



#### **NIN TOMAS**

Tena koutou katoa. Ko Karirikura te Moana, Ko Whangatauatia te Maunga, ko Tumoana te Tangata, ko te Rarawa te Iwi. Both my parents are from Te Rarawa and Te Aupouri. Through my father I am also Ngati Kahu, Taranaki and Croatian. From my mother I am Ngapuhi, Te Hikutu and Ngati Korokoro. I teach and research in a variety of areas ranging from Legal Method to Maori Jurisprudence.

#### **KERENSA JOHNSTON**

Tena koutou katoa, tenei te mihi ki a koutou katoa mai te uri o Taranaki. I am of Maori (Ngaruahine Rangi, Taranaki, Te Ati Awa) and Scottish descent. I have been a member of the Faculty of Law, University of Auckland, since 2002. I teach and research in the areas of Te Tiriti o Waitangi, Maori customary law as it applies to land and the environment, and international human rights.

This article is written at a time of great unrest within New Zealand society. It is both a tribute to those who have gone before us, and a record of the ongoing struggle to gain greater legal protection for Maori interests under New Zealand law.

Since the signing of the Treaty of Waitangi/Te Tiriti o Waitangi in 1840, Maori have shown a singular determination to maintain and develop tikanga Maori, even in the face of strong opposition from the general public, judiciary and government.

The case discussed in this article, *Ngati Apa*, deals with Maori customary rights to the foreshore and seabed of Aotearoa/New Zealand. It represents another attempt by Maori to have Maori custom law and rights protected by Te Tiriti/the Treaty recognised by the New Zealand courts and public.

**ASK THAT TANIWHA<sup>ψ</sup>  
WHO OWNS THE FORESHORE AND SEABED OF  
AOTEAROA**

NIN TOMAS AND KERENSA JOHNSTON\*

*What does that Taniwha, lying beneath the surface of her watery world, think as her obsidian gaze fixes on her fishy cousin, hauled up unceremoniously by Maui and carved up by his greedy brothers? Does she see us in all our human glory, strutting and fretting our rights and obligations at each other, and marvel at our ingenuity and perseverance? Or does she see us as a lice infestation, scrambling over each other to get the last fleshy morsels on the carcass of her mutilated relation - and weep.*

Our Taniwha may well wonder, “What has caused the crabs in the armpit of my relation to become so agitated?” There are, after all, set protocols to follow. Under Maori custom law, coastal Maori have always asserted their “tino rangatiratanga” (to use a Tiriti o Waitangi term) and their “mana rangatira” (to use a pre-Tiriti northern term) over the coast and surrounding seas. All around te Ika a Maui (the fish of Maui - North Island), areas of sea have been jealously guarded mai raano (since memory), with pou (sign-posts) being erected and rahui (restrictions) being set up to signify group territoriality. In pre-European times, wars were fought between rival groups to protect rights to the sea and the foreshore and to oust interlopers. Taniwha often acted as guardians of those rights. Knowledge of their presence throughout the area and their association with specific human whakapapa (ancestral lines), identified rights to the area as being vested in particular groups. These particular tikanga (norms/rules) were an accepted part of Maori custom law. Local variation notwithstanding, groups from other areas, including those on te Waka a Maui (the canoe of Maui – South Island) no doubt acted in a similar fashion.

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<sup>ψ</sup> Taniwha are cognitive entities whose existence marks an event, fulfils a purpose, or protects a natural resource or group of Maori people.

With colonisation, the outboard motor has replaced the hoe (paddle) in propelling a speedy get-away, and fines imposed by the state have replaced the death penalty when trespassers are caught. But the nature of the sea and foreshore as a taonga (prized possession) and battles over entitlements to the booty held within the domain of Tangaroa (god of the sea), will always remain subject to the underlying protocols of Maori custom law.

## PART I – INTRODUCTION

In Aotearoa/New Zealand two distinct ideological systems underpin separate and often conflicting notions of “law” within the same territory.<sup>1</sup> The first in time, having operated mai raano, is “Maori”. As a self-contained worldview it has its own unique principles and organisational patterns. Within Maori society the transmission of important values is often conveyed through the use of metaphor in which layers of associated meanings attach to single terms. For example, Taniwha are often portrayed by kaumatua (elders) during hearings, as “spiritual beings” or “ghost-like” creatures that guard particular resources and people. As a jural construct of Maori custom law, however, the term “Taniwha” is a symbolic reference point for the principles and practices that operate within a community to regulate individual behaviour.<sup>2</sup> At yet another level, the ongoing presence and acknowledgment of Taniwha provides evidence of the inter-generational

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<sup>1</sup> The dual terms “Maori” and “Pakeha” are used throughout this paper to refer to the two dominant and competing ideological perspectives present in Aotearoa/New Zealand. The terms are used to differentiate worldviews rather than racial groups.

<sup>2</sup> The evidence heard by the Waitangi Tribunal in the Ngawha Geothermal Claim illustrates this clearly. See Waitangi Tribunal, *Ngawha Geothermal Claim—WAI 304*, Brooker and Friend, Wellington, 1994.

continuity of territorial rights being linked to iwi whakapapa.<sup>3</sup> It represents the power, authority and unity of the people, past and present.

The other, dominant ideological system operating in Aotearoa/New Zealand belongs to “Pakeha”, the descendants of Europeans, mainly British, who settled in Aotearoa in the 19<sup>th</sup> Century. Pakeha assertion of control over the land and people of Aotearoa was facilitated by the signing of the Treaty of Waitangi/te Tiriti o Waitangi in 1840 (the Treaty/te Tiriti).<sup>4</sup> The establishment of centralised political and legal governing institutions and the implementation of aggressive immigration policies followed after 1840. When Maori objected to being dispossessed of their lands and formal authority in the mid 1800s, Pakeha control of political and legal matters was further consolidated through warfare and confiscatory laws. Under the Tohunga Suppression Act of 1907, the customary practices associated with establishing Taniwha as modern protectors of resources was outlawed.

Although inter-racial marriages are now commonplace in Aotearoa/New Zealand, ideological differences between Maori and Pakeha remain firmly entrenched. Attempts at reconciling these differences by incorporating Maori principles such as “kaitiakitanga” (guardianship) and “waahi tapu” (sacred sites) into the framework of New Zealand legislation have produced mixed reactions.<sup>5</sup> While some view such inclusions as positive recognition of Maori custom law, there is also resentment at what many Pakeha perceive to be “unwarranted special treatment” for Maori.

A bitter new site of struggle for these ideological differences has arisen in the foreshore and seabed debate following the decision of the Court of

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<sup>3</sup> “Whakapapa” is often narrowly construed as “genealogy”. In this sense it is more akin to the idea of a lifeline anchoring a people to a place.

<sup>4</sup> See Appendix 1. The Treaty of Waitangi/te Tiriti o Waitangi was signed by Maori representatives and representatives of the British Crown in 1840. There are two texts of the Treaty. The Maori text authorises the Crown to fulfil functions of governorship, preserve law and order between Maori and the settler population and affirm and protect Maori authority and control of land, resources and “taonga katoa” (all things precious). The English text vests absolute sovereignty in the Crown and protects Maori property rights. The official English text was signed in March/April 1840, at Manukau and Waikato Heads by Crown representatives and Maori representatives. Only 39 of over 500 Maori signatories signed the official English text. The debate preceding the various signings was conducted in the Maori language. See C Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin, 1987, 259.

<sup>5</sup> See sections 6, 7 and 8 of the Resource Management Act 1991.

Appeal in *Ngati Apa v Attorney General (Ngati Apa)*<sup>6</sup> in June 2003. In *Ngati Apa* the Court unanimously held that the Maori Land Court had jurisdiction to investigate whether Maori customary title to the foreshore and seabed of the Marlborough Sounds existed. No direction was given as to the likely or preferred outcome, or possible incidents of title.

Most Maori greeted *Ngati Apa* with a relieved sigh of “at last”. Since the late 1800s, every case that Maori have brought before the New Zealand courts asserting Maori property rights has been with the sure knowledge that the reasoning in *Wi Parata v Bishop of Wellington (Wi Parata)*<sup>7</sup> that the Treaty/te Tiriti was a legal nullity and that Maori had no enforceable pre-existing property rights, was morally and legally wrong. In their view, *Ngati Apa* represented an unusual alignment of law, morality, justice and equality, albeit over 100 years late.

In contrast, the general and immediate Pakeha reaction, repeatedly portrayed in the national media as representative of “New Zealanders”, was vigorous opposition to the Court’s finding. Many saw their “right” of recreational access to the foreshore as under threat. A widespread sense of betrayal by the Court of Appeal accompanied the fear of imminent loss of a “public” (Pakeha) treasure to “private” (Maori) ownership.

The public furore that has ensued since *Ngati Apa* reveals that, as the majority culture, many Pakeha believe that their interests will be best protected by the Crown vesting ownership and control of the foreshore and seabed solely in itself. Interestingly, the principle of “equality” is often invoked to justify removing existing inchoate Maori group rights that Pakeha individuals cannot possess. Such a move has the advantage of promoting assimilation by assisting the absorption of Maori, *as individuals*, into the main frame of “all New Zealanders”.

Maori, on the other hand, view this type of reasoning as abhorrent and unjust. Having patiently followed the processes set out under Pakeha law for over one hundred years, the idea of having access to ascertaining one’s property rights unilaterally extinguished by legislation *because* Pakeha fear Maori may be successful under their own, Pakeha constructed laws, is untenable.

The strong Pakeha reaction to *Ngati Apa* has laid bare a deep anti-Maori sentiment amongst Pakeha New Zealanders. Subsequent events have

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<sup>6</sup> *Ngati Apa v AG*, 3 [2003] NZLR 643.

<sup>7</sup> *Wi Parata v Bishop of Wellington* (1877) 3NZ Jur (NS) SC 72.

also revealed Maori vulnerability, as a minority population, to the political will of the prevailing Pakeha majority.

This article highlights some of the fundamental social, legal and political tensions that the *Ngati Apa* decision has unearthed within New Zealand. Although these tensions are focused around the customary ownership of foreshore and seabed, underneath lies a deeper concern about the constitutional relationship between Maori on one hand, and the Crown and Courts as Pakeha dominated systems of governance, on the other hand. In this article, we discuss the development of that relationship from the perspective of competing Maori and Pakeha ideologies.

## **PART II – MAORI CUSTOMARY CLAIMS TO THE SEA AND FORESHORE PRIOR TO “NGATI APA”**

The Maori claim to sea territory has not been constrained by the limited jurisdiction of the New Zealand courts. Evidence of foreshore and seabed “ownership” under Maori custom law has always extended into and included the surrounding seas. Several cases heard by the Maori Land Court illustrate this:

### ***(a) Maori Customary Claims to Te Moana Nui A Kiwa***

The *Te Moana Nui A Kiwa* Hearing (*Tai Tokerau* case) demonstrates the extent and nature of Maori claims to the sea. In 1955, eight members of the Taumata Kaumatua o Ngapuhi (Speaking Elders for Ngapuhi) applied to the Maori Land Court for appointment as Trustees of Te Moana Nui A Kiwa (the great ocean of Kiwa – the Pacific).<sup>8</sup> The applicants were Tamaiti Peehikura, Hohepa Heperi, Rawari Anihana, Toki Pangari, Te Awe Peehikura, Paua Witehira, Hori Hemara and Tuhi Maihi.

Although the hearing was only partially recorded and the transcript is difficult to decipher in places, it provides valuable guidance as to what constitutes Maori custom law, in Te Tai Tokerau, with respect to the sea.

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<sup>8</sup> *Te Moana Nui A Kiwa Hearing (Tai Tokerau case) 22/3/55*, Maori Land Court, NMB 1955, 306.

In his address to the Court, Tuhi Maihi, as the main spokesperson, clarified that the area being claimed was "... the ocean around New Zealand ..." which included the routes traversed across Te Moana nui a Kiwa by Maori travelling back and forth between Aotearoa and Hawaiki.<sup>9</sup>

The kaumatua stated that the water surrounding New Zealand should be held in trust for all Maori, because their ancient canoes had crossed and re-crossed the Pacific Ocean long before Europeans discovered Moana (the ocean). They had a duty to their ancient tupuna (ancestors), Tangaroa, Maui, Kupe and Nukutawhiti, to ask the Court to recognise their interests in the ocean, as a mark of respect to Moana's wisdom "... in making this part of the world so extensive that New Zealand could be fished from the sea far away from lands involved in troublesome conditions".<sup>10</sup>

Relying on tikanga (customary principles/practices) such as pou (symbolic and physical markers), the kaumatua provided evidence of "Tika Mana Rua" (rights derived from the gods or a higher authority) to explain the significance of Pouahi (pillars of fire) and Poukapua (pillars of cloud).<sup>11</sup> Although these references may appear obscure to the modern mind, they were considered by these kaumatua to be permanent indicators of the extent of Maori rights and responsibilities over the sea under Maori custom law.

The Maori Land Court dismissed the *Tai Tokerau* case because it lacked jurisdiction over the geographical area claimed. The record clearly illustrates, however, that the kaumatua who took the case appreciated its significance for Maori in the future.<sup>12</sup>

The reason we apply for our rights to be determined [is] so that it can go down in record so that the people would know our rights under the rights of our ancestors spoken above.

The *Tai Tokerau* case is significant for a number of reasons. First, it reinforces the importance of Maori territorial possession of the sea for at

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<sup>9</sup> Ibid at 306.

<sup>10</sup> Ibid at 308. There is a dual reference here. The first is to the fishing up of the North Island from the sea by the Maori ancestor Maui, ie., the emergence of Aotearoa from beneath the sea. The second reference is to the discovery of Aotearoa by the tupuna (ancestors) of the speakers.

<sup>11</sup> Ibid at 306-307.

<sup>12</sup> Ibid at 308.

least a thousand years. Second, under custom law, Maori were exerting their authority over the sea to a much greater extent than that recognised or understood by the English common law, at a time when rights to the ocean and seabed had yet to enter the mainframe of established western legal thinking. Third, the case illustrates that the Maori obligation to protect nga taonga tuku iho (prized possessions passed down), that is commonly associated with land also applies to the sea. The importance of recognising and protecting these tupuna rights is emphasised in the case.<sup>13</sup>

We apply to the Court in respecting what we have said so that our ancestors Tangaroa, Maui, Kupe, Nukutawhiti will take note that we their descendants have not forgotten their wisdom in providing us with Te Moana Nui a Kiwa.

### ***(b) Maori customary claims to the Foreshore***

#### ***(i) Kauwaeranga***

Almost fifty years earlier, in *Kauwaeranga* (1884),<sup>14</sup> Chief Judge Fenton had held that Maori ownership of the foreshore was a matter of fact, reliant only on sufficient proof of ongoing usage in accordance with custom. Although he was sure that Maori could easily establish that proof, he was uncomfortable with the negative impact this could have on the competing interests of the new settler group.<sup>15</sup>

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 in the natives, if they can prove certain acts of ownership, especially when I consider how readily they may prove such, and how impossible it is to contradict them if they only agree amongst themselves.

The “evil consequences” he feared can be summed up as being that full recognition of Maori customary rights in accordance with the common law would produce private, fee simple ownership, including the ability to exclude others. By invoking public policy concerns, he was able to avoid recognising the type of broad authority that *Tai Tokerau* envisages

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<sup>13</sup> Ibid.

<sup>14</sup> *Kauwaeranga* (1884) reported in A Frame, “Kauwaeranga Judgment” (1994) 14 VUWLR 227.

<sup>15</sup> Ibid at 244.



in favour of a more limited form of legal ownership. This ownership can best be described as a type of easement over Crown land, which enabled members of the local hapu to gather seafood inside the claimed area:<sup>16</sup>

It appears to me that there can be no failure of justice if the natives have secured to them 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; and the Court so determines, declining to make an order for the absolute propriety of the soil, at least below the surface.

On any view, Chief Judge Fenton's interpretation that the granting of "pipi-picking" rights would satisfy "the full, exclusive and undisturbed possession of all the rights and privileges" Maori exercised, is extremely narrow. Despite his fulsome discussion of the law earlier in the case which highlighted the strength of the Maori claim, his final decision was limited only to specifically named practices.

#### (ii) *In Re the Ninety-Mile Beach*

Some forty-seven years after *Kauwaeranga, In Re Ninety-Mile Beach*<sup>17</sup> came before the Maori Land Court as an application for Maori customary ownership of the foreshore. After a full hearing, Chief Judge Morison determined that the two local iwi of Te Aupouri and Te Rarawa had adduced sufficient evidence to conclusively prove their ownership:<sup>18</sup>

These two tribes respectively had complete dominion over the dry land within their territories, over this foreshore, and over such part of the area as they could effectively control. It is well known that the Maoris had their fishing grounds at sea and that these were jealously guarded against intrusion by outsiders.

As a matter of jurisprudence the ownership of territory was not restricted to what is termed the civilized world; the other races of the world also owned their territories.

The Maori Tribes must be regarded as states capable of owning territory just so much as any other peoples whether civilized or not: The Court is of the opinion that these tribes were the

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<sup>16</sup> Ibid at 245.

<sup>17</sup> *In Re Ninety-Mile Beach* [1963] NZLR 461.

<sup>18</sup> *Wharo One Roa A Tohe (90 Mile Beach) Investigation of Title*, 15/11/57. Maori Land Court, Kaitaia, NMB 1957,126-128. See Appendix 2.

owners of the territories over which they were able to exercise exclusive dominion or control. The two parts of this land were immediately before the Treaty of Waitangi within the territories over which Te Aupouri and Te Rarawa respectively exercised exclusive dominion and control and the Court therefore determines that they were owned and occupied by these two tribes respectively according to their customs and usages.

In reaching this decision, Judge Morison reinforced Chief Judge Fenton's statements in *Kauwaeranga* regarding the ease with which Maori could prove ownership of the foreshore.

Unfortunately for the Maori owners, the matter was moved to the Supreme Court by way of case stated on a question of law. The question before the court was whether customary ownership had survived the advent of the English common law in New Zealand. In the higher courts, both the Supreme Court and Court of Appeal held that Maori ownership of the foreshore had been extinguished through application of the English common law. Despite mounting a Tai Tokerau wide appeal, the Maori claimants were unable to raise the funds required to appeal the case to the Privy Council. (See Appendix 3)

Forty-one years later, with the overruling of the higher Court decisions in *Re Ninety-Mile Beach* by *Ngati Apa*, the earlier Maori Land Court decision once again emerges intact as the leading judicial pronouncement on Maori foreshore ownership.

### ***(c) Maori customary ownership of the Cavally and Aotea Islands***

Two recent Maori Land Court investigations into Maori customary land have focused on the islands and rocky outcrops located in the coastal sea area of Tai Tokerau. In 1994, Judge Spencer declared the twenty-five islands off the coast of Takou that comprise the Cavally group to be Maori customary land.<sup>19</sup> Following that, in 1998 the outlying islands and rocky outcrops of Aotea (Great Barrier Island) were also declared to

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<sup>19</sup> *Application by Dover Samuels (Cavally)*, 21/11/94, Maori Land Court, Matauri Bay, 22 KH, 198-208. Section 131(1) of Te Ture Whenua Maori Act 1993 provides jurisdiction for the Maori Land Court "to determine and declare ... the particular status of any parcel of land".

be customary Maori land.<sup>20</sup> In accordance with Maori custom law, the cases did not distinguish between land above and below the waterline.

In the *Cavally* hearing, the Applicant did not seek an order vesting ownership. He was more concerned with establishing his hapu right to "... speak for the Islands" on issues that affected them. In his evidence, Dover Samuels (the applicant), highlighted the importance of the coastal fisheries as an integral part of the tikanga attaching to the status of the land.<sup>21</sup>

Tikanga includes the fisheries; to take away the fisheries from the tikanga is to disembowel the tikanga. The land is the matenga (head) and the fishery is the tinana (body). They are inseparable. The reason why those islands were occupied was for the sustenance the surrounding sea shores provided. We seek recognition of that tikanga. We are not contesting the Crown's ownership of the seabed at this time – that is a matter for another jurisdiction.

In declaring the status of the land to be "Maori customary land" under s131(1) of Te Ture Whenua Maori Act 1993, the Court stated:<sup>22</sup>

The evidence is clear and not contested. These islands, by their use and tradition, are customary land which have not only been used as a place for gathering mutton birds, but fishing, habitation and all the traditional uses attaching to their occupation.

The unease by some arises as to what the Maori customary land status includes. It is not a question of any claim but rather what is inherently Maori customary land. It is not a question of rights that attach. It is a question whether the fishery is intrinsic, within tikanga Maori with the customary status. There is no separate claim or appendage, but rather an inseparable belonging to that customary status. The Court is of the view that the land is Maori customary land and that all the taonga tuku iho within tikanga Maori of land of that status is inherent to these 25 islands.

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<sup>20</sup> *Application by John Di Silva (Aotea Decision)*. 23/2/98, Maori Land Court, Taitokerau District.

<sup>21</sup> *Supra* n19 at 200.

<sup>22</sup> *Ibid* at 206-207.

In this case the Maori Land Court did not make an order vesting ownership of the islands as they had already been set aside as a Maori Reservation in 1948. It added the four additional hapu of Ngati Rehia ki Takou, Ngati Whakaeke ki Takou, Ngati Torehina ki Takou and Ngati Kaitangata ki Takou to the list of trustees set up for the islands at the earlier hearing. The significance of this is that it identifies, without vesting specific rights, the local hapu groups who are responsible for matters affecting the islands. Thus, it recognises the unified territorial power and authority of the named groups within Maoridom.

In the *Aotea* decision, the Maori Land Court declared the outlying islands and rocky outcrops surrounding Great Barrier Island to be “Maori customary land”. The Court issued an order vesting ownership in accordance with Maori custom law, in:<sup>23</sup>

Ngati Rehua, to hold the same as kaitiaki for themselves and, in accordance with the tikanga of whanaungatanga, for Ngati Wai ki Aotea and Marutuahu ki Aotea.

Little fanfare or public outcry followed either the *Cavally* or *Aotea* decisions. This may have been because the size, remoteness and lack of development of the islands and surrounding sea meant there were few other interested parties. In neither case was any attempt made to define the incidents of Maori customary ownership in accordance with English common law concepts of property. That remains a matter for negotiation between the relevant groups as the need arises in the future.

All the above cases show that the finding of the Court of Appeal in *Ngati Apa* that the Maori Land Court has jurisdiction to hear a claim to “Maori customary ownership” is in line with the established practice of the Maori Land Court when applying Te Ture Whenua Maori Act 1993 and its predecessors.

It is noteworthy that the Court avoided using the term “ownership” in both island cases. This is undoubtedly because the jurisdiction granted under the Act requires that status be determined “in accordance with tikanga Maori”. Thus, whakapapa associations and whanaungatanga obligations are stipulated instead. Land is vested as a type of exclusive territorial domain with overlordship to specifically named groups. In this way mana rangatira and its modern equivalent “mana whenua” are upheld. It also avoids the need for direct application of “ownership”

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<sup>23</sup> Supra n20 at 30.

principles that are most often equated with the discrete, exclusive rights of fee simple protected under the Land Transfer Act 1952.

### PART III – THE *NGATI APA* CASE

*Ngati Apa* identifies two clear lines of precedent, representing two different Pakeha judicial attitudes toward recognising Maori land entitlements.<sup>24</sup> One line follows *Wi Parata*. It holds that Maori customary land entitlements are reliant solely on Crown benevolence for recognition. Notions of western cultural supremacy, and a belief that Maori did not possess a cognisable system of law fuelled this approach. It views legislation as the principal source of legally protected Maori property rights. The other line of precedent follows *Symonds*.<sup>25</sup> It recognises that existing Maori property entitlements continued after the establishment of the English common law in the new colony of New Zealand. The status of those entitlements is not judicially defined in this case, except in that they are “less than fee simple”. For over one hundred and sixty years, judges have oscillated between the *Wi Parata* and *Symonds* lines of authority when interpreting different statutes and weighing conflicting Maori and Pakeha interests.

In this arena, the monocultural composition of the New Zealand Bench and the ideological orientation of its judges towards western thinking has been problematic for Maori. Principles of “fairness” and “justice” have provided uncertain buffers in a framework that is generally unsympathetic to upholding Maori customary rights in the face of competing, western-based, interests. Until *Ngati Apa*, the existence of inconsistent legislation was generally sufficient to totally oust Maori customary rights. The acknowledgment, therefore, by five Pakeha judges of the Court of Appeal that *Wi Parata* and the cases that relied on it were aberrant, and also wrong in law, was met with an ecstatic response by Maori:<sup>26</sup>

I agree with Keith and Anderson JJ and Tipping J that *In Re the Ninety-Mile Beach* was wrong in law and should not be

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<sup>24</sup> Most New Zealand judges are Pakeha. The appointment of Maori judges, even in the Maori Land Court, is a relatively recent phenomenon. Maori judges are few in number and are positioned at the lower level of the judicial hierarchy.

<sup>25</sup> *R v Symonds* (1847) NZPCC 387.

<sup>26</sup> Per Elias CJ, *supra* n6 at para 14.

followed. *In Re the Ninety-Mile Beach* followed the discredited authority of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, which was rejected by the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561. This is not a modern revision, based on developing insights since 1963. The reasoning the Court applied in *In Re the Ninety-Mile Beach* was contrary to other and higher authority and indeed was described at the time as “revolutionary”.

The older and higher authority to which the Chief Justice refers, is the line of precedent beginning with the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria*<sup>27</sup> and *Nireaha Tamaki*<sup>28</sup> and culminating with the *Ngati Apa* case.

In brief then, *Ngati Apa* affirms that Maori held existing customary property rights to land at the time of Pakeha settlement. It confirms that those rights were not dependent on, or derived from, the Treaty/te Tiriti or Crown recognition. These customary property rights continued to exist after the Crown assumed sovereignty, and they can only be extinguished in accordance with law. Furthermore, for extinguishment by statute to be effective it must be “plain and clear” and cannot occur by “a sidewind” or as a necessary implication drawn from inconsistent legislation. Customary title had, therefore, survived the enactment of several statutes that affected the foreshore and seabed area.

The Court of Appeal’s approach is consistent with that of the highest courts from other Commonwealth jurisdictions, notably the Australian High Court in *Mabo v Queensland*<sup>29</sup> and *Wik v Queensland*<sup>30</sup> and the Supreme Court of Canada in *Delgamuukw v British Columbia*.<sup>31</sup>

#### **PART IV – ISSUES ARISING FROM THE *NGATI APA* CASE**

The *Ngati Apa* case raises a number of fundamental issues of importance for Maori, and for the development of the common law of Aotearoa/New Zealand generally.

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<sup>27</sup> [1921] 2 AC 399.

<sup>28</sup> [1901] AC 561.

<sup>29</sup> ((No 2) (1992) 175 CLR 1).

<sup>30</sup> (1996) 187 CLR 1.

<sup>31</sup> (1993) 104 DLR (4<sup>th</sup>) 470.

**(a) *Mana Rangatira and Crown Sovereignty – Restrictions on Maori developing their Resources***

Mana rangatira (Maori authority) over traditional sea territories, the boundaries of which are still maintained by whanau, hapu and iwi, has never been ceded by Maori to the Crown. The English text of the Treaty specifically reserves “Fisheries” for hapu. Nor can mana rangatira be ceded by one generation on behalf of the next. Mana rangatira is a taonga tuku iho passed to successive generations, without which Maori would cease to exist as a distinct people with unique cultural values.

Under Maori custom law, mana rangatira is not dependent on private ownership of the land abutting the foreshore/seacoast area. It is a broader concept based on ancestral connection, entitlement and responsibility. Mana rangatira in relation to the sea is determined according to the same whakapapa process that underpins all Maori custom law. Consistent with te Tiriti o Waitangi, mana rangatira sits alongside the authority of the Crown, not under it.

According to Raymond Firth, Pakeha have difficulty dealing with the idea of mana as a broad jural principle:<sup>32</sup>

The native conception of mana in connection to land is thus most nearly akin to the idea of sovereignty. It is in reality very vague, and the attempt made by some Europeans to formulate this use of mana as a clear-cut legal concept has not met with success.

What is clear in the earlier Maori Land Court cases of *Tai Tokerau* and *Ninety-Mile Beach*, is that Maori claims to the sea are an incident of mana rangatira that extends beyond the Crown’s incremental definitions of its own expanding sea territory. Although Maori readily participate in New Zealand governance systems, the notion of territoriality that Maori possess as part of Maori custom law is consistent with the idea that a type of dual sovereignty/mana exists between Maori and the Crown, in Aotearoa/New Zealand. The strong independent stance that Maori take whenever their resources are threatened lends support to this. The fact that Maori opposition is generally argued using concepts and principles that reflect a different worldview to that represented by the Crown, reinforces it further.

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<sup>32</sup> R Firth, *Economics of the New Zealand Maori*, Wellington, Government Printer, 1959, 292.

At a practical level, a major concern for Maori today is exclusion from accessing, protecting and developing traditional coastal resources while the Crown implements policies and practices investing property rights in others. Crown policies and practices since 1840 have considerably diminished the Maori coastal estate. The granting of consents vesting private and exclusive interests under the Resource Management Act 1991 (the RMA) is accelerating the decline.

At present Maori groups are powerless to prevent exploitation of their takiwa (sea area). Local territorial authorities operating under the RMA are not required under the Act to recognise Maori rights in relation to the sea.

The Maori concern behind the *Ngati Apa* claim was the Crown's intention to invoke the coastal tendering provisions in section 12 (1) and (2) of the Resource Management Act 1991 in the area of the Marlborough Sounds.<sup>33</sup> Until then, as the apparently unencumbered holder of radical title, the Crown was able to grant rights of exclusive occupation of seabed space to third party private owners. In seeking recognition of customary title, Ngati Apa and others were trying to find a way into a tendering process they had hitherto been excluded from.

A potential positive flow-on effect of *Ngati Apa* for Maori is that customary ownership, if proven, could strengthen Maori claims to a greater share of the economic benefits derived from foreshore and seabed areas. This could be by way of guaranteed inclusion in the development of a resource, or indirectly, through the charging of rentals to other developers.

This is especially important given the recent introduction of sea farming, which, like the introduction of the fisheries quota, means that legally recognised property rights now extend into a resource that has, until recently, been free from regulation.

Maori have always been heavily reliant on sea resources for sustenance. In pre-European times, although there was strong resistance to exploitation by outsiders, reciprocal arrangements existed between groups concerning access to sea resources. With the advent of modern technology, Maori have been keen to develop their sea interests commercially. Maori do not see development as being inconsistent with

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<sup>33</sup> F McLeod, "Maori customary title to the foreshore and seabed and the allocation of coastal permits under the Act", *Resource Management Bulletin* (1998 BRMB 101).



their ancestral kaitiaki duty to respect and protect the integrity of the sea resource as part of the domain of Tangaroa (God of the sea), for future generations. They view development rights as a natural incident of their mana rangatira that is being stifled by the Crown.

**(b) *The Courts Role in Safeguarding Maori Rights***

Despite frequent disappointments, Maori retain respect for the courts of New Zealand and treat the words spoken by its judges with extreme regard. In *Ngati Apa*, Elias CJ restated a “vital rule” about the intended application of the English common law to Aotearoa and the Maori who live within its geographical confines:<sup>34</sup>

This “vital rule” of the common law (earlier applied in *R v Symonds*) was made explicit in New Zealand by the English Laws Act 1858. By it, English law was part of the law of New Zealand with effect from 1840 only “so far as applicable to the circumstances of New Zealand”.

In practice, the opposite has been the case. New Zealand courts have marginalised Maori custom law by relegating it to the realm of “lore”. While English common law principles are constantly being modified in accordance with developments in other common law jurisdictions, Maori custom as a developing body of law was been neglected. Nowadays, “clear” recognition of Maori custom is generally in order to circumscribe rights that are either to be extinguished or declared unenforceable by legislation. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, provides an example of this.<sup>35</sup>

In contrast to Maori understandings, New Zealand courts regard “sovereignty” and “property rights” as mutually exclusive concepts. As only the Crown is imbued with the former under the English common law, mana rangatira must, therefore, be something inferior.

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<sup>34</sup> Supra n6 at para 28.

<sup>35</sup> See section 9 of the Act which states: “All claims ... in respect of commercial fishing (i) Whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise; ... (c) ... are hereby fully and finally settled, satisfied, and discharged.” Section 10 (d) states: “The rights or interests of Maori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly – (i) Are not enforceable in civil proceedings ...”

Additionally, Maori customary property rights are viewed as being less complete than what Pakeha would hold in similar circumstances. In *Symonds*, for example, although Chapman J stated that native title could not be extinguished in times of peace without consent, and that Maori title was entitled to be respected, Maori possession of land did not equate with fee simple title. In his view, the “peculiar relationship between Maori and the Crown” meant that the title Maori held and passed to each other:<sup>36</sup>

... is no doubt incompatible with that full and absolute dominion over the lands which they occupy, which we call an estate in fee. ...

The existing rule then contemplates the native race as under a species of guardianship. Technically, it contemplates the Native dominion over the soil as inferior to what we call an estate in fee: practically, it secures to them all the enjoyments from the land which they had before our intercourse, and as much more as the opportunity of selling portions, useless to themselves, affords. From the protective character of the rule, then, it is entitled to respect on moral grounds, no less than to judicial support on strictly legal grounds.

In *Te Runanganui o Te Ika Whenua Inc. Society v Attorney General*, 1994, although Maori interests were identified as “... usually, although not invariably, communal or collective”, they were, ultimately, also left undefined.<sup>37</sup> It is not clearly stated in this case why a right that is held by an individual group should be treated differently from a right held by a single individual. Cooke P does reiterate, however, the important point made by Chapman J in *Symonds* regarding extinguishment of title, at page 24:

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.

The lack of protection accorded Maori land interests under Te Ture Whenua Maori Act 1993 by the general courts, is also of deep concern to

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<sup>36</sup> Supra n25 at 391.

<sup>37</sup> *Te Runanganui o Te Ika Whenua Inc. Society v Attorney General* [1994] 2 NZLR 20, 24.

Maori. In *Registrar-General of Land v Edward Marshall*,<sup>38</sup> Justice Hammond restated the paramountcy of the principle of indefeasibility under the Land Transfer Act 1952 (*Torrens system*) over the notification requirements contained in the Te Ture Whenua Maori Act 1993. After comparing the title notification provisions under both Acts, his honour concluded:<sup>39</sup>

In short, on this sort of question of primacy, the Land Transfer Act trumps the Maori Affairs legislation. At the end of the day, as a matter of high principle, that must be so: if there is any area of the law in which absolute security is required – without any equivocation – it must be in the area of security of title to real property. I completely agree with the premise that, with respect, lies behind much of McGechan J’s reasoning that any watering down of the primacy of indefeasibility of title through failure to carry out collateral notifications to other Registries ought to be resisted strenuously.

The Maori Land Court is an important institution in New Zealand. It is an institution to which many Maori in fact look before turning their attention to the Land Transfer Office. Maori rightly regard the Court as an important guardian of their interests. But, at the end of the day, as I have said, there can be no equivocation on a matter of such importance as where paramountcy of title lies. To say that non-compliance with other reporting requirements can or might somehow affect indefeasibility of title is simply untenable. McGechan J rejected such a proposition. So did Judge Carter. So do I.

In *Ngati Apa*, Gault P doubts that Parliament ever intended to extend to owners of Maori customary land the same level of protection provided to other landowners under the Torrens system. Justice Gault says at paras 105 and 106:

By s41 Te Ture Whenua Maori Act a vesting order made by the Maori Land Court under s132 in favour of the “owners of the land” as determined according to tikanga Maori (or trustees therefore) and transmitted to the District Land Registrar (s139), upon registration has the effect of vesting the land in the persons named in the order “for a legal estate in fee simple in

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<sup>38</sup> (HC Hamilton, AP 30/94).

<sup>39</sup> Ibid at 17-18.

the same manner as if the land had been granted to those persons by the Crown”.

That consequence necessarily informs the interpretation of the words “land” and “owners” in the preceding sections. Under this Part of the Act we are concerned with land capable of supporting an estate in fee simple and ownership interests capable of conversion to registered estates 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 Maori and in a developed common law informed by tikanga Maori, are not interests with which the provisions of Part VI are concerned. The requirements of the statute must be met before the point is reached that calls for consideration of tikanga *Maori*. It is for this reason that, even if we hold that the Maori Land Court has the jurisdiction contended for, I have real reservations about the ability for the appellants to establish that which they claim. But that, of course, would be for the Maori Land Court.

*Ngati Apa* also illustrates, albeit indirectly, the difficulty of reconciling national laws of general application with hapu and iwi custom law that reflects localised practice. As the law currently stands, for a Maori customary title claim to succeed in the courts, each Maori group must provide evidence of customary usage in relation to the area affected by the claim. The evidence will differ according to the particular resources in an area and the historic relationship of the group to those resources. The sea has always been an important resource to Maori, and as the *Tai Tokerau* case illustrates, Maori rights and responsibilities with respect to the sea are extensive. The Crown has already accepted the existence of Maori property interests in fisheries. In cases such as *Ninety-Mile Beach*, upholding a Maori customary claim would simply be a matter of accepting the findings of earlier Maori Land Court cases that were rejected at High Court level. Recognition of customary ownership of the seabed and foreshore does not have to be a precursor to extinguishment legislation.

Maori opposition to outright extinguishment of customary foreshore and seabed entitlements is widespread. Without consent, extinguishment by legislation is regarded by Maori as unjustified confiscation of Maori property rights and a deliberate act of aggression against hapu and iwi by the Crown.

(c) *The Place of Te Tiriti o Waitangi in New Zealand Law*

Since 1975, the “Principles of the Treaty of Waitangi” have been included in a number of statutes. This has enabled Maori to bring more claims to the courts. It has also provided an opportunity for the development of case law that includes Maori perspectives. While the movement towards a bi-cultural approach is evident in the Waitangi Tribunal hearings process, the general courts have been less willing to incorporate tikanga Maori into court processes and decision-making.<sup>40</sup>

Unfortunately for Maori, neither the *Wi Parata* nor the *Symonds* line of precedent views the Treaty/te Tiriti as anything more than peripheral to New Zealand’s legal processes. Although it has never been disembowelled to the point of becoming the complete “nullity” Prendergast envisaged in *Wi Parata*, it has been treated as non-justiciable unless recognised by statute. Conversely, in *Symonds*, both judges agreed that the Treaty of Waitangi (English text) asserted nothing new in terms of the English common law. Both lines of precedent affirmed the Doctrine of Parliamentary Sovereignty as being fundamental to the establishment of the new Colony. Thus, the need to engage in a serious inquiry as to how the twin principles of “sovereignty” and “tino rangatiratanga” might form the basis of an entirely new system of law combining the best of the English common law and Maori custom law was never entered into. Had it been seriously considered, Aotearoa/New Zealand would be wearing a significantly different legal face today.

Although *Ngati Apa* does not explicitly refer to the Treaty/te Tiriti, it discusses “sovereignty” which by implication incorporates te Tiriti. In the domestic forum the term “sovereignty” is often used as a trump card

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<sup>40</sup> See for example the decision of Wild J, in *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401, para 80, where the Maori appellants were admonished for performing karakia in the court room before the hearing began. The judge’s view of the court room as the judge’s “home”, and Maori as “visitors” who should ask permission before performing karakia, highlights the lack of acceptance of Maori and their protocols as being a natural part of the New Zealand justice system. Other public figures have displayed similar attitudes. During the recent swearing in of Tariana Turia, Member of Parliament for Te Tai Hauauru, the Speaker of the House refused to allow the karanga (ceremonial call by a woman) to finish. Pakeha insistence on maintaining control and authority according to Pakeha cultural norms in important public forums such as Courts and Parliament, illustrates the extent of intolerance for, and lack of understanding of, tikanga practices within Aotearoa/New Zealand.

by the Government of the day wearing its “Crown” hat, to trounce Maori assertions of a competing and continuing territorial authority within various rohe (areas).

The basic ideology underpinning “sovereignty” is outdated. It derives from a European history of events at a time when monarchs ruled absolutely and were sovereign “in fact”. Yet despite the erosion of that power and its transference into a variety of governing institutions, the term persists. Ironically, in the domestic context “sovereignty” now holds far greater significance for Maori than for Pakeha. Its inclusion in the English text of the Treaty and the subsequent denial of “tino rangatiratanga” has turned it into a symbol of oppression.

In a Western jural sense, both “sovereignty” and “ownership” denote ideas of relative authority, and the incidents and recognisable interests that will be protected under those rubrics. In this context, terms such as “title” and “property” serve to link people to a resource, as well as to determine the relative authority over whatever is owned. Likewise, any discussion of Maori custom law invokes “mana rangatira” and its very close relation “tino rangatiratanga” as included in te Tiriti o Waitangi. The Treaty/te Tiriti are always, therefore, relevant considerations in any case which involves Maori custom law, Maori customary title and the relationship between Maori and the Crown.

Despite the clear statement that the *Wi Parata* line of precedent was wrong, none of the five Judges in the *Ngati Apa* case was willing to revisit the long-established rule from *Te Heuheu Tukino v Aotea District Maori Land Board (Te Heuheu)*<sup>41</sup> that:<sup>42</sup>

... it is well settled that any rights purporting to be conferred by [the Treaty of Waitangi] cannot be enforced in the courts, except in so far as they have been incorporated into municipal law” and “[i]t is clear that [*Te Heuheu*] cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him.

There have, however, been rare occasions in our legal history when judges have reasoned around the rule in *Te Heuheu*. In *Huakina Development Trust v Waikato Valley Authority (Huakina)*<sup>43</sup>, Chilwell J took the Treaty of Waitangi into account when deciding whether to grant

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<sup>41</sup> [1941] 2 All ER 93 (PC).

<sup>42</sup> Ibid at 98.

<sup>43</sup> [1987] 2 NZLR 188 (HC).

a water right under the Water and Soil Conservation Act 1967, even though it was not specifically provided for in that legislation. Justice Chilwell reasoned that the Treaty of Waitangi is part of the “fabric of New Zealand society” and as such:<sup>44</sup>

it follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

In the same year as *Huakina*, the Court of Appeal in *New Zealand Maori Council v Attorney General*, (*Lands Case*),<sup>45</sup> acknowledged the developing social contract between Maori and the Crown. Despite the statutory recognition of the principles of the Treaty of Waitangi in various statutes since 1986, the Court avoided discussing the crucial issue of the relationship between tino rangatiratanga and sovereignty under the two different texts.<sup>46</sup> Instead, by reasserting Parliamentary supremacy without further elaboration, the Court also reinforced *Te Heuheu*.<sup>47</sup> As Lord Cooke stated when explaining his view of the *Lands* case in a recent submission to a Parliamentary Select Committee on the Supreme Court Bill:<sup>48</sup>

... In regard to the Treaty of Waitangi in particular, the court was activist or active only in the sense that it gave effect to what Parliament had enacted in the [State-Owned Enterprises] legislation.

The Waitangi Tribunal has been better able to examine seriously the relationship between tino rangatiratanga and sovereignty, and to accept that the Crown’s exercise of power is limited by the Treaty/te Tiriti and in particular the guarantee of tino rangatiratanga. Reference to sovereignty that is less than absolute is found in the *Ngai Tahu Sea Fisheries Report*:<sup>49</sup>

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<sup>44</sup> Ibid at 210.

<sup>45</sup> [1987] 1 NZLR 641.

<sup>46</sup> Per Bission J, *ibid* at 715 and Casey J at 702.

<sup>47</sup> Per Cooke P, *ibid* at 668.

<sup>48</sup> A Young, “Maori Judge vital in Treaty cases: Cooke” *The New Zealand Herald*, 8 May 2003, Section A6.

<sup>49</sup> Waitangi Tribunal, *Ngai Tahu Fisheries Report—WAI 27*, Brooker and Friend, Wellington, 1992, 269.

The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. This principle is fundamental to the compact or accord embodied in the Treaty and is of paramount importance... . The Crown in obtaining the cession of sovereignty under the treaty therefore obtained it subject to important limitations on its exercise.

Statements such as these, as well as the number of statutes that include references to the principles of the Treaty of Waitangi, demonstrate an improved constitutional and legal status for the Treaty since *Te Heuheu*. Because *Ngati Apa* makes no reference to that change having occurred Maori will, undoubtedly, view *Ngati Apa* as the Court of Appeal attempting to purge New Zealand law of its racist past while ensuring that the status quo remains unchallenged.

#### **PART V – LEGISLATION AS A POLITICAL WEAPON IN THE CONTEST BETWEEN MAORI AND PAKEHA (“THE CROWN”)**

The *Ngati Apa* decision that Maori *may* hold customary title to the foreshore and seabed, has thrown a spanner in the Crown’s works by opening up the possibility that its power to grant rights to third-party owners under the RMA and other legislation could become circumscribed by Maori custom law interests.

Unfortunately, the Labour Government of the day has opted to use legislation as a “quick-fix” means of appeasing the fears of its Pakeha voting public. It is not the first time this has occurred. In 1993, Parliament amended the Treaty of Waitangi Act 1975, by inserting section 6(4A) which prevents the Waitangi Tribunal recommending the government purchase private land for return to Maori in order to settle Treaty claims. It was precipitated by a Tribunal recommendation in the *Te Roroa Report* at para 8.2:<sup>50</sup>

That the Crown take all steps to acquire these [privately owned] lands ... which should not have been included in its [earlier]

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<sup>50</sup> Waitangi Tribunal, *Te Roroa Report*—WAI 38, Brooker and Friend, Wellington, 1992, para 8.2.



purchases, and to return the same to tangata whenua as hapu estates.

The statutory amendment was designed to allay the Pakeha public's fear that the Tribunal might confiscate privately owned land. The amendment was of cosmetic value only because Waitangi Tribunal recommendations do not, except in certain limited circumstances that did not apply in *Te Roroa*, bind the Crown. To date, a significant number of Waitangi Tribunal recommendations have been ignored. The 1993 amendment was little more than a political flexing of muscle aimed at soothing, rather than educating, a misinformed Pakeha voting public.

The *Ngati Apa* decision has prompted a similar knee-jerk reaction. The announcement that legislation would be passed to prevent Maori gaining ownership of the foreshore and seabed was made by the Attorney General the day after the *Ngati Apa* decision was handed down.

### ***Current Level of Protection of Individual (Pakeha) Rights to the Foreshore and Seabed under English Common Law***

There is widespread concern that “rights” presently held by “all New Zealanders” will be curtailed if Maori customary ownership of the foreshore and seabed is recognised. The idea that rights currently exist is based on a series of misunderstandings as to the current legal position relating to these areas:

First, it is based on the fallacy that there is a legally enforceable public right to the foreshore and seabed under the English common law. According to *Halsburys Laws of England*:<sup>51</sup>

The public has no right of passing along or across the foreshore, except in the exercise of the rights of navigation or fishery, or in respect of a lawfully dedicated right of way from one place to another over the foreshore; there is no right of stray or of recreation there, and no right to go across the foreshore for the purpose of getting to or from boats, except by such places only as usage or necessity has appropriated for that purpose, and no right to wander about at will, because a public right to wander is a right unknown to English common law.

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<sup>51</sup> 4<sup>th</sup> edn, Vol 49(2), Butterworths, London, 1998, para 18.

In England, the rationale that underpins Crown ownership of the foreshore and territorial waters was reinforced by the need to protect the extensive canal system of travel and trade routes throughout England before the advent of the railways, and to control smuggling off the English coast. A loose analogy can be made with Maori custom law in that areas of sea and foreshore in Aotearoa were controlled and monitored by whanau and hapu living in their various territories, who used the waters as a food basket and a means of travel. The Maori relationship with the sea, however, also took into account additional factors such as whakapapa relationships, that were not part of English common law. The difficulty of implementing an imported system of law, wholesale, over a pre-existing one, is a problem that is exacerbated by a steadily growing Maori population.

Even if a general right of public passage and recreation had existed under English common law, there are practical difficulties in implementing it. Areas of the foreshore are landlocked because the adjacent land is held in private ownership and, therefore, not accessible to the general public.

Second, the widely held belief that the foreshore and seabed of Aotearoa/New Zealand cannot be vested in private ownership is incorrect. Under the English common law:<sup>52</sup>

The soil of the seashore, and of the bed of estuaries and arms of the sea and of tidal rivers, so far as the tide ebbs and flows, is prima facie vested of common right in the Crown, *unless it has passed to a subject by grant or by possessory title.* (italics added)

Private companies and port authorities, as well as an assortment of commercial operators, already hold private, exclusive rights to coastal and sea-farming ventures off the coast of Aotearoa/New Zealand. This has further diminished the foreshore and seabed area available for general public use.

Third, the concern about public access to the sea overlooks the legislative regime that currently regulates the use of, and access to, foreshore and seabed areas that are currently available to the public.

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<sup>52</sup> Ibid at para 9.

The fear that the recognition of Maori customary claims will restrict access and use rights to some sea areas is based on the misunderstanding that Maori customary ownership must equate with fee simple title as recognised under the Torrens System. By superimposing the quasi-legal ideas of “vacant possession” and “exclusion” over Maori custom law<sup>53</sup> the common law requirement of “exclusivity” necessary to establish Maori customary ownership has been confused with the “power to exclude” that is an incident of fee simple title. While Maori would obviously possess the former, it does not follow as a matter of course that they would automatically gain, or even desire, the latter. (See Appendix 4 and Appendix 5)

Following objections from the Maori Labour Party caucus, labeling the intended extinguishment of Maori customary title by statute “confiscation”, the government began a six week period of consultation with Maori throughout Aotearoa/New Zealand before producing draft legislation.

Only very minor changes have been made between the document produced for the round of consultations with Maori and the Foreshore and Seabed Bill released in April 2004. Both documents contain four underlying principles that were unanimously rejected by Maori during the consultation process. The four principles are:

**1. Principle of access**

There should be open access and use for all New Zealanders in the public foreshore and seabed.

**2. Principle of regulation**

The Crown is responsible for regulating the use of the foreshore and seabed, on behalf of all present and future generations of New Zealanders.

**3. Principle of protection**

Processes should exist to enable the customary interests in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected.

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<sup>53</sup> “Vacant possession” is a type of inchoate right that gives the possessor more privileges than others over a resource, while “exclusion” is the power to lock others out.

#### 4. Principle of certainty

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.

Throughout the consultation period Maori argued that these principles undermined the mana rangatira and mana whenua of hapu and iwi. A Tai Tokerau wide hui held at Whitiara Marae, Te Tii, on 23 August 2003 issued the following statement:

- Whanau and hapu hold the mana whenua/mana moana for all our lands, seas, foreshore and the seabed.
- They belong to us having been passed down to us as whenua tuku iho according to the tikanga of our ancestors.
- We are responsible for controlling, using and managing our lands in a manner that ensures that they can be passed on to following generations with their life-sustaining powers intact (kaitiakitanga).
- No Pakeha law can ever change that. It can only ever either assist us, or make it very much harder for us, to carry out our responsibilities.

The hui re-iterated that to legislate in order to extinguish the property rights of a competing owner would be viewed by Maori as confiscation. It encouraged hapu and iwi to register claims with the Maori Land Court so that if such legislation was passed, future generations of Maori would know that this generation had been the unwilling victims of an oppressive democratic process.<sup>54</sup> Thus, the precedent set by kaumatua in *Tai Tokerau* of leaving behind significant legal markers for future generations to whakapapa to, was once again being set in place by Maori.

In the short period of time it took the Government to prepare its legislative response, Maori opposition to the proposals increased. On 15 April 2004 a protest hikoī (march) began from Te Rerenga Wairua (Spirits' Leap) at the tail end of the te Ika a Maui (North Island), in protest at the Government's actions. The hikoī reached Parliament on 5 May 2003, where an orderly procession of around 20,000 people delivered a petition to Parliament aimed at stopping the Foreshore and Seabed Bill.

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<sup>54</sup> A hui held later at Omaka in Blenheim, 29-31 August 2003, affirmed the decision of an earlier national hui held in Hauraki to reject the Crown's foreshore and seabed proposals.

The Government's proposals have torn through the veneer of the "one united Party" façade of the Labour Party, forcing the Prime Minister to coerce obedience from the Maori members of Parliament by invoking the (Pakeha) constitutional convention of party loyalty. Total compliance failed when Tariana Turia, Member of Parliament for Te Tai Hauauro, and Deputy Minister of Maori Affairs, resigned because she would not support the proposed legislation. She has since formed a new Maori Party which will contest all the Maori seats at the next election.

In the Opposition camp, Maori opposition to the Government's proposals was also evident. It led to the demotion of National Maori Member of Parliament, Georgina Te Heuheu, and her replacement as Maori spokesperson by a Pakeha. The message was clear. The legislation would go through with the support of both major parties, despite Maori opposition within and outside of Parliament.

### ***The Foreshore and Seabed Bill 2004***

The Bill's main objective is to "clarify" the situation with respect to the foreshore and seabed. The Bill also purports to provide for the recognition and protection of customary interests in the "public foreshore and seabed". This term is defined in clause 4 of the Bill as "... the foreshore and seabed; but does not include any land that is, for the time being, subject to a specified freehold interest". The proposed legislation, therefore, will not impact upon those who already have private property rights to the foreshore and seabed under existing laws. The Bill's main impact will be on Maori.

The main features of the Bill are:

1. The High Court's jurisdiction to consider Maori customary claims to the foreshore and seabed is removed.
2. The jurisdiction of the Maori Land Court is narrowed considerably, so that judges are prevented from vesting foreshore and seabed land in fee simple title.
3. The right of Maori to go to court to prove and have recognised, the nature and extent of their property rights to the foreshore and seabed has been removed.

## *Maori Responses to the Underlying Principles of the Bill*

### *(a) Access*

Under the proposed legislation, the full legal and beneficial ownership of “the public” foreshore and seabed will be vested in the Crown, ostensibly to secure public access for all New Zealanders to the foreshore and seabed.<sup>55</sup> As “owner”, the Crown will consolidate its unilateral control of both radical and legal titles, and will become the absolute owner in a territorial and private property sense.

Maori view this as a back-handed way of extinguishing Maori customary title, so that the Crown becomes the unencumbered owner, devoid of any responsibility to Maori either at common law or under the Treaty/*te Tiriti*. Effectively, the Crown will have used the legislative process as a tool of dispossession to rid itself of the competing Maori owner and to nullify common law rights. This is reinforced by the fact that extinguishment will only effect Maori customary interests. Private title holders with registered foreshore interests under the Land Transfer Act 1952 will retain their private interests, as will port authorities and other bodies exercising statutory roles. The latter will undoubtedly include some Maori property owners of freehold interests. The main target identified by Maori, however, is the extinguishment of the territorial ownership that Maori hapu and iwi hold over areas of the foreshore and seabed.

### *(b) Protection*

In exchange for extinguishment of the inchoate property right that the Waitangi Tribunal said could amount to a “fee simple” interest in some cases, the ancestral connection of Maori groups to particular areas of the public foreshore and seabed is recognised. This gives Maori groups the opportunity to participate in decision-making processes.<sup>56</sup>

It is not clear how “the opportunity to participate” is intended to fit within existing legislative schemes under the RMA, or within the hierarchy of existing English-based property rights. If it is a statutory

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<sup>55</sup> Clause 11 of the Foreshore and Seabed Bill, 2004.

<sup>56</sup> See the Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy—WAI 1071*, Legislation Direct, Wellington, 2004, page xiv, available at <http://www.waitangi-tribunal.govt.nz/reports/generic/wai1071foreshore/>

directive to “consult” with Maori, then nothing new is gained. Consultation, as it has been interpreted and applied under the RMA is little more than a directive to developers and local authorities to enter into dialogue with Maori and to gather information. Maori have no control over the outcome of the consultation process.<sup>57</sup>

The recognition of ancestral connection does, however, retain the whakapapa link that is the basis of Maori custom law, and is a lifeline between past and future generations. Whether it is of any assistance to future generations only time will reveal.

### (c) *Proving Customary Rights*

The Bill provides for all New Zealanders to have “customary activities” in the public foreshore and seabed recognised and protected under the RMA. In order for this to occur, the Maori Land Court must first issue a “customary rights order” which recognises a customary use, activity or practice in the public foreshore and seabed. Importantly, it does not grant an estate or interest in land or support the ability to sue for trespass.<sup>58</sup>

There are four requirements which must be satisfied before a customary order will be issued:<sup>59</sup>

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<sup>57</sup> The Waitangi Tribunal has made recommendations about the reform of resource management legislation to improve Maori participation and to strengthen the role of te Tiriti, (see for example, *Ngawha Geothermal Resource Report—WAI 304*, Brooker and Friend, Wellington, 1993, Chapter 8.5.2; *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims—WAI 153*, Brooker and Friend, Wellington, 1993, Chapter 5.4; *The Te Roroa Report—WAI 038*, Brooker and Friend, Wellington, 1992, Appendix 5), where the Waitangi Tribunal discusses reform of Part II of the Resource Management Act 1991 and related legislation.

<sup>58</sup> This should be compared with the position Maori are in at present, as summarised by Richard Boast in the following way: “What Maori have at present, following *Ngati Apa*, is clearly a property right. It is inchoate in the sense that the rights will need to be clarified by bringing an action in the Courts ... it is almost certain that at least in *some* instances this inchoate right will translate into a freehold title ... . At the present time Maori have the right and ability to do this: there is a right which exists at the present time, a valuable right”; Document A55(a) (Boast), para 12.25(a) quoted in *WAI 1071*, supra n56 at para 5.1.7.

<sup>59</sup> Clause 42 of the Foreshore and Seabed Bill, 2004.

1. The Maori group claiming the right must be related by whakapapa (whanaunga);
2. The activity or practice is *integral to tikanga Maori* (and has been since 1840);
3. The activity or practice has been exercised *substantially uninterrupted* since 1840, in accordance with tikanga Maori and continues to be so exercised; and
4. The claimed right is not illegal or has not been extinguished.

The third requirement will be difficult for Maori to prove, particularly in areas where raupatu (confiscation) and other forms of land alienation facilitated by legislation, such as the Native Land Acts and Public Works Acts, has occurred. In clause 42(2), the Bill makes it explicit that the test cannot be satisfied if a customary activity has not been followed or carried out, because another activity authorised by law has interfered with the customary activity.

New Zealand judges are likely to look to Australia and Canada for guidance in applying the “substantially uninterrupted” test.<sup>60</sup> The concept of an on-going or unbroken connection with the land, in the context of aboriginal title, has preoccupied Australian jurisprudence since *Mabo No 2* in 1992.<sup>61</sup> In that landmark Decision, Brennan J held that what is needed to prove aboriginal title rights is “... substantial maintenance of the traditional connection with the land”.<sup>62</sup> Ten years later, in *Yorta Yorta*, the High Court held that aboriginal customary rights are likely to be recognised if the customary practice in question has continued substantially uninterrupted since the acquisition of sovereignty.<sup>63</sup>

Adoption of the Australian “substantial uninterrupted” test has made it extremely difficult for aboriginal groups claiming aboriginal title rights to have those rights recognised. In *Yorta Yorta* the test was strictly applied to deny the aboriginal group’s customary rights because they had been dispossessed of their lands as a result of colonisation. According to the Court, this dispossession made it impossible for the claimants to

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<sup>60</sup> Judges may also be guided by the earlier decisions of the Maori Land Court such as *In Re Ninety Mile Beach*, *The Cavally Islands Decision* and *The Aotea Decision*, discussed earlier in this article.

<sup>61</sup> *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

<sup>62</sup> *Ibid* at 59.

<sup>63</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, 87 (12 December 2002).



continue to observe their traditional laws and customs on the land in question. Therefore any customary title rights they may have held at the time of sovereignty, and presumably at various times since, had expired. In *Yorta Yorta*, evidence that European settlers had used aboriginal lands for pastoral purposes and for commercial fishing, combined with the introduction of exotic plants and animals which led to the extinction of traditionally used native plants and animal species, helped to discount the claimant's case.<sup>64</sup>

The “substantially uninterrupted” test has been applied less stringently in Canada, where the Chief Justice in *Delgamuukw* was critical of the Australian approach, noting that to impose the requirement of continuity too stringently would perpetuate the historical injustice suffered by indigenous peoples as a result of colonisation and the failure to respect aboriginal title to land.<sup>65</sup> Similarly, in *Van der Peet*, Chief Justice Lamer found that “... it may be that for a period of time an aboriginal group for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. *Such an interruption will not preclude the establishment of an aboriginal right*”.<sup>66</sup> (emphasis added)

Judges considering customary rights claims in New Zealand under the new legislation will no doubt look to both jurisdictions for guidance on how to develop and apply the test to Maori claims based on customary rights. New Zealand judges could choose not to follow the Australian line of reasoning, as it is inconsistent with the Treaty/te Tiriti and emerging international law norms relating to indigenous peoples' rights. Certainly, the application of equitable and fiduciary principles requires that consideration be given to forced alienation of Maori land due to Crown practices and legislation passed in the period 1840-2004. Unfortunately, the Bill, in its current form, does not encourage this approach.

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<sup>64</sup> For an interesting discussion of how the continuity tests may apply in New Zealand see M Webb, “Common Law Aboriginal Title Continuity Tests - What Would Constitute An Appropriate Test in the New Zealand Jurisdiction”, Seminar Paper, Faculty of Law, 6 June 2004, .

<sup>65</sup> Per Lamer CJ in *Delgamuukw v British Columbia* (1987) 153 DLR.

<sup>66</sup> *R v Van der Peet* [1996] 2 SCR, 507.

**(d) Recognition of Territorial Customary Rights by the High Court**

The Bill also enables a Maori group to seek a declaration from the High Court that they would have been entitled to hold territorial customary rights to an area of the foreshore and seabed if full legal and beneficial ownership had not passed to the Crown.<sup>67</sup> Following recognition, the Crown must enter into discussions with Maori to consider the nature and extent of any redress that the Crown may give. There are no guarantees that redress will be forthcoming or that compensation is an option.

Finally, the Bill empowers the High Court to make customary rights orders to groups of people who are not Maori. This is a radical departure from the common law, and creates a new jurisdiction for the High Court to determine the customary rights of any group of New Zealanders to the public foreshore and seabed.

The test the High Court must apply in determining customary rights of non-Maori groups is similar to that applied by the Maori Land Court. Who will apply under these provisions, and how they will be able to establish that they have exercised customary rights and activities in public foreshore and seabed areas, according to tikanga (whose and what tikanga?) since 1840, is impossible to predict.

Parliament has acknowledged the unworkability of this aspect of the legislation:<sup>68</sup>

... The Government is not aware of the existence of any customary activities that might meet the statutory test, other than Maori customary activities, but nevertheless considers it appropriate to retain the capacity of groups to explore this possibility in the courts.

This nonsensical provision disregards the development of the common law as it relates to the doctrine of aboriginal title and the rationale behind the doctrine. It illustrates the lengths to which the Government is prepared to go in order to try to appease the majority Pakeha electorate by appearing to be “inclusive”.

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<sup>67</sup> Clauses 28 – 34 of the Foreshore and Seabed Bill, 2004.

<sup>68</sup> Explanatory Note, *ibid* at 6.

(e) *Certainty*

Having achieved Crown ownership under Principle 1 (access), established Crown authority under Principle 2 (regulation) and provided minimal recognition of Maori entitlements under Principle 3 (protection), the certainty principle completes the process by ensuring that local government bodies, acting as Crown agents, and other individuals exercising rights over the foreshore and seabed granted by the Crown, are not hindered by Maori customary title claims. The only certainty for Maori arising from the Bill is that there is yet another grievance for future generations of Maori and Pakeha to deal with.

If customary or ancestral rights are able to be established under the proposed legislation, the main impact will be felt at a local government level where whanau, hapu and iwi groups are required to work with the local bodies who manage resources. Whether this partnership is successful will depend on establishing and developing good relationships between Maori groups and particular territorial authorities. In some areas, where local authorities are already engaged in fostering good working relationships with Maori, the transition may be relatively smooth. For others it signals the beginning of a new relationship. Given the wide gulf between Maori and Pakeha views in the foreshore and seabed debate, the more likely scenerio is that the processes for enhancing Maori participation in the regulation of foreshore and seabed areas will become sites of conflict. As the Waitangi Tribunal concluded, the processes:<sup>69</sup>

... do not engage realistically with the profound difficulties of securing Maori representation that works, the numbers of people who would need to be involved for any agreements to be useful, and the consequences of the level of Maori disaffection with the Government's plans.

Ultimately, the Waitangi Tribunal concluded that the Crown, through the new policy.<sup>70</sup>

... proposes wholly to change the position for Maori, in ways that are new, untried, and only loosely described. As a result, a whole raft of new uncertainties is created.

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<sup>69</sup> *WAI 1071*, supra n56 at para 5.3.0.

<sup>70</sup> *Ibid* at para 5.2.2.

What is certain, however, is that one of the key objectives of the legislative proposals – clarification of the foreshore and seabed situation, has not been achieved.

### ***Shortcomings of the Foreshore and Seabed Bill***

There are two fundamental omissions from the legislative proposals, which render the proposals defective. The first is that it lacks a balanced human rights approach by creating new Pakeha interests while diminishing those of Maori. The creation of limited rights, recognising Maori interests in the public foreshore and seabed, does not alter this. The second is that the Bill breaches the guarantees of the Treaty/te Tiriti.

At a domestic level, the Bill raises serious questions about compliance with the New Zealand Bill of Rights Act 1990 (the NZBORA).<sup>71</sup> Section 19 (the right to be free from discrimination) and section 20 (the right to culture) are of particular relevance to the discussion that follows.<sup>72</sup>

#### ***(a) Failure to Protect Maori Human Rights according to International Law***

The New Zealand Government is bound by international law and is a party to several international human rights treaties that are relevant to the foreshore and seabed discussion. The human rights treaties, and the rights they contain, provide minimum standards for the protection of human rights of all New Zealanders.

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<sup>71</sup> C Lawrence, “Memorandum on the Human Rights Aspects of the Foreshore and Seabed Bill”, Seminar Paper, Faculty of Law, 21 April 2004. See also Attorney-General’s Opinion on Consistency of Legislation with the Bill of Rights, Foreshore and Seabed Bill, 6 May 2004, ([www.justice.govt.nz/bill-of-rights-bill-list-2004/f-bill/foreshore-seabed-bill.html](http://www.justice.govt.nz/bill-of-rights-bill-list-2004/f-bill/foreshore-seabed-bill.html)).

<sup>72</sup> Section 19 provides: “Everyone has the right to be free from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief”. Section 20 provides: “A person who belongs to an ethnic, religious, or linguistic minority in New Zealand ... has the right in community with other members of that minority to enjoy their culture, to profess and practice the religion or to use the language of that minority”. The NZBORA acts as a fetter on the exercise of public power. Legislation and policy must conform with the NZBORA, unless a breach of the fundamental human rights contained in the NZBORA is necessary and can be justified under the NZBORA.

*i. The Right of Self-Determination*

The Bill is open to challenge by Maori under international law on several grounds. First, the right of self-determination is recognised in many international and regional human rights instruments, and is referred to as a right that belongs to all peoples.<sup>73</sup> The right of self-determination is not merely a political right (to participate in a state's political affairs, for instance), it is a complex right which is related to all aspects of people's lives, including the right to culture, the right to develop and adapt that culture in indigenous territories, the right to development (including the right to develop and utilise natural resources in accordance with modern technology as well as custom) and the right to protect, retain or dispose of indigenous natural wealth and resources.<sup>74</sup>

The Human Rights Committee has recently affirmed that self-determination includes indigenous peoples' right to freely dispose of their natural wealth and resources and not to be deprived of their own means of subsistence. After considering Canada's fourth periodic report to the Human Rights Committee in 1999, the Committee asked Canada to abandon the practice of including a clause extinguishing inherent aboriginal rights in its agreements with indigenous peoples because the practice was incompatible with Article 1 of the International Covenant on Civil and Political Rights (ICCPR).<sup>75</sup> The Human Rights Committee has asked Norway to provide information about the exercise of the Sami right of self-determination under Article 1.<sup>76</sup> These comments establish

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<sup>73</sup> See for example the International Bill of Rights, which includes the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966); and the International Covenant on Civil and Political Rights (1966).

<sup>74</sup> Article 1 of the International Covenant on Economic, Social and Cultural Rights and Article 1 of the International Covenant on Civil and Political Rights (ICCPR) sets out the content of the right of self-determination. Article 1 states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" and "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

<sup>75</sup> UN Doc CCPR/C/79/Add 105, para 8.

<sup>76</sup> UN Doc CCPR/C/79/Add.112, para 17.

an important legal precedent by including indigenous self-determination within the framework of international human rights law, indicating that the New Zealand Government is required to take the Maori right of self-determination seriously or risk the negative attention of the Human Rights Committee.<sup>77</sup>

## *ii. The Right to Culture*

The right to culture (article 27 of the ICCPR) which is also guaranteed by section 20 of the NZBORA) protects a person's right in community with other members of a minority to enjoy their culture, religion and language.

It can be argued that the Foreshore and Seabed Bill undermines the ability of Maori to exercise their rights and responsibilities, according to tikanga (culture), in their foreshore and seabed areas.

The New Zealand Parliament has a long history of enacting legislation and enforcing policy that has undermined and threatened Maori cultural survival. As an imported Western institution, it quite naturally reflects the views and interests of the Pakeha electorate, often at the expense of existing Maori customary interests.

In the current social and political environment, legislation and policy that protects and enhances Maori cultural values is unlikely to be popular with many voters. Populist Pakeha opinion is that the recognition of Maori interests in the foreshore and seabed will undermine the interests of "other" (Pakeha) New Zealanders in these areas.

A better course of action that takes account of Maori interests would be for the Crown to refrain from legislative activity until Maori have agreed a framework for recognising their rights. An acceptable alternative would be to leave the courts to investigate Maori customary title and to recognise those rights accordingly, free from the political interference of

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<sup>77</sup> Maori have argued that legislative proposals that diminish or destroy the ability of hapu and iwi to exercise self-determination rights and responsibilities (for instance the ability to exercise kaitiakitanga, or to develop their natural wealth and resources) over the foreshore and seabed are inconsistent with their section 20 right to exercise kaitiakitanga as part of their culture. Te Hunga Roia o Tamaki Makaurau, *Submission to the Select Committee on the Foreshore and Seabed Bill on Fisheries and other Sea Related legislation*, 7 July 2004.

Parliament.<sup>78</sup> The drawback to the latter is that monoculturalism is also a problem amongst judges. General court decisions show that when faced with competing Maori and Pakeha worldviews, judges are better suited to applying the common law in which they are well versed than in dealing with complex issues of Maori custom law. In the High Court and Court of Appeal, for instance, arguments about the effect of a prison development on the domain of a taniwha, Takauere, subjected the appellants to ridicule. The judge openly admitted to having difficulty understanding the relevance of such considerations in legal decisionmaking.<sup>79</sup>

**(b) *The Consequences of Breaching International Law Obligations***

There is a strong argument that the Foreshore and Seabed Bill breaches international human rights law. A successful Maori complaint to the Human Rights Committee (either using the optional protocol procedure or shadow reporting) will mean that the New Zealand Government could, like Canada, face censure when it next reports to the Committee. This will reflect badly on New Zealand's human rights record and detrimentally affect our international reputation.<sup>80</sup>

The Human Rights Committee has previously criticised the New Zealand Government for its approach to Maori and Treaty/Tiriti issues. When

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<sup>78</sup> Ibid. The argument put forward by Auckland Maori lawyers is that any framework in respect of the foreshore and seabed must not interfere with kaitiakitanga and must enable Maori to properly exercise kaitiakitanga. For the Crown to assume the power to regulate use, would undermine kaitiakitanga and constitute a breach of the right to culture. Ideally, the legislation should aim for consistency with section 20 of NZBORA 1990 and the Treaty/te Tiriti by protecting and enhancing tangata whenua cultural rights, rather than limiting, abrogating, or denying those rights. The Foreshore and Seabed Bill does not achieve this in its present form.

<sup>79</sup> *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401, paras 439 and 440.

<sup>80</sup> Non-Governmental Organisations such as Aotearoa Indigenous Rights Trust, have already attracted negative attention to the Government's proposals. In July 2004, delegates attending the United Nations Working Group on Indigenous Populations made a statement to the members condemning the Government's proposals. Similarly, delegates from Ngai Tahu attended the Third Session of the United Nations Permanent Forum on Indigenous Issues, held at the United Nations Headquarters in New York, May 2004, for the purpose of attracting negative international attention to the Government's proposals and to call for an end to human rights and Treaty/Tiriti abuses in New Zealand.

considering New Zealand's last report under Article 40 of ICCPR, it noted.<sup>81</sup>

While recognizing the positive measures taken by the State party with regard to the Maori, including the implementation of their rights to land and resources, the Committee continues to be concerned that they remain a disadvantaged group in New Zealand society with respect to the enjoyment of their Covenant rights in all areas of their everyday life. *The State party should continue to reinforce its efforts to ensure the full enjoyment of the Covenant rights by the Maori people.* (emphasis added)

In 1995, the Committee noted the importance of taking into account the Treaty/te Tiriti when considering limiting the jurisdiction of judicial bodies, such as the Waitangi Tribunal. At paragraph 188 the Committee noted:<sup>82</sup>

... the Committee expresses the hope that any decisions to be taken about future limitations to the entitlement of Maori to advance claims before the Waitangi Tribunal *will take full account of Maori interests under the Treaty of Waitangi.* (emphasis added)

The enactment of legislation which breaches the rights contained in the ICCPR and the Treaty/te Tiriti, is likely to lead to criticism from the Human Rights Committee that New Zealand has actively interfered with, rather than reinforced, ICCPR rights. It could also draw criticism for failing to take account of Maori interests under the Treaty/te Tiriti.

There are other international law fora in which Maori can call the New Zealand Government to account for human rights and Treaty/te Tiriti abuses. These include the United Nations Permanent Forum on Indigenous Issues, the Working Group (on the Draft Declaration of Indigenous Peoples) and the Working Group (on Indigenous Populations). In these fora the main concern is whether fundamental human rights and Treaty/Tiriti rights have been breached by the New Zealand Government's actions, proposed policies and legislation.

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<sup>81</sup> See CCPR/CO/75/NZL, (07/08/2002).

<sup>82</sup> CCPR/C/79/Add.47, A/50/40.



**(c) Failure to Include the Treaty of Waitangi/Te Tiriti o Waitangi**

As well as failing to comply with human rights obligations, the legislative proposals fail to give effect to the Treaty/te Tiriti. Neither the Treaty/te Tiriti nor its principles, is listed as one of the guiding principles of the Bill.

The Waitangi Tribunal has concluded that the Government is in breach of its Treaty/Tiriti obligations by proceeding with the proposal in its current form and that a Government committed to giving *full expression* to Maori rights under the Treaty/te Tiriti in 2004.<sup>83</sup>

... would recognise that where Maori did not give up ownership of the foreshore and seabed, they should now be confirmed as its owners.

The Government's refusal to take this course of action, combined with the refusal to incorporate Treaty/Tiriti rights into the proposed legislation reflects the low status of the Treaty/Tiriti in legal and political terms as far as the Government is concerned. That the Government is prepared to deal with the common law as being totally independent of the Treaty/te Tiriti is another way of marginalising Maori interests. It indicates a preference to follow Canada and Australia in formulating abstract "aboriginal rights" rather than forge an independent jurisprudence that reflects the reality of a changing New Zealand society, where the Treaty/te Tiriti is a central focus. In this way the Government maintains the ideological distance between Maori and Pakeha perspectives and further entrenches the assumed supremacy of the latter.

## CONCLUSIONS

While Maori continue to strive for legal recognition of their authority over their resources and for Maori principles to be properly considered by decision-makers, the Pakeha response to *Ngati Apa* signals a strong move in the opposite direction. Although Maori custom law has played an essential role in fora such as the Waitangi Tribunal and Maori Land Court, it is less influential in the general New Zealand courts. The *Ngati Apa* decision promised new opportunities for the growth and

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<sup>83</sup> *WAI 1071*, supra n56 at para 5.3.0.

development of Maori customary title and Maori custom law in the general courts. The proposed Foreshore and Seabed legislation will curtail this development. In this restricted environment, the challenge for all judges, and Pakeha judges particularly, is to consider seriously the place of Maori custom law in the Aotearoa/New Zealand domestic legal context. While judges can gain some guidance from overseas jurisdictions, none of them are sufficiently similar to Aotearoa/New Zealand in terms of legislative, case law or circumstantial developments. New Zealand judges, particularly the new Supreme Court judges, must be willing to develop an indigenous jurisprudence. This will require a consideration of how Maori custom law, the Treaty/te Tiriti, Maori customary title and common law rules and precedents all come into play. These technical tasks sit atop a more fundamental matter that needs sorting out. That is the relationship between Maori mana rangatira and Parliamentary sovereignty.

There are many critical issues to consider. The extinguishment of Maori customary rights without Maori agreement raises serious doubts about the ability of the Crown in Parliament to govern in the interests of Maori and Pakeha alike. If Maori consent to the extinguishment of customary rights is not required, then how far has the law really progressed from *Wi Parata* towards recognising Maori property interests, let alone Treaty/Tiriti rights? Can Parliament do whatever it likes, unfettered by the guarantees in the Treaty/te Tiriti? And if so, what does this really mean for the constitutional and legal status of the Treaty of Waitangi/te Tiriti o Waitangi?

It will undoubtedly fall to the Supreme Court to interpret the forthcoming foreshore and seabed legislation. Much will depend on whether it chooses to develop a form of jurisprudence that views concepts of Maori custom law as legitimate, or whether it simply chooses to continue strait-jacketing Maori into an English common law process that has never truly represented Aotearoa/New Zealand society. The irony is that in the long run, final resolution may not be reliant so much on what the Crown and Courts choose to grant to Maori, but on whether Maori are prepared to accept it.

Ki mai te Pakeha  
Hainatia te tiriti nei  
Kei ahau te ora  
A te iwi e  
Homai o whenua  
Homai o moana  
Nga maunga teitei o Aotearoa

*And the Pakeha said  
Sign this Treaty  
I will uphold the welfare  
Of the people  
Give me your land  
Give me your seas  
The lofty mountains of Aotearoa*

Huri rawa ake au  
Kua riro katoa  
Tiro tiro kau ana  
Kei hea ra?  
Kei te Tari Maori pea  
Te Tari o te Ora  
Kei nga tari ma i te penihana

*When I turned around  
It had all gone  
I searched in vain  
Where are my people?  
At the Maori Affairs Department  
The Department of Social Welfare  
All the Departments on benefits*

Kua raru koutou  
Matenga paukena!  
I te mahi tinihanga  
A Tauwi e  
Haere ke nga korero  
Haere ke nga waewae  
Rite ki te papaka  
Titaha e!<sup>84</sup>

*You have been deceived  
Pumpkin heads!  
By the deceitful actions  
Of the strangers  
And the talk continues  
And the feet keep moving  
Just like the crab  
—Sideways!*



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<sup>84</sup> Sung to the catchy tune of “Waltzing Matilda” by Te Rarawa elder, Maori Marsden, during the hearing of the Muriwhenua Land Claim at Kaitaia, in February 1991.

**APPENDICES:**

**SECTION A**

## **Appendix 1: Te Tiriti o Waitangi and the Treaty of Waitangi**

(Source: Claudia Orange, The Treaty of Waitangi, Allen and Unwin, Wellington, 1987, 257-259.)

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### **Te Tiriti o Waitangi (Maori Text)**

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira - hei kai wakarite ki nga Tangata maori o Nu Tirani - kia wakaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu - na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanaranga kia kua ai nga kino e puta mai ki te tangata maori ki te Pakeha e noho ture kore ana.

Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o to wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua - ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini - Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

[signed] W. Hobson Consul & Lieutenant Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu. Ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu. Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

*Note: This treaty text was signed at Waitangi, 6 February 1840, and thereafter in the north and at Auckland. It is reproduced as it was written, except for the heading above the chiefs' names: ko nga Rangatira o te Wakaminenga.*

## **The Treaty of Waitangi (English text)**

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and secure to them the enjoyment of Peace and Good Order has deemed necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

### Article the first

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over the respective Territories as the sole sovereigns thereof.

### Article the second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon

between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

### Article the third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[signed] W. Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

*Note: This English text was signed at Waikato Heads in March or April 1840 and at Manukau on 26 April by thirty-nine chiefs only. The text became the 'official' version.*

**Editors Note:** Most Maori signed the Maori text of Te Tiriti which retains “tino rangatiratanga” or “absolute authority” to Maori hapu. The English text, however, cedes “sovereignty” absolutely, to the Crown of England. The debate about how the two fit together in a constitutional democracy is ongoing and the relationship between Maori and the Crown is constantly being reviewed. Although not legally recognised, the Treaty/te Tiriti remains the hallmark by which many New Zealanders, Maori and Pakeha alike, evaluate the justice of Crown actions.



**Appendix 2: Decision of Morison CJ in *Te Wharo Oneroa A Tohe* (90 Mile Beach)**

(Source: NMB 1957, 126-128)  
reproduced as published

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**Page 126**

KAITAIA - NOVEMBER 15th 1957

PRESENT-D.G.B. Morison - Chief Judge  
B. Kaka - Clerk

WHARO ONEROA A TOHE  
(90 Mile Beach)

INVESTIGATION OF TITLE

Mr. Dragecivich for the Applicants - Sir Vincent Meredith and Mr. Rosen for the Crown

This is an application for the investigation of Title, as customary land, to an area of land lying between mean high water mark and mean low water mark on the West Coast extending from a little South of Scott Point at the North end to the vicinity of Reef Point at the South end. It comprises the whole length of what is commonly known as the Ninety Mile Beach. The name given to it by the Applicant is Wharo Oneroa a Tohe.

The claimants are the Te Aupouri Tribe and the Te Rarawa Tribe each tribe claiming a portion of the land with a boundary between them at a place called Ngapae. There is no dispute as to this boundary. The claim is that the Northern portion belongs to Te Aupouri and the Southern portion to Te Rarawa.

The application is opposed by the Crown whose contentions are -

(1) That immediately prior to the Treaty of Waitangi the Te Aupouri and Te Rarawa tribes did not own the land under their customs and usages.

(2) That on the cession of New Zealand under the Treaty of Waitangi everything passed to the Crown and that imported the Common Law of England under which the foreshore always was the property of the Crown and was held by the Crown for the benefit of

the subjects of the Crown which would include Maoris and Europeans alike

(3) By a Proclamation of May 29th 1872 under Section 4 of the Native Lands Act 1867 the operation of the Native Lands Act 1865 was suspended in respect of all foreshores in the Auckland province, that the proclamation has never been revoked, and that following on the proclamation domestic legislation has taken over control of foreshores and fishing under the Harbours Acts and the Fisheries Acts.

(4) That to establish land to be Maori Customary Land it will require proof that there has been exclusive and continuous occupation from before the Treaty up to the date of investigation, that is, up to the present day; that there has been no such exclusive occupation for well over half a century but the land has been in general use by the public.

The Court considered that the first contention should be disposed of before proceeding with the others, as the subject matter of the first is a matter purely for the Maori Land Court whereas the second and third present substantial questions of law which it might be found desirable to refer to the Supreme Court. Furthermore if the Crown were to succeed on its first contention the application must fail, and be dismissed.

The Court therefore confined the proceedings at this stage to deal purely with the first contention.

Evidence was called by the applicants for the purpose of establishing that the land was occupied and owned by the two tribes respectively under their customs and usages immediately before the Treaty.

The evidence established the following: -

(a) That the Northern portion was within the territory occupied

**Page 127**

by Te Aupouri and the Southern portion was within the territory occupied by Te Rarawa.

(b) That the members of these tribes had their kaingas and their burial grounds scattered inland from the beach at intervals along the whole distance.

(c) That the two tribes occupied their respective portions of the land to the exclusion of other tribes.

(d) That the land itself was a major source of food supply for these tribes in that from it the Maoris obtained shell fish namely toheroa, pipi, tuatua, and tipa from the beach itself, and kutai from the rocks below high water mark at the part known as the Maunganui Bluff.

(e) That the Maoris caught various fish in the sea off the beach, and for this purpose went out in canoes. The fish caught were, mullet, schnapper, flounder, kahawai, parore, herrings, rock cod, yellow-tail, kingfish and shark.

(f) That for various reasons from time to time “rahuis” were imposed upon various parts of the beach and the sea itself.

(g) That the beach was generally used by the members of these tribes.

It is clear beyond doubt that the land was exclusively occupied by the two tribes under their customs and usages, and the further question is whether it can be said to have been owned by them.

In the circumstances existing in N.Z. before the Treaty the various Maori tribes exercised complete dominion over their tribal territories. The boundaries of these territories altered from time to time by reason of inter tribal wars and conquests, just as the boundaries of the territories owned by nations, large or small, in the Western world have altered from time to time as a result of wars and conquests.

These two tribes respectively had complete dominion over the dry land within their territories, over this foreshore, and over such part of the sea as they could effectively control. It is well known that the Maoris had their fishing grounds at sea and that these were jealously guarded against intrusion by outsiders.

Western nations have long asserted ownership to the dry land and to such parts of the sea round their coasts as they could effectively

control – by international law an artificial distance of three miles from the shore appears to have been generally agreed upon, but in more recent years nations have asserted their rights to areas extending to greater distances. For example the recent claim by Peru to a distance of 200 miles when certain fishing vessels were arrested within this area.

England has long asserted her right to ownership up to three miles from the coast. The whole is owned by the Crown, but by a purely domestic law the ownership of land by the subject does not extend below high water mark except in the case of particular grants.

As a matter of jurisprudence the ownership of territory was not restricted to what is termed the civilized world; the other races of the world also owned their territories.

The Maori Tribes must be regarded as states capable of owning territory just as much as any other peoples whether civilized or not: The Court is of the opinion that these tribes were the owners of the territories over which they were able to exercise exclusive dominion or control. The two parts of this land were immediately before the Treaty of Waitangi within the territories over which Te Aupouri and

**Page 128**

Te Rarawa respectively exercised exclusive dominion and control and the Court therefore determines that they were owned and occupied by these two tribes respectively according to their customs and usages.

**Appendix 3: Letter seeking support for *Ninety Mile Beach***  
**Appeal to Privy Council**  
reproduced as published

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NINETY MILE BEACH - OWNERSHIP CLAIM

BY

AUPOURI AND RARAWA PEOPLE

APPEAL TO PRIVY COUNCIL IN LONDON.

FUNDS ARE URGENTLY REQUIRED TO PREPARE THE CASE FOR FILING WITH THE PRIVY COUNCIL AND TO SEND LEGAL COUNSEL TO LONDON TO ARGUE THE CASE ON THE APPEAL.

THE GOVERNMENT HAS DECLINED AN APPLICATION FOR FINANCIAL ASSISTANCE. THIS IS A CASE OF EXTREME IMPORTANCE TO ALL MAORI PEOPLE. AN APPEAL FOR ONE POUND FROM EACH MAORI ADULT PERSON IN THE NORTH AND AUCKLAND DISTRICT IS THEREFORE NOW BEING MADE. MINIMUM AMOUNT REQUIRED IS £2,500. IF YOU CAN ASSIST WITH A CONTRIBUTION PLEASE FORWARD URGENTLY DIRECT TO OUR SOLICITOR WHO WILL FORWARD OFFICIAL RECEIPT (ENVELOPE ENCLOSED). IF TARGET IS NOT REACHED MONEY WILL BE RETURNED.

WAATA TEPANIÁ - ORIGINAL APPLICANT.

RIKIHANA ETANA - SECRETARY AUPOURI TRUST BOARD FOR  
AUPOURI AND RARAWA PEOPLE.                      2ND SEPTEMBER, 1963.

**Appendix 4: Te Aupouri Maori Trust Board Submission to  
Government on the Foreshore and Seabed Bill 2004**

(source: [www.teope.co.nz/submissions](http://www.teope.co.nz/submissions))

reproduced as published

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**Te Aupouri Maori Trust Board  
Submission on the Foreshore and Seabed Bill**

8 July 2004

**1. Introduction**

Te Aupouri Maori Trust Board is an entity that represents the Iwi of Te Aupouri in the Muriwhenua rohe of the Far North of Aotearoa New Zealand. We share kaitiakitanga (guardianship) with our neighbouring Iwi over two of the most scenic and recognised coastal seabed and foreshore assets in the country, namely the Parengarenga Harbour and the Ninety Mile beach as well as a huge number of other coastal bays, beaches and harbours. The purpose of this submission is to express in writing our objection to the proposed foreshore and seabed legislation. We also request that your committee visit Potahi Marae in Te Kao to hear verbal submissions from us and our people.

**2. Details of Te Aupouri Opposition**

By vesting all foreshore and seabed in the Crown (clause 11), the Bill extinguishes all existing Te Aupouri customary / property rights and ownership relating to the foreshore and seabed, and this is:

- 2.1 Totally unwarranted, unprovoked and unacceptable alienation of Te Aupouri mana-whenua and mana-moana;
- 2.2 Imposed upon Te Aupouri without our consent;
- 2.3 In breach of Article II of Te Tiriti o Waitangi / the Treaty of Waitangi (Te Tiriti) which guarantees Te Aupouri exclusive and undisturbed possession of our Lands and Estates, Forests, Fisheries and other properties

which we collectively or individually possess so long as it is our wish and desire to retain the same in our possession;

2.4 Creating harmful and unnecessary division and racial tension across the country and in the Far North.

### **3. Legal Impediment**

The Bill would remove all meaningful judicial routes for Te Aupouri to have our customary rights investigated and legally recognised (clauses 9 & 10) and this is:

- 3.1 Prejudicial to the action lodged with the Maori Land Court by Te Aupouri Maori Trust Board in relation to our customary title over the foreshore and seabed within our rohe.
- 3.2 In breach of Article III of Te Tiriti;
- 3.3 Effectively an unfair reversal of the Court of Appeal decision against the Crown, and as such represents an abuse of Parliamentary power;
- 3.4 Calls to question the validity and integrity of the New Zealand legal system and its processes;
- 3.5 Totally inconsistent with internationally-recognised principles of human rights;
- 3.6 At odds with the common law principles of access to the Courts and due process of law;

### **4. Territorial Customary Rights**

The new Territorial Customary Rights findings proposed by the Bill (Part 2) are essentially pointless because:

- 4.1 They have no legal effect except requiring the Crown to enter into discussions for redress but, given the Crown's recent record of disregarding decisions of both the Waitangi Tribunal and the Court of Appeal, Te Aupouri can take no confidence from being left in the position of supplicant;
- 4.2 The High Court may not make a finding if there is other protection available for the rights concerned through Maori Land Court ancestral connection or customary rights orders, or a High Court customary rights order.<sup>1</sup> Theoretically then, Maori may never get past this restriction to get an opportunity to discuss redress with the Crown;
- 4.3 The prohibitive cost of taking a High Court action is likely to deny this process to Te Aupouri;
- 4.4 They will not be a substitute for the rights that are lost.

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<sup>1</sup> Clause 30(1) (a)

## **5. Ancestral Connection Orders**

The new Maori Land Court Ancestral Connection Orders proposed by the Bill (Part 3) offer nothing meaningful to Te Aupouri, and will:

- 5.1 Require Te Aupouri to “prove” in Court our undeniable ancestral connection to our foreshore and seabed which will require additional resources and effort to justify an affinity with that which the Bill proposes to take away from us i.e. needing to prove our innocence otherwise we are found guilty by default!;
- 5.2 Create a situation where any ‘connections’ falling outside the Bill’s definitions or not documented through the Court process by 31 December 2015 will cease to be recognised;<sup>2</sup>
- 5.3 Provide absolutely no new opportunities for Te Aupouri to influence management of the Coastal Marine Area;
- 5.4 Merely duplicate the consultative opportunities and obligations which already exist under the Resource Management Act 1991, without increasing the likelihood that Te Aupouri concerns will be given any greater weight than at present;
- 5.5 Result in confusion for Local and Central Government servants as to which processes should be used for interacting with Te Aupouri (i.e. Treaty settlement negotiations or judicial process);
- 5.6 Only provide for Agreements to recognise ancestral connection,<sup>3</sup> but do not automatically provide for redress discussions as required with respect to a High Court Territorial Customary Rights finding;<sup>4</sup>
- 5.7 Not sufficiently replace the rights that will be lost.

## **6. Maori Land Court Customary Rights Orders**

The new Maori Land Court Customary Rights Orders proposed by the Bill (Part 3) offer nothing meaningful to Te Aupouri. The Orders:

- 6.1 Do not require the Crown to enter into discussions with Te Aupouri over redress as required with respect to a High Court Territorial Customary finding<sup>5</sup>;
- 6.2 Involve tests and definitions that:
  - 6.2.1 Are excessively restrictive and will deny legal recognition to the great majority of genuine customary rights and practices;
  - 6.2.2 Are out of step with international jurisprudence;

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<sup>2</sup> Clause 37(2).

<sup>3</sup> Part 6, cl 111.

<sup>4</sup> Clause 33: This is important because the High Court may not make a TCR finding if there is other protection available for the rights concerned through the Maori Land Court (re ancestral connection or customary rights orders), or a High Court (re customary rights order) (cl 30). Theoretically then, Maori may never get past this restriction to get an opportunity to discuss redress with the Crown.

<sup>5</sup> See not 4 above.



- 6.2.3 Create a situation where any rights or practices falling outside the Bill’s definitions or not documented through the Court process by 31 December 2015<sup>6</sup> will be considered to be extinguished;
- 6.4 Fail to recognise the development right that arises from customary ownership by restricting the exercise of customary use rights to their past/present scales, which is inconsistent with international jurisprudence and prior New Zealand practice, for example in relation to the 1992 Fisheries Settlement;
- 6.5 Will not be a substitute for the rights that will be lost.

## 7. High Court Customary Rights Orders

The new High Court Customary Rights Orders proposed by the Bill (Part 4) will:

- 7.1 Be determined using a new test – “*cultural practices of the group*”<sup>7</sup> that replaces the “*held in accordance with tikanga Maori*” test under Te Ture Whenua Maori. This allows non-Maori to apply for and secure a ‘*customary right*’ that until this time was a common law right available only to indigenous peoples. This diminishes the status of Te Aupouri as tangata whenua of this land to the status of just another member of the public, and it diminishes the Treaty relationship between Te Aupouri and the Crown. It also highlights the gains that non-Maori acquire at Te Aupouri’s expense;
- 7.2 Be restricted only to instances where other protection is not already available (i.e. through Maori Land Court ancestral connection or customary rights orders, or a High Court customary rights order).<sup>8</sup> Theoretically then, Te Aupouri may never get past this restriction to get a Customary Rights order;
- 7.3 Prohibit Te Aupouri from taking a High Court action due to the costs to participate;
- 7.4 Not be a substitute for the rights that are lost.

## 8 Other Impacts

In combination, the framework provided by the Bill:

- 8.1 Will be time-consuming and expensive to obtain, for little or no benefit in return
- 8.2 Is likely to reduce even the current low-level of customary rights and interests protection through the Resource Management Act and other legislation as currently implemented, as no rights are likely to be given cognisance by authorities unless they have been proven through these mechanisms thus placing more hurdles before Te Aupouri in its attempt to assert its Kaitiakitanga;

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<sup>6</sup> Clause 37(2).

<sup>7</sup> Clause 61(1)(b)(i) and (iii).

<sup>8</sup> Clause 30(1)(a).

- 8.3 Does not come close to being an adequate replacement for the real legal rights which Te Aupouri hold currently which we are seeking to confirm in the Maori Land Court,
- 8.4 Will have an overwhelmingly negative effect on Te Aupouri, a people of the coast with a direct affinity to and reliance on our foreshore and seabed as a source of physical, mental, cultural and spiritual sustenance.

**9. Other issues of concern to Te Aupouri in the Bill are:**

- 9.1 The process by which this policy has been developed is quite unjust because the **universal rejection** of the policy by Te Aupouri and others, as demonstrated in the foreshore and seabed Hikoi in which Te Aupouri strongly participated has been totally ignored;
- 9.2 The policy and this Bill are fostering conflict in the community and will further disenfranchise and disempower Maori to the disadvantage of the whole country;
- 9.3 The concerns about the risk of decreased public access and alienation / sale if Te Aupouri gains recognised title have been manufactured and manipulated for political ends and bear no semblance of reality to the generous host nature presently and historically demonstrated by Te Aupouri on its fine beaches, bays and harbours;
- 9.4 I agree with the Waitangi Tribunal that the Crown policy, represented in this Bill is not necessary to protect the interests of all New Zealanders when, in other areas such as Lake Taupo and Okahu Bay in Auckland, ownership interests of Maori have been recognised in a way that provides for everyone's interests;
- 9.5 If this Bill becomes law, it will open New Zealand up to criticism at an international level which is not desired by Te Aupouri as we focus on building our country towards a prosperous future in conjunction with all inhabitants.

**10. If passed into law, this Bill could have the following effects:**

- 10.1 The fencing of those portions of the foreshore that are retained in private title, yet have been granted public access to date, leading to possible conflict and property damage;
- 10.2 Potential acts of protest from Maori and non-Maori on either side of the debate which could have a negative environmental impact on the beaches;
- 10.3 Further power struggles between Maori and non-Maori as they attempt to out-litigate each other to determine ancestral connection and customary rights ahead of and above the other;
- 10.4 A contemporary grievance under Article II of Te Tiriti, resulting in ongoing litigation and an extension to the settlement industry – just as Te Aupouri are positioning to move out of that mode and into a mode of growth and development;

- 10.5 A general breakdown of relationships between Te Aupouri and other Iwi/Hapu in the Muriwhenua rohe as well as potential altercations between Maori and non-Maori in general.

**11. Submission**

I ask that the Committee recommend that:

- 11.1 This Bill be abandoned; and
- 11.2 The Government enter into equitable dialogue with Te Aupouri to find an acceptable and constructive solution; and
- 11.3 The Government retain the principles of this bill as base line points of negotiation with Te Aupouri once the nature and extent of our customary rights are determined through the New Zealand judiciary system.

*Signed for and on behalf of Te Aupouri Maori Trust Board*

Stephen Allen  
CEO

## **Appendix 5: Te Runanga o Te Rarawa Submission to Parliament on the Foreshore and Seabed Consultation Proposals**

(source: [www.teope.co.nz/submissions](http://www.teope.co.nz/submissions))  
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**TE RUNANGA O TE RARAWA**  
28 South Rd, P.O. Box 361, KAITAIA

3 October 2003

### **TE RUNANGA O TE RARAWA SUBMISSIONS – GOVERNMENT PROPOSALS ON FORESHORE AND SEABED**

#### **Introduction**

1. Te Runanga o Te Rarawa (Te Rarawa) makes these submissions on behalf of the whanau, hapu and iwi of Te Rarawa: past, present, and those future generations to come. As representatives of our respective hapu and collectively as Te Rarawa Iwi, we reiterate that we are the principal spokespeople, protectors and custodians over all our taonga, which are our inherited and given rights.

#### **Acknowledgments / Affirmations**

2. Te Rarawa acknowledges and affirms the following points as a means to contextualise the current foreshore and seabed debate.

#### **The Declaration of Independence**

3. The 1835 Declaration of Independence established Maori sovereignty that enabled Maori to Treat with the Government in 1840. Article 2 of the Declaration stated that the Confederation of the United Tribes:

*“will not permit any legislative authority separate from themselves...to exist, nor any function of government to be exercised...unless...acting under the authority of laws regularly enacted by them”*

4. It is presumed that “laws regularly enacted” would reflect and be consistent with the practices, customs, values and beliefs of hapu and iwi such as mana and kaitiakitanga. In other words, the Declaration was expressing that no legislative authority or government would be permitted unless it acted consistent with

those practices, customs, values and beliefs. This qualifier is as powerful and relevant today as it was in 1835.

## Te Tiriti o Waitangi

### *Crown Obligation of Good Governance*

5. The Government has the right, by virtue of Article I of Te Tiriti o Waitangi (Te Tiriti), to govern in New Zealand (including the right to make laws). However, such governance is not unfettered: the Government's right is qualified by Article II, which states that:

*“Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira – ki nga hapu ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa.”*

A fair translation of which reads as follows<sup>1</sup>

*“The Queen of England agrees to protect the Chiefs, the Subtribes and all the people of New Zealand in the unqualified exercise of their paramount authority over their lands, villages and all their treasures.”*

6. Therefore, to the extent that the Government's foreshore and seabed Proposals do not protect te tino rangatiratanga a Te Rarawa (including our customary rights and obligations), those same Proposals are in breach of the Government's fiduciary obligation of good governance.

### Retention of the Substance of the Land

7. It was Panakareao who said at Waitangi “The Shadow of the land goes to the Queen, the substance remains with us”. This reflected that our ancestral rights to our foreshore and seabed are part of our ‘*papa-tupu-whenua tuku iho*’. This continues to be the understanding of Te Rarawa with respect to the intention of Te Tiriti (regardless of the fact that after the Northland land sales Panakareao bitterly reversed his famous saying when he felt only a shadow remained after all).

### Marlborough Sounds Court of Appeal Decision

8. On 19 June 2003 the Court of Appeal released its decision on the jurisdiction of the Maori Land Court to investigate title to the foreshore and seabed of the Marlborough sounds.<sup>2</sup>

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<sup>1</sup> Translation by Margaret Mutu, Appendix 2, “Te Whanau Moana” (McCully Matiu and Margaret Mutu, 2003).

- 8.1 The Maori Land Court has jurisdiction to determine the status of the foreshore and seabed under the Te Ture Whenua Maori Act (the Act); but just as significantly
  - 8.2 The decision *In Re Ninety Mile Beach*<sup>3</sup> is wrong. That judgment held that the English common law of tenure displaced customary property in land upon upon the assumption of sovereignty. However, the Court of Appeal states that *In Re Ninety Mile Beach* is based on the discredited authority of *Wi Parata v Bishop of Wellington*<sup>4</sup>.
9. Common law therefore upholds that Maori customary rights have not been extinguished.

### **Procedural Unfairness**

10. The Government's response to the foreshore and seabed issue is procedurally unfair. The Government has shown bad judgment and a lack of good faith in its reaction to the Marlborough sounds Court of Appeal decision. For the following reasons, Te Rarawa considers that the government's Proposals (the Proposals) herald an imposed solution based on political expediency rather than legitimacy and the protection of Maori customary rights.
  - 10.1 In many respects it has been ill-timed, ill-considered and mismanaged. This has materially contributed to public and political confusion, uncertainty, and a lack of perspective. The result is the creation of a policy environment that is at best unreceptive and at worst oppressive to Maori, and manifestly hostile to the promotion of Maori customary rights.
  - 10.2 The Proposals were developed unilaterally by the Government.
  - 10.3 Te Rarawa sees the proposal to legislate as a 'back door' solution to circumvent due legal process. The Government's system and renders farcical its statement that "The ability to take a claim to the courts is an important check on government for all citizens, and in this context it provides a particular protection for Maori."<sup>5</sup>

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<sup>2</sup> 2 *Ngati Apa and others v Attorney-General* (Unreported, 19 June 2003, Court of Appeal, Wellington, CA 173/01.

<sup>3</sup> *In Re Ninety Mile Beach* [1963] NZLR 461 (CA)3 (1877).

<sup>4</sup> *Wi Parata v Bishop of Wellington* NZ JUR (NS) SC 72.

<sup>5</sup> Government Proposals, p28. Te Rarawa has a particular view about the

- 10.4 The Government's consultation process:
- a. Wrongly treats Maori customary right holders as merely another stakeholder along with the interested public. Rather, the Government ought to engage separately and directly with Maori as the holders of customary rights whose permission must be sought and expressly obtained regarding any changes to those rights. Maori are not merely to be consulted with.
  - b. Has a timeframe that is unreasonably short.
11. In summary, Te Rarawa:
- 11.1 Notes an inherent contradiction in the Proposals: the Government's approach is based on four 'Principles', yet the Government has failed to observe the fundamental principle of procedural fairness which should underpin its entire approach;
  - 11.2 On the basis of procedural unfairness alone:
    - a. Strenuously rejects the Proposals outright;
    - b. Is extremely distrustful of the Government's response to the foreshore and seabed issue;
    - c. Considers that the Government's request of Maori to respond in itself constitutes an act of bad faith and a breach of the Treaty of Waitangi; and
    - d. Does not consider that there is any sense in responding.
12. Te Rarawa does not wish to further acknowledge or legitimize the Government's procedurally unfair consultation by taking part in it. We only comment below on the substantive aspects of the Proposals as a starting point in anticipation of the Government's implementation of a fair process of engagement with Maori.

### **Substantive Issues – The Four Principles**

13. The Four Principles contained in the Proposals are already enshrined in Te Rarawa understanding of our customary rights. Te Rarawa refrains from commenting comprehensively on those

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merits of the Maori Land Court (see paras 22-26 below). However, this view does not detract from our criticism of the Crown undermining Maori access to due legal process.

Principles and the nature and extent of our customary rights at this time, but makes the following brief observations.

#### The Principle of Access

14. Te Rarawa has always maintained that in principle it has no desire to prevent reasonable public access for recreational purposes to coastal areas within the Te Rarawa rohe. Te Rarawa has no intention, in principle, to significantly change reasonable public recreational access and use.
15. As with any principle, however, there are always exceptions. Te Rarawa reserves the right to limit access to:
  - 15.1 Certain discrete sites of significance that are of special importance to Te Rarawa whanau, hapu or iwi. Such sites may include those presently being negotiated in the Te Rarawa Historical Treaty claims settlement process. The return of such sites to Te Rarawa would be justified not only by their special significance but also because of the nature and extent of the Crown Treaty breach associated with those sites. Arguably, public access is already limited to many of these sites due to their remote location.
  - 15.2 Certain areas from time to time in accordance with our practices and customs (e.g. for sustainable natural resource management purposes, such as rahui).

#### The Principle of Regulation

16. Te Rarawa refutes that regulating the use of the foreshore and seabed is solely the Crown's responsibility. Regulation and management is also an inherent component of the customary rights of Te Rarawa.

#### The Principle of Protection

17. Te Rarawa considers that the Proposals make Maori customary rights subordinate to a mere interest (i.e. public use and access). This subordination is:
  - 17.1 Evidenced by the name of the Proposals Consultation Document, and the order in which the Government's Four Principles (Access, Regulation, Protection and Certainty) are presented and discussed in the Proposals; and
  - 17.2 In itself a response to the speculation and unfounded fears of the New Zealand public majority regarding restricted access to the foreshore and seabed by Maori.



18. This subordination does not give Te Rarawa confidence that the Government will properly protect our customary rights. On the contrary, Te Rarawa foresees that the general public will gain disproportionately at the expense of protection of Maori customary rights.

### The Principle of Certainty

19. Te Rarawa agrees with this principle. However, to a large extent ‘certainty’ will depend on the legitimacy and fairness of any foreshore and seabed solution. If it is not procedurally and substantially fair, Te Rarawa will deem the solution to be a contemporary Crown breach of Te Tiriti. This will result in ongoing uncertainty as Te Rarawa continues the struggle for recognition and protection of our customary rights.

### **Substantive Unfairness – General Submissions**

#### Onus of Proof

20. The Government has effectively placed the onus on Maori to prove our specific customary rights. Te Rarawa contends there is sufficient legal foundation and evidence to establish our customary rights, therefore the onus should be on the Government to disprove their existence. Te Rarawa refuses to accept that the burden of proof should be ours to discharge. Unless and until they are disproved, Te Rarawa customary rights remain intact.

#### Nature and Extent of Customary Rights

21. The Proposals demonstrate only a rudimentary Government understanding and recognition of Maori customary rights. The Government has assumed “*that there are few if any customary rights that have not by now already been acknowledged and protected.*”<sup>6</sup> This assumption is erroneous. The responsibility is therefore placed on Maori to correct that assumption. However that assumption suggests a lack of Government willingness and open-mindedness to acknowledge and discuss all components of Maori customary rights relating to the foreshore and seabed which include but are not limited to:

- 21.1 Protection of the resource consistent with our tikanga  
– Te Rarawa does not seek a title over our seabed and foreshore, rather we consider a title-less status is more appropriate;

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<sup>6</sup> Government Proposals, p7.

- 21.2. Regulation/management;
- 21.3. Use and access (in some cases exclusive);
- 21.4. Development and evolution (cultural and economic);  
and
- 21.5. Intergenerational transference (of the resource and  
knowledge associated with it).

### Maori Land Court

22. The Government prefers its proposal to re-design the Maori Land Court (the MLC) to investigate and record customary rights and interests in the foreshore and seabed.<sup>7</sup> However, the proposals list a number of issues<sup>8</sup> that need to be explored and resolved regarding MLC role and function and foreshore and seabed matters, and more issues are likely to be identified. Te Rarawa at this time has considerable doubts as the suitability of the MLC to resolve foreshore and seabed matters for various reasons including the following.

#### *Onus of Proof and Tests to be Applied*

23. The Appeal Court commented that it may be difficult to prove customary rights before the MLC. We can only assume that the Appeal court was alluding to the tests which are likely to be applied in New Zealand courts, i.e. that the claimant must show<sup>9</sup>:
- 23.1 “The interest or activity is an element of a practice, custom, or tradition integral to the distinctive culture of the group claiming the right.”
  - 23.2 “The interest or activity was being undertaken at the time of the signing of the Treaty of Waitangi (1840) and continues to be undertaken.”
  - 23.3 “The customary right has not been extinguished by or under law, for example by the imposition of a conflicting statutory regime to regulate the activity or the space, or the legal grant of the space to another person.”
24. Again, Te Rarawa refuses to accept that the burden of proof should be ours to discharge. Unless and until they are disproved, Te Rarawa customary rights remain intact. With respect to 23.2 above, Te Rarawa takes issue with having to prove continuous use of our customary rights when Government actions or omissions may have impeded or prevented Maori from exercising the same. Te Rarawa

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<sup>7</sup> Government Proposals, p29.

<sup>8</sup> Government Proposals, p29.

<sup>9</sup> Government Proposals, p7.

is obviously averse to engaging in a process where there is real risk of creating any opportunity for the Government to unjustly benefit from a Crown breach of Te Tiriti.

### *Unsuitability of Outcome*

25. Currently a MLC decision does not provide a mechanism that protects Te Rarawa customary rights. As stated above, Te Rarawa does not wish to have the foreshore and seabed returned to us in freehold title. The MLC may be able to determine land ‘ownership’ matters, but we do not see that the Court has the jurisdiction to determine other customary rights matters (such as those listed in paragraph 21 above).

### *Erosion of Te Rarawa Rights*

26. A MLC judgment will for all intents and purposes set in stone Applicant areas of interest, or boundaries. Te Rarawa believes cultural evolution is our customary right. In this regard Te Rarawa sees potential MLC judgments as a serious threat insofar as it effectively locks our people into a point in time. Te Rarawa notes this threat is echoed in other aspects of the MLC Proposals and the Proposals generally, eg. that customary rights *are “Not able to be...used for commercial purposes, or in any way used for pecuniary gain or trade.”*<sup>10</sup>

### **Concluding Remarks**

27. Te Rarawa looks forward to the Government withdrawing its proposal and starting again, using Te Tiriti and the extensive current knowledge and expertise of individual whanau, hapu and iwi in respect of their foreshore and seabed to reach solutions which benefit all.
28. If the Government fails in its Proposals to protect Maori customary rights to the foreshore and seabed Te Rarawa will consider them to be a contemporary breach, and Te Rarawa will be left with no option but to take all and any means to protect our customary rights.

Gloria Herbert, ONZM  
**Chairperson**

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<sup>10</sup> Government Proposals, p30.

**Appendix 6: Statement of Professor Margaret Mutu to Select  
Committee hearing at Auckland, 25 August 2004**  
reproduced as published

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**To the Fisheries and Other Sea-Related Legislation Select Committee  
Of the New Zealand Parliament**

**Ngāti Kahu consideration of the Foreshore and Seabed Bill**

My name is Professor Margaret Mutu.

I am of Te Whānau Moana hapū of Ngāti Kahu whose lands include the foreshore and seabed of the Karikari peninsula in the Far North within the territories of Ngāti Kahu iwi. My home is situated on Karikari beach and includes the foreshore and seabed of that beach. Details of Te Whānau Moana's centuries old mana whenua to this area and our dependence and interrelationship with our seas, including the foreshore and seabed, has been published in the book *Te Whānau Moana – Ngā kaupapa me ngā tikanga: Customs and protocols* written jointly by me and my uncle, McCully Matiu and published by Reed Publishing in 2003. It contains numerous photographs of the lands and seas over which Te Whānau Moana holds and will always hold mana whenua and dominion. The Select Committee can obtain a copy of the book from Bennett's Bookshop.

This book was launched in May 2003 and the government's Attorney General and Minister of Treaty of Waitangi Negotiations attended the launch which coincided with the signing of Ngāti Kahu's Terms of Negotiation for the settlement of our claims against the Crown. That event was witnessed by all the marae and hapū of Ngāti Kahu. The Terms of Negotiation required both parties to act in good faith and to work towards building a relationship of mutual respect and trust between Ngāti Kahu and the Crown. Two months later the same Attorney General speaking on behalf of the government blatantly violated that agreement by announcing that the government intended to confiscate our foreshore and seabed, knowing full well it belonged to us. Many of Ngāti Kahu interpreted that as an act of treachery and a declaration of war and immediately issued the Attorney General with a very strongly worded message to cease and desist from such behaviour. Since that time Ngāti Kahu have been unable to convene a meeting with her even though we have done our utmost to keep the negotiations alive and uphold our undertakings in the Terms of Negotiations.

I am also of Te Rarawa iwi and the lands of my whānau of Te Rarawa include the foreshore and seabed of Te Kōhanga (Shipwreck Bay) on Te Oneroa-a-Tōhē (Ninety Mile beach).

I am the chairperson of the mandated iwi authority of Ngāti Kahu, Te Rūnanga-a-Iwi o Ngāti Kahu, and am authorised to speak on behalf of Ngāti

Kahu on this matter. As such I attach a copy of the affidavit I submitted to the Waitangi Tribunal on behalf of Ngāti Kahu on this matter. That affidavit details who Ngāti Kahu are and my role as my iwi's representative.

Many other Ngāti Kahu have also sent communications to your committee as individuals and representatives of their whānau, hapū and our iwi and have asked to be heard, mainly in our own rohe in Kaitaia. Given the undertakings and promises of your government that everyone who wished to be heard would be heard, Ngāti Kahu takes a particularly dim view of your government's instructions to this committee which have effectively denied the right of almost all Ngāti Kahu to be heard. Ngāti Kahu has nevertheless discussed this matter at considerable length in many hui over the 14 months since the government signalled its intention to confiscate our foreshore and seabed.

Ngāti Kahu is a member of Te Ope Mana a Tai and fully supports the communication to your committee made by that body. We are also extremely grateful to Te Ope Mana a Tai for the timely, accurate, extensive and detailed information and analysis they have provided to all New Zealanders on the issue of the government's proposal to confiscate our foreshore and seabed. The New Zealand government would be wise to listen to and take the advice given by Te Ope Mana a Tai.

### **General position on the Foreshore and Seabed Bill**

I, my whānau, my hapū and my iwi are **strongly and vehemently opposed to the Foreshore and Seabed Bill in its entirety.**

The reasons for my/our opposition to the Bill are as follows:

- the process by which this policy has been developed is quite wrong and a misuse of the term 'consultation' because the universal rejection of the policy by Māori and others has been totally ignored
- the policy and this Bill are fostering conflict in the community and will actively disenfranchise and disempower Māori to the disadvantage of the whole country
- concerns about the risk of decreased public access and alienation/sale if Māori can gain title has been manufactured and exploited for political ends – most Māori have said that legislation which just addressed those two issues would be acceptable
- I agree with the Waitangi Tribunal that the Crown policy, represented in this Bill, is not necessary to protect the interests of all New Zealanders when, in other areas such as Lake Taupō and Ōkahu Bay in Auckland, ownership interests of Māori have been recognised in a way that provides for everyone's interests
- I do not want to see New Zealand criticised by the international community in the way that it will if this Bill becomes law

### Part 3. Specific Issues

I/we have the following particular concerns in relation to the Bill:

#### *(a) Vesting and extinguishment (Clause 11 of the Bill)*

By vesting all foreshore and seabed in the Crown, the Bill is intended to extinguish all existing Māori customary/property rights and ownership and this is:

- a flagrant and blatant denial of due process by interfering with a matter before the courts before it has been able to complete the process allowed by the courts
- *an arrogant attempt to assert Crown ownership over land belonging to others after attempts to prove that the Crown owned it failed in the Court of Appeal. Given the line of questioning being adopted by one member of this committee it should be noted that the Court of Appeal made no finding on whether, as a matter of Pākehā law, Maori owned the foreshore and seabed. Rather, it quite properly left that matter for the Maori Land Court to determine in accordance with tikanga. The Maori Land Court has already issues a preliminary decision in respect of Te Oneroa-a-Tohe finding that it is customary Maori land (and this led to the 90-mile beach case which the Court of Appeal overturned)*
- totally unwarranted and unacceptable
- expropriation of property rights without consent
- in clear breach of Article II of the Treaty of Waitangi
- out of step with increasing international acknowledgement of the rights of indigenous peoples, and recognition that those rights should not be interfered with without their consent
- is creating harmful and unnecessary division in the country

#### *(b) Denial of Access to Justice (clauses 9 & 10)*

The Bill would remove all meaningful judicial routes for Māori to have their rights investigated and legally recognised and this is:

- effectively an unfair reversal of the Court of Appeal decision, which the Crown lost, and as such represents an abuse of Parliamentary power
- totally inconsistent with internationally-recognised principles of human rights
- at odds with the common law principles of access to the Courts and due process of law
- in breach of Article III of the Treaty of Waitangi
- seriously erode Māori confidence in our supposedly equal and bicultural society and discourage engagement in the legal system and its processes

*(c) Ancestral Connection Orders (Part 3 of the Bill)*

The new Ancestral Connection Orders proposed by the Bill offer nothing meaningful to Māori, and will:

- require whānau/hapū/iwi to “prove” in Court, their undeniable connection to their whenua and moana which goes back many generations (while the Crown, ironically, simply asserts its ownership without any proof whatsoever)
- create a situation where any ‘connections’ not documented through the Court process by 31 December 2015 will cease to be recognised
- provide absolutely no new opportunities to influence management of the Coastal Marine Area
- merely duplicate the consultative opportunities and obligations which already exist under the Resource Management Act 1991, without increasing the likelihood that Māori concerns will be given any greater weight than at present
- confuse existing processes for interacting with Māori, particularly as they can be granted as part of Treaty settlement negotiations, as well as through a judicial process
- not be a substitute for the rights that will be lost

*(d) Customary Rights Orders (Part 3)*

The new Customary Rights Orders proposed by the Bill offer nothing meaningful to Māori, and the tests and definitions for the sort of customary rights that can be recognised through Customary Rights Orders:

- are excessively restrictive and will deny legal recognition to the great majority of genuine customary rights and practices
- are totally inconsistent with tikanga Māori
- are out of step with international jurisprudence
- create a situation where any rights or practices falling outside the Bill’s definitions or not documented through the Court process by 31 December 2015 will be considered to be extinguished
- fail to recognise the development right that arises from customary ownership by restricting the exercise of customary use rights to their past/present scales, which is inconsistent with international jurisprudence and prior New Zealand practice, for example in relation to the 1992 Fisheries Settlement
- will have the effect of devaluing the existing s.6(e), ‘to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, waters, sites, wahi tapu, and other taonga’, resulting in reduced protection for other legitimate customary rights
- will not be a substitute for the rights that will be lost

*(e) Territorial Customary Rights Orders (Part 4)*

The new Territorial Customary Rights Orders proposed by the Bill are essentially pointless and:

- the test to be applied by the High Court in determining them reflect the most minimalist, worst practice end of the international spectrum
- the test bears no resemblance to the current “held in accordance with tikanga Māori” test under Te Ture Whenua Māori, which is the only formulation which would provide for a full recognition of tikanga
- the orders have no legal effect except requiring the Crown to enter into discussions and, given the Crown’s recent record of ignoring decisions of both the Waitangi Tribunal and the Court of Appeal, Māori can take no confidence from being left in the position of supplicants
- the prohibitive cost of taking a High Court action is likely to deny even this sham process to the great majority of whānau/hapū/iwi
- will not be a substitute for the rights that are lost

#### **Part 4. Concluding Observations**

Ngāti Kahu whānau, hapū and iwi have discussed this and concluded that the foreshore and seabed is the domain of hapū who are obligated to and responsible for the preservation and conservation of these areas. To vest the full and beneficial ownership of the foreshore and seabed in the crown will result in a confiscation from Māori. On this basis we make the following declaration:

We will not agree to the ownership of the crown over the foreshore and seabed as this will constitute a confiscation of land from tāngata whenua. The foreshore and seabed in our rohe belongs to Ngāti Kahu, always has done and always will do. We will never give up our mana over our foreshore and seabed in our rohe from Rangaunu harbour to Te Whatu (Berghan’s Pt) and, if called on by our southern Ngāti Kahu whanaunga, on to Takou Bay and Te Tii. Neither will we abide by any legislation that attempts to remove or deny our ownership. The proposed Foreshore and Seabed Bill clearly sets out the manner in which the New Zealand government intends to both deny and remove our ownership to our foreshore and seabed. We do not give permission for that to happen and will fight all and every move to do so both now and forever.

At this point, I need to explain the specifics of why and how the statement will be upheld. Underlying this statement is a very clear understanding of the nature of mana whenua and the fact that no Pākehā legal mechanism or parliamentary assertion can ever remove mana whenua. It can only trample it or denigrate it.

What Te Whānau Moana and Ngāti Kahu hold in respect of our foreshore and seabed is mana whenua. Mana is defined as ‘lawful permission delegated by the gods to their human agents and accompanied by the



endowment of spiritual power to act on their behalf and in accordance with their revealed will'. Mana whenua is the mana that the gods planted within Papatuanuku, the mother earth, to give her the power to produce the bounties of nature. A person or tribe who holds or is mana whenua of a particular area has the god-given power and authority to derive a living from the lands and seas and their natural resources and the responsibility to manage, protect and guard them from desecration, pillage and any unwanted attention of outsiders. Mana whenua therefore encompasses all of the English notions of ownership (without the right to permanently alienate), regulation, allocation, management and control, and adds also spiritual aspects of powers and responsibilities which the English language has great difficulty expressing. The closest English word I can find for mana whenua is "dominion". No Pākehā legislation can ever remove mana whenua. It can only either support Māori in the responsibilities we have, or make it extremely difficult for us to carry out our responsibilities as mana whenua. The proposed Bill, of course, will achieve only the latter.

Ngāti Kahu has nevertheless resolved that it will actively assert its mana whenua. We have issued public notices and notices to local and central government that all activities pertaining to the foreshore and seabed in our territories must have the authority and permission of Ngāti Kahu. Any which do not and which are in violation of Ngāti Kahu tikanga are illegal activities and must cease. Remedial action to clean up the results of numerous illegal activities is required. Details of several such activities are listed in my affidavit to the Waitangi Tribunal. Any attempts to commence new activities without Ngāti Kahu's permission will be illegal and restraining orders in accordance with our tikanga will be issued and implemented.

It should be rather obvious from this that the Foreshore and Seabed Bill will not be implemented in Ngāti Kahu's territories. Any attempts to impose it in our territory will be considered an act of aggression and treated accordingly. The warning by a senior civil servant of the inevitability of civil war if this bill is enacted is not hyperbole, and this committee and your government would be extremely unwise not to comprehend the enormity of what it is proposing to visit upon this country.

## **Part 5. Recommendations**

I therefore ask that the Committee recommend to the New Zealand Parliament that the Bill be abandoned and that the Government enter into true dialogue with Māori to find an acceptable and constructive solution. And to assuage the public fears wrongly and falsely fostered, that the option of just legislating to confirm public access and non-saleability of foreshore and seabed should be explored.

**Appendix 7: New Zealand Herald Report of Select Committee  
Hearing at Auckland, 25/8/04**

(Source: *New Zealand Herald*, Section A3, 26/8/04  
www/NZHerald.co.nz)  
reproduced as downloaded

**'Bloodshed' if seabed bill passed, professor warns**

26.08.2004

By SIMON COLLINS

One of the country's top Maori academics says parts of New Zealand will see the same kind of bloodshed as seen in Palestine and Israel if the Government nationalises tribally owned parts of the coastline.

Professor Margaret Mutu, the head of Maori Studies at Auckland University and chairwoman of the Ngati Kahu tribe of the Far North, told the parliamentary committee on the Foreshore and Seabed Bill in Auckland yesterday that Ngati Kahu would stop the bill being implemented in its district.

"The warning by a senior civil servant of the inevitability of civil war if this bill is enacted is not hyperbole," she said in a prepared statement.

When National MP Dr Wayne Mapp asked her if she seriously believed civil war was inevitable in Ngati Kahu's district if the bill was passed, she said: "I think that is clearly stated in this paper, which is authorised by Ngati Kahu."

Dr Mapp then asked what she meant by civil war. She said: "The sorts of things that I thought everybody knew about, that happen in Palestine and Israel.

"If you are in any culture in the world and assert that you are going to take over another culture's territory, that is a declaration of war."

Dr Mapp later issued a press statement questioning Auckland University's employment policies and urging it to distance itself from Dr Mutu's "inflammatory statements".

"Freedom of speech does not extend so far as to threaten civil war. That is tantamount to treason," he said.

Maori Language Commission chief executive Haami Piripi came under fire early this month for predicting civil war if the bill is passed.

An Auckland University spokesman said the university had no comment to make on Dr Mutu's remarks.

Dr Mutu, who had six other Ngati Kahu leaders and advisers with her, was applauded by the mainly Maori audience of about 60 people.

The opening day of the select committee's Auckland hearings was at the Alexandra Park Raceway.

Many in the audience were among almost 4000 people who made written submissions against the bill but were not given a right to speak.

The committee decided to hear fewer than 400 submitters before reporting the bill back to Parliament on November 5.

Auckland District Maori Council chairwoman Titewhai Harawira said her council, the Tai Tokerau (Northland) Maori Council, and the New Zealand Maori Council were still waiting for replies to their submissions.

Committee chairman Russell Fairbrother said the committee was not "an entertainment" and did not want to hear people who "do not understand the issues in the bill".

"The committee is hearing those who have issues to contribute to the bill and will help us in our consideration of the bill," he said.

Yesterday the committee heard from 14 Pakeha submitters and four Maori groups.

Tensions were high from the start, when a committee staff member was upset by the way she was treated by a group of Maori asked to leave when the committee met in private before the public hearings began.

Although no complaint was laid with police, Mr Fairbrother said the worker was "visibly shocked and upset".

When the hearings started, Mrs Harawira stood to welcome the MPs to Auckland. Mr Fairbrother ordered her to sit down, then asked police officers to escort her out. She sat down before they did so.

Mrs Harawira's daughter Hinewhare sat at a press table and spread a Tino Rangatiratanga (Maori sovereignty) flag over it. Mr Fairbrother allowed her to stay but told her repeatedly to stop shouting, and officials removed the flag at lunchtime.

Many of the audience wore Maori Party jackets and applauded their party leader Tariana Turia when she arrived three hours after the hearings started.

The bill places coastal land below high-water mark in Crown ownership, but allows Maori groups to go to the courts to have customary rights recognised.

However, submitters noted that land held in freehold title by either Maori or Pakeha owners was exempted from the bill.

The chairman of the Whakaki Lake Trust near Wairoa, Walter Wilson, said he was going home happy after MPs pointed out that his land would not be affected because it was in freehold title.

Planner Kathleen Ryan said the bill was "racially targeted" because it nationalised foreshore areas where Maori groups might have been able to prove customary title, but exempted freehold properties.

The secretary of the Bay of Plenty Regional Council's Maori representation committee, Waaka Vercoe, said tribal land rights passed down from tipuna (ancestors) in "tipuna title" continued to underlie any modern land titles.

Auckland University law professor Jock Brookfield, author of *Waitangi and Indigenous Rights, Revolution, Law & Legitimation*, said "the great mass" of legal authority in English-speaking countries supported the judgment of the Court of Appeal in the Ngati Apa Marlborough Sounds case last year that customary title to parts of the foreshore could be established by indigenous people.

He suggested a compromise where the Government could still nationalise the foreshore but held it "upon trust for Maori customary owners if and where they are judicially sustained".

**SECTION B:**

**HE AHA TENA TUHAI MEA TE “MANA WHENUA”?**

**WHAT KIND OF THING IS “MANA WHENUA”?**

