

Unpresented *Introduction to Annual Conference*
'*Anthropology, Change and Development in Native title*', convened by the Centre for Native
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Fiduciary responsibility

Nicolas Peterson
Australian National University

A fiduciary duty is a legal obligation of one party to act in the best interests of another. It involves the highest standard of care and it may involve the exercise of discretion. Although fiduciary duty, obligation and responsibility are often used interchangeably, in the context of native title I use fiduciary responsibility to indicate a generalised on-going moral responsibility that differs from the normal fiduciary duty, which generally arise only in private law contexts around particular matters.

According to Mr Justice Kirby, "whether a fiduciary duty is owed by the Crown to the indigenous peoples of Australia remains an open question" (at 688; Mr Justice Kirby in *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677) but even though this statement was made twenty-two years ago it still applies.¹

The basis for such a fiduciary responsibility can be made on several grounds including the fact that Aboriginal people have been wards of the states for long periods, and that under land rights and native title legislation their land is only alienable to the Crown. That is, the Crown has placed itself between Aboriginal people and the rest of us in order to prevent exploitation. So, it seems that a fiduciary relationship could arise out of its power to extinguish traditional title by an action such as alienating the land.

However, whether these, or other points, are of any legal significance is not important to the question I want to examine here which is not so much whether the states and/or the federal government have a fiduciary

responsibility or duty towards Aboriginal people but if they did what might we expect of them acting as a fiduciary in relation to native title issues.

This is clearly a complex question involving not only political and practical considerations but moral ones too, even if these considerations were not technically part of the fiduciary relationship. It also involves the question of to which one or more of the three branches of government the fiduciary relationship might apply: the executive, the legislature or the judiciary.

In Canada the key decision relating to the existence of a fiduciary relationship with First Nations is in the *Guerin* case (1984) which indicated that the Canadian government had a duty to protect aboriginal land interests. More recently in the 1991 *Delgamuukw* case the Court recognised that there was a government obligation to aboriginal people, or put in another way, that 'the honour of the Crown was a restraint on the Crown' (Hughes 1993:94-5).

In the US a broad view of the government's obligation to provide adequate levels of funding and services to Indian communities has not received judicial recognition, only the narrower view that the executive arm of government is accountable for its management and disposition of Indian lands and assets ((Hughes 1993:87).

Some limited attention was given to the concept in the *Mabo* case, with five judges saying very little, and Justice Dawson finding that there was no fiduciary obligation, but on the incorrect ground that Aboriginal people had no surviving title in the land. Only Justice Toohey gave more consideration to it, finding in favour of a fiduciary obligation on the Crown to ensure that traditional or native title is not impaired or destroyed (Hughes 1993:75).

You might well ask, therefore, why I raise this issue here at our native title conference given there is no firm body of law in relation to the application of a fiduciary responsibility. I do so because native title raises some troubling moral issues for us as a nation and as citizens. In particular there is the issue of which you are all well aware, that while the recognition of native title was a huge leap forward for the nation, and brings benefits to many Aboriginal

people, it also disadvantages just as many, if not more people, creating enduring conflicts, and inequities. The kind of fiduciary responsibility that the government might have to those with native title is relatively clear from the foregoing. But what is our collective responsibility, and that of the government, to these people who are disadvantaged? If recognising native title is unequivocally right, but for practical reasons unavailable for all, how could a fiduciary responsibility for those left out be met?

Nationwide Aboriginal people live in villages and towns and have done so for many generations in most cases, so that large numbers of people are living on the land of a very small group of native title holders in most cases. Where this is the case we are creating a small rentier class, as in the Northern Territory. Yet all of the Indigenous co-residents have a shared history, are equally disadvantaged, and cannot be distinguished on any other ground. This 'disenfranchisement' has come about because of the requirements of our market-based economy for certainty and a straight forward application of mainstream ideas about property that go with it, to the neglect of group rights which have always been emphasised as a feature of Indigenous rights.

It is probably too late to undo arrangements that have already been set in place but if we are aware of the problem it can perhaps be ameliorated and may be prevented from arising elsewhere. The Northern Territory is a particularly good example because it involves the issues in their most stark form with its 70 odd Aboriginal communities and cashed up federal government involved. There, small groups of thirty or forty native title holders are receiving hundreds of thousands of dollars annually, money that is rent for land on which the buildings and facilities used by all, stand, instead of the money going to community benefit such as house maintenance, improved infrastructure and the like.

A fiduciary responsibility would require thinking about all Aboriginal people, all of whom were originally native title holders. There are several ways this could be done in the case of remote communities such as buying out the native title holders, or making the payment of rents for publicly funded facilities used by all low and conditional on a larger proportion of the money going into a fund

for house maintenance and public infrastructure. This same principle of thinking globally by region and location could be applied nationally.

Native title recognition while not so obviously beneficial legislation as land rights legislation clearly is, because it does have the same moral objective of righting a wrong, meeting the requirements of natural justice, removing the grounds for legitimate complaint and not creating further injustice in the process. As such the non-Aboriginal population have a stake in native title recognition as a contribution to reconciliation because we hope that it goes some way to ameliorating the wrongs of the past and to improving our relationship with Aboriginal people but it can only do this if it includes them all and not just some fraction.

Treaty-making in particular offers state and federal governments one powerful way in which a fiduciary responsibility to the excluded could begin to be exercised by government. Settlements must deal with the residential Indigenous population or regions, not just with the narrowest category of native title holders. This is only likely to happen if all those involved in native title matters, both anthropologists and lawyers at both local and regional levels keep this issue on the agenda with both government and those privileged native title holders lucky enough to have their native title recognised.

References

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¹ Two unsuccessful attempts have been made to argue for a fiduciary duty in the Crown in Right of the State of Western Australia: *Bodney v Western Australian Airports Corporation Pty Ltd* (2000) 180 ALR 91 and *Collard v Western Australia [No 4]* [2013] WASC 455. Submission by Greg McIntyre 2018. To Joint Select Committee Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples. 11th June 2018. [Aph.gov.au](http://aph.gov.au). Submission 196.