crown’s intention, notwithstanding the use of the language of trusts, as not in fact being to create a legally enforceable trust but rather to create an entirely different creature — the ‘political’ or ‘public’ trust.

*A The ‘Political’ or ‘Public’ Trust: When Can the Government Be a Trustee?*

It is fundamental to the principle of separation of powers that the courts should not interfere in the governmental, administrative or executive functions of the Crown:

the Crown has many tasks to perform in the discharge of its legislative, executive, and public administration responsibilities which are governmental functions to be enforced in the political arena rather than encumbered with court-imposed remedies.<sup>22</sup>

Consequently, the courts are traditionally reluctant to impose trust obligations on the Crown. According to Megarry V-C, this effectively creates a legal presumption against the Crown being a trustee: ‘if the Crown was a trustee at all, it would always be a trustee in the higher sense unless there was enough to show that it was intended to be a trustee in the lower sense.’<sup>23</sup>

The ‘political’ or ‘public’ trust doctrine was established in various English cases, including *Skinners’ Co v Irish Society*<sup>24</sup> and *Kinloch v Secretary of State*

<sup>20</sup> In relation to Queensland, see Mudaliar, above n 18, 5. In relation to the Northern Territory, see *Welfare Ordinance 1953–1960* (Cth) ss 25–6; *Aboriginals Ordinance 1918–1933* (Cth) s 29A.

<sup>21</sup> Hogg and Monahan, above n 14, 258.

<sup>22</sup> *Authorson v A-G (Canada)* (2002) 215 DLR (4<sup>th</sup>) 496, 518 (Austin and Goudge JJA) (‘Authorson’). See also John Glover, *Equity, Restitution & Fraud* (2004) 118 for more on the ‘public’ trust.

<sup>23</sup> *Tito v Waddell [No 2]* [1977] Ch 106, 217. According to Glover, in this context there arises ‘a presumption that legislation does not intend to impose trust obligations in respect of governmental or administrative functions on the Crown and its servants and agents’: Glover, above n 22, 118. According to J D Heydon and M J Leeming, *Jacobs’ Law of Trusts in Australia* (7<sup>th</sup> ed, 2006) 65, ‘the mere use of the word “trust” in relation to Crown or governmental property usually does not denote a trust enforceable in a court of equity.’

<sup>24</sup> (1845) 12 Cl & F 425, 487–8; 8 ER 1474, 1499–500 (Lyndhurst LC). See also the discussion of this case in Glover, above n 22, 119.

(India) (*'Kinloch'*).<sup>25</sup> In *Kinloch*, war booty captured during the Indian mutiny campaign was stipulated by a Royal Warrant to be held 'in trust' for members of the armed forces. The House of Lords held that this merely described a political obligation and did not create a trust enforceable in the courts.<sup>26</sup> Any 'trust' related only to

higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown.<sup>27</sup>

In *Tito v Waddell [No 2]*, the inhabitants of a small and phosphate-rich Pacific Island near Nauru brought proceedings against their former colonising power, the British Crown.<sup>28</sup> The plaintiffs alleged that the Crown had acted in breach of trust and fiduciary obligations owed to them in respect of phosphate mining royalties that had been paid into funds described as 'trust funds'. These 'trust funds' were set up in various agreements and documents, including the *Mining Ordinance 1928* (Gilbert and Ellice Islands), which described the funds as being held 'in trust on behalf of' the natives.<sup>29</sup> The British Crown had recognised in negotiation with the plaintiffs that 'the land was the Banabans' land, and the royalty was being paid in respect of the phosphate in that land.'<sup>30</sup>

Nevertheless, Megarry V-C considered that what had been created was a trust 'in the higher sense' rather than a true, and legally enforceable, trust.<sup>31</sup> The use of the word 'trust' — even in a formal document or decree such as a Royal Warrant or the *Mining Ordinance 1928* (UK) — does not necessarily create an enforceable trust,<sup>32</sup> particularly where the trust relationship alleged is with the Crown.<sup>33</sup> There were no relevant statements by government officers showing an unequivocal intention that the royalty be held on a true and enforceable trust.<sup>34</sup> Nor did the mere existence of a separate fund, even where established by statute, play any part in distinguishing between a true trust and a mere governmental obligation. Indeed, according to Megarry V-C, 'the separateness of the fund or account seems ... to be indifferently a badge of each.'<sup>35</sup> In addition, there was

<sup>25</sup> (1882) 7 App Cas 619, discussed in Glover, above n 22, 119; Kidd, above n 3, 37. The case name is spelt variously as '*Kinloch*' or '*Kinlock*': see, eg, *Tito v Waddell [No 2]* [1977] Ch 106, 212–14 (Megarry V-C).

<sup>26</sup> *Kinloch* (1882) 7 App Cas 619, 619.

<sup>27</sup> *Ibid* 626 (Lord Selbourne LC).

<sup>28</sup> [1977] Ch 106.

<sup>29</sup> See *ibid* 165 (Megarry V-C), where the *Mining Ordinance 1928* (Gilbert and Ellice Islands) s 6(2) is quoted as requiring the royalties to 'be paid to the resident commissioner to be held by him in trust on behalf of the former owner or owners if a native or natives of the colony subject to such directions as the Secretary of State for the Colonies may from time to time give.'

<sup>30</sup> *Tito v Waddell [No 2]* [1977] Ch 106, 222 (Megarry V-C).

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid* 212–16, discussing *Kinloch* (1882) 7 App Cas 619.

<sup>33</sup> *Ibid* 211. According to Megarry V-C, the possibility exists that without holding the property on a true trust, the Crown is nevertheless administering that property in the exercise of the Crown's governmental functions. This latter possible explanation, which does not exist in the case of an ordinary individual, makes it necessary to scrutinise with greater care the words and circumstances which are alleged to impose a trust.

<sup>34</sup> *Ibid* 223.

<sup>35</sup> *Ibid* 219.

nothing in the agreements creating the Banaban Fund ‘to give any identifiable Banabans any definable right in the capital of that fund.’<sup>36</sup>

This case is consistent with a view expressed in numerous 19<sup>th</sup> century American and Canadian cases that the courts should not intervene even where the Crown has broken express promises or treaty obligations to indigenous people<sup>37</sup> — a latter-day version of the view that ‘the King can do no wrong’.<sup>38</sup> It is inconsistent with international human rights principles and possibly even domestic human rights legislation where such legislation exists.<sup>39</sup> This approach presents a significant barrier to potential ‘stolen wages’ claimants since the defence could argue that, following *Tito v Waddell [No 2]*, legislation establishing ‘Aboriginal Trust Funds’ and the like merely created a governmental obligation or a ‘political trust’ rather than an enforceable legal trust.

However, there are several possible arguments that *Tito v Waddell [No 2]* should be distinguished or not followed.

#### 1 *Overcoming Tito v Waddell [No 2]: The Independent Legal Interest Test*

The first argument against the *Tito v Waddell [No 2]* formulation of the political trust is that the doctrine is applicable only where the trust property can be characterised as, effectively, an emanation of the sovereign’s goodwill — a Crown grant to which the plaintiffs have no pre-existing legal right. Where the plaintiffs have an independent and pre-existing legal interest in the trust property, the political trust doctrine does not apply.

There is considerable overseas authority for this restriction of the political trust. In *Guerin v The Queen* (*‘Guerin’*), an Indian band that had surrendered land to the Crown argued that the Crown owed trust and fiduciary obligations to deal with the land on terms conducive to their welfare.<sup>40</sup> The Crown argued that the political trust doctrine applied to render legally unenforceable any obligations it had assumed in relation to the land. The Court held that the political trust doctrine was inapplicable because the Crown was not merely acting ‘in the exercise of its legislative or administrative function.’<sup>41</sup> Rather, it was acting pursuant to its obligation to protect the Indians’ interest in land, which was an ‘independent legal interest’<sup>42</sup> because — in contrast to *Tito v Waddell [No 2]*<sup>43</sup> — it was not the creation of the legislature or executive.<sup>44</sup>

<sup>36</sup> Ibid 222.

<sup>37</sup> See, eg, *Lone Wolf v Hitchcock*, 187 US 553 (1903); *Henry v The King* (1905) 9 Ex CR 417; *A-G (Canada) v Giroux* (1916) 53 SCR 172. See also Kidd, above n 3, 38–40; Camilla Hughes, ‘The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada’ (1993) 16 *University of New South Wales Law Journal* 70, 77–9.

<sup>38</sup> Hogg and Monahan describe the political trust as a ‘nothing’ and as a ‘catastrophe’ for its supposed beneficiaries, who ‘had been unsuccessful in obtaining satisfaction from the government out of court, and had then lost prolonged and expensive litigation’: Hogg and Monahan, above n 14, 259.

<sup>39</sup> Note, in the United Kingdom context, that ‘[p]ublic law can also take into account the hierarchy of individual interests which exist [sic] under the *Human Rights Act 1998*’: see *R v East Sussex County Council; Ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58, 66 (Lord Hoffmann).

<sup>40</sup> [1984] 2 SCR 335. For discussion of this and other related cases, see Hughes, above n 37, 87–91.

<sup>41</sup> *Guerin* [1984] 2 SCR 335, 385 (Dickson J for Dickson, Beetz, Chouinard and Lamer JJ).

<sup>42</sup> Ibid.

A response to this may be that this restriction on the scope of the political trust doctrine is limited to cases not involving an independent legal interest, the restriction only applying where the trust property is Aboriginal *land*. The Court in *Guerin* required the plaintiffs to prove aboriginal or native title before a trust or fiduciary obligation would be imposed.<sup>45</sup> However, later Canadian cases such as *R v Sparrow* held that the independent legal interest test for the existence of trust or fiduciary duties could be satisfied even where the case did not directly concern surrender of or dealings with land.<sup>46</sup> Similarly, in *Authorson v A-G (Canada)* ('*Authorson*'), which involved a class action by a group of disabled war veterans who alleged that the Crown had maladministered pensions and other funds it held on their behalf, the Ontario Court of Appeal distinguished both *Kinloch* and *Tito v Waddell [No 2]*.<sup>47</sup> This was on the basis that:

in neither case could it be said that the funds held by the Crown were in any sense owned by those claiming that the Crown held the funds in trust for them. Here, the fact that each veteran had a property interest in the fund being administered on his behalf is a clear indication that this is not a political trust. By contrast, the 'political trust' cases involve not private funds, but public funds or

<sup>43</sup> Judicial attempts to distinguish *Tito v Waddell [No 2]* make for interesting reading. In *Guerin* [1984] 2 SCR 335, 352, Wilson J (for Ritchie, McIntyre and Wilson JJ) argued that royalties paid to the Banaban Islanders in *Tito v Waddell [No 2]* were 'exclusively Crown property'. This seems to ignore the fact that the royalties flowed from the Crown's use of the Banaban Islanders' land and were — again, admittedly from a modern perspective — a recognition of the Banaban Islanders' pre-existing moral, if not legal, rights. Glover regards Wilson J's argument on this point as an 'unlikely contention': Glover, above n 22, 125 fn 611. Nevertheless, Toohey J in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 202 fn 65 ('*Mabo*') put a similar argument, stating that '[t]he trust claimed in *Tito v Waddell [No 2]* to exist for the benefit of Banaban landowners, with respect to a fund comprising compensation or royalties paid by Crown lessees, was a question of construction of the *Mining Ordinance 1928* of the Gilbert and Ellice Islands Colony.' Ultimately, it is suggested, *Tito v Waddell [No 2]* is only reconcilable with the later jurisprudence if viewed as a product of the era of terra nullius, an era in which the Islanders' land rights were not recognised as rights of a 'legal' nature at all.

<sup>44</sup> Thus, the Court held that the Crown had accepted an equitable obligation that was very close to a trust — specifically, a fiduciary duty under which it 'will be liable to the Indians in the same way and to the same extent as if such a trust were in effect': *Guerin* [1984] 2 SCR 335, 376 (Dickson J for Dickson, Beetz, Chouinard and Lamer JJ). See also Glover, above n 22, 123–5; Hughes, above n 37, 88–9.

<sup>45</sup> *Guerin* [1984] 2 SCR 335, 376–7 (Dickson J for Dickson, Beetz, Chouinard and Lamer JJ). See also David Tan, 'The Fiduciary as an Accordion Term: Can the Crown Play a Different Tune?' (1995) 69 *Australian Law Journal* 440, 443–4.

<sup>46</sup> [1990] 1 SCR 1075. The appellant in *R v Sparrow* [1990] 1 SCR 1075 had been convicted of an offence against fisheries legislation. He argued that he was exercising a traditional Aboriginal right to fish, and that this right was recognised by the *Constitution Act 1982*, being sch B to the *Canada Act 1982* (UK) c 11 ('*Constitution Act 1982*'). The Supreme Court of Canada found that 'aboriginal and treaty rights' (the term used in the *Constitution Act 1982*) could validly be regulated or even extinguished. However, the Crown's power to do so must be balanced against its trust or fiduciary obligation to Aboriginal people. This fiduciary obligation arose not only from the *Canadian Constitution* but also from '[t]he sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown': at 1108 (Dickson CJ and La Forest J for Dickson CJ, Lamer, Wilson, La Forest, L'Heureux-Dube and Sopinka JJ). See also Amanda Jones, 'The State and the Stolen Generation: Recognising a Fiduciary Duty' (2002) 28 *Monash University Law Review* 59, 69.

<sup>47</sup> (2002) 215 DLR (4<sup>th</sup>) 496.



property held by the Crown, whose distribution is found to be the province of the political arena, not the courts.<sup>48</sup>

The Australian cases are not as yet clear on the reach of the independent legal interest restriction on the scope of the political trust doctrine. In *Mabo v Queensland [No 2]* ('*Mabo*'), Toohey J accepted that the defendant might be bound to the plaintiffs by trust and fiduciary obligations in relation to the plaintiffs' rights in the Murray Islands.<sup>49</sup> His Honour rejected the Queensland government's argument that any responsibilities it owed to the plaintiffs with respect to the Islands were a mere matter of governmental discretion, or a political trust.<sup>50</sup> His Honour distinguished *Kinloch* on the basis that there '[t]he interest claimed to be held in trust was created expressly by the Crown itself',<sup>51</sup> stating that traditional title, in contrast, 'arises as a matter of common law, quite independently of any grant or other action on the part of the Crown.'<sup>52</sup>

In *Noble v Victoria* ('*Noble*'), the Queensland Court of Appeal rejected an argument that the Victorian government owed trust or fiduciary obligations in relation to reward money it had received on behalf of, but never given to, two 'black trackers' who had assisted in the capture of the Kelly Gang.<sup>53</sup> McPherson JA cited *Tito v Waddell [No 2]* in support of the notion that the actions of the Rewards Board in allocating the money to the government, rather than directly to 'persons unable to use it',<sup>54</sup> created a mere 'precatory trust' rather than a legally enforceable trust.<sup>55</sup> According to McPherson JA, the words of the Rewards Board and the other instruments on which the plaintiffs founded their claim 'nowhere use the expression "trust" or anything like it.'<sup>56</sup> McPherson JA also stated that:

The plaintiffs' claim is in no way related to land occupied or formerly occupied by Aborigines, but exclusively to personal property in the form of money that

<sup>48</sup> Ibid 517 (Austin and Goudge JJA). The Court also rejected an argument that had been accepted in another case, *Callie v Canada* [1991] 2 FC 379, that the sole source of the Crown's fiduciary obligation in *Guerin* [1984] 2 SCR 335 was the sui generis Aboriginal interest in the land. Austin and Goudge JJA stated at 519 (emphasis added):

fiduciary duty is created by the aboriginal right to the land (undoubtedly a sui generis right), together with the obligations placed on the Crown by the *Indian Act* in disposing of that land. It is the combination of the aboriginal interest in the land with the statutory obligations imposed on the Crown in dealing with that interest which render the Crown subject to the fiduciary obligation. ... [I]t is the nature of the relationship, not the specific category of actor involved, that gives rise to the fiduciary duty.

<sup>49</sup> (1992) 175 CLR 1. For discussion concerning this aspect of the *Mabo* decision, see Hughes, above n 37, 72–6; Jones, above n 46, 70–2.

<sup>50</sup> *Mabo* (1992) 175 CLR 1, 201–2.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid 202.

<sup>53</sup> [2000] 2 Qd R 154. See also the trial decision *Noble v Victoria* (Unreported, Supreme Court of Queensland, Helman J, 12 September 1997) and discussion of the decision in Kidd, above n 3, 49.

<sup>54</sup> *Noble* [2000] 2 Qd R 154, 157. The Rewards Board had noted that it would not be desirable to place any considerable sum of money in the hands of persons unable to use it. They therefore recommend that the sums set opposite to their names be handed to the Queensland and Victorian Governments to be dealt with at their discretion.

<sup>55</sup> Ibid 164–5.

<sup>56</sup> Ibid 164.

was promised or to be paid by a colonial government to persons some of whom happened to be Aborigines.<sup>57</sup>

It is suggested, however, that *Noble* is not authority for the proposition that the independent legal interest exception is confined in Australia to cases in which the alleged trust property is traditional indigenous land. The plaintiffs' case in *Noble* was relatively weak in that the report of the Rewards Board allocating the money to the government clearly stated that the money was to be dealt with 'at ... [the government's] discretion.'<sup>58</sup> As the Ontario Court of Appeal pointed out in *Authorson*, the logically crucial feature distinguishing 'political' from true trusts is that the former concerns government or Crown property while the latter concerns private property.<sup>59</sup> There seems to be no reason in policy or principle for not following the Canadian approach.

If the Canadian approach is followed in Australia, there seems little doubt that potential stolen wages plaintiffs would be able to overcome the argument that legislation creating 'Aboriginal Trust Funds' and the like merely created a political trust. Unlike the plaintiffs' money in *Noble* or booty in *Kinloch*, the money placed in Aboriginal Trust Funds was not money in the nature of a grant or reward. It was money that the plaintiffs had earned as employees and to which they had a clear legal right. If the situation were otherwise, there would seem no alternative but to regard Aboriginal workers as having been legally enslaved.<sup>60</sup>

## 2 *Overcoming Tito v Waddell [No 2]: The Sovereign Immunity Argument*

The second argument against applying *Tito v Waddell [No 2]* to potential stolen wages claims in Australia is that *Tito v Waddell [No 2]* rests — explicitly or implicitly — upon what Paul Finn terms:

a palpable ... deference and preference accorded the Crown in curial proceedings. This posture may have been — and may still be — appropriate in England. I do not comment on that. Its justification in a country which began to enact comprehensive *Claims against the Government* legislation as early as 1866 is open to serious question.<sup>61</sup>

The suggestion is that the true basis for the political trust doctrine is not the traditional judicial reluctance to interfere in political or executive decisions — a feature of the separation of powers common to both English and Australian law — but rather a peculiarly English attitude of deference to authority. Finn's argument implies that Australian courts have a more robust attitude towards authority than English courts. This suggests that legislation allowing claims against the government<sup>62</sup> should be interpreted as abrogating entirely the

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid* 157.

<sup>59</sup> (2002) 215 DLR (4<sup>th</sup>) 496, 517 (Austin and Goudge JJA).

<sup>60</sup> For a recent discussion of this issue, see Stephen Gray, 'The Elephant in the Drawing Room: Slavery and the "Stolen Wages" Debate' (2007) 11(1) *Australian Indigenous Law Review* 30.

<sup>61</sup> Paul Finn, 'The Forgotten "Trust": The People and the State' in Malcolm Cope (ed), *Equity: Issues and Trends* (1995) 131, 140 (citations omitted).

<sup>62</sup> See, eg, *Judiciary Act 1903* (Cth) s 64, which is applicable in the Northern Territory.

political trust doctrine rather than as merely clarifying the fact that the government can be sued in an appropriately non-political case.<sup>63</sup>

There is some support for Finn's suggestion in a recent United States case, *Cobell v Babbitt*, which had strong factual similarities to potential stolen wages claims.<sup>64</sup> The case was a class action by over 300 000 Native American beneficiaries of so-called Individual Indian Money ('IIM') trust accounts. These accounts were established by statute to hold money derived from income-producing activities negotiated by the Bureau of Indian Affairs over Indian land.<sup>65</sup> The plaintiffs sought relief for alleged mismanagement of their trust accounts.

The Columbian District Court did not explicitly refer to the so-called political trust doctrine. However, it did consider whether the doctrine of sovereign immunity had been waived in relation to the substantive claims and remedies sought by the plaintiffs. Sovereign immunity in the US is waived in certain circumstances provided in the *Administrative Procedure Act*, 5 USC § 702 (1993), which states that:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States ...

Lamberth J rejected an argument from the defendants that the 'plaintiffs' accounting claim is merely "part and parcel" of a hypothetical money damages claim that has been "temporary [sic] shelved for the purposes of this litigation."<sup>66</sup> His Honour noted that the plaintiffs had 'repeatedly stated that they do not seek to recover any money or other substitutionary relief.'<sup>67</sup> Had the plaintiffs sought monetary damages, their action would have been barred due to the operation of the doctrine of sovereign immunity.<sup>68</sup>

<sup>63</sup> Kidd takes up Finn's argument, suggesting that claims against the government on the basis of such legislation may have the effect of making government 'as accountable for its management of Aboriginal finances "as the humblest citizen"': Kidd, above n 3, 169.

<sup>64</sup> 91 F 2d 1 (DC Cir, 1999).

<sup>65</sup> The IIM accounts were the result of US policies dating back to the early 1800s, under which tribal communities were 'removed' or relocated from their original tribal homelands to remote locations in the Louisiana Purchase territory. The government then entered into treaties or agreements identifying the new tribal lands. Under the *General Allotment Act of 1887*, c 119, 24 Stat 388 ('*Dawes Act*'), individual tribal families were allotted small parcels of land from within their original tribal reservation, with the 'surplus' lands then opened to non-Indian settlement. Allotted land was held in trust by the US for the individual Indians: see *ibid* 5 (Lamberth J). Pursuant to this trust duty, at the time of the original court trial in 1999 the US held approximately 11 million acres of the plaintiffs' individual land allotments in trust: *ibid* 6 (Lamberth J). Income was derived from such agreements and activities as grazing leases, timber leases, timber sales, oil and gas production, mineral production and rights of way: *ibid* 7 (Lamberth J). Another agency, the Office of Trust Fund Management, was then responsible for correctly banking the money received and crediting it to an individual account holder or a special deposit account: see *ibid* 7–13 (Lamberth J).

<sup>66</sup> *Cobell v Babbitt*, 91 F 2d 1, 27 (DC Cir, 1999).

<sup>67</sup> *Ibid* 24.

<sup>68</sup> Thus, in effect, the operation of the doctrine prevented the plaintiffs from seeking recovery of the US\$2.4 billion revealed in an Arthur Anderson report to have been misappropriated from the IIM accounts. For a discussion of the possible implications of this position for the beneficiaries

If this doctrine is regarded as equivalent to the doctrine of the political trust, then *Cobell v Babbitt* supports the proposition that legislation permitting claims against the government is relevant to the question of whether a ‘true’ or enforceable trust, rather than a political trust, exists. In Australia, legislation permitting claims against the government does not restrict the available remedies to a mere accounting of the lost moneys.

Nevertheless, the case law — and particularly Toohey J’s comments in *Mabo*<sup>69</sup> — supports the proposition that the political trust doctrine does still exist in Australia, albeit perhaps in a limited form. It does not seem plausible to argue that claims against the government entirely abrogate the doctrine. A better argument seems to be that the doctrine is now limited to situations in which it is inadvisable on a policy basis to impose trust obligations on government. Factors relevant to such an assessment are arguably similar to the factors now recognised as governing the imposition of a duty of care upon government in tort.<sup>70</sup>

### 3 *Overcoming Tito v Waddell* [No 2]: *Liability of Crown Servants*

A third argument is derived from the High Court’s decision in *Accident Compensation Tribunal v Federal Commissioner of Taxation* (*‘Accident Tribunal v FCT’*), a case concerning whether the Registrar of the Tribunal held workers’ compensation payments as trustee.<sup>71</sup> The Court accepted the principle derived from *Kinloch* that clear words were required

before an obligation on the part of the Crown or a servant or agent of the Crown, even if described as a trust obligation, will be treated as a trust according to ordinary principles or, as it is sometimes called, a ‘true trust’; ... in the absence of clear words, the obligation will be characterized as a governmental or political obligation, sometimes referred to in the decided cases as a trust ‘in the higher sense’ or ‘a political trust’.<sup>72</sup>

Despite this, the High Court also pointed out that the language of the instrument is not conclusive since ‘subject matter and context are also important and, in some cases, may be more revealing of intention than the actual language used.’<sup>73</sup> This suggests that the use of the word ‘trust’ in legislation providing for the withholding of wages should be seen in the context of the general ‘protective’

of the IIM accounts and for taxpayers, see Billee Elliott McAuliffe, ‘Forcing Action: Seeking to “Clean Up” the Indian Trust Fund: *Cobell v Babbitt*, 30 F Supp 2D 24 (DDC 1998)’ (2001) 25 *Southern Illinois University Law Journal* 647, 675–6. The 1989 Arthur Anderson report is referred to at 657.

<sup>69</sup> (1992) 175 CLR 1, 201–2, where Toohey J leaves open the question of whether the idea of a political trust has any utility.

<sup>70</sup> See, eg, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 557, where Gleeson CJ stated that to hold that the government owed a duty of care

necessarily implies that the reasonableness or unreasonableness of the inaction of which complaint is made is a legitimate subject for curial decision. Such legitimacy involves questions of practicality and of appropriateness. There will be no duty of care to which a government is subject if, in a given case, there is no criterion by reference to which a court can determine the reasonableness of its conduct.

<sup>71</sup> (1993) 178 CLR 145.

<sup>72</sup> *Ibid* 162–3 (Mason CJ, Deane, Toohey and Gaudron JJ) (citations omitted).

<sup>73</sup> *Ibid* 163.

intention of legislation controlling Aboriginal wages, a view that arguably tends to suggest that a mere ‘governmental obligation’ was intended.

However, in the case the High Court also pointed out that ‘there is no rule of law or equity to prevent the imposition of ordinary trust obligations on a person who is, in other respects, a servant or agent of the Crown.’<sup>74</sup> A person who is a servant or agent of the Crown ‘may bear that character in relation to some functions, but not [necessarily] those associated with the obligation in question.’<sup>75</sup>

According to the High Court, the Registrar’s duty to invest workers’ compensation money may not be ‘easily described as a Crown or governmental function’.<sup>76</sup> Indeed, the ‘mere fact that the person on whom the obligation is cast is a statutory office holder cannot, of itself, require [the inquiry into] whether he or she is a trustee in the ordinary sense to be approached on the basis of a presumption to the contrary.’<sup>77</sup> The issue of whether the obligation in question can properly be described as a ‘governmental interest or function’<sup>78</sup> can only be determined with reference to ‘the law as it stands from time to time.’<sup>79</sup>

Following this reasoning, stolen wages claimants might argue that the obligation cast on the Chief Protector or other responsible official with respect to moneys held by them on behalf of Aboriginal employees cannot properly be described as a ‘Crown or governmental function.’ Just as the Registrar’s duties in relation to compensation moneys were separate to their general duties in relation to the Accident Compensation Fund, so too were the Chief Protector’s duties in relation to Aboriginal employees’ money separate to their general ‘protective’ duties in relation to those employees. There was no ‘governmental interest or function’ involved in managing the Aboriginal Trust Accounts.

A potential difficulty with this argument for stolen wages plaintiffs is that the Registrar of the Tribunal in *Accident Tribunal v FCT* was alive and available to give evidence. In contrast, it is unlikely that a Director of Welfare or other responsible government official would be available to give evidence in a stolen wages claim relating to the administration of trust funds 40 or more years ago. However, it is clear that the trust relationship in *Accident Tribunal v FCT* rested on the terms of the statute, not on the evidence of the Registrar in person. Stolen wages claimants would equally be relying on the terms of the statute rather than on the evidence of some long-retired or deceased Director of Welfare.

#### 4 *Overcoming Tito v Waddell [No 2]: The Statutory Trust*

A final possibility is that the obligation cast on the responsible official should properly be described neither as an ‘ordinary’ or ‘true’ trust nor a ‘political’ trust, but rather as something in between: the so-called ‘statutory’ trust. The ‘statutory trust’ is a category most recently, if somewhat fleetingly, referred to by the High

<sup>74</sup> *Ibid* (citations omitted).

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid* 164.

<sup>78</sup> *Ibid*.

<sup>79</sup> *Ibid* (citations omitted).

Court in *Bathurst City Council v PWC Properties Pty Ltd* ('*Bathurst*').<sup>80</sup> This case raised the question of whether the Bathurst City Council could be restrained from selling land to a private developer by provisions in local government legislation that land under the control of a council was 'land subject to a trust for a public purpose' and was 'community land'.<sup>81</sup>

There was no 'true' trust as there was no beneficiary. Nor could the trust easily be described as being for charitable purposes.<sup>82</sup> Nevertheless, following a review of the history of legislation regulating the management and control of 'waste lands' of the Crown,<sup>83</sup> the Court concluded that the council would be restricted by the relevant provisions in its dealings with the land 'and subject to restraint at the suit of the Attorney-General.'<sup>84</sup> The Court described this obligation as a "statutory trust" which bound the land and controlled what otherwise would have been the freedom of disposition enjoyed by the registered proprietor of an estate in fee simple.<sup>85</sup>

It is questionable whether the category of statutory trust as described by the High Court in *Bathurst* is applicable to stolen wages claimants. According to the authors of *Jacobs' Law of Trusts in Australia*, the decision in *Bathurst* was the most recent in 'the long history of "public trusts" created by Crown grant.'<sup>86</sup> They also added that '[t]hose obligations may be enforceable at the suit of the Attorney-General as a matter of public law, but do not give rise to a trust enforceable in equity.'<sup>87</sup> Finn refers to the statutory trust as often 'a trust for an abstract non-charitable purpose'.<sup>88</sup> David Wright comments that this "statutory trust" placed a fetter upon the free alienability of the land<sup>89</sup> but notes that '[i]t is not apparent if this "statutory trust" can also be the source of positive obligations.'<sup>90</sup>

Thus, it is currently unlikely that a statutory trust might provide the basis for a stolen wages claim as the trust obligation alleged by potential stolen wages claimants does not concern land, is not created by Crown grant, is not likely to be enforced by the Attorney-General and does concern identifiable beneficiaries. Nevertheless, it is at least conceivable that a stolen wages claim might provide the High Court with a further opportunity to 'modernise the Australian law of trusts' by giving further 'content to the "statutory trust"'.<sup>91</sup>

<sup>80</sup> (1998) 195 CLR 566.

<sup>81</sup> *Local Government Act 1993* (NSW) sch 7 s 6(2)(b).

<sup>82</sup> *Bathurst* (1998) 195 CLR 566, 591 (Gaudron, McHugh, Gummow, Hayne, Callinan JJ).

<sup>83</sup> *Ibid* 589.

<sup>84</sup> *Ibid* 592.

<sup>85</sup> *Ibid*.

<sup>86</sup> Heydon and Leeming, above n 23, 66.

<sup>87</sup> *Ibid*.

<sup>88</sup> Finn, 'The Forgotten "Trust"', above n 61, 139 fn 59.

<sup>89</sup> David Wright, 'The Statutory Trust, the Remedial Constructive Trust and Remedial Flexibility' (1999) 14 *Journal of Contract Law* 221, 225 (citations omitted).

<sup>90</sup> *Ibid* 225 fn 36.

<sup>91</sup> *Ibid* 225.

### B Scope of the Trustee's Duties

In ordinary private trust law, the first duty of the trustee is 'that an account of [their] receipts and payments should be kept, to be produced to those interested in the account when it is properly demanded.'<sup>92</sup> 'The account must be timely, faithful, accurate, and usually supported by documentary evidence.'<sup>93</sup> Trustees should keep accurate information regarding beneficiaries and retain a current schedule of trust property. They should also identify accounts as 'trust' accounts and document revenue and expenditure.<sup>94</sup>

As noted above, it is arguable that not all of these duties apply equally to the Crown as trustee. In particular, the duty not to 'mix' trust funds may not apply equally to the Crown.<sup>95</sup> However, the Crown as trustee still owes a duty to account.<sup>96</sup> This general obligation of accountability applies a fortiori to government relations with indigenous people, which are marked by relations of peculiar power and vulnerability.<sup>97</sup>

A duty to account is of enormous significance to stolen wages claimants. As the history of the litigation in *Cubillo v Commonwealth* ('Cubillo')<sup>98</sup> has shown, the lapsing of time is perhaps the greatest single difficulty facing stolen wages claimants. Given the loss of records and the death of key witnesses, the accounting difficulties of tracing 'what happened' to individual moneys placed in trust are likely to be almost insuperable. Governments, rather than individuals, are best placed to answer such questions. In *Cobell v Norton*, following a finding of breach of trust, the US government was ordered to overhaul its accounting practices and to produce a historical account of the trust funds.<sup>99</sup> Such an order would be of great value to stolen wages claimants around Australia.<sup>100</sup>

<sup>92</sup> *Wroe v Seed* (1863) 4 Giff 425, 429; 66 ER 773, 774–5 (Stuart V-C). See also *Trustee Act 1907* (SA) s 8; G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia* (3<sup>rd</sup> ed, 2004) 619–20.

<sup>93</sup> Dal Pont and Chalmers, above n 92, 619 (citations omitted). See further *Christensen v Christensen* [1954] QWN 37, 44.

<sup>94</sup> See Dal Pont and Chalmers, above n 92, 620.

<sup>95</sup> *New South Wales v Commonwealth [No 3]* (1932) 46 CLR 246, 262 (Rich and Dixon JJ). This case is also discussed in Hogg and Monahan, above n 14, 260.

<sup>96</sup> Dal Pont and Chalmers, above n 92, 137 (emphasis in original) (citations omitted) speak of the government's general responsibility to the governed as trustee:

perhaps the easiest duty to conceptualise is the duty to comprehensively *account* faithfully and accurately to the people in a form that facilitates the public monitoring of the government's performance. This is required as a check upon misuse of the power conferred by the public to its representative, and as such, founds the basis of responsible government. The courts' reluctance to attach equitable doctrines of confidence to governmental information reflects this policy at a judicial level.

See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ).

<sup>97</sup> For example, the Crown has the power to alienate land belonging to indigenous peoples, thus extinguishing native title: *Mabo* (1992) 175 CLR 1, 203 (Toohey J). See also Dal Pont and Chalmers, above n 92, 141; above Part II(A)(1).

<sup>98</sup> (2001) 112 FCR 455.

<sup>99</sup> 240 F 3d 1081, 1109 (Sentelle J) (DC Cir, 2001), where the Columbian Court of Appeal affirmed the order of the district court: at 1093 (Sentelle J).

<sup>100</sup> However, as the history of the litigation in *Cobell v Norton* has shown, such an order is likely to be only the beginning of the road. More than 10 years after the plaintiffs launched their case, and five years after their success on appeal in *Cobell v Norton*, they are yet to receive any financial

### III STOLEN WAGES PLAINTIFFS AND FIDUCIARY DUTY

Should stolen wages plaintiffs be unable to prove an express trust, they might argue that the government assumed fiduciary duties in relation to moneys kept in Aboriginal Trust Accounts. Alternatively, they might argue that the government owed broader, perhaps even positive, fiduciary obligations to indigenous workers. Thalia Anthony, for example, has recently suggested that governments owed a duty to 'ensur[e] the general welfare of Indigenous workers,'<sup>101</sup> including a duty to ensure that cattle stations and other employers adhered to their statutory obligations to provide wages rather than rations and to adhere to other employment conditions.<sup>102</sup>

Generally, a fiduciary relationship exists where one party (the fiduciary) undertakes to act in the interests of another 'in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.'<sup>103</sup> The accepted fiduciary relationships include those of trustee and beneficiary, employee and employer, director and company, and guardian and ward.<sup>104</sup> However, the courts have preferred to develop fiduciary law on a case-by-case basis rather than by seeking a precise definition.<sup>105</sup>

Thus in *Mabo*, Toohey J noted that '[t]he factors giving rise to a fiduciary duty are nowhere exhaustively defined.'<sup>106</sup> He summarised the general features of fiduciary relationships in terms that seem curiously apt to describe the position of a Chief Protector or Director of Welfare vis-à-vis the Aboriginal 'native' or 'ward':

compensation for the government's admitted breach of trust. Instead, the case has been delayed with interminable collateral proceedings, or 'scores of other orders and opinions' in what one American legal commentator has termed an 'incredibly complicated case': see Richard J Pierce Jr, 'Judge Lamberth's Reign of Terror at the Department of Interior' (2004) 56 *Administrative Law Review* 235, 239. Prominent in these 'myriad details' (at 239) has been debate about several issues: first, the judge's power to issue 'a permanent structural injunction that requires the [Department of the Interior ('DOI')] to provide the kind of accounting the judge prescribed on the schedule he prescribed': at 239 (citations omitted); secondly, the judge's use of contempt orders against various government employees: at 240-5; thirdly, his actions in ordering the DOI's computer system to be disconnected from the internet because of the fear that hackers might destroy or alter trust records: at 245-6. Problems of missing data and inadequately skilled personnel have been at least partially responsible for the delay: see Christopher Barrett Bowman, 'Indian Trust Fund: Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of *Cobell v Norton*' (2004) 53 *Catholic University Law Review* 543. Lamberth J's zeal in pursuing the DOI has been characterised by Richard J Pierce Jr as a 'reign of terror' — Pierce uses this phrase in the title of his article 'Judge Lamberth's Reign of Terror at the Department of Interior' (2004) 56 *Administrative Law Review* 235. Most recently, he has been removed from the case on the basis that his 'professed hostility to Interior' had become 'so extreme as to display clear inability to render fair judgment': see *Cobell v Kempthorne*, 455 F 3d 317, 335 (Tatel J for the Court) (DC Cir, 2006), citing *Liteky v United States*, 510 US 540, 551 (Scalia J for the Court).

<sup>101</sup> Anthony, above n 2, 17.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97 (Mason J) ('*Hospital Products*'). See also Tan, above n 45, 441.

<sup>104</sup> *Hospital Products* (1984) 156 CLR 41, 96 (Mason J), 141 (Dawson J).

<sup>105</sup> At *ibid* 141 (citations omitted), Dawson J noted that the courts have said more than once that it is not possible to define completely and with precision those matters which give rise to fiduciary obligations notwithstanding that it is possible to discern a fiduciary relationship when it exists.

<sup>106</sup> (1992) 175 CLR 1, 200 (citations omitted).



Underlying such relationships is the scope for one party to exercise a discretion which is capable of affecting the legal position of the other. One party has a special opportunity to abuse the interests of the other. The discretion will be an incident of the first party's office or position. The undertaking to act on behalf of, and the power detrimentally to affect, another may arise by way of an agreement between the parties, for example in the form of a contract, or from an outside source, for example a statute or a trust instrument. The powers and duties may be gratuitous and 'may be officiously assumed without request'.<sup>107</sup>

These comments seem to suggest that a fiduciary relationship would exist between a government and potential stolen wages plaintiffs. Such a relationship could have arisen directly because the relationship between such plaintiffs and the government was that of ward and guardian. Alternatively, such a relationship could have arisen indirectly by virtue of the government's undertaking contained in 'protective' legislation to act on behalf of Aboriginal employees, including the provisions relating to trust accounts and the resulting power to detrimentally affect the interests of Aboriginal workers. It is notable that Toohey J's comments did not regard the fiduciary relationship as necessarily arising only out of the power to alienate and extinguish native title. Rather, Toohey J left open the possibility that such a fiduciary relationship had a broader basis in the general 'course of dealings by the Queensland Government with respect to the Islands since annexation ... and the exercise of control over or regulation of the Islanders themselves by welfare legislation'.<sup>108</sup>

In *Wik Peoples v Queensland* ('*Wik*'), Brennan CJ made comments that have been interpreted by some commentators as supportive of the existence of a broad, even *sui generis*, fiduciary obligation.<sup>109</sup> Responding to an argument that the state owed a fiduciary duty to indigenous inhabitants of land that was subject to pastoral leases, Brennan CJ stated that the statutory power to alienate land and thereby extinguish native title could not, of itself, be described as creating a

<sup>107</sup> *Ibid* (citations omitted).

<sup>108</sup> *Ibid* 203. Toohey J also found a narrower basis for the fiduciary obligation in the Queensland government's power to alienate and extinguish native title in the Meriam people's traditional land at 203 (emphasis in original):

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; it does not depend on an exercise of that power.

Such a fiduciary obligation was 'in the nature of the obligation of a constructive trustee': at 204 (Toohey J) (citations omitted). The content of the obligation would be 'tailored by the circumstances of the specific relationship from which it arises. But, generally, to the extent that a person is a fiduciary he or she must act for the benefit of the beneficiaries': at 204 (Toohey J) (citations omitted). The other members of the High Court gave the issue of fiduciary duty only brief treatment. Dawson J considered that the existence of any fiduciary duty was dependant upon the existence of an Aboriginal interest in or over the land. Since his Honour considered that such Aboriginal interests in land did not exist, there was 'no room' for the application of fiduciary principles: at 166. Brennan J, with whom Mason CJ and McHugh J concurred, considered that a fiduciary duty might arise upon surrender of native title to the Crown: at 60. However, Hughes, above n 37, 72 (emphasis in original) suggests that 'it is not certain that Brennan J intended to suggest that a fiduciary duty would arise *exclusively* in the hypothetical scenario he describes'. Deane and Gaudron JJ opined that actual or threatened interference with the enjoyment of native title might attract more general equitable remedies, such as the imposition of a remedial constructive trust: at 113. They did not explicitly consider fiduciary duty.

<sup>109</sup> (1996) 187 CLR 1.

fiduciary duty.<sup>110</sup> Some extra element was needed: this element was a ‘discretionary power — whether statutory or not — that is conferred on a repository for exercise on behalf of, or for the benefit of, another or others’.<sup>111</sup>

However, Toohey J’s broad conception of the fiduciary relationship has been criticised on a policy basis<sup>112</sup> and has not been adopted in subsequent cases. In *Williams v Minister* (Aboriginal Land Rights Act 1983) (*Williams*), the New South Wales Supreme Court found that the plaintiff’s position as a state ward subject to the control of the Aborigines Welfare Board did not invoke the legal relationship of guardian and ward.<sup>113</sup> Consequently, the duties attaching to guardianship did not apply.<sup>114</sup> In addition, the Court declined to follow Canadian cases that have extended fiduciary principles to cover social and familial relationships,<sup>115</sup> holding that such principles did not protect the ‘fundamental human and personal interests’ claimed.<sup>116</sup>

Similarly, in *Cubillo* the Full Court of the Federal Court rejected a claim by members of the ‘Stolen Generation’ that the Commonwealth had breached

<sup>110</sup> *Ibid* 96.

<sup>111</sup> *Ibid* (Brennan CJ). On the facts in *Wik*, however, Brennan CJ at 96 was

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 in or over that land is liable to be extinguished without their consent and contrary to their interests.

This was because ‘[t]he imposition on the repository of a fiduciary duty to individuals who will be adversely affected by the exercise of the power would preclude its exercise’: at 96. See also Jones, above n 46, 73, where she argues that these comments, together with Toohey J’s analysis in *Mabo*, effectively extend the fiduciary obligation to a power-dependency relationship, provided there are ‘[t]he elements of power and discretion, and the corresponding vulnerability, and reasonable expectations’. Jones suggests that the fiduciary obligation is ‘easily applied in the Stolen Generation context’ since the state had a discretionary power to remove children from their families, the children were in a position of vulnerability and the ‘reasonable child could have believed that the State would act in their interests’: at 73. Indeed, Jones suggests, ‘Brennan CJ in *Wik* supported the extension of fiduciary principles to the indigenous context generally’: at 74.

<sup>112</sup> According to Glover, to source the obligation merely in a ‘power-dependency relationship’ could have the result that ‘many groups within society who live in comparable conditions to the Meriam people’ might also be able to argue that the government owes them a fiduciary obligation: Glover, above n 22, 126–7.

<sup>113</sup> (1999) 25 Fam LR 86.

<sup>114</sup> *Ibid* 234–5 (Abadee J). The plaintiff claimed that the Board — and consequently the responsible Minister — had breached a fiduciary obligation owed to her by failing to ensure that she was properly cared for, as a result of which she suffered physical and psychological harm. In an appeal on an earlier application for extension of the statutory limitation period, *Williams v Minister* (Aboriginal Land Rights Act 1983) (1994) 35 NSWLR 497, Kirby P had held that the Aborigines Welfare Board was under a fiduciary duty to provide for Ms Williams’s custody, maintenance and education. The duty arose from the Aborigines Welfare Board’s position as the child’s statutory guardian: at 511 (Kirby P). In the hearing on the substantive issue, however, Abadee J distinguished Kirby P’s views: see *Williams* (1999) 25 Fam LR 86, 233. See also Jones, above n 46, 64.

<sup>115</sup> See, eg, *M(K) v M(H)* [1992] 3 SCR 6, 64 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ). See generally Dal Pont and Chalmers, above n 92, 127–8. Note that, in Australia, fiduciary law has been rejected as a vehicle to circumvent limitation statutes in sexual abuse claims: see *Paramasivam v Flynn* (1998) 90 FCR 489.

<sup>116</sup> *Williams* (1999) 25 Fam LR 86, 233 (Abadee J). According to Dal Pont and Chalmers, above n 92, 128, this decision is an example of the ‘frosty reception’ given to attempts in the Australian courts ‘to rely upon the fiduciary-like relationship between guardian and ward to replicate common law duties.’ If the plaintiff had legal remedies, they were in tort. As the Court noted, it was not possible to ‘convert an unsustainable claim at common law, based on the same facts, into a sustainable one in equity’: *Williams* (1999) 25 Fam LR 86, 242 (Abadee J).

fiduciary obligations to act in their interests and ensure that they were adequately cared for.<sup>117</sup> Though the Court accepted O’Loughlin J’s finding at trial that the Director of Welfare might owe fiduciary duties arising from his statutory role as the children’s legal guardian,<sup>118</sup> the Court held that the fact that the Director might owe fiduciary obligations did not mean that such obligations were owed by the Commonwealth.<sup>119</sup> In any case, fiduciary obligations could not be ‘superimposed’ on common law duties ‘simply to improve the nature or extent of the remedy.’<sup>120</sup> A fiduciary obligation could not ‘forbid what the legislation permitted.’<sup>121</sup> This meant that the concept of fiduciary duty could not be used to impugn the plaintiffs’ removal from their parents nor the conditions under which they were detained. If a fiduciary duty existed at all, it could protect economic interests only.<sup>122</sup>

The Full Court of the Federal Court’s comments about the restricted scope of the fiduciary obligation can be understood in light of an earlier High Court decision in *Breen v Williams* (‘*Breen*’).<sup>123</sup> In *Breen*, the High Court rejected an attempt to apply fiduciary law ‘in an expansive manner so as to supplement tort law and provide a basis for the creation of new forms of civil wrongs.’<sup>124</sup> It was

<sup>117</sup> (2001) 112 FCR 455. Note that the earlier case — *Cubillo v Commonwealth* (1999) 89 FCR 528 — involved an interlocutory application in which the Commonwealth applied to have the proceedings summarily dismissed. This interlocutory application is explained in *Cubillo* (2001) 112 FCR 455, 466–7 (Sackville, Weinberg and Hely JJ).

<sup>118</sup> O’Loughlin J’s reasoning can be found in *Cubillo v Commonwealth* [No 2] (2000) 103 FCR 1, 397–409. The Full Federal Court stated that ‘[t]he fact that the Director became the legal guardian of the appellants by virtue of statute is no obstacle to the creation of a fiduciary relationship’: *Cubillo* (2001) 112 FCR 455, 575 (Sackville, Weinberg and Hely JJ) (citations omitted).

<sup>119</sup> The Director, not the Commonwealth, was the appellants’ guardian and so the relationship of power and vulnerability existed between the Director and the appellants, not the Commonwealth and the appellants. Whether the Commonwealth in fact owed fiduciary obligations to the appellants depended on ‘other considerations’, although the Court declined to specify precisely what these considerations were: see *Cubillo* (2001) 112 FCR 455, 575 (Sackville, Weinberg and Hely JJ).

<sup>120</sup> *Norberg v Wynrib* [1992] 2 SCR 226, 312 (Sopinka J), quoted in *Cubillo* (2001) 112 FCR 455, 576 (Sackville, Weinberg and Hely JJ). See also *Breen v Williams* (1996) 186 CLR 71, 109–10 (Gaudron and McHugh JJ) (‘*Breen*’).

<sup>121</sup> *Cubillo* (2001) 112 FCR 455, 577 (Sackville, Weinberg and Hely JJ). In full, the Court stated that:

Any fiduciary obligation must accommodate itself to the terms of statute. In particular, a fiduciary obligation cannot modify the operation or effect of statute: to hold otherwise, would be to give equity supremacy over the sovereignty of parliament: [*Tito v Waddell* [No 2] [1977] Ch 106, 239]. It follows that if the removal and detention of Mrs Cubillo had been authorised by the [*Aboriginals Ordinance 1918* (NT)], no fiduciary obligation could forbid what the legislation permitted.

<sup>122</sup> According to O’Loughlin J, it was ‘inappropriate for a judge at first instance, to expand the range of the fiduciary relationship so that it extends ... to a claimed conflict of interests where the conflict did not include an economic aspect’: *Cubillo v Commonwealth* [No 2] (2000) 103 FCR 1, 408.

<sup>123</sup> (1996) 186 CLR 71.

<sup>124</sup> *Ibid* 113 (Gaudron and McHugh JJ) (citations omitted). In *Breen*, a woman seeking access to her doctor’s medical records for the purpose of a class action in the US argued that she was entitled to those records by virtue of a fiduciary relationship existing between herself and her doctor. The High Court accepted that some restricted aspects of the doctor–patient relationship could be fiduciary in nature, in particular those relating to financial matters or confidential information. However, these restricted fiduciary duties — which are essentially applications of the traditional profit and conflict rules — did not extend to a positive duty to disclose information: at 110, 113 (Gaudron and McHugh JJ).

at pains to point out that Australian fiduciary law is proscriptive only<sup>125</sup> — that is, that it could not be the source of positive obligations such as ‘utmost good faith and loyalty’, which would extend the duty to take reasonable care already imposed in tort.<sup>126</sup>

On this analysis, fiduciary duty would be of little assistance to potential stolen wages plaintiffs seeking redress for the government’s failure to protect their welfare by ensuring that employers adhered to statutory employment conditions. Arguably, the government — or at least the Director of Welfare — did have a fiduciary relationship with such workers. However, the Director’s duties would only extend to the traditional fiduciary duties to avoid conflict of interest and profit, not to a positive obligation to ensure that employment conditions were fulfilled.

Most recently, however, in *Trevorrow* the South Australian Supreme Court accepted that a fiduciary relationship existed between the plaintiff and the Aborigines Protection Board, which was the plaintiff’s statutory legal guardian.<sup>127</sup> The plaintiff was an Aboriginal man who had been removed from his parents as an infant in 1957. His removal was without the knowledge and consent of his parents and in circumstances where the relevant departmental officials knew that they had no legal power or authority to so act.<sup>128</sup> However, the state failed to disclose these facts to the plaintiff, who remained under the impression that his parents had consented to his removal until 1997, when his solicitor obtained various departmental files.<sup>129</sup>

The Court considered that the plaintiff was ‘in a situation of vulnerability and dependence which required special protection of his interests’.<sup>130</sup> The state had a duty to ensure that he was given full information as to the circumstances of his removal and to ensure that he was given access to professional legal advice.<sup>131</sup> The Court cited Kirby P in *Williams v Minister (Aboriginal Land Rights Act 1983)*,<sup>132</sup> as well as Canadian authority,<sup>133</sup> in support of its conclusion that the

<sup>125</sup> *Ibid* 113 (Gaudron and McHugh JJ):

Australian courts only recognise proscriptive fiduciary duties. This is not the place to explore the differences between the law of Canada and the law of Australia on this topic. With great respect to the Canadian Courts, however, many cases in that jurisdiction pay insufficient regard to the effect that the imposition of fiduciary duties on particular relationships has on the law of negligence, contract, agency, trusts and companies in their application to those relationships.

See generally Shaunnagh Dorsett, ‘Comparing Apples and Oranges: The Fiduciary Principle in Australia and Canada after *Breen v Williams*’ (1996) 8 *Bond Law Review* 158, 177–9.

<sup>126</sup> *Breen* (1996) 186 CLR 71, 95 (Dawson and Toohey JJ), 111 (Gaudron and McHugh JJ).

<sup>127</sup> (2007) 98 SASR 136, 343–8 (Gray J).

<sup>128</sup> *Ibid* 324.

<sup>129</sup> *Ibid* 327.

<sup>130</sup> *Ibid* 344.

<sup>131</sup> *Ibid*.

<sup>132</sup> (1994) 35 NSWLR 497, 511 (Kirby P).

<sup>133</sup> *Szarfer v Chodaos* (1986) 27 DLR (4<sup>th</sup>) 388, indirectly referred to in *Trevorrow* (2007) 98 SASR 136, 347 (Gray J).

plaintiff would be entitled to compensation in equity for the losses occasioned by the want of proper care.<sup>134</sup>

It must be said that it is not easy to reconcile the decision in *Trevorrow* with the earlier decisions in *Williams* and *Cubillo*.<sup>135</sup> It is important to note that in contrast to the situation in *Williams* and in *Cubillo*, the plaintiff in *Trevorrow* was removed from his parents despite the defendant being clearly aware that it had no statutory authority to do so. Thus, *Trevorrow* was a case in which the government had clearly acted outside its statutory powers rather than one in which it had allegedly failed to adequately enforce them. This might suggest its limited applicability to broader stolen wages claims alleging that the government had failed adequately to police its statutory obligations towards Aboriginal workers. In any case, *Trevorrow* is inconsistent with other recent Australian cases in this area in that it accepts that the fiduciary relationship can be the source of positive obligations and that, if these are breached, the defendant is liable for the consequences of that breach.

*A Indigenous People and Fiduciary Duty after Trevorrow: A Sui Generis  
Fiduciary Relationship?*

From time to time, and particularly in the optimistic aftermath of the *Mabo* decision, indigenous people and their advocates have spoken of the possibility of a broad fiduciary principle being invoked to protect the interests of indigenous people in their relationship with the government. After a subsequent line of cases in which the prospects of success of such an argument appeared all but extinct, the decision in *Trevorrow* has arguably blown a reinvigorating breeze across the embers of the argument. Recently, Brad Morse has suggested that fiduciary duty might be used to impugn extinguishments of native title prior to 1975,<sup>136</sup> or, even more controversially, to impugn legislative infringements of indigenous rights or interests such as those reflected in the Commonwealth's Northern Territory 'intervention'.<sup>137</sup> The possibility that indigenous rights might be recognised in some form in a constitutional preamble, or even in the *Constitution* itself,<sup>138</sup> could give added impetus to such arguments.

<sup>134</sup> *Trevorrow* (2007) 98 SASR 136, 347–8 (Gray J). However, the Court decided that equitable compensation should not be granted since any rights in equity entirely overlapped with common law entitlements.

<sup>135</sup> As discussed above, Kirby P's judgment in *Williams v Minister (Aboriginal Land Rights Act 1983)* (1994) 35 NSWLR 497 was not followed on appeal. See also the brief explanation in Peter Hanks, Patrick Keyzer and Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary* (7<sup>th</sup> ed, 2004) 125.

<sup>136</sup> See generally Brad Morse, 'Is the Common Law Still Relevant for Indigenous Australians? A Canadian Perspective' (Speech delivered at the Castan Centre for Human Rights Law Public Lecture, Monash University Law Chambers, Melbourne, 16 October 2007) <<http://www.law.monash.edu.au/castcentre/events/2007/morse-lecture.html>>. Morse's argument recognises that the government had the power to extinguish native title prior to 1975 but that its power to do so was subject to a duty to respect the native title rights of those whose title was extinguished. For an equivalent argument in Canada, see *Guerin* [1984] 2 SCR 335.

<sup>137</sup> *Northern Territory National Emergency Response Act 2007* (Cth).

<sup>138</sup> See, eg, Kevin Rudd's proposal in his recent 'Apology to Australia's Indigenous Peoples' to constitutionally recognise indigenous peoples: Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172 (Kevin Rudd, Prime Minister).

Finn has depicted the relationship of the government with indigenous people as an ‘aspect’ of the general, if ‘forgotten’, trust or fiduciary relationship between citizen and state.<sup>139</sup> However, he notes that we lack treaty or constitutional provisions equivalent to those in New Zealand and Canada ‘capable of sustaining distinctive rights in indigenous people, [or] distinctive obligations in the state and its agencies.’<sup>140</sup> As a result,

we are, of necessity, thrown back on constitutional principle, the common law and, where relevant, statute. And it is here, in my view, that advocacy for an enhanced but distinct fiduciary law regulating the State/indigenous people relationship is likely to founder.<sup>141</sup>

According to Finn, the lack of constitutional or legal recognition of the separate and distinct status of Australian indigenous people means that they can only benefit from ‘the *same* fiduciary (or trust) relationship which exists between the State and the Australian people.’<sup>142</sup> This would require only that the government act fairly as between indigenous and non-indigenous people, a position, he suggests, already reached via the *Racial Discrimination Act 1975* (Cth) (‘*RDA*’).<sup>143</sup> Nevertheless, this fiduciary duty ‘to act fairly’ would require ‘a balancing of interests in a given case’ including ‘an evaluation of the general public purposes served by a particular decision, the proportionality of the means employed to the end to be served, and the impact of the decision on the enjoyment of particular Aboriginal rights affected.’<sup>144</sup>

Other writers have gone further, arguing that indigenous people do not stand in the same relationship to the Crown as do non-indigenous citizens. As a uniquely underprivileged group whose traditional lands have for the most part been expropriated by the Crown, indigenous people exist in a relationship of special vulnerability to Crown actions. As such, it is arguable that the government has, ‘in addition to undertaking to act in the interests of the people, undertaken a *more specific* duty in respect of particular persons’.<sup>145</sup>

However, there are difficulties in locating the source of the government’s fiduciary duty towards Aboriginal people in a specific undertaking to act on their behalf. One such difficulty, as Lisa Di Marco points out, is that this ‘does not reflect or sit well with historical reality’, in particular the fact that the Crown has generally abused rather than protected Aboriginal rights and interests.<sup>146</sup>

<sup>139</sup> Finn, ‘The Forgotten “Trust”’, above n 61, 135–8.

<sup>140</sup> *Ibid* 137. In Canada, see *Guerin* [1984] 2 SCR 335; *R v Sparrow* [1990] 1 SCR 1075. In the US, see *United States v Creek Nation*, 295 US 103 (1935). See generally Tan, above n 45.

<sup>141</sup> Finn, ‘The Forgotten “Trust”’, above n 61, 137.

<sup>142</sup> *Ibid* 138 (emphasis in original).

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid*.

<sup>145</sup> Dal Pont and Chalmers, above n 92, 141 (emphasis in original), paraphrasing Toohey J in *Mabo* (1992) 175 CLR 1, 203–4 (Toohey J). According to Dal Pont and Chalmers, this is sufficient to establish a ‘*sui generis* fiduciary principle’ applicable in the context of the government–aboriginal citizen relationship: at 141.

<sup>146</sup> Lisa Di Marco, ‘A Critique and Analysis of the Fiduciary Concept in *Mabo v Queensland*’ (1994) 19 *Melbourne University Law Review* 868, 872. Di Marco argues that the Crown ‘merely acted in the interests of the Aborigines as appropriate’ rather than ‘with any real commitment to be bound by fiduciary obligations’: at 873.

One possible response is that the Crown's historical abuse of Aboriginal rights is evidence that it has breached its fiduciary obligation rather than evidence that such an obligation did not exist in the first place. General protective legislation — or what the government says it will do — is the undertaking. Failure to enforce the terms of that legislation — or what the government actually does — would suggest evidence of breach.

David Tan identifies a somewhat different problem with the idea that the fiduciary relationship between the Crown and Aboriginal people is sourced in an undertaking — the problem of identifying 'what the Crown-fiduciary precisely undertook to do on behalf of Aboriginals.'<sup>147</sup> The task of guaranteeing the 'protection' or 'special rights' of Aboriginal people, he suggests,

is wholly unlike other fiduciary categories, in which the fiduciary actually acts on behalf of the beneficiary/principal. Although the Crown must avoid infringement of aboriginal rights, it certainly does not promote or defend aboriginal rights in the same manner as a trustee, director, solicitor, guardian or doctor acts on behalf of her or his principal. In fact, the Crown-aboriginal fiduciary relationship sits uncomfortably when juxtaposed against this classical backdrop. More often than not, the Crown and aborigines appear to be adversaries, suggesting the opposite of a fiduciary relationship, where the existence of a conflict between the interests of the fiduciary and the beneficiary indicates a prima facie breach of the duty!<sup>148</sup>

It is not entirely clear why a fiduciary relationship between the Crown and Aboriginal people is unlike other fiduciary relationships simply because the Crown is not obliged to 'promote or defend' Aboriginal rights. The argument is perhaps plausible in the context of the post-assimilation, post-*RDA* era of 'self-determination' — an era which, in any case, seems now to have ended. However, it seems far less plausible in the era of 'protection' or of assimilation, during which the *Aboriginals Ordinance 1918* (Cth) and its successors were aimed precisely at 'promoting or defending' Aboriginal rights or interests, as they were then conceived.

An alternative basis for a sui generis fiduciary relationship between the Crown and Aboriginal people is the 'special vulnerability' of indigenous people, an unequal power relationship such that 'one party is at the mercy of the other's discretion.'<sup>149</sup> A test based on 'special vulnerability', particularly if combined with 'public policy', could be the source of a broad duty to protect Aboriginal rights and interests.

However, this alternative basis for the fiduciary relationship is also not without difficulty. To begin with, it seems excessively wide — its scope 'practically impossible to ascertain'<sup>150</sup> — to the extent that the danger appears to exist of fashioning obligations 'according to trendy notions of justice and fairness in the treatment of Aboriginal people.'<sup>151</sup> Secondly, as Richard Bartlett has suggested,

<sup>147</sup> Tan, above n 45, 445.

<sup>148</sup> Ibid (citations omitted).

<sup>149</sup> Ernest J Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1, 7, cited in Di Marco, above n 146, 875.

<sup>150</sup> Tan, above n 45, 448.

<sup>151</sup> Ibid 447.

it is arguable that the fiduciary duty based on vulnerability is confined to the *special* or *peculiar* vulnerability of *proprietary* interests.<sup>152</sup>

As can be seen, the major obstacle for an argument based on fiduciary duty has not been establishing that such a relationship existed but that its scope was broad enough to encompass harm of the type alleged. In traditional fiduciary law, the duties of the fiduciary are confined to a rule forbidding misuse of the fiduciary's position for advantage ('the profit rule') and a rule forbidding conflict of interest ('the conflict rule').<sup>153</sup> While these duties clearly cover the alleged withholding or misuse of trust fund moneys, they would not appear to encompass broad failures to advance the interests of indigenous workers or to enforce the protective standards and measures contained in the *Aboriginals* and *Welfare Ordinances*.

Thalia Anthony has suggested that in failing to enforce such measures, the Commonwealth breached the conflict and profit rules:

The Commonwealth, as a fiduciary, breached its duties by allowing stations to provide rations rather than wages in order to avoid its own welfare responsibilities; by failing to inspect stations; and, by failing to enforce protective regulations. In pursuing its own interests to minimise expenditure the Commonwealth engaged in a conflict of interest and profited from its role as fiduciary. ... It is arguable that the Government also declined to cancel licences for fear that Indigenous cattle station workers would become its responsibility.<sup>154</sup>

These suggestions raise a broad question of what it means to say that a duty is only proscriptive, or negative, and not positive in nature. If a *positive moral* obligation is not enforced, might it not also be true to say that a *negative duty* to avoid 'profiting' — by failing to enforce that obligation — is breached? This is particularly true when the fiduciary is the government, which always 'profits' in a sense when it minimises expenditure and is always in 'conflict' as between different interest groups with legitimate demands.

However, a problem with this argument is that it could be characterised as leading to precisely the type of inquiry into executive decisions that the courts have declined to make in the political trust cases. It is difficult to say at a distance of 40 years or more why the government failed adequately to enforce protective regulations in the Northern Territory and elsewhere. No doubt the desire to minimise expenditure on Aboriginal affairs was part of it. In part also, as the historical record makes clear, it was the difficulty of attracting and retaining good staff, particularly dedicated and experienced patrol officers capable of 'standing up' to pastoral management.<sup>155</sup> Moreover, there is also the

<sup>152</sup> Richard H Bartlett, 'The Fiduciary Obligation of the Crown to the Indians' (1989) 53 *Saskatchewan Law Review* 301, 301–2, referred to in Di Marco, above n 146, 876.

<sup>153</sup> Tan, above n 45, 448.

<sup>154</sup> Anthony, above n 2, 17–18.

<sup>155</sup> See, eg, Jeremy Long, North Australia Research Unit, Australian National University, *The Go-Betweens: Patrol Officers in Aboriginal Affairs Administration in the Northern Territory 1936–74* (1992) 139, where, according to former patrol officer Jeremy Long,

[c]omplaints that shortages of experienced staff were limiting patrol activities recur frequently in the annual reports of the late 1950s and early 1960s ... Station inspection work was often restricted because officers had no vehicle at all or no vehicle fit to negotiate the rough roads and tracks between the stations.



difficulty of proving breach of fiduciary duty where patrol officers visited stations only rarely and for short periods, and where owners avoided being questioned about suspected forgeries and exaggerations in the station ledgers.<sup>156</sup> Even if the political trust argument can be surmounted, an argument that failure to enforce regulations constitutes a breach of fiduciary duty appears uncomfortably similar to an attempt to enforce ‘positive’ obligations; obligations that, to date, Australian courts have rejected.

#### IV CONCLUSION

This article has established that potential stolen wages plaintiffs have solid legal bases, either in trust or fiduciary law, for arguing that governments should be made to account for missing moneys held in Aboriginal trust funds and the like. These legal bases arise from distinguishing past cases, such as *Tito v Waddell [No 2]*, *Cubillo*, *Williams* and *Breen*, from the context of stolen wages claims.

There are several reasons why such arguments are more likely to succeed than in previous unsuccessful cases. First, and in contrast with the plaintiffs in *Cubillo* and in *Williams*, stolen wages claimants are not seeking to apply concepts of trust or fiduciary duty to personal, non-economic interests. The economic damage they allege is squarely within orthodox principles.<sup>157</sup>

Secondly, in contrast to the plaintiffs in *Cubillo*, potential stolen wages claimants are not challenging the validity of actions taken under relevant legislation applying to Aboriginal people. Rather, damage of the type they allege would be a consequence of the breach of duties established in relevant applicable legislation. They are not seeking to invoke the fiduciary obligation to ‘forbid what the legislation permitted.’

Thirdly, while there is no constitutional basis for duties of the type they allege — as exists in Canada and New Zealand — there is a clear statutory basis. This basis is, of course, found in the applicable Ordinances specifying the powers and duties of the Chief Protector or Director of Welfare as trustee.

Fourthly, while the trust or fiduciary duties alleged do not have their bases in a proprietary interest — as in most of the US and Canadian authority and as suggested in *Mabo* and *Wik* — they are clearly the reflection of an independent legal interest of the type recognised as necessary in *Guerin*. The plaintiffs’ independent legal interest is their legal right to the money owed to them as employees.

Some of the difficulties faced by all patrol staff dealing with pastoral management, but particularly by the inexperienced, are summarised in a typescript by the well-known writer and former patrol officer W E Harney, appended to Long’s book. Harney comments that had a patrol officer criticised station owners ‘about the treatment of their aboriginal stockmen, they repl[ie]d by using their hospitality, a very effective weapon, to influence their visitors (official and other) by referring in scathing innuendo to his character’: W E Harney, ‘The Protector of Aboriginals’ in Jeremy Long, North Australia Research Unit, Australian National University, *The Go-Betweens: Patrol Officers in Aboriginal Affairs Administration in the Northern Territory 1936–74* (1992) 172, 172.

<sup>156</sup> See *ibid* 9.

<sup>157</sup> Cf *Paramasivam v Flynn* (1998) 90 FCR 489.

Fifthly, potential stolen wages claimants do not need to rely on the broad ‘power–dependency’ or ‘vulnerability’ relationship suggested by Toohey J in *Mabo* as sufficient to invoke fiduciary duties, a concept criticised by commentators and not followed in subsequent case law. Unlike the unsuccessful plaintiff in *Williams*, potential stolen wages claimants do not have to rely on fiduciary duties allegedly flowing from a broad guardian–ward relationship established by protective legislation. While the protective legislation is useful to place the specific duties in context, and perhaps as an alternative basis for the relationship, the major source for the duties is clearly the legislation establishing and governing the administration of the trust accounts.

Finally, and unlike the unsuccessful plaintiffs in *Cubillo* and *Williams*, potential stolen wages claimants do not face the difficulty of the fact that there are alternative, common law remedies available. This is because these claimants are not seeking compensation for non-economic loss of the sort normally recoverable in tort.

Though potential stolen wages claimants seem to have solid grounds for success, it must be noted that there are fewer prospects of success for the argument that the government owed broader, positive fiduciary obligations. This is at least the case if Australian courts continue to adopt the interpretation of the scope of the fiduciary obligation preferred in cases such as *Cubillo*, *Williams* and *Breen*. It is possible that the decision in *Trevorrow* represents the first intimations of change. It seems more likely, however, that a more expansive interpretation of the scope of the fiduciary obligation must await a future, and bolder, High Court.