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ROUGH SEAS AHEAD: THE FORESHORE AND SEABED PAST, PRESENT AND FUTURE

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ABSTRACT

In many respects this thesis is limited in that the focus is primarily on the foreshore and seabed issue itself, rather than wider constitutional issues. This thesis has three objectives. The first is to provide the reader with an historical context to the recent Court of Appeal decision *Ngati Apa*¹, by examining the common law doctrine of aboriginal title and in particular two dubious decisions *Wi Parata v The Bishop of Wellington*² and *In Re Ninety Mile Beach*³. The second objective is to examine the Marlborough Sounds litigation in light of the historical context with the underlying theme being that the final Court of Appeal decision should not have come as a complete surprise to the government. The final objective is to outline the government's proposal to pre-empt any attempt by Maori to lay claims with the Maori Land Court as allowed by the Court of Appeal, and scrutinize the proposal against the principles of the Treaty of Waitangi 1840. The theme of this paper is the consideration of aboriginal title, in the context of the foreshore and seabed.

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 14763 words.

¹ *Ngati Apa v Attorney General* (19 June 2003) Court of Appeal CA173/01, 75/02.

² *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

³ *In Re Ninety Mile Beach* [1963] NZLR 461 (CA).

I INTRODUCTION

In 1935 the Crown Solicitor wrote to the Solicitor-General: "The consensus of opinion (in which I fully concur) is that the claim of the Crown is weak. The Department [of Lands and Survey] would prefer that the matter, if possible, be removed from the jurisdiction of the Native Land Court."⁴ This statement regarding the assertions that the foreshore belongs to the Crown by a presumption of English common law, unbeknown to the author of those words, would become the very stance taken by the Court of Appeal in June 19 2003.⁵ While the 1963 Court of Appeal decision *In Re Ninety Mile Beach* nullified the Crown's concerns to a certain extent, the Crown's claim to the foreshore, remained precarious, due to the dubious authority of that case. With the release of *Ngati Apa*, and the subsequent knee-jerk reactions from the Crown, it would be fair to say that the Crown had been caught napping on the issue.

In *Ngati Apa*, the Court of Appeal ruled on a narrow jurisdictional question that the Māori Land Court has jurisdiction to investigate customary ownership in the foreshore and seabed.⁶ The immediate effect of the decision was to open the way for Māori applicants to seek title to areas of the foreshore and seabed in the Māori Land Court previously had been prevented by *In Re Ninety Mile Beach*. While in many ways the case does not state anything new,⁷ it is in the overruling of *In Re Ninety Mile Beach* in which the 2003 Court breaks new ground.

That Māori may possibly, however remote, obtain property rights in the foreshore and seabed, evoked national outcry from a cross section of New Zealand society. Of particular concern is the possibility of fee simple title in the foreshore and seabed and the fear of Māori excluding access to beaches around New Zealand. Likewise, the Court of Appeal ruling stirred strong reaction among Māori. Apart

⁴ Cited in RP Boast "In Re Ninety Mile Beach Revisited: The Native Land Court and the Forshore in New Zealand Legal History" (1993) 23 VUWLR 145, 162.

⁵ Tom Bennion, "The Claim of the Crown is Weak" (May 2003) *Maori Law Review* 1.

⁶ *Ngati Apa v Attorney-General* (19 June 2003) Court of Appeal CA173/01, 75/02.

from the jurisdictional finding, which is in itself of momentous significance, the decision also highlights wider issues of the legal recognition of Māori customary rights, including property rights, the status given to such rights and how underlying constitutional issues are to be resolved between the Crown and Māori now and in the future.⁸

In response to *Ngati Apa* the government issued its proposal to resolve this apparent contest between interests of Māori customary property rights and the interests of the public at large. In essence the government intends to legislate to declare the foreshore and seabed to be in the "public domain", or land belonging to no one, while precluding Māori from being issued a fee simple title to those areas. The reforms as proposed however fail to deliver the 'win win' result promised.

Apparent from a reading of the document is that Māori customary property rights will be severely restricted in an attempt to appease the wider public. As a result, Māori have been unequivocal in rejecting the proposal. All consultation hui have outright rejected the proposal. Any solution to the current climate of uncertainty is hard to see, however with an issue of such importance, time should be taken to get the solution right. If the Crown fails to incorporate the views of Māori when developing the final proposal, inevitably breaches of the Treaty of Waitangi 1840 ("the Treaty") will result. Breaches are potentially on two fronts; an inadequate process and in the proposal itself.

While aboriginal rights have received scattered recognition in New Zealand courts, the government has generally stayed clear of aboriginal rights⁹, but rather

⁷ Bennion, above, 1.

⁸ Interview with Maui Solomon, (The Breakfast Show, TVNZ, Wednesday 30 July 2003) transcript provided by Newztel News Agency.

⁹ See for example the generic Deeds of Settlement clause, which reads "Nothing in this Deed extinguishes or limits any aboriginal title or customary rights that [iwi] may have, or constitutes or implies any acknowledgment or acceptance by the Crown that such title or rights exist either generally or in any particular case..." Ngati Awa Deed of Settlement 1.6 (a).

has approached customary rights from the context of the Treaty.¹⁰ *Ngati Apa* however has thrown aboriginal rights back to the forefront of public debate and indeed the government's agenda. In many ways this thesis is limited in that it does not consider the wider constitutional or policy issues that *Ngati Apa* has given renewed impetus to. Nor does it attempt to detail the relationship that Maori have with the land and the sea. Rather this thesis considers the issue of aboriginal title, what it is and how it applies in New Zealand, in the context of the foreshore and seabed. The report then reviews case law regarding the Crown's actions in relation to the assumption of ownership of the foreshore and seabed and the lack of regard for aboriginal rights. Finally the paper considers the response of the Crown to the Court of Appeal's decision and draws conclusions on the approach taken and the impact on aboriginal rights and Treaty of Waitangi obligations.

II ABORIGINAL TITLE

The judicial identification of the English common law principles relating to the effect of British sovereignty on pre-colonial legal systems is sourced from the beginning of the seventeenth century. The presumption of continuity recognised in *Campbell v Hall*¹¹, found that British sovereignty of itself did not disrupt the pre-existing legal system of the indigenous habitants. This presumption included indigenous property rights. *Amodu Tijani v Secretary, Southern Nigeria*:¹²

A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing.

¹⁰ Rt Hon Helen Clark, Prime Minister *Foreshore and Seabed: Protecting Public Access and Customary Rights: Consultation Paper* (Wellington, 2003), 8.

¹¹ *Campbell v Hall* (1774) Lo Ft 655 Mansfield LJ.

¹² *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399.

The purpose of the doctrine of aboriginal title was to facilitate the harmony of two cultures, to avoid an otherwise chaotic society.¹³ The Crown's sovereignty is expressed as a blend of imperium or the right to govern, and dominium, or the Crown's position as ultimate owner of all land in the colony.¹⁴ As a consequence of acquisition of sovereignty the colonising power, acquired a radical or underlying title.¹⁵ In *Mabo v State of Queensland [No 2]* Brennan J described radical title as "a postulate of the doctrine of tenure and a concomitant of sovereignty."¹⁶ The effect of radical title was recently discussed in *Te Runanganui of Te Ika Whenua Inc Society v Attorney General*:¹⁷

On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty...But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective. It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes.

This right of eminent domain is distinct from the Crown's feudal title, plenum dominium.¹⁸ However, in inhabited territories such as New Zealand where feudalism, the theory of the Crown as the ultimate owner of all land, was introduced, the Crown was technically treated as 'owning' the land occupied by the aboriginal people.¹⁹ Taken this far, it would seem that the law denies land rights to the original occupants, which is the exact view taken by New Zealand courts for 100 years

¹³ PG McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 104.

¹⁴ PG McHugh "Aboriginal servitudes and the Land Transfer Act 1952" (1986) 16 VUWLR 313, 316.

¹⁵ *Te Runanganui of Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20, 23.

¹⁶ *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1, 48.

¹⁷ *Te Runanganui of Te Ika Whenua Inc Society v Attorney General*, above, 23-24. See also, *Te Runanga O Muriwhenua v Attorney-General* [1990] 2 NZLR 641.

¹⁸ PG McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 103, footnote 18.

¹⁹ PG McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 104.

beginning with *Wi Parata v The Bishop of Wellington*²⁰. What these courts failed to recognise, was that pre-existing property rights of Māori burdened the Crown's title.²¹ Any property interest of the Crown in land was therefore dependent on pre-existing customary interest and its nature.

A *Content of Aboriginal Title*

The content of the aboriginal title is informed by the customary practices of the indigenous people, which is required to be proved as a matter of fact.²² "The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs."²³ In New Zealand the content may also depend on the approach of the Court considering the case.²⁴

Such rights are not equivalent to common law concepts, but as noted in Canada:

They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful then to avoid the application of traditional common law concepts of property as they develop their understanding of ... the *sui generis* nature of aboriginal rights.²⁵

Depending on the custom and practice, the title may be so comprehensive as to amount to a claim of exclusive ownership over land leaving little room for title sourced from the Crown becoming vested in non-traditional owners.²⁶ This title is termed territorial title. On the other hand non-territorial title will arise where a non-exclusive right to carry out a custom is insufficient to support a claim to title to land

²⁰ *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

²¹ PG McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 104.

²² *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 23 (CA).

²³ *Mabo v Queensland [No 2]* (1992) 107 ALR 1, 42 (HCA) Brennan J.

²⁴ *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, above, 24.

²⁵ *Sparrow v The Queen* [1990] 1 SCR 1075.

²⁶ PG McHugh "Aboriginal servitudes and the Land Transfer Act 1952" (1986) 16 VUWLR 313, 316.

itself, or the claimants are precluded from asserting a full territorial title by virtue of some form of extinguishment.²⁷

B Extinguishment

Importantly extinguishment of the rights can only occur by explicit legislation or voluntary relinquishment by the traditional owners. This principle was espoused in *R v Symonds*:²⁸

[I]t cannot be too solemnly asserted that [native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it.

The Legislature must display a 'clear and plain' intention to extinguish the rights.²⁹ As aboriginal title is usually conceived of as a bundle of rights, extinguishment may be partial or full and final.³⁰ Where a partial extinguishment title has occurred, the territorial title is reduced to a non-territorial title, no claim to the exclusive use and occupation of the land can subsist.³¹ However this does not necessarily extinguish rights that are independent of the ownership of the land,³² such as the right to fishing as found in *Te Weehi v Regional Fisheries Officer*.³³

C Critique of Aboriginal Title

While the doctrine of common law title recognises and protects pre-existing customary property, it is by no means beyond criticism. It is patent that the doctrine

²⁷ *R v Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289.

²⁸ *R v Symonds* (1847) [1840-1932] NZPCC 387 (SC), 390.

²⁹ *Faulkner v Tauranga District Council* [1996] 1 NZLR 357.

³⁰ PG McHugh "Aboriginal servitudes and the Land Transfer Act 1952" (1986) 16 VUWLR 313, 322.

³¹ PG McHugh "Aboriginal servitudes and the Land Transfer Act 1952" (1986) 16 VUWLR 313, 321.

³² PG McHugh "Aboriginal servitudes and the Land Transfer Act 1952" (1986) 16 VUWLR 313, 325.

³³ *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

is a paternalistic method of recognising pre-existing Māori land rights.³⁴ Some Māori, along with other indigenous peoples', view the common law rules, as having developed as part of "a discourse of dispossession", which subordinate indigenous rights to the prevailing interests of the colonizing State.³⁵ Concepts such as "customary title" as defined by the common law became less than full rights, evidenced in such rights being alienable only to the Crown and in the ability of the Crown to extinguish the rights.³⁶

The weakness of the common law rights are emphasised by the dominant conception of aboriginal title rights as a bundle of rights.³⁷ This theory sees aboriginal title as a bundle of distinct severable and enumerable rights and interests that can be exercised on land. However as discussed in North J's minority decision in *Western Australia v Ward*³⁸, the bundle of rights theory does not sit well with indigenous perspectives on their relationship with the land.³⁹ The theory assumes proprietary rights can be divided up, however Aboriginal (and Māori) people do not make such divisions between property rights.⁴⁰

The typical bundle of rights analysis does not take account of spiritual relationship with land which is so pivotal to Aboriginal people...As Watson argues, to fail properly to recognise indigenous ownership in a way which adequately reflects indigenous ownership of the land is to continue the colonisation and oppression of indigenous people.⁴¹

³⁴ Moana Jackson "There are obligations there" *A Consideration of Māori Responsibilities and Obligations in Regard to the Seabed and Foreshore* <<http://www.arena.org.nz/sbmoana.htm>> (last accessed 1 October 2003).

³⁵ Jackson, above.

³⁶ Jackson, above.

³⁷ Katy Barnett *Western Australia v Ward: One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis* [2000] MULR 17 <<http://www.austlii.edu.au/au/journals/MULR/2000/17.html>> (last accessed 7 October 2003).

³⁸ *Western Australia v Ward* (2000) 170 ALR 159.

³⁹ *Ward*, above, 353.

⁴⁰ *Ward*, above, 353.

⁴¹ *Ward*, above, 353.

Moreover, the co-existence of aboriginal title and the English legal system creates the danger of equating native custom with English legal concepts.⁴² This danger may dismiss customary interests as less than recognisable English legal estates.⁴³ It may also cause lesser customary interests to be overstated to conform to English legal estates.⁴⁴ As courts have struggled to reconcile customary notions of rights in property with the English property concepts of ownership, it has been a constant complaint of indigenous peoples around the world that the common law does not adequately reflect the true customs of those groups.

III THE DOCTRINE OF ABORIGINAL TITLE AS APPLIED IN NEW ZEALAND

A Modified Continuity

In New Zealand the presumption of continuity was of a modified form. Post British annexation tribal tenure continued to be regulated by customary law, but this tenure was limited to Māori.⁴⁵ Non-Māori had to establish their title to land from a Crown grant.⁴⁶ Hence it is correct to speak of a 'modified continuity' as the continuity was limited by the alienability to the Crown only and its subsequent grantees.⁴⁷ Thus the acquisition of sovereignty in New Zealand resulted in a dual system of land tenure, an aboriginal tenure based on customary land tenure, and a feudal tenure based on English law.⁴⁸ Importantly, while the Crown recognises aboriginal title, that aboriginal title is not Crown derived.⁴⁹

In terms of the Treaty of Waitangi, although Māori customary rights were explicitly recognised and protected, it was simply declaratory of the common law

⁴² *Amodu Tijani v Secretay, Southern Nigeria* [1921] 2 AC 399.

⁴³ *Ngati Apa v Attorney-General* (19 June 2003) Court of Appeal CA173/01, 75/02, para 33.

⁴⁴ *Ngati Apa v Attorney-General*, above, para 33.

⁴⁵ PG McHugh "Aboriginal servitudes and the Land Transfer Act 1952" (1986) 16 VUWLR 313, 319.

⁴⁶ McHugh, above, 319.

⁴⁷ This is the Crown's pre-emptive right.

⁴⁸ McHugh, above, 319.

⁴⁹ McHugh, above, 319.

imported into New Zealand.⁵⁰ The Treaty did not assert either in doctrine or in practice anything new in the guarantee of Māori customary land, nor in providing that the Crown's pre-emptive right to extinguish it by purchase.⁵¹ This fact was recognised early in New Zealand. Chapman J noted in *R v Symonds* that "in solemnly guaranteeing the native title, and in securing what is called the Crown's pre-emptive right, the Treaty of Waitangi...does not assert anything new or unsettled."⁵² This conception of the Treaty was notably rejected by *Wi Parata*, which saw property rights as deriving from the Crown.⁵³ The Treaty itself was characterized as 'a simple nullity'.⁵⁴

B Judicial Recognition of Aboriginal Title

In New Zealand the common law doctrine of aboriginal title was first judicially recognized in *R v Symonds*. In terms of the effect the Crown's assumption of sovereignty had on Māori property rights, Chapman J held that:

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that [native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it.⁵⁵

⁵⁰ Jacinta Ruru, "Māori Customary Title Confirmed in Treaty" <<http://www.arena.org.nz/sblawpro.htm>> (last accessed 22 September 2003).

⁵¹ Ruru, above.

⁵² *R v Symonds* (1847) [1840-1932] NZPCC 387 (SC), 390.

⁵³ PG McHugh "Aboriginal servitudes and the Land Transfer Act 1952" (1986) 16 VUWLR 313, 319.

⁵⁴ *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 78.

⁵⁵ *R v Symonds*, above, 390.

This recognition of the legal right of Māori to their lands accorded with the colonial practice and legislation, including that passed by the Imperial Parliament.⁵⁶ *R v Symonds* remained the approach of New Zealand courts⁵⁷ until *Wi Parata* 1877.

C **Wi Parata v The Bishop of Wellington**

One of the most influential decisions in New Zealand's legal history, in terms of the effect it had on the constitutional status of Maori and their aboriginal rights, is *Wi Parata v The Bishop of Wellington*. It is on aspects of dubious reasoning from this case on which *In Re Ninety Mile Beach* and indeed the High Court decision of *Ngati Apa* were based.

Wi Parata rejected the approach taken in *R v Symonds*, and rather, denied that the possibility of judicial recognition of aboriginal title in New Zealand both in regards to the common law and statute.⁵⁸ The Chief Justice found that Māori were 'uncivilized', therefore they lacked sovereignty and any property rights.⁵⁹ The Treaty, as 'a simple nullity' did not alter the position for Māori.⁶⁰ "Transactions with the natives for the cession of their title to the Crown are thus to be regarded as acts of State and therefore are not examinable by any Court."⁶¹

Having taken this view, it was then open for Prendergast CJ to conclude that as there existed no sovereign system in New Zealand, all title was therefore the Crown's. McHugh describes such reasoning as a 'fundamental misconception'

⁵⁶ PG McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 111. For example section 73 of the New Zealand Constitution Act provided that it was 'unlawful for any Person other than Her Majesty...to purchase or in anywise acquire or accept from the aboriginal Natives land of or belonging to or used or occupied by them in common as Tribes or Communities.'

⁵⁷ The approach in *R v Symonds* was reiterated in *Re 'The Landon and Whitaker Claim's Act, 1871* (1872) 2 NZ (CA) 41.

⁵⁸ PG McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 113.

⁵⁹ McHugh, above, 113.

⁶⁰ *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 78.

⁶¹ *Wi Parata*, above, 79. This, as pointed out by McHugh, contradicts the constitutional principle that the Crown cannot claim an Act of state against its own subjects. McHugh, above, 114.

conflating sovereignty with ownership or imperium with dominium.⁶² The only source of title to land recognized by the courts being Crown derived.⁶³ That is, Maori lacked legal claim to their traditional lands except where their title had been transformed into a Crown derived title through the Native Land Court.⁶⁴ If Maori lacked sovereignty they also lacked property rights when the Crown acquired sovereignty.⁶⁵ As observed by Brennan J in *Mabo [No 2]* "[I]t is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty."⁶⁶ It is this line of reasoning that the Crown continued to argue in subsequent litigation, including *In Re Ninety Mile Beach*, and the High Court decision of *Ngati Apa*.

While a full history of cases post the *Wi Parata* decision cannot be canvassed here, it is noted that the approach of New Zealand courts was rejected by the Privy Council in *Nireaha Tamaki v Baker*⁶⁷ and *Wallis v Solicitor General*.⁶⁸ Despite the severe criticisms made by the Privy Council, including the observation that it was "rather late in the day" for the argument to be made that there was no Māori customary law from which the Courts could "take cognizance",⁶⁹ *Wi Parata* remained the approach to aboriginal title for over 100 years.⁷⁰

Moreover, that Māori could not bring claims to customary land against the Crown became codified in section 84 of the Native Lands Act 1909.⁷¹ The legacy of *Wi Parata* remained until *Te Weehi* was decided in 1987. Williamson J concluded that "treatment of its indigenous peoples under English common law had confirmed that the local laws and property rights of such peoples in cede or settled colonies

⁶² McHugh, above, 115.

⁶³ McHugh, above, 115.

⁶⁴ McHugh, above, 115.

⁶⁵ McHugh, 115.

⁶⁶ (1992) 175 CLR 1 at 51.

⁶⁷ *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371.

⁶⁸ *Wallis v Solicitor-General* (1903) NZPCC 23:

⁶⁹ *Nireaha Tamaki*, above, 382.

⁷⁰ See *Waipapakura v Hempton* (1914) 33 NZLR 1065 (SC), *In Re Ninety Mile Beach* [1963] NZLR 461 (CA), *In Re the Bed of the Wanganui River* [1962] NZLR 600 (CA).

were not set aside by the establishment of British sovereignty."⁷² His Honour concluded that legislation did not extinguish the common law right to fishery, but rather fisheries legislation explicitly excluded customary fisheries.⁷³ Thus the case is significant in its admittance of the common law as a source of the customary fisheries right alongside the statutory recognition, in direct contrast to the approach of *Wi Parata*.⁷⁴

D Summary

The common law doctrine of aboriginal title as recognised in the courts of New Zealand, has gone through a full circle. The early courts displayed a clear willingness to follow the precedent established in other colonizing nations. However, *Wi Parata* removed any possibility of enforcing aboriginal rights in New Zealand, except via the Native Lands Acts. Later Lands Acts codified the statutory approach to aboriginal rights delineated in *Wi Parata* and it was not until over one hundred years later, in the *Te Weehi* decision, that the common law was once again recognised as a source of aboriginal rights in New Zealand.

IV MĀORI LAND COURT

Before the establishment of the Native Land Court, Crown purchases were required to extinguish Māori customary title to land and open the way for settlement under subsequent Crown grant. Māori land legislation, first enacted in 1862, was explicitly established "to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown".⁷⁵ The Native Land Court, a creation of statute,⁷⁶ was established to achieve

⁷¹ PG McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 120.

⁷² *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682, 687.

⁷³ McHugh, above, 130.

⁷⁴ PG McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 131.

⁷⁵ As outlined in the preamble to the Native Lands Act 1865.

this objective, and thus to extinguish Māori customary title to land and to establish Crown a derived tenure.⁷⁷

The Native Land Acts⁷⁸ conferred jurisdiction on that court to determine “who according to Native custom” were the ‘owners’ of the customary land.⁷⁹ The owners had to prove that according to Māori tikanga they were the owners of land. If the Court was satisfied with the claims, the owners were recorded as the owners in the Court’s records and were then issued with a Court certificate of title. This certificate was then exchanged for a Crown grant in freehold from the Governor.⁸⁰ The tenurial substitution only occurred with the issue of a Crown grant or a certificate of title under the land transfer system.⁸¹

The Māori Land Court today has a significantly different role. The purpose of the current version of the Native Land Act, Te Ture Whenua Māori Act 1993⁸² is to ‘promote the retention of that land in the hands of its owners...and to facilitate the occupation, development, and utilization of that land for the benefit of its owners...’⁸³ The preamble recognises that ‘land is a taonga tuku iho of special significance to Māori people’. Like its predecessors the Māori Land Court has the ability to ascertain who according to Māori custom are the ‘owners’ of Māori customary land.⁸⁴

⁷⁶ The Court, as it is known today, derives from the 1865 Act, as the 1862 Act envisaged an informal body. Richard Boast “The Evolution of Maori Land Law 1862-1993” 54, in Richard Boast, Andrew Erueti, Doug McPhail, Norman F Smith *Māori Land Law* (Butterworths, Wellington, 1999).

⁷⁷ PG McHugh *The Māori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 113. The Court has been the subject of considerable academic writings and has been described as an ‘engine of destruction’, see David Williams *Te Kooti Tango Whenua: The Native Land Court 1864-1909* (Huia, Wellington, 1999).

⁷⁸ Now known as the Māori Land Court.

⁷⁹ Section 21 Native Land Act 1862.

⁸⁰ Richard Boast “The Evolution of Maori Land Law 1862-1993” 54, in Richard Boast, Andrew Erueti, Doug McPhail, Norman F Smith *Māori Land Law* (Butterworths, Wellington, 1999).

⁸¹ Boast, above.

⁸² Also known as the Māori Land Act 1993.

⁸³ Preamble to Te Ture Whenua Maori Land Act 1993.

⁸⁴ Section 132.

The general jurisdiction of the Māori Land Court is set out in section 18. In particular, the Court has jurisdiction to:

Determine for the purposes of any proceedings in the Court or for any other purpose whether any specified land is or is not Māori customary land or Māori freehold land or General land owned by Māori or General land or Crown land.⁸⁵

The question arises whether the 1993 Act sets up anything new in regards to Māori customary land. Section 18(1)(h) itself confers the general jurisdiction on the Māori Land Court to determine whether an area of land is, amongst other things, Māori customary land. This function is a new aspect of the Māori Land Court's jurisdiction⁸⁶ as the early Native Land Court proceedings were focussed on the identification of the owners of the customary land, rather than the class of land involved. The legal effect of conducting this investigation alone is not clear, however the general jurisdiction of section 18(1)(h) is delineated further in sections 130-141.

It is these provisions that outline the specific extent of the Land Court's jurisdiction. Section 131 gives the Māori Land Court jurisdiction to determine and declare, by a status order, the status of any parcel of land, including Māori customary land.⁸⁷ The Court also has jurisdiction to make a vesting order, in respect of the defined parcel of land, in favour of such persons as the Court finds to be entitled.⁸⁸ That land shall then become Māori freehold land.⁸⁹ The court therefore has the ability to investigate the status of the land without determining the question of ownership. The significance of this is that it results in a status order, which may or may not be a vesting order. Theoretically at least, if any Māori customary land is found to exist, such land can retain its Māori customary status under the Act.

⁸⁵ Section 18(1)(h) Te Ture Whenua Māori Act 1993.

⁸⁶ The Māori Affairs Act 1953 s 161(1) preserved the exclusive jurisdiction of the Māori Land Court to investigate customary land. No mention is made in the Act of determining the status of customary land.

⁸⁷ Section 131.

⁸⁸ Section 134(7).

⁸⁹ Section 134(2).

McHugh argues that the presumption that the transformation of customary title to Maori freehold land completely assimilates all traditional incidents of land tenure into the English system is flawed.⁹⁰ First it applies a statute based approach, that only rights attached to a statutory created customary title can be recognised, and overlooks the common law doctrine of aboriginal title.⁹¹ Secondly he argues that the Maori Affairs Act 1953 and its predecessors deal with customary title rather than listing of incidents attaching to that title.⁹² As such, the transformation of customary title to a Maori freehold title precludes a territorial from being made out, however traditional incidents may remain over the land as non-territorial title.⁹³

This point has received renewed significance after *Ngati Apa*, however the debate over whether a distinction exists between the common law doctrine of aboriginal title and Maori customary land as recognised in Te Ture Whenua Maori Act 1993, remains unresolved. Counsel in the Appeal case sought to make such a distinction. The President, however, questioned whether there was in actual fact 'any real distinction' given that both are directed to interests in land in the nature of ownership.⁹⁴

V DEFINITIONS OF THE FORESHORE AND SEABED

The litigation involves three marine areas, the foreshore, the seabed of internal waters⁹⁵ and the seabed of territorial sea. In New Zealand, the foreshore⁹⁶ is that part of the territory that lies between high-water mark and low-water mark. Specifically at common law, the foreshore's landward limit is the high-water mark of ordinary tides, which being the line of the medium tide between the spring and the neap tides

⁹⁰ PG McHugh "Aboriginal servitudes and the Land Transfer Act 1952" (1986) 16 VUWLR 313, 323.

⁹¹ McHugh, above, 323.

⁹² McHugh, above, 323.

⁹³ McHugh, above, 324.

⁹⁴ *Ngati Apa v Attorney-General* (19 June 2003) Court of Appeal CA173/01, 75/02, para 103.

⁹⁵ Internal waters are statutorily defined to include areas of the sea landward of the baseline of the territorial sea. Section 4 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977.

during the year.⁹⁷ The foreshore is a particular issue in New Zealand law is due to the specific rules of the common law as applied, supplemented and supplanted by statute in New Zealand.⁹⁸

The seabed itself is generally known as the soil and subsoil underneath the sea. The seabed and related waters includes both the inland waters, inside harbours and bays, and the territorial seas beyond the low water mark stretching to the 12 nautical miles, as well as the soil in the exclusive economic zone⁹⁹, and in the continental shelf where it extends beyond 200 nautical miles.¹⁰⁰

The areas in question in the *Ngati Apa* litigation concern the foreshore and seabed as defined above. Title to these areas of land is not to be confused with the Queen's Chain and the quite separate issue of accessing the New Zealand coastline. It is out of the scope of this paper to examine the Queen's Chain, but it is mentioned simply to highlight the separate questions being asked in the foreshore and seabed debate.

VI THE FORESHORE

A The Common Law

The common law presumption is that the foreshore and seabed, by prerogative right at common law, is vested in the Crown.¹⁰¹ The House of Lords in *Attorney-General v Emerson* confirmed this general presumption:¹⁰²

⁹⁶ The foreshore, seashore, or sea beach are generally regarded as the same thing. See *Government of the State of Penang v Beng Hong Oon* [1972] AC 425, 437.

⁹⁷ *Attorney-General v Findlay* [1919] NZLR 513.

⁹⁸ RP Boast "The Foreshore" (Waitangi Tribunal Rangahaua Whanui Series, Wellington, 1996) 1.1.1.

⁹⁹ The EEZ runs from 12 to 200 nautical miles from the low tide mark

¹⁰⁰ Rt Hon Helen Clark, Prime Minister *Foreshore and Seabed: Protecting Public Access and Customary Rights: Consultation Paper* (Wellington, 2003), 6.

¹⁰¹ *Raven v Keane* [1920] GLR 168, *Attorney-General v Emerson* [1891] AC 649, 653.

¹⁰² *Attorney-General v Emerson* [1891] AC 646, 653.

It is beyond dispute that the Crown is prima facie entitled to every part of the foreshore between high and low water mark, and that a subject can only establish a title to any given part of the foreshore, either by proving an express grant thereof from the Crown, or by giving evidence from which such grant, though not capable of being produced will be presumed.

While the presumptive title can be displaced by proof of an express Crown grant¹⁰³ or continuous occupation,¹⁰⁴ the presumption itself is in contrast to the presumption of ordinary land, where the present possessor is presumed to have lawful title unless proved otherwise.¹⁰⁵ It was on this presumption that the Crown argued that it owned the foreshore and seabed, and upon which it approached the continued challenge by Māori to these areas. The Crown continually asserted that acquisition of sovereignty imported English common law and vested the foreshore in the Crown.¹⁰⁶ Indeed the evidence of this belief is to be found in the various statutes enactments that assume that the Crown owned the foreshore.¹⁰⁷

B Native Land Court

Early Native Land Courts were not adverse to at least the notion of granting title to the foreshore. In Māori custom the foreshore and the coast was 'owned' in a similar manner as the land.¹⁰⁸ Ownership of the foreshore by a particular descent group was to be proved as a matter of fact, by evidence of exclusivity, actual use, and management by customary law.¹⁰⁹ Fenton CJ in *Whakaharatau* viewed the issue of ownership of the foreshore as simply a question of fact.¹¹⁰

¹⁰³ These grants are taken subject to the public right of navigation and anchorage *Attorney-General v Emerson*, above, 653.

¹⁰⁴ *Attorney-General v Emerson*, above.

¹⁰⁵ RP Boast "The Foreshore" (Waitangi Tribunal Rangahaua Whanui Series, Wellington, 1996), 23.

¹⁰⁶ *In Re Ninety Mile Beach* [1963] NZLR 461, 463 (CA).

¹⁰⁷ See the Foreshore And Seabed Endowment Revesting Act 1991, the Resource Management Act 1991.

¹⁰⁸ Alan Ward "National Overview" (Waitangi Tribunal Rangahaua Whanui series, GP Publications, Wellington, 1997), vol 2, 337 <<http://www.knowledge-basket.co.nz/oldwaitangi/natview/vol2/v2prelim.PDF>> (last accessed 30 August 2003).

¹⁰⁹ Ward, above, 338.

¹¹⁰ *Whakaharatau* Hauraki 4 MB 202 in *Kauwaeranga Judgment* (1870) 4 Hauraki MB 236; reprinted in (1984) VUWLR 227 footnote 3.

While the claimant's case was dismissed, it was only due to a lack of evidence proving ownership. The *Kauwaeranga Judgment*¹¹¹, which was decided just weeks after *Whakaharatau*, likewise considered ownership of the foreshore. The Court proceeded on the basis that the Native Land Court had jurisdiction to consider and decide on the matter as it saw fit. However Fenton CJ refused to issue a certificate of title recognising 'an absolute freehold interest in the soil' due to "evil consequences which might ensue" if the Court issued exclusive title to Māori.¹¹²

C Crown Reaction

Boast suggest that the Crown considered, up until mid-1870 at the latest, the Crown did not consider that it owned the foreshore until the land contiguous to the foreshore was extinguished.¹¹³ In 1878 the Crown enacted section 147 of the Harbours Act¹¹⁴ was enacted. Section 147 provided:

No part of the shore of the sea, or of any creek, bay, arm of the sea, or navigable river communicating therewith, where and so far up as the tide flows and re-flows, nor any land under the sea or under any navigable river, except as may already have been authorized by or under any Act or Ordinance, shall be leased, conveyed, granted, or disposed of to an Harbour Board, or any other body (whether incorporated or not), or to any person or persons, without the special sanction of an Act of the General Assembly.

The provision states the Crown's view that only itself could make grants to the foreshore "except as may already have been authorized by or under any Act or Ordinance". However, the language of the provision is clearly forward looking, prohibiting future grants by any body other than by a legislative Act. Even before the

¹¹¹ *Kauwaeranga Judgment* (1870) 4 Hauraki MB 236; reprinted in (1984) VUWLR 227.

¹¹² *Kauwaeranga Judgment*, above, 244.

¹¹³ RP Boast "The Foreshore" (Waitangi Tribunal Rangahaua Whanui Series, Wellington, 1996) 13.4.

¹¹⁴ Replaced by s150 Harbours Act 1950, repealed by s362 Resource Management Act 1991.

Ngati Apa discussion on this provision, it was doubtful that this provision would satisfy modern extinguishment tests.¹¹⁵

Nor did the Act clarify the Land Court's jurisdiction over the foreshore.¹¹⁶ As outlined above, title by the Native Land Court was different from the grant by the Crown. While the Harbours Act did not allow the Crown to grant an area of foreshore, this did not prevent the Native Land Court from carrying out an investigation of title in the Court and the subsequent issue of a title from the Court.¹¹⁷ By 1909 the legislature had moved to prohibit customary rights from being enforced in any forum bar the Native Land Court. "[S]ave so far as otherwise expressly provided in any other Act" Māori were limited to enforcing their customary title through the Native Land Court.¹¹⁸ The next significant event for Māori claims to the foreshore came in 1962 in *In Re Ninety Mile Beach*.

D Re Ninety Mile Beach

Notably, in 1962 the Court of Appeal was faced with the exact issue in regards to the foreshore as the High Court and Court of Appeal in the *Ngati Apa* litigation. In both cases the central issue concerned whether the Māori Land Court had jurisdiction to investigate title and issue freehold orders to the foreshore. The findings of *Ninety Mile Beach* have been severely criticised by the Court of Appeal in *Ngati Apa* and such failings will be examined in Part XII. The purpose of this section is to underline the conclusions of *Ninety Mile Beach* and the resulting effect of the decision on Māori claims to the foreshore.

It was argued by the Solicitor-General, that on the assumption of sovereignty the foreshore became vested in the Crown. That by the common law the foreshore

¹¹⁵ RP Boast "The Foreshore" (Waitangi Tribunal Rangahaua Whanui Series, Wellington, 1996) 13.4.

¹¹⁶ Richard Boast "In Re Ninety Mile Beach Revisited" (1993) 23 VUWLR 145, 153.

¹¹⁷ Richard Boast "In Re Ninety Mile Beach Revisited" (1993) 23 VUWLR 145, 153.

¹¹⁸ These provisions were re-enacted by sections 155-158 of the Māori Affairs Act which provide that Māori customary title is unenforceable against the Crown. While this provision has been repealed by

was vested in the Crown.¹¹⁹ This principle became applicable to New Zealand as part of the common law relating to title to land.¹²⁰ The Māori Land Court never had jurisdiction to investigate land below the high water mark as the Crown prima facie is entitled to the foreshore, thus limiting the jurisdiction of that Court.¹²¹

The Court of Appeal was unconvinced by this argument. In North J's opinion the better view was that in early times the jurisdiction of the Māori Land Court was not limited to land above the high water mark.¹²² It was accepted as obvious, that Māori prior to 1840 regarded the foreshore as part of the lands over which they exercised dominion.¹²³ The Crown's assertions that native title over the foreshore was extinguished by the Crown by operation of the common law were described by Gresson J's as involving a 'serious infringement of the spirit of the Treaty of Waitangi' and would amount to depriving Māori of their customary rights to the foreshore 'by a side wind.'¹²⁴

The Court of Appeal found that Maori could only enforce their aboriginal rights against the Crown through a statute that recognised such rights.¹²⁵ In North J's view "...the rights of Maori to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria..."¹²⁶ In reaching this conclusion both North J and T.A. Gresson J applied feudal principles¹²⁷ evident in the reasoning of *Wi Parata*. North J proceeded to find that statute law burdened the Crown's paramount title to land within New Zealand.¹²⁸ This gave the Maori Land Court jurisdiction to

Te Ture Whenua Māori, section 6 of the Limitation Act 1950 now provides that any such claims have to be brought before the court within 12 years of the offending act.

¹¹⁹ Citing *Attorney-General v Emerson, Sutton and Wintringham* [1891] AC 649, 653.

¹²⁰ Citing *R v Joyce* (1906) 25 NZLR 78, 89, *Waipapakura v Hempton* (1914) 33 NZLR 1065, 1071.

¹²¹ *In Re Ninety Mile Beach* [1963] NZLR 461, 467.

¹²² *In Re Ninety Mile Beach*, above, 468.

¹²³ A fact which the appellant Māori tribes had demonstrated in relation to the foreshore of Ninety Mile Beach and were thus deemed by the Court as having owned and occupied according to their customs *In Re Ninety Mile Beach*, above, 467.

¹²⁴ *In Re Ninety Mile Beach*, above, 477-478.

¹²⁵ PG McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 125.

¹²⁶ *In Re Ninety Mile Beach*, above, 468.

¹²⁷ McHugh, above, 125.

¹²⁸ McHugh, above, 127.

investigate and issue title down to the low-water mark. However, that jurisdiction was now necessarily limited. According to the Court, once an application for investigation of title for land adjoining the sea had been determined, the customary rights to land below the high water mark were extinguished. If the Court fixed the boundary at the high water mark, then ownership of the land in between the high water mark and low water mark 'remained' with the Crown, freed from its obligations undertaken by legislation.¹²⁹

If the ocean was described the boundary of land, by virtue of section 12 of the Crown Grants Act 1866, the foreshore likewise 'remained' with the Crown.¹³⁰ That is the Crown Grant operated to restrict seaward boundary of the land. In Gresson J's view it would be inconsistent with the terms of the grant to argue that land below the high water mark could be subject of a later freehold order.¹³¹

In terms of the effect of section 150 of the Harbours Act 1950 both JJ North and Gresson were of the view that it was the intention of the Legislature to ensure that the foreshore was not to be disposed of otherwise than by a special Act of Parliament.¹³² While North J formulated the limitation of the Māori Land Court jurisdiction independently of section 150, Gresson J belief was that the provision acted as a fetter on the jurisdiction of the Māori Land Court.¹³³ 'I am satisfied it was no longer competent for the Māori Land Court to investigate title to or issue any freehold order in respect of the foreshore in face of the prohibition contained in this section.' This stance received much attention in *Ngati Apa*.

The immediate effect of *Ninety Mile Beach* was to preclude claims to the Māori Land Court for investigation of the foreshore where the adjoining land was no longer

¹²⁹ *In Re Ninety Mile Beach*, above, 473.

¹³⁰ *In Re Ninety Mile Beach*, above, 473.

¹³¹ *In Re Ninety Mile Beach*, above, 479.

¹³² *In Re Ninety Mile Beach*, above, 474.

¹³³ 'I am satisfied it was no longer competent for the Māori Land Court to investigate title to or issue any freehold order in respect of the foreshore in face of the prohibition contained in this section.' *In Re Ninety Mile Beach*, above, 480.

Māori customary land. Thus in *Green v Ministry of Agriculture and Fisheries*¹³⁴ it was held that as the right claimed was an exclusive right to the tribe, derived and based from a proprietary tribal claim to the foreshore, any exclusive fishing right, based on ownership of the foreshore, was extinguished.¹³⁵ *Ninety Mile Beach*, while based on dubious reasoning itself, was the basis of the High Court decision of *Ngati Apa*.

E Further Statutory Enactments

Today, the Crown's claim to title to the foreshore continues to be generally on the common law. Section 150 of the Harbours Act 1950 was repealed by section 362 of the Resource Management Act 1991. However in the same year the Foreshore and Seabed Endowment Revesting Act 1991 was enacted to re-vest in the Crown certain areas of the foreshore and seabed previously alienated to harbour boards and local authorities.¹³⁶ Surprisingly, nowhere in the 1991 Act did the statute contain a restriction on alienation of the foreshore and seabed. Section 9A was enacted in 1994 to overcome that deficiency.

Foreshore and seabed to be land of the Crown – (1) The principal Act is hereby amended by inserting, after section 9, the following section:

‘9A. (1) All land that –

(a) Either –

i. Is foreshore and seabed within the coastal marine area (within the meaning of the Resource Management Act 1991); or

ii. Was foreshore, seabed, or both, within the coastal marine area (within the meaning of that Act) on the 1st day of October 1991 and has been reclaimed (whether lawfully or otherwise) on or after that date; and

(2) All land of the Crown to which this section applies shall be held by the Crown in perpetuity and shall not be sold or otherwise disposed of except-

(a) Pursuant to the Resource Management Act 1991; or

(b) By the authority of a special Act of Parliament; or

¹³⁴ *Green v Ministry of Agriculture and Fisheries* High Court, Wanganui [1990] 1 NZLR 411.

¹³⁵ *Green*, above, 414.

¹³⁶ The long title the Foreshore and Seabed Endowment Revesting Act 1991.

- (c) By a transfer to the Crown, where the land will not be land to which the Land Act 1948 applies....

The Amendment Act provided:

Section 2 ...

(2) Notwithstanding anything in section 9A of the principal Act (as inserted by subsection (1) of this section), in relation to any land of the Crown to which that section applies, nothing in that section shall limit or affect –

- (a) Any agreement to sell, lease, licence, or otherwise dispose of that land that was entered into before the date of commencement of that section, where the disposal has not been completed before that date; or
- (b) Any interest in that land held by any person other than the Crown.

Section 5 of the 1991 Act re-vested many areas of the foreshore that the Crown had. This re-vesting took effect as if the land “had never been alienated from the Crown...”¹³⁷ the common law position being restored in respect of those areas.¹³⁸ The significance being that the Crown’s title to the foreshore remains encumbered by Māori customary rights where those rights are shown to exist.¹³⁹ Notably nowhere in the Resource Management Act 1991 is title vested in the Crown. Rather the purpose of this act is management of natural and physical resources.

VII THE SEABED

The Crown’s title to the bed of internal waters arose when Britain acquired territorial sovereignty.¹⁴⁰ The source of Crown’s title to the territorial seabed is not clear.¹⁴¹ The source may stem from a common law rule imported into New Zealand, or it may stem from a rule of international law given effect in domestic law.¹⁴² The

¹³⁷ Section 5(b) Foreshore and Seabed Endowment Revesting Act 1991.

¹³⁸ FM Brookfield “The Waitangi Tribunal and the Whanganui River-Bed” (2000) NZLR 1, footnote 11.

¹³⁹ Brookfield, above.

¹⁴⁰ PG. McHugh “The Legal status of Maori Fishing Rights in Tidal Waters” (1984) 14 VUWLR 247, 249.

¹⁴¹ McHugh, above.

¹⁴² McHugh, above.

Crown, by the common law had always claimed the sovereign jurisdiction over the seabed for 3 miles.

Whatever the source, the Crown's title was confirmed in legislation. Following the Convention on the Territorial Sea and Contiguous Zone 1958, section 7¹⁴³ of the Territorial Sea and Fishing Zone Act 1965 clarified the Crown's title to the both internal waters and the territorial sea. Section 7 is the statutory vesting provision, which provides, subject to the grant of an estate or interest made, the seabed and subsoil of the submarine areas bounded on the landward side by low-water mark and on the seaward side by the outer limits of the territorial sea are deemed to be, and always to have been, so vested. Remarks noted in *Attorney-General ex rel Hutt River Board v Leighton*¹⁴⁴ are relevant when analysing this provision.

The operative words are "shall remain and shall be deemed to have been always vested in the Crown." These are not words purporting to vest or divest anything. The words "shall remain" look to the future, and the other words look back to the past, and there are no words operative *in praesenti* such as one would expect to find if the purpose were to divest interests already alienated from the Crown and to re-vest them in the Crown. This is the sort of thing one expects in a declaratory enactment...¹⁴⁵

The vesting provision is arguably declaratory of the common law, as to the seabed of three-mile territorial sea. This Act was replaced by the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977, which retained the above section, but substituted the three-mile territorial sea by 12 miles in 1978, extending

¹⁴³ **7. Bed of territorial sea and internal waters vested in the Crown** – Subject to the grant of any estate or interest therein (whether by or pursuant to the provisions of any enactment or otherwise, and whether made before or after the commencement of this act), the seabed and subsoil of the submarine areas bounded on the landward side by the low-water mark along the coast of New Zealand, including the coast of all islands, and on the seaward side by the outer limits of the territorial sea of New Zealand shall be deemed to be and always to have been vested in the Crown

¹⁴⁴ *Attorney-General ex rel. Hutt River Board v Leighton* [1955] NZLR 750, 789.

¹⁴⁵ Although these remarks were made in reference to section 261 of the Coal Mines Act 1979 *AG ex re. Hutt River Board*, above, 789.

the area of vested seabed beyond the three-mile common law limit and as such, cannot be regarded as declaratory.¹⁴⁶

The sovereignty of the Crown over New Zealand's territorial sea¹⁴⁷ is qualified by the customary international right of innocent passage enjoyed by foreign vessels through the territorial sea.¹⁴⁸ The public has certain rights in respect of the territorial sea and internal waters. These common law rights include the public right of navigation and the right to anchor.¹⁴⁹ How such rights would interact with a customary title of some kind is an issue that is unanswered in New Zealand, and is likely to remain that way in light of the government's foreshore and seabed proposal. In Australia this point has received judicial attention, with the general view being that international rights enjoy a higher status than aboriginal or native title rights.¹⁵⁰

Notably, the claim to customary title made in the seabed made in the Marlborough Sounds litigation is not unheralded in the Maori Land Court. In 1955, Nga Puhī elders sought to title to the Pacific Ocean in the Māori Land Court. The Maori Land Court declined jurisdiction on the issue. As a creature of statute, the Court reasoned, it was necessarily limited by the powers conferred to it by statute.¹⁵¹ Its power in relation to the sea and tidal waters were limited to disputes concerning Māori fisheries.¹⁵²

A Summary

¹⁴⁶ *The Laws of New Zealand* (Butterworths, Wellington, 2002) Water, part I(1), para 10.

¹⁴⁷ In terms of the Exclusive Economic Zone (seaward of the territorial sea to 200 Nautical Miles), New Zealand has a limited jurisdiction than sovereignty. The same applies to the Continental Shelf.

¹⁴⁸ See the United Nations Convention on the Law of the Sea (Montego Bay, Jamaica, 10 December 1982; UN DOC A/CONF 62/122 and Corr 1-11), Arts 17-19.

¹⁴⁹ *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153, 169 (PC).

¹⁵⁰ *Commonwealth v Yarmirr; Yarmirr v Northern Territory* [2001] HCA 56.

¹⁵¹ *Te Moananui a Kiwa*, 26 Hokianga MB 306, 310.

¹⁵² *Te Moananui a Kiwa*, 26 Hokianga MB 306, 310.

The above sections have been an attempt to give historical context to the current foreshore and seabed litigation, both in terms of judicial decisions, and also legislative Acts. What has been seen is that while initially the Native Land Court was receptive to foreshore claims at least, this practice soon desisted, particularly after *Ninety-Mile Beach*. The government obviously concerned to assert its claim to the foreshore and seabed passed various enactments in an attempt to clarify the point. However, such provisions have since proved to be insufficient, as will be discussed below.

VIII RE MARLBOROUGH SOUNDS FORESHORE AND SEABED

In 1997 Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa and Rangitane, commenced proceedings in the Māori Land Court for declaratory orders that the foreshore and seabed in the Marlborough Sounds is Māori customary land. If successful, the claimants were to seek an investigation of title to the land.¹⁵³ If the Māori Land Court were to find that the land was not Māori customary land, but Crown land, the iwi sought a declaration that the land was held by the Crown in a fiduciary capacity for their benefit under section 18(1)(i) of Te Ture Whenua Māori Act.

In the Māori Land Court, Hingston J was faced with the question of whether since 1840, Māori customary rights to the foreshore and seabed in and around the Marlborough Sounds had been extinguished. It was assumed that historically Māori customary rights existed over the seabed and foreshore.¹⁵⁴ Hingston J distinguished *Ninety Mile Beach* on the basis that that case preceded on the assumption that the land in question had been investigated by the Native Land Court¹⁵⁵, which was unlike the lands of the Marlborough Sounds which had been purchased before the

¹⁵³ Under section 132 of Te Ture Whenua Māori Act 1993.

¹⁵⁴ *In Re the Marlborough Sounds foreshore and seabed* 22A Nelson MB 1 22 December 1997 161.

¹⁵⁵ *In Re Marlborough Sounds*, above, 164. Despite the finding of the Court of Appeal being false in regards to the particular history of Ninety Mile beach. See Richard Boast "In Re Ninety Mile Beach Revisited" (1993) 23 VUWLR 145.

Land Court came into being.¹⁵⁶ As such, the customary rights in the foreshore not included in the sales of land adjacent in the Marlborough Sounds or extinguished by an Act, remained in existence.¹⁵⁷

In regards to the seabed, after referring to the extinguishment test espoused in *Faulkner*, the Judge stated that section 7 of the Territorial Sea and Exclusive Economic Zone 1977 went no further than statutorily assume sovereignty over the seabed. As such the provision did not extinguish Māori customary rights in the seabed. This decision was appealed to the Māori Appellate Court, where that Court agreed to state a case to the High Court.

IX ATTORNEY-GENERAL V NGATI APA (HIGH COURT)

Unlike the Land Court, the central issue faced by the High Court and the Court of Appeal, was the initial question, as a point of law, of whether the Māori Land Court could entertain the substantive enquiry of whether customary land exists in fact in the foreshore and seabed. In the High Court, Ellis J answered this question in the negative.

The High Court found that the Māori Land Court had jurisdiction to investigate Māori customary land¹⁵⁸, but included land to the low water mark only. As such, the Māori Land Court did not have jurisdiction over land below the low water mark.¹⁵⁹ However, following *Ninety Mile Beach*, if the land above the high water mark was no longer Māori customary land, any Māori customary title to the foreshore was extinguished.¹⁶⁰ Accordingly, the jurisdiction of the Māori Land Court was effectively non-existent.

¹⁵⁶ *In Re Marlborough Sounds*, above, 164.

¹⁵⁷ *In Re Marlborough Sounds*, above, 164.

¹⁵⁸ *Attorney-General v Ngati Apa* 22 June 2001 HC Wellington AP 152/2000, 7.

¹⁵⁹ *Ngati Apa*, above, 13.

¹⁶⁰ *Ngati Apa*, above, 32.

While Ellis J does not directly address the doctrine of aboriginal title, the legacy of *Wi Parata* remained evident in background comments made by the Justice. The Justice found:

...it attractive to hold that upon cession of sovereignty to the Crown, the Crown then held the land as against her subjects including Māori with "full and absolute dominium" including the fee. The Crown's Treaty obligations were then for the Crown to honour by transferring the fee to Māori in respect of customary land, where they could show rights more or less equivalent to their right to exclusive possession, an essential aspect of fee simple.¹⁶¹

That is in Ellis J's view, on the assumption of sovereignty the Crown acquired full beneficial ownership of New Zealand also. As noted above, the Crown acquires its radical title over the land, however this title is burdened by the customary title of Māori. It is only once this title is lawfully extinguished that the radical title expands to full beneficial ownership of land.¹⁶² The existence and recognition of pre-existing property rights did not depend on statutory acknowledgment, but remained in existence until lawfully extinguished.

Further there was never a requirement that Māori claimants had to prove exclusive possession to be granted a freehold title. The Native Land Court was empowered to decide who according to tikanga Māori were the rightful owners, rather than whether the customary rights amounted to exclusive possession, a feature of fee simple title. Erueti labels this approach as 'plainly ethnocentric'¹⁶³

¹⁶¹ *Ngati Apa*, above, 27.

¹⁶² Andrew Erueti "Native Title Claims to Sea Country" [2001] NZLJ 415, 417.

¹⁶³ Erueti, above, 417.

**X NGATI APA V ATTORNEY GENERAL (COURT OF APPEAL):
GENERAL COMMENTS**

A Approach of the Courts

The approach taken in the Māori Land Court and the Court of Appeal are in stark contrast to the approach of the High Court. Hingston J, while faced with a different question, emphasises the continuity of pre-existing property rights, which were assumed to be in existence until lawfully extinguished. In contrast Ellis J's analysis is focused on unmodified English common law, and as a consequence is not receptive to the notion of recognition of customary property rights. Like the Maori Land Court, the Court of Appeal, spends considerable time detailing the doctrine of aboriginal title and the fact that the common law in New Zealand was modified by local circumstances. It is fundamentally on this basis on which the Court of Appeal proceeds.

**XI NGATI APA V ATTORNEY GENERAL (COURT OF APPEAL):
DECISION**

On June 19 2003 the Court of Appeal issued its opinion from the appeal of Ellis J's decision. The Court of Appeal was at pains to stress that it was only dealing with the narrow issue of the extent of the Māori Land Court's jurisdiction. "The outcome of the appeal cannot establish that there is Māori customary land below the high water mark."¹⁶⁴ Moreover any such claims would face "a number of hurdles in fact and law."¹⁶⁵ In the proceedings before it, however, the onus was on the respondents to prove that the Māori Land Court did not have the appropriate jurisdiction. The standard being, as Elias CJ states, "only if it is clear without any

¹⁶⁴ *Ngati Apa v Attorney General* (19 June 2003) Court of Appeal CA 173/01, 75/02, para 8.

¹⁶⁵ *Ngati Apa*, above, para 8.

evidence being necessary that the appellants cannot succeed as a matter of law that this can be prevented from proceeding to a hearing.¹⁶⁶

A *Māori Land Court's Jurisdiction*

The Court was unanimous in its view that the Māori Land Court has jurisdiction to consider whether the foreshore and seabed were Māori customary land. The Court proceeded to make substantial criticisms of Ellis J's findings stating that the High Court was in error, both in beginning its analysis with the English common law unmodified by New Zealand's conditions and assuming Crown acquired dominium on acquisition of sovereignty.¹⁶⁷ The Court made a number of observations in regards to sovereignty acquisition.

1 *English common law*

The starting point of the Court's reasoning is that, in British colonies, the introduced common law adapted to reflect local conditions, including the pre-existing property rights.¹⁶⁸ New Zealand was no different. As of 1840 the laws of England as existed January 14 1840, were to be enforce in New Zealand only "so far as applicable to the circumstances thereof."¹⁶⁹ This approach was affirmed by the English Laws Act 1858. As Sir Kenneth Roberts-Wray notes "[a] Court may therefore hold, in the light of the circumstances, that an English law is to be entirely rejected..." as this Court of Appeal in fact did.¹⁷⁰

Any prerogative of the Crown as to property in foreshore and seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage recognising property in foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law, unless such property interests have been lawfully extinguished. The

¹⁶⁶ *Ngati Apa*, above, para 12.

¹⁶⁷ *Ngati Apa*, above, para 13.

¹⁶⁸ *Ngati Apa*, above, para,17.

¹⁶⁹ *Ngati Apa*, above, para 17.

¹⁷⁰ Sir Kenneth Roberts-Wray *Commonwealth and Colonial law* (Stevens, London 1966), 626.

existence and extent of any such customary property interest is determined in application of tikanga. That is a matter for the Māori Land Court to consider on application to it or on reference by the High Court.¹⁷¹

In taking this approach the Court of Appeal sweeps aside the respondents' assertions¹⁷² that the common law¹⁷³ provides that the Crown is by prerogative right, the presumptive owner of the seabed, foreshore, the beds of tidal rivers, and coastal waters in New Zealand.¹⁷⁴ Whether the Crown has property in the foreshore and seabed is dependent on the pre-existing property interests, determined according to tikanga, in the foreshore of Māori. Only when such interests are lawfully extinguished does the Crown take beneficial ownership of those areas. Whether those interests have been lawfully extinguished is to be determined by the Māori Land Court.

2 *Foreshore and seabed – different from land*

The respondents agreed that the Crown had no property in ordinary land (above mean high water mark) until lawfully extinguished, but argued this was not true of the foreshore and seabed. This difference, it was argued, is a result of the common law, statutory vesting of such lands in the Crown, and the meaning of 'land' in Te Ture Whenua Māori was not inclusive of such areas. These assertions will now be looked at in turn.

(a) The common law

The Attorney General asserted that "the legal assumption of an original native title over the surface of New Zealand had always ended where the land ends and the

¹⁷¹ *Ngati Apa*, above, para 49.

¹⁷² Throughout New Zealand's legal history regarding ownership, the main argument of the Crown has been that the general principle at common law is, that the Crown is by prerogative right the presumptive owner of the foreshore, seabed, the beds of tidal rivers, and coastal waters. R Boast *The Foreshore*, (Waitangi Tribunal Rangahaua Whanui Series, Wellington, 1996), 22.

¹⁷³ This presumptive title can be displaced by proof of a Crown grant or continuous occupation.

¹⁷⁴ Boast, above.

sea begins” but limited this argument to the seabed.¹⁷⁵ This presumption is sourced in the common law, inherent because of the different qualities of the foreshore and seabed from land and because of the public rights in navigation and recreation, which it was argued, makes “private property interests somehow unthinkable.”¹⁷⁶

In response, the Court noted that interests in soil below low water mark were not unknown to the laws of England, including interests arising by custom and usage. In fact, many interests were created by the Crown¹⁷⁷, as demonstrated by the titles in Port Marlborough.¹⁷⁸ Therefore there could be tenable argument that at least some seabed could be constitutive of land under section 129. The proper starting point is with the facts as to native property, rather than assumptions of the nature of property.¹⁷⁹

(b) Meaning of ‘land’

The Court of Appeal was unanimous in concluding that the seabed and foreshore is “land” for the purposes for section 129(1) of Te Ture Whenua Māori Act 1993. The Chief Justice argued that dictionary definitions were not conclusive, but noted that many definitions were consistent with the foreshore and seabed being “land”, for example, “the solid portion of the earths surface”.¹⁸⁰ In addition as a matter of language, the Chief Justice was unable to distinguish between seabeds, lakebeds or riverbeds, the latter two both being the subject of rulings by the Māori Land Court.¹⁸¹

In some respects the finding that land as used in Te Ture Whenua Māori includes the foreshore and seabed runs counter to other statutory enactments. ‘Land’ is defined in section 4 of Te Ture Whenua Māori Act as “including Māori land,

¹⁷⁵ *Ngati Apa*, above, para 50.

¹⁷⁶ *Ngati Apa*, above, para 50.

¹⁷⁷ *Ngati Apa*, above, para 51.

¹⁷⁸ *Ngati Apa*, above, para 110.

¹⁷⁹ *Ngati Apa*, above, para 54.

¹⁸⁰ *Ngati Apa*, above, para 55.

¹⁸¹ *Ngati Apa*, above, para 55.

General land and Crown land.” Compare this the Crown Minerals Act 1991 where land is defined as “land covered by water; and also includes the foreshore and seabed to the outer limits of the territorial sea.”¹⁸² However by taking a liberal approach to statutory interpretation the Court of Appeal is able to get around the apparent inconsistency between statutes.

In fact, Elias CJ questioned whether the jurisdiction of the Māori Land Court is properly addressed by asking whether Parliament intended to permit recognition in the seabed under Te Ture Whenua Māori. The Lands legislation was never constitutive of customary property.¹⁸³ Keith and Anderson JJ also pick up on this point and after reviewing Te Ture Whenua Māori Act the conclude that:

[g]iven the long history of Māori customary property and rights in areas covered by water a much clearer indication would have had to appear in the 1993 Act for it to be a measure preventing the Māori Land Court from investigating claims in those areas.¹⁸⁴

A literal approach did not apply to the Māori Land Court or Te Ture Whenua Māori Act.¹⁸⁵ As noted above, as certificates of title had previously been issued for land under the sea within the claimed area, it could not be said that at least some seabed within the claim area could constitute “land in New Zealand.”¹⁸⁶

3 *The doctrine of Aboriginal title and Māori customary land*

The Chief Justice outlines the doctrine of aboriginal title and its treatment in New Zealand courts. Elias CJ then makes some poignant conclusions and clarifications in regards to the doctrine of aboriginal title and its relationship with the statutory recognised Māori customary land:

¹⁸² Section 2 Crown Minerals Act 1991, Andrew Erueti “Native Title Claims to Sea Country” [2001] NZLJ 415, 417.

¹⁸³ *Ngati Apa*, above, para 56.

¹⁸⁴ *Ngati Apa*, above, para 178.

¹⁸⁵ *Ngati Apa*, above, para 174.

¹⁸⁶ *Ngati Apa*, above, para 11.

New Zealand legislation has assumed continued existence at common law of customary property until it is extinguished. It can be extinguished by sale to the Crown, through investigation of title through the Land Court and subsequent deemed Crown grant, or by legislation of other lawful authority. The Māori lands legislation was not constitutive of Māori customary land. It assumed its continued existence. There is no presumption of Crown ownership as a consequence of the assumption of sovereignty to be discerned from the legislation. Such presumption is contrary to the common law. Māori customary land is a residual category of property, defined by custom...The Crown has no property interest in customary land and is not the source of title to it.¹⁸⁷

Justice Tipping stated that:

It is also important to recognise that the concept of title, as used in the expression Māori customary title, should not necessarily be equated with the concepts and incidents of title as known to the common law of England. The incidents and concepts of Māori customary title depend on the customs and usages (tikanga Māori) which give rise to it. What those customs and usages may be is essentially a question of fact for determination by the Māori Land Court.

Justice Tipping said that title to Māori customary land must be lawfully extinguished before it could be viewed as ceasing to exist.¹⁸⁸ The two methods available to abrogate such interests were an Act of Parliament or a decision of a competent court amending the common law.¹⁸⁹ However, in view of the nature of Māori customary title, as underpinned by the Treaty of Waitangi and the Te Ture Whenua Māori Act 1993, no court having jurisdiction in New Zealand could properly extinguish Māori customary title.¹⁹⁰ Parliament could effect such extinguishment, however such intention would need to be "crystal clear," demonstrating its purpose by express words or at least by necessary implication.¹⁹¹ While Keith and Anderson JJ phrase extinguishment in terms of the necessary

¹⁸⁷ *Ngati Apa*, above, para 47.

¹⁸⁸ *Ngati Apa*, above, para 185.

¹⁸⁹ *Ngati Apa*, above, para 185.

¹⁹⁰ *Ngati Apa*, above, para 185

purpose of the legislation having to be "clear and plain"¹⁹² it is unlikely that any difference exists between the two formulations.

XII EXTINGUISHMENT: FORESHORE

A In Re the Ninety Mile Beach rejected

As noted above, *Ninety Mile Beach* provided a substantial obstacle for the iwi trying to assert customary ownership to the foreshore. The Court of Appeal, however, made substantial criticisms of the reasoning of the 1963 Court of Appeal. Elias CJ, Keith and Anderson JJ, conclude that *Ninety Mile Beach* was wrong in law and should not be followed. Following the principle that the English common law applied in New Zealand so far as the circumstances allowed, the Court is critical of the 1963 Court of Appeals assumption that the English common law displaced Māori customary title on acquisition of sovereignty.¹⁹³ Turner J in the Supreme Court, particularly placed reliance upon English common law presumptions relating to ownership of the foreshore. The Court is adamant, however, that the common law as received in New Zealand was modified by recognised Māori customary property interests. "If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different."¹⁹⁴ This is a strong hint for future litigants concerning any subject matter, to argue for a New Zealand common law, rather than a blind obsession with the English common law.

The Court of Appeal was also critical of the statutory analysis in *Ninety Mile Beach*, in particular the reading given to section 150 of the Harbours Act 1950. As noted above, an investigation and determination of a claim to customary land did not

¹⁹¹ *Ngati Apa*, above, para 185.

¹⁹² Following the authority of *R v Sparrow* [1990] 1 SCR 1075, 1099, *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 64, 11, 195-196 and *Te Runanga O Muriwhenua v Attorney-General* [1990] 2 NZLR 641, 655.

¹⁹³ *Ngati Apa*, above, para 79.

¹⁹⁴ *Ngati Apa*, above, para 86.

itself involve a grant of land as prescribed by section 150. Secondly the provisions were forward looking in the restriction of grants to the foreshore. Therefore as a result of not following a principle espoused in the decision, that native property rights should not be extinguished 'by a side wind', the 1963 Court of Appeal itself misread the provision.¹⁹⁵

The analysis of section 12 of the Crown Grants Act 1866 likewise received critical review. According to the 1963 Court of Appeal, by virtue of section 12 of the Crown Grants Act 1866¹⁹⁶, investigation and grant of land to the high-water mark determined the foreshore to 'remain' in the Crown. Keith and Anderson JJ however argue that section 12 was no more than a conveyancing presumption rebuttable by the terms of the grant. The Justices did not see Crown Grants Act as having general significance as extinguishment.¹⁹⁷ Such determinations are to be made only on interpretation of particular grants.¹⁹⁸

Elias CJ reasons that an investigation and grant of coastal land cannot extinguish any property held under Māori custom in lands below high water mark. Whether there are such properties is a matter for the Māori Land Court to investigate in the first instance as a question of tikanga. "An approach which precludes investigation of the fact of entitlement according to custom because of an assumption that custom is displaced by a change in sovereignty or because the sea was used as a boundary for individual titles on the shore is wrong in law."¹⁹⁹

Interestingly, Gault P takes a different view on *Ninety-Mile Beach*. The President limited the finding that a Land Court grant which stated the sea as the boundary, to the facts of particular cases. However Gault P argues that once land is

¹⁹⁵ *Ngati Apa*, above, para 154, per Keith and Anderson JJ.

¹⁹⁶ That section reads: "Whenever in any grant the ocean, sea, or any sound, bay or creek or any part thereof affected by the ebb or flow of the tide is described as forming the whole or part of the boundary of the land to be granted, such boundary or part thereof shall be deemed and taken to be the line of high-water mark at ordinary tides."

¹⁹⁷ *Ngati Apa*, above, para 157.

¹⁹⁸ *Ngati Apa*, above, para 157.

¹⁹⁹ *Ngati Apa*, above, para 89.

investigated by the Native Land Court and interests in Native Lands bordering the sea were extinguished and substituted with grants of fee simple.

[i]t does not seem open now to find that there could have been strips of land between the claimed land bordering the sea and the sea that were not investigated and in which interests were not identified and extinguished once Crown grants were made.²⁰⁰

This line of reasoning in effect reinstates the ratio of *Ninety-Mile Beach*. The Land Court may find a property right only where coastal land was purchased or investigated and the sea was not stated as the boundary. This minority approach eliminates the ability to find customary interests where the sea is stated as the boundary, as it was very common for the Crown Deeds to do as such.²⁰¹

Criticisms made by the majority lend support to the view that the 1963 Court of Appeal was likewise wrong in *Re the Bed of the Wanganui River*. In particular, it's finding that Māori customary title in navigable riverbeds ceased by application of the *ad medium filum aquae* common law principle. Following the reasoning of *Ngati Apa* as the common law is imported as far as local circumstances allow, an good argument can be made that analogously that if custom is shown to give interests in bed of navigable rivers, there would be no room for a contrary presumption derived from English common law.²⁰²

However due to the Coal Mines Act, in Bennion's view the practical outcome of any court action is likely to be compensation.²⁰³ Section 14 of the Coal Mines Act Amendment Act, that applicable legislation, provide that except where granted by the Crown, the beds of navigable rivers "shall remain and shall be deemed to have always been vested in the Crown; and...all minerals (including coal) within the such

²⁰⁰ *Ngati Apa*, above, para 121.

²⁰¹ Tom Bennion, "The Claim of the Crown is Weak" (May 2003) *Maori Law Review* 1, 2.

²⁰² *Ngati Apa*, above, para 86.

²⁰³ Section 261(2) of the Coal Mines Act 1979 reads: "Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all

bed shall be the absolute property of the Crown.” As Keith and Anderson JJ note, the phrase “absolute property” indicates both radical title and beneficial ownership, indicated that section 14 extinguishes any Māori customary rights in the bed of navigable rivers.²⁰⁴

B Foreshore and Seabed Endowment Revesting Act 1991

The Crown asserted that section 9A vests all foreshore and seabed land in the Crown.²⁰⁵ Section 9A was inconsistent with any Māori customary title to foreshore and seabed, it was submitted, as it refers to all foreshore and seabed and not just that land revested under section 5 of principal Act. The Court rejected this reading of section 9A, rather finding that that section applied to land which was property of the Crown, of which Māori customary land was excluded.²⁰⁶

The Chief Justice reasons that the purpose of section 9A is to set up a different regime for land “for the time being vested in the Crown” according to if they are foreshore and seabed lands or not.²⁰⁷ Elias CJ draws an analogy between the land of which is the subject of section 9A²⁰⁸, with the definition of Crown land in the Land Act 1948.²⁰⁹ The latter specifically excludes “any Māori land”. As Māori freehold land will be “land held by any person in fee simple” it is excluded from section 9A(1)(b).²¹⁰

The Court found the language of section 9A(1) to be incapable of being read as effecting a vesting of land. According to the Court it simply identifies the subject of

minerals (including coal) within such bed shall be the *absolute property* of the Crown.” The original declaration being found in s 14 of the Coal-Mines Act Amendment Act 1903

²⁰⁴ Tom Bennion, “The Claim of the Crown is Weak” (May 2003) *Maori Law Review* 1, 2.

²⁰⁵ *Ngati Apa v Attorney General* (19 June 2003) Court of Appeal CA 173/01, 75/02, para 68.

²⁰⁶ *Ngati Apa*, above, para 73.

²⁰⁷ *Ngati Apa*, above, para 68.

²⁰⁸ Land which is “for the time being vested in the Crown, but for the time being is not set aside for any public purpose or held for any person in fee simple.”

²⁰⁹ “[L]and vested in Her Majesty which is not for the time being set aside for any public purpose or held by any person in fee simple.”

²¹⁰ *Ngati Apa*, above, para 69.

section 9A as foreshore and seabed which "is for the time being vested in the Crown". Radical title in all land being vested for all time, is clearly inconsistent with references to "for the time being."²¹¹ Moreover, the reference to land vested in the Crown lands defines the foreshore and seabed that would otherwise be available for disposal by the Crown. According to the Chief Justice such land has always excluded Māori customary land.²¹²

Even if such reasoning was incorrect, the Chief Justice, Keith and Anderson JJ and Gault P viewed Māori customary interest as an interest in land protected by subsection 2.²¹³ In the Court's view, there was nothing about the legislation being sufficiently 'clear and plain to extinguish existing Māori customary property.

XIII EXTINGUISHMENT: SEABED

A The Territorial Seas Acts

It was submitted by the Crown that section 7 of the Territorial Sea and Fishing Zone Act 1965 and the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 either was consistent with the non-recognition of Māori customary land as part of the seabed, or alternatively, extinguished that status.²¹⁴ The Court of Appeal found otherwise, concluding that there was no expropriatory purpose about either Act in regards to Māori property. Moreover, that the seabed is vested in the Crown is not inconsistent with the continuing existence of Māori customary property. The principal focus of the 1965 Act was in establishing "as against the world the 12 mile fishing zone" a matter of sovereignty not beneficial ownership. Likewise the primary purpose of the 1977 Act was to establish the exclusive economic zone.²¹⁵ As the language is deeming, preservation of existing property, compatibility of radical title with Māori customary title and the lack of a

²¹¹ *Ngati Apa*, above, para 70.

²¹² *Ngati Apa*, above, para 71.

²¹³ *Ngati Apa*, above, para 74.

²¹⁴ *Ngati Apa*, above, para 113.

direct intention to expropriate make it impossible for the statute to extinguish Māori customary title.²¹⁶

A reading of the Parliamentary debates supports these conclusions. In terms of the Territorial Sea and Fishing Zone Bill 1965, it is clear that the legislature did not turn their minds to the question of the possibility of Māori customary rights. The purpose of the Bill was to "define for the first time, the base line from which the 3-mile territorial sea is measured"²¹⁷ and to establish a 9-mile fishing zone outside of the 3 miles.²¹⁸ Consequently the debate is focused on these two issues. This is not surprising given that the Crown had presumed that they owned the 3-mile territorial sea. The question of Māori customary title over this area simply did not factor into the Bill's debate.

B Resource Management Act 1991

It was argued by New Zealand Marine Farming Association that claims to ownership of property in foreshore and seabed were inconsistent with the Resource Management Act 1991, specifically the controls of the coastal marine area. Further it was asserted that only Māori customary property less than ownership can be recognised under the scheme of the Resource Management Act.²¹⁹ The Chief Justice noted that while the Resource Management Act may restrict activities of those with interests in Māori customary property, as with all owners of foreshore, seabed and ordinary land. However the statutory management of natural resources not inconsistent with existing property rights 'as a matter of custom'. "The legislation does not effect any extinguishment of such property."²²⁰

²¹⁵ *Ngati Apa*, above, para 162.

²¹⁶ *Ngati Apa*, above, para 63.

²¹⁷ Rt Hon Keith Holyoake (Prime Minister) (2 June 1965) 342 NZPD 60-61.

²¹⁸ Rt Hon Keith Holyoake (Prime Minister) (2 June 1965) 342 NZPD 60-61.

²¹⁹ *Ngati Apa*, above, para 75.

²²⁰ *Ngati Apa*, above, para 76

XIV MĀORI LAND COURT'S POWERS

As noted by the Chief Justice, the Court of Appeal decision does not resolve the questions pertaining to the nature of the property interest in the claimed area. That is whether those interests amount to a fee simple interest, or something less.²²¹ A subsequent question of law which would require resolution is the extent or otherwise of the Māori Land Court to recognise interests in land less not equivalent to fee simple.²²²

Notably the Native Land Court did once explicitly possess the power to grant less than exclusive rights.²²³ However the ability of the Māori Land Court to recognise non-territorial rights was revoked by sections 84 to 91 of the Native Land Act 1909. Sections 161 and 162 of the Māori Affairs Act 1953 duplicates these sections. It is due to these enactments that rights less than fee simple could not be recognised in *Ninety Mile Beach*. These provisions have since been repealed, however the ability of the current Māori Land Court to recognise rights less than fee simple remains uncertain.

While Elias CJ was content to leave the question open for the Māori Land Court to explore, Gault P doubted the ability to recognise rights less than fee simple. The President stating that under the particular Part VI of the Te Ture Whenua Māori Act, the concern was with land capable of supporting an estate in fee simple and ownership interests capable of conversion to registration under the Land Transfer Act. "Interests in land in the nature of usufructuary rights or reflecting mana, though they may be capable of recognition both in tikanga Māori and in a developed

²²¹ *Ngati Apa*, above, para 9.

²²² *Ngati Apa*, above, para 10.

²²³ Section 23 of the Native Lands Act 1865 "...shall order a certificate of title to be made and issued which certificate shall specify the names of the persons...who own or are interested in the land describing the nature of such estate or interest and describing the land comprised in such certificate or the Court may in its discretion refuse to order a certificate to issue to the claimant or any other person." In *Kauwaeranga Judgment*, Fenton CJ refused to issue a certificate of title recognising 'an absolute freehold interest in the soil', rather the claimants were issued with an order to "the full, exclusive, and undisturbed possession of all the rights and privileges over the locus in quo...which they or their ancestors have ever exercised."

common law informed by tikanga Māori, are not interests with which the provisions of Part VI are concerned.²²⁴

If Gault's reasoning holds true, this gives weight to McHugh's argument that non-territorial rights will subsist despite the transformation from Maori customary land to Maori freehold land. As the doctrine of aboriginal title "recognises both the title itself and the traditional incidents of Māori land tenure" if the rules of customary title defined by Part VI do not include all the incidents of Māori aboriginal title²²⁵ this leaves open the possibility of non-territorial rights subsisting in area of the foreshore that have been transformed from customary into Māori freehold land under Part VI. As the statute fails to accommodate the full common law recognition of tribal title, the change in status may only result in the partial extinguishment of the common law aboriginal title, leaving non-territorial rights to subsist.²²⁶ However, if the interest amounts to a fishing right, the question remains whether that right has been extinguished by the fisheries settlement and The Treaty of Waitangi (Fisheries Settlement) Act 1992. Given the strong approach taken by the Court of Appeal on the language of extinguishing statutes, the statute requires careful scrutinisation.

A further question left open was whether the land court could make a vesting order, if the interest is found to be equivalent to a fee simple, once a status order is issued. The proposition of provisional title under the Land Transfer Act troubled Tipping J, but in his view this could not amount to extinguishment of customary property rights in the foreshore and seabed.²²⁷ This is particularly so given that a vesting order was not inevitable, and that in some circumstances it may be appropriate to decline to make a vesting order.²²⁸

²²⁴ *Ngati Apa*, above, para 106.

²²⁵ PG McHugh "Aboriginal servitudes and the Land Transfer Act 1952" (1986) 16 VUWLR 313, 324.

²²⁶ McHugh, above, 324.

²²⁷ *Ngati Apa*, above, para 195.

²²⁸ *Ngati Apa*, above, para 196.

XV CONCLUDING COMMENTS

A Role of the Judiciary

The aftermath of the Court of Appeal's decision saw a range of accusations made in a number of directions. One poignant criticism directed at the Court of Appeal itself was that it had diverged into making law instead of simply interpreting the law. Critics of *Ngati Apa* have indeed labeled it as an illustration of "judicial activism." In the author's view this stance is incorrect. To a large extent the case does not state anything new. It merely follows settled domestic and international principles in regards to pre-existing property rights. In regards to *Ninety Mile Beach*, it has been shown, as the Court of Appeal itself illustrates, that this case was based on erroneous assumptions and bad law. In finding that legislation was insufficient to extinguish Māori customary title, the Court merely interpreted the law as written by the Legislature.

To reiterate, the Court did not say that there were customary rights in the foreshore and seabed, but rather that the Maori Land Court had jurisdiction to entertain such claims. The Court identified many hurdles and some members of the Bench were indeed doubtful of the success of claims to the Maori Land Court. However regardless of these concerns, the Court's narrow jurisdictional finding has been a long time Maori applicants who have been precluded from asserting their customary rights in the Maori Land Court for at least forty years. For the Crown it provided a rude awakening to a fact which it had been aware of at least since 1935; that its title to the foreshore and seabed rested on weak foundations.

XVI PUBLIC POLICY

In the past, the underlying theme driving the Courts refusal to recognise customary interests in the foreshore and seabed is the concern for public policy. This is evidenced in *Kauwaeranga* where Fenton CJ stated that:²²⁹

I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of the foreshore of the Colony will be vested absolutely in the Native if they can prove certain acts of ownership.

In *Ninety Mile Beach* North J was clearly concerned that finding in favour of Māori, may lead to an owner of property adjoining the ocean having title to the high water mark, having no legal right of access to the sea.²³⁰ Likewise, Ellis J explicitly stated, "[t]he consequences of agreeing with the arguments adduced by the applicants would be highly detrimental to citizens as a whole, including Māori other than the applicants."²³¹ In effect, the property rights of owners other than the claimants in each case, were given more weight, than the property rights held by Māori. The fact that the rights of Māori were being ignored was a necessary effect of the greater public good. This public policy debate, while it has formed the backdrop to the case law, has now been propounded to the forefront of the foreshore and seabed debate as a result of the Court of Appeal's decision and the government's subsequent decision to legislate on the matter.

XVII GOVERNMENTS RESPONSE

At the time of writing the Marlborough Port Authority is the only party contemplating appealing the Court of Appeal's decision to the Privy Council. On 18 August 2003, however, the government released its proposal to resolve what it sees as an unsatisfactory situation for the Crown. It intends to pre-empt any efforts to

²²⁹ *Kauwaeranga Judgment* (1870) 4 Hauraki MB 236; reprinted in (1984) VUWLR 227, 244.

²³⁰ *In Re Ninety Mile Beach* [1963] NZLR 461, 467 (CA).

²³¹ *Ngati Apa*, above, para 32.

convert Māori customary title to the foreshore and seabed into fee simple. The crux of the proposal being that Māori may no longer pursue claims through the Māori Land Court, as permitted by the Court of Appeal decision. Rather the foreshore and seabed are to become “public domain” neither owned by the Crown nor by Māori.

Notably the foreshore and seabed issue impacts other major policy movements currently being undertaken by the government. The development of the Ocean’s Policy, the aquaculture reforms and the issue of accessing the New Zealand coastline, together with the foreshore and seabed issue amount to a mammoth project, which involve many stakeholders.

The general theme of the government’s proposal, which is evident throughout the document, is the subordination of Māori customary rights. This is illustrated by the continual reference to ‘customary interests’ rather than customary rights or customary title. Characterizing something as a ‘right’ tends to immunize it from challenge. To transgress a right is to commit a wrong.²³² Thus in defining something as a right, it is more or less removed from political challenge.²³³ The choice of the term ‘interest’ seems to indicate to the author that the government is seeking to avoid any notion that Maori may possess rights, which if transgressed, as the government’s proposal no doubt will, would be to commit a wrong. To classify what Maori hold as an interest therefore makes it politically easier to limit.

Carrying on the theme of subordination, the proposal begins by incorrectly defining Māori customary rights as “a way in which the law can protect, for indigenous people, their interests in and associations with particular places of historic, cultural or spiritual significance.”²³⁴ However the customary right itself is

²³² G Dinwoodie, W Hennessey and S Perlmutter *International Intellectual Property Law and Policy* (Lexis Nexis, 2001) 433.

²³³ Dinwoodie, above.

²³⁴ Rt Hon Helen Clark, Prime Minister *Foreshore and Seabed: Protecting Public Access and Customary Rights: Consultation Paper* (Wellington, 2003) 7 and 25.

not to be confused with the method by which those rights are recognised.²³⁵ Such a statement ignores the role that tikanga plays in defining customary rights and overlooks the test for Māori customary land as defined in the Te Ture Whenua Māori Act, as “[1]and that is held by Māori in accordance with Tikanga Māori...”

Secondly, the document states that the Māori Land Court system “was designed with only “dry land” in mind.”²³⁶ While the current Māori Land Court has undergone much reform since its first inception, this statement runs contrary to the early practice of the Native Land Court, as detailed previously, to grant titles to the foreshore. It also runs contrary to the position taken by the early colonial government by implicitly acknowledging that the Native Land Court did in fact have jurisdiction over this area. Such misleading statements are influential in persuading readers to form a particular view on the issue. This is particularly a concern given it is on the information presented in the government’s proposal that the public are asked to form their own view on the issues and make submissions the proposal.

What precisely the legislation will look like is not yet certain. The proposal itself lacks any real detail and as such it is difficult to give substantive comment on it. The government intends to incorporate what it sees as four key principles of access, regulation, protection and certainty. These will now be examined in turn.

A Principle of Access

The government considers that the foreshore and seabed should be accessible to all New Zealanders. There can no denying that accessing beaches is of fundamental importance as an integral part of the New Zealand way of life. However Māori have continually denied that they ever intended to deny access to beaches if title to land were to be confirmed in the Māori Land Court. Rather the customary

²³⁵ *Moana Jackson* "There are obligations there" A Consideration of Māori Responsibilities and Obligations in Regard to the Seabed and Foreshore <<http://www.arena.org.nz/sbmoana.htm>> (last accessed 1 October 2003).

principle of manaakitanga dictates against any blanket denial of access to either the foreshore or seabed.²³⁷ Relying on customary principles to maintain accessibility to the foreshore and seabed, however, is a leap of faith which the government and indeed many members of the public are clearly not prepared to take. Legislation for many is the only way to ensure the public's rights are maintained.

The government proposes to declare the foreshore and seabed to be "public domain", neither owned by Māori or the Crown. In doing so the government wishes to divorce concepts of ownership and title from the foreshore and seabed.²³⁸ Interestingly there is some irony in the fear of Māori possibly having the ability to sell their title to the foreshore and seabed, as it was the Native Land Court which was established to transform collective Māori interests into freehold title.²³⁹

B Principle of Regulation

Under this principle the Crown legitimately reiterates that it is responsible for regulating the use of the foreshore and the seabed, on behalf of all present and future generations of New Zealanders. However, there is no mention that Māori may have a role in developing regulation of the coastal area. Further, this principle runs the risk of demeaning the 'public domain' notion, as the government will effectively be in the position of the owner of the foreshore and seabed.²⁴⁰

²³⁶ Rt Hon Helen Clark, Prime Minister *Foreshore and Seabed: Protecting Public Access and Customary Rights: Consultation Paper* (Wellington, 2003) 10.

²³⁷ Moana Jackson *Statement By Ngati Kahungunu on the Government Proposals on the Foreshore and Seabed*. (September 12, 2003) <http://www.teope.co.nz/pdf/submissions/NgatiKahungunu_Omahu.PDF> (last accessed 21 September 2003).

²³⁸ Rt Hon Helen Clark, Prime Minister *Foreshore and Seabed: Protecting Public Access and Customary Rights: Consultation Paper* (Wellington, 2003) 16.

²³⁹ Jackson, above.

²⁴⁰ Jackson, above.

C *Principle of Protection*

The principal of protection entails the establishment of processes to enable the customary interests of whanau, hapu and iwi in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected.²⁴¹ Two options are identified to enable recognition and protection of customary interests.²⁴² The body chosen would identify and record customary interests that amounted to customary rights in the foreshore and seabed.²⁴³

According to this section of the proposal, customary rights are to be awarded to whanau, hapu or iwi; exercised collectively and in support of customary activities of the whanau, hapu or iwi; and not able to be alienated or otherwise used for commercial purposes, or in any way used for pecuniary gain or trade.²⁴⁴ The exclusion of the commercial element, accords with judicial tendency to read down customary rights.²⁴⁵ More significantly, this approach prejudices the nature and extent of customary rights.²⁴⁶ The nature of the customary right will, rather, depend on the customary law of the particular group.

D *Principle of Certainty*

The final principle suggests that there should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions. Clearly certainty is important for all stakeholders involved. However

²⁴¹ Rt Hon Helen Clark, Prime Minister *Foreshore and Seabed: Protecting Public Access and Customary Rights: Consultation Paper* (Wellington, 2003), 27.

²⁴² Rt Hon Helen Clark, Prime Minister *Foreshore and Seabed: Protecting Public Access and Customary Rights: Consultation Paper* (Wellington, 2003) 27.

²⁴³ Rt Hon Helen Clark, Prime Minister *Foreshore and Seabed: Protecting Public Access and Customary Rights: Consultation Paper* (Wellington, 2003) 27.

²⁴⁴ Rt Hon Helen Clark, Prime Minister *Foreshore and Seabed: Protecting Public Access and Customary Rights: Consultation Paper* (Wellington, 2003) 30.

²⁴⁵ Andrew Erueti "Native Title Claims to Sea Country" [2001] NZLJ 415, 417.

²⁴⁶ Te Ope Mana a Tai *Submissions on the Crown's Proposal to Protect Public Access and Customary Rights* (October 2003) < <http://www.teope.co.nz/pdf/submissions/TeOpeOct03.PDF> > (last accessed 7 October 2003).

legislation should not be rushed to achieve this principle. Once again the rights of Maori should not necessarily yield in order to achieve this principle.

E Summary

The response of the Crown to the Court of Appeal's decision has been on two levels, political and legal. While it is a basic rule of New Zealand constitutional law that Parliament is supreme when acting in its legislative capacity²⁴⁷ and could in theory pass any law it saw fit, the Crown's response is measured by the current political climate and by the government's commitment to the Treaty of Waitangi and to the settlement of claims process. This commitment, however, is being strongly tested by the foreshore and seabed issue.

XVIII TREATY BREACHES

The ensuing consultation process has not been as fruitful as the government would have liked. Rather, Māori have been strong in opposition, with all hui unanimously rejecting the government's proposals.²⁴⁸ It is clear that the proposal and the procedure employed have generated renewed distrust and anger towards the government in the scale similar to that of the fiscal envelope fiasco. The bitter point for Māori is that the government's proposal clearly breaches Article II of the Treaty and as such is likely to create modern Treaty grievances. This has led to the lodging claims with the Waitangi Tribunal. In response, the government has indicated that it will not comment further on the debate until after the Tribunal has issued its findings on whether the proposal breaches the Treaty of Waitangi.

The Tribunal has general jurisdiction to inquire into claims made by Māori that they are or are likely to be prejudicially affected by an act or omission of the Crown

²⁴⁷ PG McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 12.

and such acts or omissions are inconsistent with the principles of the Treaty of Waitangi.²⁴⁹ The Waitangi Tribunal has confirmed seven questions that it will inquire into.²⁵⁰ One issue is whether the Crown's proposed policy abrogates or otherwise interferes with Māori customary title or other interests in the foreshore and seabed and whether the proposed policy abrogates the means of investigating the title or interest and giving it legal recognition and protection.²⁵¹

The following is an account of what the author believes to be the grounds on which the government's policy breaches the principles of the Treaty of Waitangi and interferes with Māori customary title or interests. The government's proposal may breach the Treaty on two fronts. The first breach may lie in the procedure employed by the government, while the second and more certain rests in the proposal itself.

A Procedural Breach

It is common ground that in regards to matters particularly significant to Māori, as the foreshore and seabed undoubtedly is, the Crown has a duty to act reasonably,

²⁴⁸ Te Ope Mana a Tai *Submissions on the Crown's Proposal to Protect Public Access and Customary Rights* (October 2003) < <http://www.teope.co.nz/pdf/submissions/TeOpeOct03.PDF> > (last accessed 7 October 2003).

²⁴⁹ Under section 6 of the Treaty of Waitangi Act 1975:

"(1) Where any Māori claims that he or she, or any group of Māoris of which he or she is a member, is or is likely to be prejudicially affected

(a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or (b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or

(c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or (d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown, and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section."

²⁵⁰ Waitangi Tribunal *Memorandum and Directions of Judge C M Wainwright: Wai 1071 #2.131*. See Appendix.

²⁵¹ Waitangi Tribunal, above, 7.

to make educated decisions and to contemplate the future needs of Māori.²⁵² The government issued its proposal August 18 2003 and required all submissions on the proposal to be in by October 3 2003. In that timeframe the government also undertook a series of consultation hui around New Zealand in an attempt to fulfil its duty of consultation. However, given the complexity of legal issues involved, the timeframe for submissions set out by the government is arguably inadequate and unreasonable for Māori to undertake full and considered advice on the issues. While the government seeks to resolve the issue expediently as possible, this should not be at the expense of fair opportunity of Māori, as Treaty partners, to obtain legal advice and to consider their response to the government's proposal. As such, the procedure cannot be regarded as active protection of Māori interests.²⁵³

B Substantive Breach

1 Principle of Partnership

One of the fundamental principles of the Treaty is the notion of partnership between the Crown and Māori. In the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*²⁵⁴, the Tribunal found that the kawanatanga of the Crown must not be exercised in a way which reduces the rangatiratanga of iwi, as guaranteed in Article II, to exercise control over their resources.²⁵⁵ The Tribunal describes rangatiratanga as 'the exercise by Māori of autonomy, authority, self-government, or self-regulation over their tribal domain...it encapsulates their right to the development of their resources.'²⁵⁶ It was found in the *Ahu Moana Report* that

²⁵² Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report: Wai 953* (Legislation Direct, Wellington, 2002), 70.

²⁵³ Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report: Wai 953* (Legislation Direct, Wellington, 2002), 70.

²⁵⁴ Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Government Printing Office, 1989).

²⁵⁵ Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Government Printing Office, 1989).

²⁵⁶ Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report: Wai 953* (Legislation Direct, Wellington, 2002), 64.

the claimants traditionally exercised authority over the coastal marine area and, significantly, 'it is likely that other Māori will be able to establish similar rights.'²⁵⁷

On the face of the government's proposal, it is an undoubted breach of Article II of the Treaty, in which Māori are guaranteed exclusive and undisturbed possession of their lands and taonga. Māori customary title will be abrogated by the proposal, in that it will be restricted by the terms set out in the protection principle, rather than determined by tikanga Māori. Even if Māori could prove that they exercised sufficient control over the foreshore and seabed to amount to a customary title, under the proposal no such title could be awarded. Rather merely interests could be recognised and even then these are limited by inalienability and non-commerciality. As such the exercise of kawanatanga by the government reduces the ability of Māori to exercise autonomy and self-regulation over their domain.

Moreover, in the *Report on the Muriwhenua Fishing Claim* it was stated that the right to develop and progress in all areas is an inherent right of all people.²⁵⁸

C[ommercial development of resources does not depend upon proof of a pre-Treaty commercial expertise. A treaty that denied a development right to Māori would not have been signed...It is the inherent right of all people to develop and progress in all areas. No one has seriously suggested that Māori could not develop their lands and sell the produce of their industry.

According to the principle of protection, customary rights are to be awarded collectively and not able to be alienated or otherwise used for commercial purposes. This term runs in direct contrast to the development right arising from the Treaty as identified in the *Report on the Muriwhenua Fishing Claim*. It also ignores previous

²⁵⁷ Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report: Wai 953* (Legislation Direct, Wellington, 2002), 64.

²⁵⁸ Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Government Printing Office, 1989) section 11.6.6.

practice of the government which recognises the right to development, see the 1992 Fisheries Settlement.²⁵⁹

2 Active Protection

Recently in the *Ahu Moana Report*, the Waitangi Tribunal reviewed the conduct of the government in regards to aquaculture reform. The Tribunal found that the duty of active protection applied to Māori interests in aquaculture and marine farming.

The duty of actively protect requires that, to the extent that Māori interests in aquaculture and marine farming have been or will be prejudicially affected by Crown acts, practices or omissions, the Crown must correct that imbalance and remove the prejudice. This duty requires the Crown to make informed decisions, but, because the Crown has not fully investigated the nature and extent of the Māori interest in marine farming, it cannot be said with confidence that it has discharged its duty to actively protect that interest.²⁶⁰

The duty is further described as 'onerous' that in the context of the aquaculture report was not met without having a mechanism to fully investigate the Māori interest and also by not consulting with Māori.²⁶¹ However the Tribunal went on to state that there is nothing inherently wrong with the reforms proceeding without the claims being settled and rights not adequately defined,²⁶² as long as potential claims

²⁵⁹ Notably the Tribunal has no jurisdiction to inquire into commercial fisheries, or the Deed of Settlement 1992. Section 6(7) reads:

"Notwithstanding anything in this Act or any other Act or rule of law, on and from the commencement of this subsection the Tribunal shall not have jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of

(a) Commercial fishing or commercial fisheries (within the meaning of the Fisheries Act 1983); or (b) The Deed of Settlement between the Crown and Māori dated the 23rd day of September 1992; or (c) Any enactment, to the extent that it relates to such commercial fishing or commercial fisheries."

²⁶⁰ Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report: Wai 953* (Legislation Direct, Wellington, 2002), 67.

²⁶¹ Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report: Wai 953* (Legislation Direct, Wellington, 2002), 68.

²⁶² Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report: Wai 953* (Legislation Direct, Wellington, 2002), 76.

are "provided for in a suitable manner, the Treaty obligation is discharged."²⁶³ One of the questions that the Waitangi Tribunal will look into is on what basis can the Crown justifiably abrogate Māori interests "without making a thorough assessment of the nature and extent of that title or interest."²⁶⁴

On the basis of the *Ahu Moana Report* the question becomes whether the proposed provision to investigate Māori interests provides for future claims 'in a suitable manner'. While the government's proposal indicates that Māori can have their customary interests ascertained possibly in the Māori Land Court, it is difficult to see how the proposal actively protects Māori interests when the effect of it is to deny Māori from having their customary title recognised and enforced in the Māori Land Court. However this must be weighed against legitimate interests of government to legislate for the good of the public.

C Summary

The proposal of the government as outline in the consultation document leaves something to be desired. In attempting to appease the general public, the proposal also subordinates the genuine rights of Māori and runs the risk of creating new Treaty grievances. The findings of the Waitangi Tribunal, while recommendatory only, will be awaited with interest. This is particularly so as the Tribunal "is uniquely placed to add value to the legal and political debate about the foreshore and seabed."²⁶⁵

XIX CONCLUSION

Regardless of the final shape of the government's policy, the Court of Appeal's *Ngati Apa* decision will remain a landmark case in New Zealand. The ridding of two

²⁶³ Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report: Wai 953* (Legislation Direct, Wellington, 2002), 76.

²⁶⁴ Waitangi Tribunal *Memorandum and Directions of Judge C M Wainwright: Wai 1071* #2.131 question (5)(a) 7.

discredited authorities, *In Re Ninety Mile Beach* and the source of many judicial failings, *Wi Parata*, is itself a success for the New Zealand legal system. Likewise Court's authoritative statements on aboriginal title. While this may be of little consolation to Māori now, it at least

It is debatable whether the government's proposal, if enacted, would be constitutional. In effect the proposal denies, where proven to exist, Māori from enforcing their customary title as against the Crown. There is little doubt that such a proposal breaches the Treaty of Waitangi. The proposal as it stands will deny the ability of Māori to enforce property rights. In the Crown's view this is necessary in the public interest. However this reasoning confuses the "public (non-Māori) interest" with the right of the "Māori public" and constrains the ability of Māori to exercise the rights and authority contained in the Treaty of Waitangi.²⁶⁶

This nexus between the property rights of Māori and the 'rights' of ordinary New Zealanders to access the foreshore and seabed is clearly a difficult contest to resolve. While the views at present appear to be polarized, some compromise is required. Compromise does not mean that one set of rights yield completely to the other, as appears to be the case from the government's proposal. Rather genuine dialogue must be entered into on the basis of partnership and good faith. Only then will a satisfactory solution be reached.

In many respects, the narrow foreshore and seabed issue forms a part of the wider debate over the constitutional relationship between Maori and the Crown. What is certain is that the foreshore and seabed issue provides the nation with an opportunity to forge new paths in personal and constitutional relations. The question is whether lessons can be learnt from the past, to realise this opportunity. The challenge has been laid.

²⁶⁵ Waitangi Tribunal *Memorandum and Directions of Judge C M Wainwright: Wai 1071* #2.131, 3.

²⁶⁶ Moana Jackson "There are obligations there" A Consideration of Māori Responsibilities and Obligations in Regard to the Seabed and Foreshore <<http://www.arena.org.nz/sbmoana.htm>> (last accessed 1 October 2003).

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Appendix

Waitangi Tribunal *Memorandum and Directions of Judge C M Wainwright: Wai 1071 #2.131.*

Confirmed Issues set by the Waitangi Tribunal :

- (1) Generally, and not in relation to any particular group, what are the Maori interests in the foreshore and seabed?
- (2) How might those interests be recognised in a Maori customary title to the foreshore and seabed? Consider:
 - a. In what circumstances might the Maori customary title equate to a freehold title?
 - b. What kinds of evidence would be required to support recognition of customary title?
 - c. What title, shore of freehold title, might be recognised, and how would such recognition be effected?
 - d. Does the Sealord Deal (and implementing legislation) preclude reliance on use of the fisheries resources as a basis for demonstrating customary title?
- (3) How are those interests impact upon by the existing
 - a. Environmental management regime;
 - b. Crown minerals management regime;
 - c. Aquaculture and marine farming regime;
 - d. Regime for the management of commercial and recreational, and customary fishing;
 - e. Private property rights;
 - f. Relevant international instruments?
- (4) Do the Crown's proposed policies comprise an abrogation of other interference with Maori customary title or other interests in the foreshore and seabed, and/or the means for investigating that title/interest and giving it legal recognition and protection?
- (5) If the answer to (4) is "yes", on what basis (at law or under the Treaty_ is the Crown justified in that abrogation or interference without:
 - a. Making a thorough assessment of the nature and extent of that title or interest; and/or
 - b. Providing a regime for compensation?
- (6) How are Maori prejudiced, or likely to be prejudiced, by the Crown's proposed policy?
- (7) What options are available for mitigating and/or averting that prejudice.

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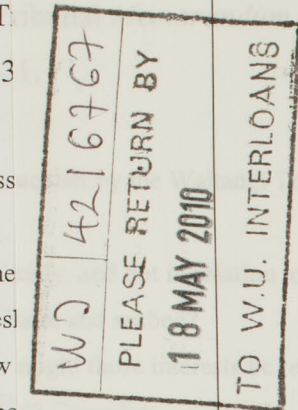
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- a. environmental management regime;
- b. Crown minerals management regime;
- c. Aquaculture and marine farming regime;
- d. Regime for the management of commercial and recreational, and customary fishing;
- e. Private property rights;
- f. Relevant international instruments?

(4) Do the Crown's proposed policies comprise an abrogation of other interference with Maori customary title or other interests in the foreshore and seabed, and/or the means for investigating that title/interest and giving it legal recognition and protection?

(5) If the answer to (4) is "yes", on what basis (at law or under the Treaty_ is the Crown justified in that abrogation or interference without:

- a. Making a thorough assessment of the nature and extent of that title or interest; and/or
- b. Providing a regime for compensation?

(6) How are Maori prejudiced, or likely to be prejudiced, by the Crown's proposed policy?

(7) What options are available for mitigating and/or averting that prejudice.



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