

**Unuhia te rito o te harakeke  
Kei hei te ko'mako e ko?  
Ki mai ki au  
He aha te mea nui o tenei ao  
Maku e ki atu  
He tangata, he tangata, he tangata**

*Pluck out the heart of the flax  
Where will the bellbird sing?  
Ask me,  
What is the greatest thing of this world?  
And I will reply  
It is people, it is people, it is people*



# NGA MIHI KI NGA KAI TAUTOKO O TENEI TUHITUHINGA

## Acknowledgments

---

He mihi nui tenei ki a koutou e manaaki mai i a matou i te wa e mahi ana matou i nga korero i roto i te pukapuka nei.

Te Tai Haruru wish to acknowledge and thank the many people who have supported the publication of this journal.

The external support, assistance and advice given by colleagues from Waikato, Victoria and Otago Law Schools has been very gratefully received.

Within our own Faculty of Law at Auckland, particular thanks must go to Stephen Poon for his technical assistance in formatting the cover and to Theresa Ryan for her perseverance in formatting the entire publication, including maps and photographs. It is far more than can be reasonably expected of the Dean's Secretary.

Thank you also to Bruce Harris for supporting the idea of a Maori journal of legal writing, to Jane Kelsey for rescuing Taniwha and putting it back up front and to Kate Buchanan for her assistance in wrestling Taniwha to the page.

Finally, special thanks are due to the students of the Maori Land Law class of 2003, who trusted their teacher enough to allow publication of their essays in this Journal, and to Tina Barclay for her photographic contributions.

Editor:	Nin Tomas, Te Tai Haruru, Auckland Faculty of Law
Principal Reviewer:	Jacinta Ruru, Otago Faculty of Law
Publisher:	International Research Unit for Maori and Indigenous Education, University of Auckland.

**ISBN Number: 0-9582588-0-5**

This work is entitled to the full protection given by the New Zealand Copyright Act 1962 to the holders of copyright.

Applications for reproduction and general enquiries should be made to the Director, International Research Institute for Maori and Indigenous Education, University of Auckland, Private Bag 92-019, Auckland, New Zealand.

This volume is also available by direct order from Te Tai Haruru, Faculty of Law, University of Auckland, Private Bag 92-019, Auckland, New Zealand.  
Email: [n.tomas@auckland.ac.nz](mailto:n.tomas@auckland.ac.nz)

# NGA TUHITUHI KEI ROTO

## Contents

---

### TE KORERO TUATAHI

#### Foreword

Judge Layne Harvey .....	5-8
--------------------------	-----

### SECTION A

#### TE TAHA MOANA ME TE TAKUTAI MOANA O AOTEAROA..... 9

#### The Foreshore and Seabed of Aotearoa/New Zealand

Ask That Taniwha who Owns the Foreshore and Seabed of Aotearoa.....	10-52
— <i>Nin Tomas and Kerensa Johnston</i>	

### SECTION B

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

#### THE CONCEPT OF “MANA WHENUA” ..... 86

Mana Whenua and Tuku Whenua: Ngati Koata ki te Tau Ihu .....	88-104
— <i>Bernadette Arapere</i>	

Mana Whenua and the Ngawha Geothermal Resource Claim .....	106-120
— <i>James Jackson</i>	

Mana Whenua and the Ngai Tahu Claim .....	121-138
— <i>Simon Fitness</i>	

Mana Whenua and the <i>Ngati Apa</i> Decision .....	140-159
— <i>Adina Thorn</i>	

### MAPS

Te Tau Ihu o Te Waka Maui.....	89
Ngawha Geothermal Claim .....	107
Ngai Tahu Purchases .....	122
Kaikoura Purchases.....	123
<i>Ngati Apa</i> Claim Area.....	141

## APPENDICIES TO SECTION A:

Appendix 1: Maori text of te Tiriti o Waitangi and Official English text of the Treaty of Waitangi .....	54-57
Appendix 2: Preliminary Maori Land Court Decision - <i>Te Wharo One Roa a Tohe (90 Mile Beach)</i> .....	58-61
Appendix 3: Letter seeking support for Ninety Mile Beach Ownership Claim Appeal to the Privy Council.....	62
Appendix 4: Te Aupouri Maori Trust Board Submission to Government on the Foreshore and Seabed Bill 2004 .....	63-68
Appendix 5: Te Runanga o Te Rarawa Submission to Parliament on the Foreshore and Seabed Consultation Proposals .....	69-76
Appendix 6: Statement of Dr Margaret Mutu to Select Committee Hearing at Auckland on 25 August 2004.....	77-82
Appendix 7: NZ Herald Report of Select Committee Hearing held at Auckland on 25 August 2004.....	83-85

# TE KORERO TUATAHI

## Foreward

---

*Ko wai ra, ko wai ra  
Ko wai ra te tangata tutu taua kaore koa  
Ko Hau, ko Nuiho, ko Nuake, ko Manu, ko Weka  
Ko Toroa, ko Ruaihona, ko Tahinga o te ra  
Tenei te maro ka hurua, huruhurunui no Manu no Weka  
Ka tutapori atu ka tutapori mai  
Weronoa weronoa nga rakau whakaiaia  
Na nga tipuna i tikina ki ra waahi  
Hai homai mo taku waka te Waimihia  
Te mata o nga rakau a Tukariri, te mata o nga rakau a Tukaniwha  
Te mata o nga rakau a Tukai taua  
Whano whano haramai te toki, haumi e, hui e, taiki e.*

In 1893 as he lay dying, the prophet Te Kooti Arikirangi Te Turuki exhorted his supporters to pursue legal remedies for their grievances:

*Ko te waka hei hoehoenga mo koutou i muri ahau ko te ture  
Ma te ture ano te ture e aki*

*The canoe for you to paddle after me is the law  
Only the law can be pitched against the law*

Implicit in his kupu whakaari or prophetic saying was the notion that the pathway to redress for Maori claims was via legal processes. As is well known, Te Kooti had considerable first hand knowledge of both armed conflict and the legal system, and suffered injustice as a result. Despite those experiences he remained committed to the ideal of Maori aspirations being realised through legal means. His remarks seem apposite even today. However, once Chief Justice Prendergast, in 1877, had rendered the Treaty of Waitangi “a simple nullity” and the Privy Council in 1941 had determined that the Treaty was of no effect until incorporated into municipal law, Maori legal and constitutional matters remained for the most part irrelevant to the wider community. Despite the array of cases involving Maori being heard before superior courts - immortalising for the litigants’ names like Wi Parata, Tamihana Korokai, Mere Roihi, and Nireaha Tamaki - such issues often remained at the fringe of serious critical analysis. The principal exception was the

continuing alienation of Maori land and resources. Until the late 1970s, with limited exceptions, such issues did not feature significantly on the legal and political landscape.

In the 1980s events occurred that altered that position irrevocably. One was the appointment of Edward T J Durie as Chief Judge of the Maori Land Court and Chairperson of the Waitangi Tribunal. Under his inspired leadership the Tribunal gained a new relevance and credibility. The amendment to the Treaty of Waitangi Act 1975, permitting claims back to 6 February 1840, was equally significant. The Tribunal became the forum within which Maori historical claims at last found expression, and in some cases, reached settlement. Running parallel has been the revival of Maori language, culture and identity, which have renewed a consciousness in Maori social, political and legal issues. Maori broadcasting, Maori print media and the revival of wananga have provided new fora for debate on kaupapa Maori (Maori philosophy). Tertiary institutions have also contributed by producing more Māori graduates, including those with legal qualifications. Maori legal graduates involved in the public and private sector, politics, academia and the judiciary are greater in number than ever before.

During the 1980s, a series of seminal judgments on Maori customary rights and Treaty of Waitangi matters raised the profile of Maori legal issues even further. They include *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 and the landmark *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641. Those and other related decisions have refined the concept of “the principles of the Treaty of Waitangi” and have also delineated the limitations of Maori customary rights. The Privy Council, for example, has even determined that *iwi* means “traditional tribes”. In the wake of *Ngati Apa v Attorney General* [2003] 3 NZLR 643 it may yet pronounce on another important legal issue affecting Maori and the wider community. The 1980s and early 1990s also witnessed the inclusion of “Treaty clauses” in an array of legislation concerning conservation, resource management, education and the health system. Compliance with those provisions required central and local government agencies to consult with Maori as to their interests. This has resulted in the development of a new body of law on the consultative process.

In the context of Maori legal issues, the impact of the Waitangi Tribunal cannot be underestimated. It is largely through Tribunal processes and subsequent legislative and judicial responses that the entire body of

jurisprudence surrounding the principles has developed. There is little doubt that the decision to include section 9 in the State Owned Enterprises Act 1986 had its genesis in the *Muriwhenua* Inquiry. Similarly, the enactment of the Fisheries Settlement Act 1992 and the consequences flowing from that legislation are linked to Maori fisheries claims, the reports of the Tribunal and the decisions of superior courts. It is through claim processes such as these that the transfer of several billion dollars of public assets into private Maori ownership will be effected in the near future. With few exceptions, the assets and resources returned in settlements will be placed under the stewardship of kin-based governance entities. At the same time, what may be labelled “the Maori economy” has improved and the assets of Maori trusts and incorporations continue to grow. It is inevitable that, as occurs in the Pakeha arena, there will be disputes over the administration and management of such resources.

In response to some of these developments, various reviews have recommended expanding the jurisdiction of the Maori Land Court to enable it to deal with the resolution of disputes involving Maori assets and resources. As a result, the Fisheries, Aquaculture Reform and Foreshore and Seabed Bills currently before Parliament contain provisions that will expand the jurisdiction of the Maori Land Court. Many of the proposals also stress the need for a range of options to dispute resolution beyond adjudication before courts and tribunals.

Against this backdrop, Maori legal issues have expanded into a significant niche of their own. They are no longer questions at the periphery of academic debate. In short, the landscape has changed dramatically. In recent times, Maori issues, including those of a legal nature, have taken centre stage in New Zealand. The need then for a journal of Maori legal writing seems even more acute. This latest initiative of the Faculty of Law and the International Research Institute for Maori and Indigenous Education at the University of Auckland is, therefore, particularly welcome. While there have been a plethora of seminar papers, articles and texts on a host of legal matters affecting Maori in the last decade, this publication must be one of the first periodicals published by a New Zealand university that has as its principal focus, Maori legal issues. Unsurprisingly, the articles submitted for this first edition address Maori custom law and notions of mana and *tuku whenua*, geothermal resource claims and the mammoth Ngai Tahu claim. These are issues that affect everyone, not just Maori. It is entirely appropriate then, that the contributors are both Maori and Pakeha. Regardless of what perspectives might be proffered, the key

point is that debates are occurring. And beyond the narrow slogans of headlines. In time the Journal of Maori Legal Writing may yet become a major forum for discussion on what are often vexed issues. The development of Maori custom law principles by courts, tribunals and the litigants that appear before them will require scrutiny and analysis. This journal will undoubtedly provide such commentary as the limits of such principles are explored to ensure the issues they concern remain relevant to the 21st Century.

A new initiative like this requires the tautoko (support) of not only law students and academics, but also practitioners, policy makers and judges, and the general community whose interests it affects.

Finally, in considering the occasion of this publication of this first issue I am reminded of the whakatauki of one of my iwi, Ngati Awa: *he manu hou ahau, he pi ka rere – I am like a new born bird, a fledgling that has just learned to fly.* Let us hope then that the journey now begun will be fulfilling and far reaching in the days yet to come.



L R Harvey  
*Ngati Awa, Rongowhakaata, Te Aitanga a Mahaki,  
Te Whanau a Apanui, Ngati Kahungunu.*  
Judge, Maori Land Court  
Rotorua  
6 September 2004



**SECTION A:**

**TE TAHA MOANA ME TE TAKUTAI MOANA**

**THE FORESHORE AND SEABED OF  
AOTEAROA/NEW ZEALAND**



#### **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.

---

<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

---

\* Nin Tomas (Te Rarawa, Te Aupouri, Ngati Kahu. Te Hikutu, Taranaki) is a senior lecturer at the Faculty of Law, University of Auckland. Kerensa Johnston (Ngaruahine Rangi, Te Ati Awa, Taranaki) is a lecturer at the Faculty of Law, University of Auckland. Many thanks to Kate Buchanan, Faculty of Law, University of Auckland, for her comments and assistance with earlier drafts of this article.

<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

---

<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

---

<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.

---

<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

---

<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

---

<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

---

<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

---

<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.

---

<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”

---

<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

---

<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.

---

<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.

---

<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

---

<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.

---

<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

---

<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

---

<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

---

<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

---

<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>

---

<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]

---

<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.

---

<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.

---

<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.

---

<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.

---

<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

---

<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>

---

<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

---

<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.

---

<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”.

---

<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.

---

<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.

---

<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

---

<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

---

<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

---

<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.

---

<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

---

<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!*



---

<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.)

---

### **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

---

**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

---

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

---



**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.

---

<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;

---

<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;

---

<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))  
reproduced as published

---



**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>

---

<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>

---

<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

---

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;

---

<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

---

<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**

---

<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

---

**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 issued 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”?**



## BERNADETTE ARAPERE



Ko Rangitikei te awa  
Ko Ngati Raukawa te au ki te tonga  
Ko Ngati Pikiahuaewae te hapu  
Ko Poupatate te marae kainga  
Ko Bernadette Roka Arapere ahau.

My primary iwi is Ngati Raukawa. I am also affiliated to Ngati Maniapoto and Ngati Tuwharetoa. I am uri of the Whakatere, Parewahawaha, Herangi and Anihana whanau through my father, and Wackrow and McLennan families through my mother. I was raised in the Bay of Plenty, Manawatu and Auckland.

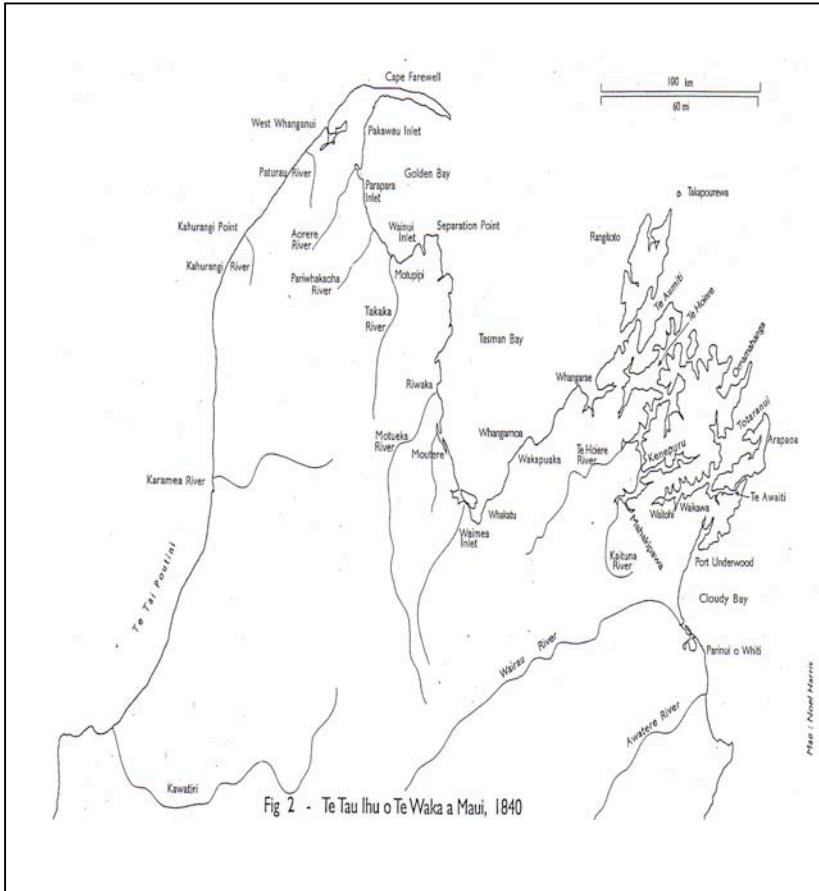
I have a BA in history and Maori Studies and a Master of Arts degree with first class honours in History from the University of Auckland. My Masters thesis focused on hapu relationships within Ngati Raukawa from the heke (migrations) of the 1830s through to the Crown acquisition of the Rangitikei-Manawatu block in 1866-7.

I have worked in the areas of policy, negotiations and historical research into te Tiriti o Waitangi/the Treaty of Waitangi for six years. During this period I have been engaged as a Policy Analyst at the Office of Treaty Settlements, a Research Officer at the Waitangi Tribunal and an independent contract researcher. I have researched and written reports for the Gisborne, Wairarapa and Urewera district inquiries and was Claims Facilitator at the Tribunal for the Tau Ihu (northern South Island) hearings. Most recently I have completed research commissions for Te Whanau o Waipareira and Ngati Ruanui Group Management Ltd.

Some of my influences are Rihi Puhiwahine Te Rangihirawea, Roka Arapere Nathan, Piki Kereama, Professor Mason Durie, Te Kenehi Teira and Te Ahukaramu Charles Royal. My work continues to be informed by my interest in Maori history and law, and the whakapapa and korero handed down by my tipuna. I will complete my law degree in 2004.



## LOCATION MAP TE TAU IHU O TE WAKA A MAUI



Source: Dr G.A. Phillipson, *The Northern South Island: Rangahaua Whanui District 13*, Waitangi Tribunal, 1995, 224.

# MANA WHENUA AND TUKU WHENUA: NGATI KOATA KI TE TAU IHU

BERNADETTE ARAPERE

## INTRODUCTION

This essay demonstrates the practical application of the principle of mana whenua by discussing Ngati Koata mana whenua at Te Tau Ihu. It discusses tuku whenua (exchange or gifting of land) as an incident of mana whenua. Ngati Koata is part of the Tainui waka confederation of iwi. Since the 1820s Ngati Koata has resided in various places at Te Tau Ihu o te Waka a Maui (the northern part of the South Island). Ngati Koata currently has a claim (Wai 566) before the Waitangi Tribunal to lands and resources in the area around Tasman Bay from Te Matau (Farewell Spit) to Wakatu (Nelson) and Te Hoiere (Pelorus Sound), including Rangitoto (D'Urville Island).<sup>1</sup> Evidence relating to Ngati Koata's claim was heard by the Waitangi Tribunal in February 2001. This essay draws upon historical and legal submissions heard in evidence at that hearing, as well as other material on the Record of Documents for the Tau Ihu District Inquiry (Wai 785).

Part I of this essay considers judicial and academic views of Maori custom law or tikanga. The principles of mana whenua and tuku whenua, alongside other related concepts such as ahi kaa (continued occupation), and takahia te whenua (walking the land), are discussed. Part II is a case study of Ngati Koata mana whenua at Te Tau Ihu. I argue that Ngati Koata's claim to mana whenua in this region stems from an important legal event: a tuku whenua. The tuku whenua was confirmed by significant acts with legal implications such as takahia te whenua and ahi kaa as well as intermarriage and strategic peacemaking. The essay concludes with a comment on the present significance of mana whenua for Ngati Koata, in light of the Treaty of Waitangi claims process, the fisheries allocations, and the foreshore and seabed litigation.

---

<sup>1</sup> See attached Location Map.

## PART I - TIKANGA MAORI (MAORI CUSTOM LAW) AND THE PRINCIPLE OF “MANA WHENUA”

### *Maori Custom Law*

The term “custom law” is used to describe the body of rules developed by indigenous societies to govern themselves.<sup>2</sup> The closest equivalent to the phrase “custom law” in the Maori language is “tikanga”. Tikanga has been described as the obligation to do things in the “right” way and as “the Maori way of doing things”.<sup>3</sup> Tikanga, therefore, is not law in the legal positivist sense but law that is shaped by praxis or custom. Tikanga is pragmatic, open-ended and subject to reinterpretation according to changing circumstances.<sup>4</sup> Therefore, contextualisation is important in the interpretation and application of tikanga.

Various writers have emphasised different aspects of mana whenua. Justice Durie has referred to Maori custom law as “the values, standards, principles or norms to which the Maori community generally subscribed for the determination of appropriate conduct.”<sup>5</sup> Durie has also observed that custom law means law generated by social practice and acceptance, as distinct from institutional law that derives from the organs of a super-ordinate authority such as the British Crown.<sup>6</sup>

Paul McHugh’s definition of custom law emphasises the flexible and informal nature of tikanga as compared to Western models of law. McHugh defines Maori custom law as:<sup>7</sup>

... a body of rules backed by sanctions and ... a set of dispute resolution mechanisms. At a more informal level it was also a series of accepted behaviours which allowed daily life to proceed. The formal rules are backed by sanctions

---

<sup>2</sup> New Zealand Law Commission, *Maori Custom and Values in New Zealand Law: Study Paper 9*, Wellington, 2001, 15.

<sup>3</sup> Ibid at 16.

<sup>4</sup> E Durie, *Custom Law*, (unpublished discussion paper), 1994, 4; A Erueti, “Maori Customary Law and Land Tenure: An Analysis” in R Boast et al ed., *Maori Land Law*, Butterworths, Wellington, 1989, 26.

<sup>5</sup> NZ Law Commission, supra n2 at 16.

<sup>6</sup> Durie, supra n4 at 4.

<sup>7</sup> P McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Oxford University Press, Auckland, 1991, 74.

and are clearly articulated in terms of what one should do and why.

The Privy Council identified the flexible and developing nature of tikanga in *Hineiti Rirerire Arani v Public Trustee of New Zealand*.<sup>8</sup> In that case, the Court observed that the custom relating to adoption and title to land was not fixed but was “based upon the old custom as it existed before the arrival of the Europeans, but it has developed, and become adapted to the changing circumstances of the Maori race of today.”<sup>9</sup> Thus, the Court accepted that change and development are part of tikanga.

In summary, Durie emphasises the content and realities of Maori custom law and discusses law against a Maori context. McHugh stresses the flexible nature of Maori custom law as compared to western law. The Privy Council has commented on the ability of mana whenua, as part of tikanga, to change and develop according to new exigencies.

### *Mana Whenua*

That the formalities relating to Maori land tenure formed part of Maori custom law and mana whenua is now commonly accepted as a principle of Maori customary land law. Mana whenua has been defined by Cleve Barlow, kaumatua (elder), as:<sup>10</sup>

... the power associated with the ability of the land to produce the bounties of nature ... . By the power of mana mauri all things have the potential for growth and development towards maturity. There is another aspect to the power of land: a person who possesses land has the power to produce a livelihood for family and tribe, and every effort is made to protect those rights ... . In addition, there were a number of other important principles associated with the mana of land ... including: inherited rights, the establishment of fortresses, the power to control and protect,

---

<sup>8</sup> [1919] NZPCC 1 (PC) 6.

<sup>9</sup> Ibid. By contrast, some years earlier Prendergast CJ had expressly denied the existence of custom law in *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 77-78.

<sup>10</sup> C Barlow, *Tikanga Whakaaro: Maori Concepts*, Oxford University Press, Auckland, 1991, 61-62.

land confiscation, conservation, chiefly status, and sacred burial grounds.

Some doubt as to the use of mana whenua has been cast on the term by Justice Durie, who has observed that mana whenua is sometimes:<sup>11</sup>

... used as a cultural equivalent for western concepts of suzerainty. The alternative proposition is that mana accrued to people not land, and that those of great mana could unite many hapu as one iwi to exert influence over a wide territory. Similarly if mana was lost, territory was lost as hapu found alternative allegiances.

The Waitangi Tribunal, in its report on Rekohu (Mori and Ngati Mutunga claims in the Chatham Islands), found that the term “mana whenua” arose from a 19<sup>th</sup> century Maori endeavour to conceptualise Maori authority in terms of the English law approach to land rights.<sup>12</sup> The Tribunal indicated that this was an unhelpful innovation which “does violence to cultural integrity” because the understanding of mana whenua now set out in the Reserves Act 1977, the Conservation Act 1987 and the Resource Management Act 1991, equates tangata whenua status with *exclusive* mana whenua exercised by an iwi or hapu over an area.<sup>13</sup> For example, section 2 of the Resource Management Act 1991 defines mana whenua as “customary authority exercised by an iwi or hapu in an identified area”.<sup>14</sup> The Tribunal found that this definition of mana whenua implied that only one group can speak for all in a given area or had priority of interest when there might in reality be several distinct communities of interest.<sup>15</sup>

Thus, it is clear that the meaning and ambit of the term “mana whenua” has developed over time and the term is now capable of various interpretations.

Mana whenua arose out of formal and informal rules and behaviours that were appropriate to particular places and circumstances. According to Andrew Erueti, in Maori custom law relating to land, no one individual or kinship group owned land in the sense that they

---

<sup>11</sup> E Durie ‘Directions, Memoranda on Procedure, Evidence and Issues’ 11 November 1994, *WAI 46*, doc # 2.59, at 18, cited in A Ward, *Te Atiawa in Te Tau Ihu, Report for the Crown Forestry Rental Trust*, August 2000, 2.

<sup>12</sup> See T Bennion ed., *Maori LR*, May 2001, 2.

<sup>13</sup> *Ibid.*

<sup>14</sup> T Bennion ed., *Maori LR*, December 2000/January 2001, 5.

<sup>15</sup> *Ibid.*

held all rights to the land to the exclusion of other levels of kinship or adjacent groups.<sup>16</sup> Rather, Maori held land in a complex tenure system where different kinds of rights could be held by hapu. The individual right to use land was derived from membership within the wider hapu community.<sup>17</sup> Thus, it has been argued that the rights of individuals of different hapu intersected on the ground resulting in a “patchwork of use-rights” to land and resources.<sup>18</sup> This system contrasts sharply with the English system of real property rights. The English land tenure system (as it has developed) was a body of clearly defined rules that facilitated the private and exclusive use and enjoyment of land by individuals without reference to the wider community.

The New Zealand Law Commission has accepted that mana whenua is a traditional Maori legal concept. Accordingly, it bases the exercise of mana whenua upon a set of underlying tikanga values such as whanaungatanga (the relationships with the land and between people), mana (the power or authority which hapu and iwi derive from land), utu (the reciprocal relationship with land), kaitiakitanga (the obligation to protect land) and tapu.<sup>19</sup> These values underpinned the complex relationship between people, the natural environment, gods, ancestors and land.<sup>20</sup>

The customary bases of rights to land were complex and inter-related. Rights to land and resources were transferred by a number of customary means. Transfers could occur through war or threat of war, and rights to specific resources were commonly transferred by gifting and inheritance.<sup>21</sup>

Maori Land Court Judge Norman Smith described four principal ways or “take” (foundations) by which rights to land were acquired. These are:<sup>22</sup>

- Taunaha (discovery);
- Tupuna (ancestry);
- Raupatu (conquest); and

---

<sup>16</sup> Erueti, supra n4 at 27.

<sup>17</sup> Durie, supra n4 at 62.

<sup>18</sup> A Ballara, *Iwi: The Dynamics of Maori Social Organisation from c1769 to c1945*, Victoria University Press, Wellington, 1998, 195.

<sup>19</sup> NZ Law Commission, supra n2 at 47-48.

<sup>20</sup> Durie, supra n4 at 62.

<sup>21</sup> Erueti, supra n4 at 27.

<sup>22</sup> N Smith, *Maori Land Law*, AH and AW Reed, Wellington, 1960, 88.

- Tuku (gift)

Joan Metge and others have added one further basis, take ahi kaa (occupation and use), to Judge Smith's standard analysis.<sup>23</sup> Various legal and historical commentators have argued that the Native Land Court put too much emphasis on conquest as the basis for establishing claims to land, and too little on the role of whakapapa or ancestry.<sup>24</sup> The Native Land Court's processes also resulted in a distortion and over-simplification of what were generally rather fluid arrangements.<sup>25</sup> However, most academic commentators agree that prior to colonisation these five ways were the means by which rights to land were acquired under Maori custom law and that, in practice, the five take complemented each other. A claim of right or mana whenua required a mix of different take and none was sufficient on its own.<sup>26</sup> For example, a claim based upon raupatu needed to be backed up by ahi kaa.

The principle of mana whenua and other tenets of custom law were not static. The contested arena of the Treaty claims process has shown that Maori customary rights to land and principles of Maori customary law are not as certain or as absolute as the Native Land Court and Judge Smith's analysis might suggest. Jurists and historians have questioned the meaning of terms such as mana whenua. Justice Durie cautioned counsel in the 1994 Ngati Awa raupatu hearings that:<sup>27</sup>

... the use of mana whenua, or mana as applied to land as distinct from persons, may be new and arose from Maori attempts to adapt to new exigencies that land purchase operations and the Native Land Court imposed.

---

<sup>23</sup> J Metge, *Issues Arising from Pre-Treaty Land Transactions*, WAI 45, doc # K1; Erueti supra n4 at 42.

<sup>24</sup> DV Williams, *Te Kooti Tango Whenua: The Native Land Court 1864-1909*, Huia Publishers, Wellington, 1999, 187; H Riseborough and J Hutton, *Rangahaua Whanui National Theme C: The Crown's Engagement with Customary Tenure in the Nineteenth Century*, Waitangi Tribunal, Wellington, 1997, 137-138. The Native Land Court required claimants to prove ownership or land rights on the basis of ancestry (take tupuna), discovery/exploration (take taunaha), conquest (take raupatu), gift (take tuku) or occupation (take ahi kaa) or a combination of such claims to land. The '1840 rule' provided that tribal boundaries and ownership were fixed as at 1840.

<sup>25</sup> Erueti, supra n4 at 44.

<sup>26</sup> Ibid at 42.

<sup>27</sup> E Durie, "Directions, Memoranda on Procedure, Evidence and Issues", 11 November 1994, WAI 46, doc # 2.59, 18, cited in Ward, supra n11 at 2.

Thus, Justice Durie has questioned the term and whether the meanings that have been ascribed to it now actually reflect the realities of custom law prior to colonisation. He has also argued that mana accrued to people rather than to land. David V Williams, has written that, because custom was never passive, new imperatives led to a focus on mana whenua rather than mana tangata.<sup>28</sup> Alan Ward argues that custom law was changing and adapting under the new context of European contact *prior* to 1840 and that it continued to change *after* 1840.<sup>29</sup> Thus, in Ward's view, identifying the rights of a hapu or iwi about the time of the Treaty of Waitangi is complicated by the cultural change and flux occasioned by Maori contact with the wider world.

Given the lack of clarity as to the practical meaning and application of "mana whenua" it is argued here that the best approach in applying the principle is to consider all available evidence and the principles and actions that underlie the exercise of mana whenua.

### ***Tuku Whenua – An Incident of Mana Whenua***

This section discusses some of the concepts related to the principle of mana whenua. The most significant of these concepts for Ngati Koata ki Te Tau Ihu is take tuku whenua. I also address some of the means by which mana whenua was established and consolidated. These concepts are practically applied to Ngati Koata's claims in Part II of this essay.

The doctrine of take tuku whenua was a customary method of disposing of and acquiring rights to or mana over land. Margaret Mutu, in evidence before the Waitangi Tribunal in the Muriwhenua hearings, described two forms of tuku whenua.<sup>30</sup> The first is "tuku i runga i te tika" whereby rights were allocated in accordance with criteria such as take tupuna or ancestry and continuing occupation. The second type can be referred to as "tuku i runga i te aroha" where rights could be allocated to those without ancestral rights, such as through marriage.

---

<sup>28</sup> DV Williams, *The Crown and Ngati Tama ki te Tau Ihu: An Historical Overview Report*, February 2000, 44, cited in Ward, *supra* n11 at 3.

<sup>29</sup> *Ibid.*

<sup>30</sup> M Mutu, *Tuku Whenua or Land Sale?—WAI 45 doc # F12*, 9.



Pat Hohepa has observed that:<sup>31</sup>

... gifting was always in terms of allowing others the use of the land but maintaining mana whenua so that the users gave the use back once its gifting had run its course or until the users had been assimilated into those who held manawhenua. Such gifted lands were whenua tuku (lands released).

Angela Ballara has argued that chiefs with mana had the right to make either temporary or permanent gifts of land. However, such gifted lands were not permanently alienated because “if the recipient died or moved away, abandoning the gift, it reverted to the giver.”<sup>32</sup> She notes elsewhere that over time and long residence recipients of land gained similar rights over the land to the giver; “they could gift or allot to other kin parts of the land they had been given.”<sup>33</sup>

A gift of land brought with it obligations between the donor and donee of the gift.<sup>34</sup> Indeed, the translation of tuku as “gift” is something of a misnomer. Tuku is more correctly translated as an “exchange” because of the obligations that it placed upon the donee and donor, and the reciprocal nature of the transaction.<sup>35</sup> In most cases the tuku would impose conditions upon the donee and a continuing relationship of reciprocity between the parties that could be passed on to their descendants. Thus, tuku whenua may be seen as an exchange of rights and obligations rather than the making over of an absolute property right.

Tuku whenua occurred for many reasons and appears to have varied according to the circumstances and intentions of the parties. Land could be gifted in gratitude for help in avenging enemies, as compensation for the destruction of property, and in times of war to ensure the survival of a vanquished or conquered people.<sup>36</sup> The ruling chiefs of conquering hapu acquired mana over defeated

---

<sup>31</sup> P Hohepa, “Te Tiimatanga Mai, nga Kupu, me nga Tikanga Whenua”, seminar, Faculty of Law, Auckland, 3 June 1994, 8.

<sup>32</sup> Ballara, supra n18 at 206.

<sup>33</sup> A Ballara, *Customary Maori Land Tenure in Te Tau Ihu (Northern South Island) 1820-1860: An Overview Report on Te Tau Ihu*, Crown Forestry Rental Trust, February 2001, WAI 785, doc # D1, 36.

<sup>34</sup> D Arapere, *An Analysis of Tuku Whenua according to Tikanga Maori, and its implications for Claimants before the Waitangi Tribunal* (LLB (Hons) Dissertation, Waikato University 2002), 25.

<sup>35</sup> Ward, supra n11 at 23.

<sup>36</sup> Ballara, supra n18 at 206; Erueti, supra n4 at 43.

peoples but the defeated peoples were often permitted to remain on the land.

The doctrine of ahi kaa cemented claims to land. Ahi kaa roa refers to long, burning fires and is a metaphor for the continuous occupation and use of the land and its resources by descendants of ancestors with mana to the land.<sup>37</sup> Those who lived elsewhere or who conquered an area but did not continuously occupy it eventually lost their rights over land because their claims to it grew cold. An example of occupation following take raupatu was when Ngati Raukawa migrated from Maungatautari to the Horowhenua and Rangitikei areas in the 1830s, defeating Ngati Apa and Rangitane in battle. Ahi kaa was established over particular areas of the land through the building of permanent kainga and the planting of cultivations.<sup>38</sup> Thus, invasion and the driving out of prior inhabitants was not sufficient to establish mana whenua if the land was not also permanently occupied by the invading hapu. The proof of this continuity of occupation was sufficient to establish ownership in later years.<sup>39</sup> However, Justice Durie also points out that the “[Native Land] Court’s conception of the ahi kaa rule, may have been more appropriately applied to individual use-rights, though even there, inchoate associational interests were maintained.”<sup>40</sup>

There were also other customary ways by which mana whenua was established in a new territory. The customary practice of takahia te whenua (travelling the land) to name significant locations or geographical markers on the landscape was one such method.<sup>41</sup> Tuku of land were also marked in ceremonial or symbolic ways such as through exchanges of taonga (treasures) or the composition of waiata (songs) or whakatauki (proverbs) to commemorate the event. Such peacemaking ceremonies symbolised the binding together of the two transacting parties into an ongoing and long-term relationship.<sup>42</sup> Physical markers such as pou (posts) or small groups of people left to

---

<sup>37</sup> Ballara, supra n18 at 200.

<sup>38</sup> H Toremi, *Himatangi hearing*, 9 April 1868, Otaki Minute Book no. 1C 580 cited in B Arapere *Maku ano hei hanga i toku nei whare: Hapu Dynamics in the Rangitikei Area, 1830-1872* (MA (Hons) Thesis, University of Auckland, 1999), 55; Ballara, supra n18 at 248.

<sup>39</sup> R Firth, *Economics of the New Zealand Maori*, Government Printer, Wellington, 1959, 384-385; Erueti, supra n4 at 43.

<sup>40</sup> Durie, supra n4 at 73.

<sup>41</sup> Arapere, supra n34 at 8.

<sup>42</sup> Ibid at 26; Mutu, supra n30 at 8.

reside on the land were seen as boundary markers to signify a claim or take to land.<sup>43</sup>

Political associations could produce legal consequences. Strategic marriages were often arranged between the conquerors and the conquered so that the children of these alliances would acquire the rights of both groups. For example, in the 1820s Ngati Apa of Rangitikei admitted defeat by Ngati Toa but retained some of its former independence because Te Pikinga, a Ngati Apa woman, had been married to Te Rangihaeata, a Ngati Toa chief, during an earlier Ngati Toa excursion through the region.<sup>44</sup> However, according to Erueti, in the absence of intermarriage “the ancestral ties would come in time with sustained occupation of the land and the handing down of use-rights to successive generations of users.”<sup>45</sup>

In summary, custom law and the Maori land tenure system were dynamic, flexible and communal in nature. It was the introduction of property rights defined and transferred according to introduced law after 1840 which has made it difficult to reconcile competing claims to land based in custom. However, it is clear that there were a variety of ways of transferring rights in land and that such transfers occurred for different reasons. Mana whenua or claims to land were reinforced by strategic acts such as intermarriage, takahia te whenua, peacemaking and continued occupation.

## PART II - NGATI KOATA KI TE TAU IHU

In Ngati Koata’s hearing before the Waitangi Tribunal in 2001, Crown counsel rejected Ngati Koata mana whenua at Te Tau Ihu due to circumstances surrounding the tuku whenua. The Crown argued that Ngati Koata was a small group who, with the protection of Ngati Toa, was able to secure possession of land in the midst of a “subservient and quiescent” tangata whenua.<sup>46</sup> The Crown stated that its preliminary view was that Ngati Koata’s tuku arrangement was

---

<sup>43</sup> Ballara, *supra* n33 at 37.

<sup>44</sup> M Te Whiwhi, *Himatangi Hearing*, 11 March 1868, Otaki Minute Book no. 1C 198 cited in Arapere, *supra* n38 at 47.

<sup>45</sup> Erueti, *supra* n4 at 43.

<sup>46</sup> Memorandum of Crown Counsel in response to Ngati Koata Statement of Claim, 22 December 2000, Waitangi Tribunal, *WAI 785*, doc # 2.189.

“totally or substantially overtaken” by the later conquests by Ngati Toa and other allies of Ngati Koata.<sup>47</sup>

This section demonstrates the practical application of the principle of mana whenua by assessing the claims of Ngati Koata to land and resources in Te Tau Ihu based upon *tuku whenua*. I argue that the *tuku whenua* was a significant legal and political agreement for Ngati Koata and Ngati Kuia. Moreover, far from being “subservient and quiescent”, Ngati Kuia made the agreement with Ngati Koata in response to new political exigencies and with an eye to the future. I argue that the obligations imposed by the *tuku whenua* created an ongoing relationship of peace and reciprocity between Ngati Koata and Ngati Kuia that subsisted beyond later conquests of the area by Ngati Toa and others. Through the *tuku* and other significant acts Ngati Koata established *mana whenua* and consolidated their rights to land and resources at Te Tau Ihu.

Ngati Koata and Ngati Toa (and other *iwi*) traditionally occupied Kawhia harbour but left the area in approximately 1820, travelling south with Te Rauparaha to Kapiti Island and the Wellington region.<sup>48</sup> In 1824 a group of southern *iwi* including Ngati Kuia attacked Kapiti Island. Ngati Koata managed to repel the attackers and capture Tutepourangi, the paramount chief of Ngati Kuia, Ngati Apa and Rangitane of Te Tau Ihu.<sup>49</sup> At the same time, Ngati Apa captured Tawhe, a Ngati Koata boy of chiefly rank.<sup>50</sup> Ngati Apa took Tawhe to Te Hoiere (Pelorus Sound) and were pursued across the Strait by Ngati Koata and Ngati Toa.<sup>51</sup> They came with the intention of attacking Ngati Kuia, but when they discovered that Tawhe was still alive an exchange was arranged instead.

The essence of the *tuku* was that in exchange for sparing his life, Tutepourangi released Tawhe and made a gift of all his land to Ngati Koata and Ngati Toa.<sup>52</sup> Ngati Toa returned to Kapiti Island but Ngati Koata chose to take up the offer of land. Tutepourangi, accompanied by Tekateka, a Ngati Koata chief, travelled to the mainland of Te Tau Ihu, where Tutepourangi named the places that marked the extent of the *tuku*. According to Ngati Kuia accounts, the *tuku* extended from

---

<sup>47</sup> Ibid.

<sup>48</sup> H Bassett and R Kay, *Nga Ture Kaupapa o Ngati Koata ki te Tonga*, 2000, 11, *WAI 785*, doc # A76, at 11.

<sup>49</sup> Arapere, *supra* n34 at 33; Bassett, *supra* n48 at 23.

<sup>50</sup> Ballara, *supra* n33 at 79.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid at 95.

Anatoto at the mouth of the Pelorus estuary and included places in the Sounds and along the coast such as Rangitoto (D'Urville Island), Croiselles harbour, Cape Soucis, Wakapuaka, Wakatu (Nelson), Motueka and on to Te Matau (Separation Point).<sup>53</sup> More recently, however, the extent of the tuku has been the subject of a boundary dispute between Ngati Koata and Ngati Kuia. Ngati Koata argue that Te Matau refers to Farewell Spit which is further west of Separation Point.<sup>54</sup>

Tutepourangi made the tuku from a position of relative fragility. He had lost people in the battle on Kapiti Island and he did not have the weapons that Ngati Koata possessed. Moreover, Ngati Koata was closely allied with Te Rauparaha and Ngati Toa who were acknowledged as “conquerors extraordinaire”.<sup>55</sup> However, Tutepourangi was also a man of mana (greater authority and leadership than others) among Ngati Kuia, Ngati Apa and Rangitane and made the tuku of land in order to ensure his people’s survival. Fundamentally, the tuku was a significant legal and political agreement that formed the basis of a new and peaceful relationship between Ngati Kuia and Ngati Koata. It also established permanent rights to the land which are alive today.

Ngati Koata assert rangatiratanga in Te Tau Ihu on the basis of the tuku whenua made by Tutepourangi around 1824. As discussed in Part I, a claim to land under tuku whenua required other acts to cement rights over the land. What did Ngati Koata do to consolidate their claim to mana whenua at Te Tau Ihu?

Intermarriage was a customary means by which Ngati Koata and Ngati Kuia established their new relationship and through which Ngati Koata established mana whenua. Marriages occurred between the families of Tutepourangi and Tekateka indicating that Tutepourangi was a person of mana and was not regarded as a slave.<sup>56</sup> Ballara says that an exchange of women marked the peace between Ngati Kuia and Ngati Koata.<sup>57</sup> Tekateka married Koruria of Ngati Kuia and Nukuhoro of Ngati Apa, Ngati Kuia and Rangitane. Intermarriage gave the descendants of both tribes a connection and relationship with the land.

---

<sup>53</sup> Ibid. See attached Location Map.

<sup>54</sup> Arapere, *supra* n34 at 35.

<sup>55</sup> Ballara, *supra* n33 at 81.

<sup>56</sup> Ibid at 81.

<sup>57</sup> Ibid.

Ngati Koata also travelled the area included in Tutepourangi's gift making peace with the local Ngati Kuia and Rangitane chiefs.<sup>58</sup> This process involved the customary practice of takahia te whenua (travelling the land) throughout the extent of the tuku, in order to claim the area. Ngati Koata saw this act as a way of taking possession of the land. For example, at Horoirangi, north of Wakapuaka, Matiu Te Mako of Ngati Koata was said to have established a claim to the land by comparing the flax that grew there to his own hair and the place was known thereafter as Ngaurukehu (the light or reddish haired).<sup>59</sup> Another example involved a war canoe called Te Awatea. Te Awatea was an iconic symbol for Ngati Kuia because it was named for one of the twin hulls of the Kurahaupo waka. During the peacemaking process a Ngati Kuia chief told Ngati Koata that the canoe was hidden at Motueka. Ngati Koata went to Motueka and took possession of the canoe and used it to travel throughout the region in order to take possession of the land and resources.<sup>60</sup>

Ngati Koata occupied their new lands at Te Tau Ihu continuously after the 1824 tuku by Tutepourangi. A substantial party of Ngati Koata under Te Patete settled on Rangitoto. Tekateka and another section of Ngati Koata remained in occupation on the mainland. He was left as the kaitiaki or chief in charge of the new territories. A mixed community of people from the tangata whenua iwi, including Tutepourangi, as well as Ngati Koata lived at Wakapuaka and Wakatu.<sup>61</sup>

According to both Ngati Koata and Ngati Kuia accounts, nobody was killed in the peacemaking process. Ballara has argued that Ngati Koata's peace with Ngati Kuia indicated that they intended to share the land with the resident population or at least allow them to live on it.<sup>62</sup> Ngati Koata attempts to protect Ngati Kuia from conquest by Ngati Toa and other allies in later years also indicates that the tuku was still in force between Ngati Koata and Ngati Kuia after 1824. According to Meihana Kereopa of Ngati Kuia:<sup>63</sup>

---

<sup>58</sup> Evidence of Ihaka Tekateka, Nelson MB2, 255-256, 307-9, cited in Ballara, supra n33 at 95.

<sup>59</sup> Ibid; A Ballara, *Taua: 'Musket wars', 'land wars' or tikanga? Warfare in Maori Society in the Early Nineteenth Century*, Penguin Books, Auckland, 2003, at 361.

<sup>60</sup> Ibid at 96.

<sup>61</sup> Ibid at 96.

<sup>62</sup> Ibid.

<sup>63</sup> M Kereopa, Nelson MB2, 17 November 1892, 310.

... because of the peaceable relationship established formerly with Ngatikuia. Ngatikoata did not take part in the attack of the original inhabitants consequently the Gift [sic] of Tutepourangi was not trodden underfoot.

Thus, Ngati Koata's claims derive from Tutepourangi's tuku, cemented by occupation and intermarriage. The obligations imposed by the tuku whenua to maintain a peaceful and ongoing relationship between Ngati Koata and Ngati Kuia were upheld despite subsequent conquests of the wider region by allies of Ngati Koata. The tuku can therefore be viewed as a significant agreement with ongoing obligations for both Ngati Koata and Ngati Kuia.

Events for Ngati Koata in later years are beyond the scope of this essay. However, to briefly summarise, it appears that the conquests of the 1830s by Ngati Toa, Ngati Tama and Ngati Rarua upset the equilibrium between Ngati Koata and Ngati Kuia to some extent. It was later contact and interactions with the New Zealand Company, the Crown and the Native Land Court that impacted most significantly upon the mana whenua of Ngati Koata. Changes in the Maori economy from hunting, fishing and cultivating to small scale farming on areas of land reserved by the New Zealand Company had detrimental economic and social outcomes. Like other hapu elsewhere in New Zealand, life on reserves restricted the land and water resources that Ngati Koata could utilise and created subsistence living, a precursor to the rural poverty of the 20th century.<sup>64</sup>

## CONCLUSION

In summary, Maori custom law and mana whenua are complex, flexible and pragmatic jural constructs. I have argued that claims to mana whenua, based upon tuku whenua, required further political and legally significant acts to cement a group's rights to land. Such acts included peacemaking, takahia te whenua, intermarriage and ahi kaa. Ngati Koata's claims in Te Tau Ihu are based upon a significant legal agreement, namely the 1824 tuku whenua between Ngati Kuia and Ngati Koata chiefs. Thereafter, a process of peacemaking,

---

<sup>64</sup> See for example, the small reserve allocations allotted to Ngati Raukawa after the Crown acquisition of the Rangitikei-Manawatu block in 1868: Arapere, supra n38 at 152.

community building and continuity of occupation was sufficient to confer land ownership or mana whenua upon Ngati Koata.

Questions of mana whenua and tangata whenua status are highly charged and contested issues in the arena of the Treaty of Waitangi claims process. The application of these principles in the Waitangi Tribunal and in the courts has been fiercely debated. Much of the problem relating to the modern application of these principles has been because of the “quasi-codified interpretations” and ideas of exclusive mana whenua developed by the Native Land Court in the 19<sup>th</sup> century and published by Judge Smith in 1960.<sup>65</sup> Such interpretations are likely to continue to impact on the settlement of claims taken to the Waitangi Tribunal and in direct negotiations with the Crown. Indeed, absurd situations have arisen at Tribunal hearings where claimant groups such as Ngati Koata and Ngati Kuia have been in the invidious position of having to pitch their claims to mana whenua against each other in order to establish *exclusive* mana whenua over an area. Such competition between claimant groups only serves to divert attention and resources away from the pursuit of claims against the Crown based on breaches of the principles of the Treaty of Waitangi.

The Waitangi Tribunal has not yet released its findings and recommendations relating to Maori claims at Te Tau Ihu. The preliminary view of the Crown, however, regarding Ngati Koata mana whenua at Te Tau Ihu will have important and far-reaching consequences for Ngati Koata. It is likely to impact upon the level and extent of any fiscal and cultural redress offered to Ngati Koata in future settlement negotiations with the Crown given that the Tribunal’s recommendations are not binding. It may influence the distribution of fisheries assets to Ngati Koata and any future relationships that Ngati Koata has with central and local government in its region. Ngati Koata is also a party to the foreshore and seabed litigation. Crown perceptions of Ngati Koata mana whenua may influence any potential compensation when the Crown legislates away Maori rights to have customary interests to the foreshore and seabed determined by the Maori Land Court. Undoubtedly Ngati Koata will await the Waitangi Tribunal’s report into claims at Te Tau Ihu with anticipation, if not trepidation.

---

<sup>65</sup> For further discussion see Ward, *supra* n11 at 1.





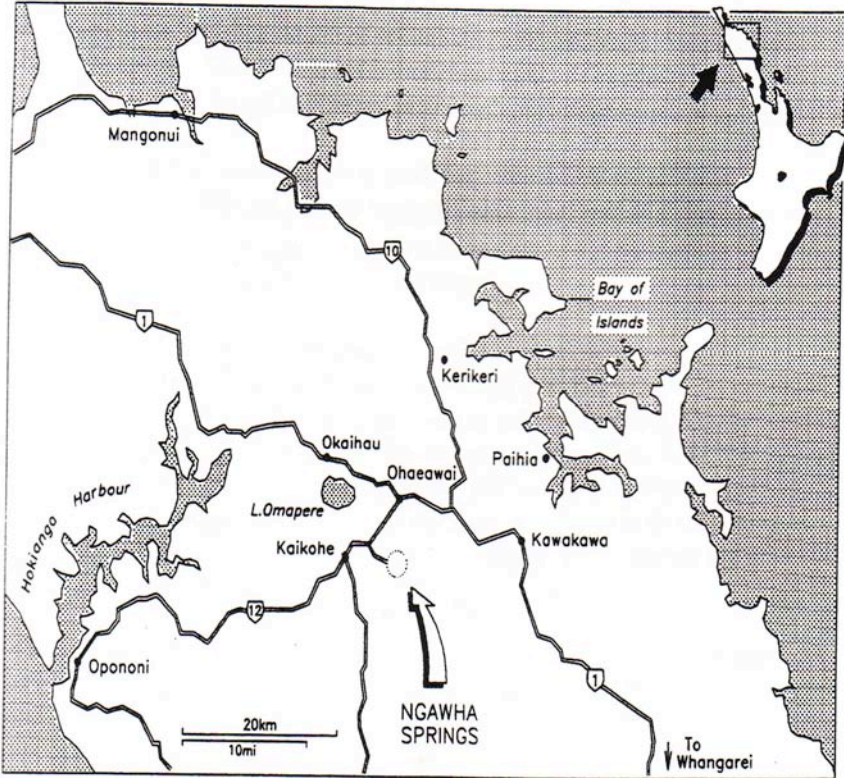
## JAMES JACKSON



My name is James Jackson. I am a 4<sup>th</sup> generation New Zealander of European descent. I am a full-time Law Student, having returned to tertiary education after consecutive careers as a surveyor and utility mapper, and photographer.

My interest in law developed from my practical experience as a surveyor, wherein I became deeply concerned about the environment. Having to work with the public under various resource management laws has made me aware of the fundamental importance of reconciling Maori claims to natural resources and land with public policy and private enterprise. In the future, I intend to continue to expand my studies in these fields, especially in relation to aqua-culture and the marine environment.

## LOCATION MAP NGAWHA GEOTHERMAL CLAIM



Source: Waitangi Tribunal, *Ngawha Geothermal Resource Report*, 1993, x.

# MANA WHENUA AND THE NGAWHA GEOTHERMAL RESOURCE CLAIM

JAMES JACKSON

## INTRODUCTION

It is often stated that a vast gulf lies between the philosophies underlying English and Maori land tenure systems, making it difficult to reconcile the two. In Part I of this essay I will look at customary Maori land tenure, including the principle of mana whenua, to see whether an analogy can be drawn with English thinking. In Part II, I will use the Ngawha Geothermal Resource Report<sup>1</sup> produced by the Waitangi Tribunal (“the Tribunal”) in 1993 as a case study to highlight the interconnectedness of Maori principles and concepts in the management of natural resources.

## PART I: CUSTOMARY MAORI LAND TENURE

Traditional Maori concepts of land and resource use have a different philosophical basis to those enshrined in the English real property tradition. The English system of land tenure is steeped in ideas about “ownership”, the most important of which are notions of the exclusive possession and enjoyment that accrue to those who are “owners”.<sup>2</sup> In contrast, Maori custom law concepts and principles highlight a spiritual belonging to the land which is inextricably linked to the iwi social hierarchy and the complex family and political groupings of whanau (extended family), hapu (wider extended family) and iwi (affiliated hapu).<sup>3</sup> Rights attaching to use of land and its resources are circumscribed by notions of “tino rangatiratanga”

---

<sup>1</sup> Waitangi Tribunal, *Ngawha Geothermal Resource Report—WAI 304*, Brooker and Friend, Wellington, 1993.

<sup>2</sup> Hinde, McMorland and Sim, *Land Law in New Zealand*, Butterworths, Wellington, 1997, 3.

<sup>3</sup> A Erueti “Maori Customary Law and Land Tenure: An Analysis”, *Maori Land Law*, R Boast et al ed., Butterworths, Wellington, 1999, 27.

(chieftainship) and “kaitiakitanga” (stewardship). These notions over-arch Maori resource management and provide a guideline for human interaction with natural resources.<sup>4</sup> Accordingly, the entire concept of traditional Maori identity, as tangata whenua (people of the land), is referenced in terms of land and environmental associations. Customary rights psychosocially link “belonging to the land” to the concept of whakapapa (genealogy).<sup>5</sup>

This idea of connectedness, born of an ongoing ancestral relationship to the land, is fundamental to Maori thinking. Prior to colonisation, protecting this relationship ensured a durable and long-lasting tenure of landholding that was shared by the group as a whole. It also acted as a constraint on those within the group with authority to alienate the land and cautioned them to take care in watching out for the needs of others. As Andrew Erueti states, “while ruling chiefs had extensive rights in relation to the land ... they did not possess the authority to transfer an absolute right in perpetuity”.<sup>6</sup> Political conditions attaching to transfers of land between parties meant that if those conditions were not maintained any rights held would revert to the original group.

English settler mentality had difficulty bridging the conceptual gulf between Maori and English concepts of land tenure, and therefore interpreted land dealings by reference to their own systemic norms. From a Maori perspective, however, early post-colonial land gifts and even early land sales were akin to conditional licences or leases with a right of reversion if the recipient failed to comply with the conditions of transfer.<sup>7</sup>

### *Defining Mana Whenua*

Divorced of physical context, the definition of “mana whenua” appears to be quite straightforward. The Resource Management Act 1991 defines it simply as “the authority held by a group”.<sup>8</sup> Yet the concept is remarkably complex, for it involves compounding cultural, customary and political nuances that do not translate well into English. Richard Boast suggests that this is why, despite there being

---

<sup>4</sup> N Tomas, “Implementing Kaitiakitanga under the RMA 1991” (1994) 2 *New Zealand Environmental Law Reporter*, 41.

<sup>5</sup> Erueti, *supra* n2 at 30.

<sup>6</sup> *Ibid* at 29.

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

<sup>8</sup> Section 2(1) of the Resource Management Act 1991.

an extensive and elaborate body of Maori customary law, no systematic analysis of tikanga Maori (Maori jural concepts, principles and rules) has ever been undertaken.<sup>9</sup> Pat Hohepa suggests another reason for the resistance to codifying tikanga. He points to the fact that to do so would leave it “to languish in human created laws”.<sup>10</sup>

The definition of mana whenua tendered by Psychologist, Dr Cleve Barlow captures its multi-faceted nature:<sup>11</sup>

*Mana Whenua* ... is the power associated with the possession of lands; it is also the power associated with the ability of the land to produce the bounties of nature.... There is another aspect to the power of the land: a person who possesses land has the power to produce a livelihood for family and tribe, and every effort is made to protect these rights....In addition, there were a number of other important principles associated with the *mana* of land, some of which are still applicable today, including: inherited rights, the establishment of fortresses, the power to control and protect, land confiscation, conservation, chiefly status, and sacred burial grounds.

Justice Durie states that the resources and benefits available from lands and waterways accrued to all Maori within a community. Accordingly, any individual holding extensive use rights “carried a commensurately larger obligation to the community”.<sup>12</sup> However, while Durie correctly says that there was no English law equivalent to these concomitant duties, an English parallel can be drawn to large land-holders being accorded “influential status in their local society”.<sup>13</sup> While the English tradition had no equivalent to the idea that kaitiaki obligations conferred status, property rights at the time of colonisation bestowed substantial “influence”. They conferred the voting influence/privileges in both municipal and central government

---

<sup>9</sup> R Boast, “The Bases of Maori Claims to Natural Resources”, Seminar on Maori Claims and Rights to Natural Resources, Energy and Natural Resources Law Association of New Zealand, 19 February 1993, 6.

<sup>10</sup> P Hohepa and DV Williams, “The Taking Into Account of Te Ao Maori in Relation to Reform of the Law of Succession”, *Working Paper for the New Zealand Law Commission*, Wellington, 1994, 6.

<sup>11</sup> C Barlow, *Tikanga Whakaaro – Maori Concepts*, Oxford University Press, Auckland, 1992, 61.

<sup>12</sup> E Durie, “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 No4 Otago LR, 454.

<sup>13</sup> Ibid.

elections for men,<sup>14</sup> which gave rise to the women's suffrage movement.<sup>15</sup>

Durie further defines Maori land rights as a "privilege" to use resources correlative to maintaining one's obligations to both the community and the ever-present deities which protected both whenua and resources.<sup>16</sup> Durie's idea that privileges and rights are inextricably linked to obligations and duties echoes the early twentieth century analysis of Wesley Hohfeld. Hohfeld maintained that rights could not exist in a vacuum but that correlative duties, by necessity, attached to them.<sup>17</sup> Hohfeld's model becomes the philosophical equivalent to the notion in physics that every action has an equal and opposite re-action. Durie's observation fits squarely within the Hohfeldian analysis. This reciprocating aspect of mana whenua is illustrated in the Ngawha geothermal case-study which follows.<sup>18</sup>

## **PART II: THE NGAWHA GEOTHERMAL CLAIM**

In Part II I wish to highlight mana whenua as a complex web of relationships that links Maori and the rest of their environment. Complex family groupings, ancestral links and unique perceptions of the land itself as a spiritual force, are all present in the Ngawha Claim.

### ***Tangata Whenua Conceptualisation of the Ngawha Springs***

The Ngawha geothermal resource claim was brought before the Waitangi Tribunal by the trustees of the Ngawha Springs Domain, acting on behalf of whanau and hapu who claimed an interest in the geothermal resource. The genealogical links and geographical spread of the claimants extended over the entire Ngapuhi confederation of

---

<sup>14</sup> *Queen v Harrald* [1872] LR7 QBD 361.

<sup>15</sup> L Holcombe, "The Equality of Two: After the Acts", *Wives and Property*, M Robertson ed., University of Toronto Press, Toronto, 1983, 206.

<sup>16</sup> Durie, *supra* n12 at 454.

<sup>17</sup> W Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale, 1919. There is a useful summary of Hohfeld's account in J. Feinberg *Social Philosophy*, Englewood Cliffs, New Jersey, 1973, chapter 4.

<sup>18</sup> *WAI 304*, *supra* n1.

iwi. Although the claimants who appeared before the Tribunal represented only ten iwi, these being Ngati Hine, Te Hikutu, Te Uri Taniwha, Te Mahurehure, Te Uriohua, Ngati Rehia, Ngai Tawake, Ngati Hau, Ngati Rangi and Ngati Tautahi, the Tribunal acknowledged that the claimants had genealogical and political ties to all 136 or more hapu of Ngapuhi.<sup>19</sup>

The claimants combined under the umbrella of Nga Hapu o Ngawha (“Nga Hapu”). The claim concerned the ownership and right to control an extensive geothermal resource approximately six kilometres east of Kaikohe,<sup>20</sup> over which Nga Hapu claimed they had never relinquished their mana rangatira (authority/sovereignty) the retention of which was guaranteed under Article 2 of both Te Tiriti o Waitangi (Maori text) and the Treaty of Waitangi (English text). A proposed scheme to generate power from the geothermal field added considerable impetus to their attempt to legally quantify their mana whenua so that it had formal recognition under New Zealand law.<sup>21</sup> Unlike many other claims heard by the Tribunal, the claimants did not claim exclusive ownership of the Ngawha geothermal resource or that rangatiratanga (chieftainship) over the taonga (something of great value) was vested solely in them. Instead they asserted that the resource is, as it always has been, shared by all hapu of Ngapuhi.<sup>22</sup>

The geothermal resource comprises a sub-surface aquifer from which some thirty hot springs emanate. Since their discovery by the ancestress Kareariki, Ngapuhi have revered the hot springs at Ngawha, viewing them as a taonga of great value. Oral evidence from kaumatua and kuia, often in the form of ancient waiata, indicates that the hot springs have been used from time immemorial for healing purposes.<sup>23</sup> They are said to possess a *mauri* (life force/spirit) of miraculous healing power.<sup>24</sup>

Oral accounts linked the evolution of Ngapuhi from the time of their arrival in Aotearoa on the waka Takitimu, to the discovery of the springs and to the present time. Kaumatua related claims to territory that had been under continuous Ngapuhi control and authority up until the time of colonisation.

---

<sup>19</sup> Ibid at 7.

<sup>20</sup> Ibid at 1.

<sup>21</sup> Ibid at 3.

<sup>22</sup> Ibid at 7.

<sup>23</sup> Ibid at 16.

<sup>24</sup> Ibid at 65. The pools are renowned for their curative properties and particularly for providing relief for rheumatism and post-partum natal convalescence.



Ngai Tawake kaumatua, Manga Tau, related how the relationship of Ngapuhi with the springs is encapsulated in a proverb that likens the springs to the warmth of a woman's intimate embrace:<sup>25</sup>

Ko Moi te maunga	<i>Moi is the mountain</i>
Ko Ngawha te tangata	<i>Ngawha is the person</i>
He aroaro wahine	<i>The passage to the womb of a woman</i>
He ara mahana	<i>Is a warm passage</i>

A second metaphorical association is the Maori perception of the Springs as lying hidden, deep within the belly of Papatuanuku (earthmother).<sup>26</sup>

Other kaumata evidence from Te Uri Taniwha and Ngai Tawake hapu re-affirmed the ancient understanding that the underground resource is indivisible from its surface manifestations.<sup>27</sup>

Ko te Ngawha te kanohi o te taonga, engari ko tona whatumanawa, ko tona mana hauora, no raro.

*Ngawha is the eye of the taonga, but its heart, its life giving power, lies beneath.*

The presence of the esoteric guardian, the taniwha Takauere, in the Ngawha system was put forward as further substantiating the Ngapuhi claim to the geothermal resource in terms of tikanga Maori (Maori custom law). Although lacking in western technology, Ngapuhi ancestors nevertheless understood that there was an underground connection between the aquifer, the hot springs and nearby Lake Omapere. They related stories of the Taniwha's ability to travel below ground and re-appear at different places so that its head could be present at the Lake while its tail could simultaneously be seen whipping in the pools adjoining the hot springs.<sup>28</sup>

The Tribunal recognised that this rich oral history and tradition served to impart ownership rights on the basis of discovery and continuous occupation and control, this being emphasised by the notion of *ahi kaa* (home fires). The Tribunal accepted that of all the

---

<sup>25</sup> Ibid at 16.

<sup>26</sup> Ibid at 16.

<sup>27</sup> Ibid at 17.

<sup>28</sup> Ibid.

available resources that were regarded as essential for the people's well-being, none was regarded as more valuable to Ngapuhi than the Ngawha hot springs.<sup>29</sup>

### ***Pakeha Conceptualisations of the Ngawha Springs***

The European perspective of the springs reflected a different world view. The understanding that a connection exists between geographically isolated hot springs, lakes and underground aquifers was entirely absent from the colonial mindset.<sup>30</sup> The colonial settlers assessed the value of the springs in terms of immediate and potential financial gains.

Early settler references to the springs indicated their only value as being as a potential source for the extraction of mercury and mineral resources.<sup>31</sup> Indeed, at the time of busy land buying in the area, (from 1873 onwards), the springs and surrounding environs were considered of such poor quality that the Crown was reluctant to pay more than 3 shillings an acre for them.<sup>32</sup> During negotiations in 1885 the Assistant Surveyor-General described the land as “sterile in the extreme and the gum which gave it value formerly is about exhausted”.<sup>33</sup> Today, geothermal science consultants still regard the resource simply as a series of surface and sub-surface features, some of which are considered remote and “probably” unconnected.<sup>34</sup>

### ***The Native Land Court And Investigations of Title***

The Native Lands Act 1865 extinguished customary Maori land title by providing for its conversion into freehold title.<sup>35</sup> Any Maori land

---

<sup>29</sup> Ibid at 17.

<sup>30</sup> F Hochstetter, *Geology of NZ 1864: Contributions to the Geology of the Provinces of Auckland and Nelson*, C Flemming ed., Government Printer, Wellington, 1959, 161.

<sup>31</sup> Hochstetter, *ibid* at 161; also Dr Hector, the Director of the Geological Survey stated that the springs had no particular value, *WAI 304*, *supra* n1 at 59.

<sup>32</sup> *WAI 304*, *supra* n1 at 42.

<sup>33</sup> *Ibid* at 41.

<sup>34</sup> *Ibid* at 27.

<sup>35</sup> The Preamble of The Native Lands Act 1865 reads: “Whereas it is expedient to amend and consolidate the laws relating to lands in the Colony which are still subject to Maori proprietary customs and to provide for the ascertainment of the persons who according to such customs are the owners

owner could apply to the Native Land Court for a hearing and the grant of a certificate of title to land held in collective customary ownership.<sup>36</sup> Once an application had been lodged the other “owners” were forced to take part in the process or risk losing their land entitlements. Once inside the process they were subjected to protracted and costly court proceedings.<sup>37</sup> Ancillary expenses had to be borne by Maori. Ngapuhi were seriously impacted by these provisions, losing land at every step of what turned out to be little more than an expropriating process.<sup>38</sup>

The Native Land Court investigation process left Maori wide open to exploitation. Ranginui Walker comments that as soon as certificates of title were dispensed “land sharks, speculators and government land purchasing officers moved in to buy the land”.<sup>39</sup> Some rangatira became caught up in commercial opportunism. Hirini Taiwhanga, for example, became a free-ranging entrepreneur who acted as an agent between the Land Purchase Office and his whanau, and collected hefty commissions for his efforts.<sup>40</sup> As Maori landholdings became more deeply absorbed into the colonial system of land tenure, the land under Ngapuhi control shrank accordingly.

As a result of applications to the Native Land Court and subsequent judicial ukase, Ngawha turangawaewae was converted into valuable, privately held Maori estates, severed from any iwi obligations. The

---

thereof and to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown and to provide for the regulation of the descent of such lands when the title thereto is converted as foresaid and to make further provisions in reference to the matters aforesaid.”

<sup>36</sup> See sections 21-23 of the Native Lands Act 1865; DV Williams, *Te Kooti Tango Whenua: The Native Land Court 1864-1909*, Huia Publishers, Wellington, 1999, 157-160; R Walker, *Ka Whawhai Tonu Matou Struggle Without End*, Penguin, Auckland, 1990, 136.

<sup>37</sup> Duties were levied pursuant to section 55 of the Native Lands Act 1865. The result of the duty reduced net proceeds upon sale. Further Court fees were imposed under section 62 of the Act and accrued in a scale dependent upon the length of time the hearing took and how many claimants and opponents were involved in each exchange transaction. Frequently, the Court ordered a partition so that fees could be discharged. This resulted in the further loss of some part of the land. Survey was necessary under section 25 of the Act, which stipulated that land had to be surveyed and marked off prior to the order of a certificate of title. Section 68 allowed unpaid surveyors to place a lien on the title.

<sup>38</sup> *WAI 304*, supra n1 at 21-49.

<sup>39</sup> *Ibid* at 137.

<sup>40</sup> *Ibid* at 23.

process set in train a series of leases and subdivisions, the granting of mining rights, and ultimately, sale. By 1894 the partitioned land around the Ngawha Springs had all been sold. No reservation had been made for the hot springs.<sup>41</sup> Of the several thousand acres that had been held under hapu rangatiratanga and kaitiakitanga, only 15 acres remained in Maori freehold title.<sup>42</sup>

Some Maori did not accept the loss and continued to occupy the land surrounding the springs. In 1926 Nga Hapu successfully petitioned the Government to reserve approximately 5 acres immediately adjacent to the springs.<sup>43</sup> This reserve became known as the Parahirahi C block or “the five acre springs block”. Parahirahi C was set apart as a Native reservation “for the common use of the owners thereof as a village and a bathing place”.<sup>44</sup> It was this small parcel of land and the Ngawha Springs system that became the subject of the geothermal resource claim. Nga Hapu were reluctant in the extreme to relinquish their traditional rangatiratanga and kaitiakitanga, both manifestations of mana whenua, over a resource that was central to their identity and vital to their wellbeing.

### *Exercising Mana Whenua*

In 1929, Nga Hapu attempted to exercise mana whenua over this small domain by fencing its boundaries. The local council inspector stopped the work and a disagreement erupted as to “ownership” of the reserve.<sup>45</sup> A series of petitions to Parliament ensued. In December 1934, in an apparent about-face, the block was reclassified under the auspices of the Public Reserves Domains and National Parks Act 1928. The title of the block was registered in the name of Her Majesty the Queen and became known as the ‘Ngawha Hot Springs Domain’.<sup>46</sup>

An avalanche of petitions from Ngapuhi kaumatua seeking an official inquiry into land alienation ensued and continued from 1939 to 1944. Despite positive verbal responses from Crown representatives and although Nga Hapu had maintained their ahi kaa by living in close proximity to the hot springs for centuries and exercising

---

<sup>41</sup> Ibid at 22.

<sup>42</sup> Ibid at 24.

<sup>43</sup> Ibid at 24.

<sup>44</sup> Ibid at 67.

<sup>45</sup> Ibid at 67.

<sup>46</sup> Ibid at 68.

rangatiratanga over the springs and the adjoining land, nothing came of the petitions.<sup>47</sup> However, in 1961 the Minister of Lands approved the eviction of those living on the Crown-owned Reserve. Finally, in 1964, after a lengthy hearing in the Kaikohe Magistrates Court, the presiding judge upheld the Crown's entitlement to the domain and declared those residing upon it to be trespassers. They were given a month to vacate the domain.<sup>48</sup>

### *Post Eviction*

In 1992 the Waitangi Tribunal met to determine whether the Crown had acquired an interest in the springs domain in breach of the principles of te Tiriti o Waitangi/the Treaty of Waitangi (te Tiriti/the Treaty). Article 2 of the English text guarantees:<sup>49</sup>

full exclusive ownership of their lands and Estates Forests Fisheries and other properties which they possess so long as it is their wish and desire to retain the same in their possession.

The fundamental issue deliberated by the Tribunal was whether the Maori owners had willingly and knowingly alienated the block. The claimants pointed to various defects in the deeds of purchase and to the circumstances surrounding the Crown's methods of gaining signatures and consent for sale. They maintained that these methods conflicted with the principles of te Tiriti/Treaty. In response, counsel for the Crown relied on the deeds of purchase to which it had obtained signatures during the period 1886 to 1894.<sup>50</sup>

In its deliberations the Tribunal stressed the importance of the duty imposed upon the Crown under te Tiriti/Treaty to actively protect Maori interests.<sup>51</sup> The duty to protect customary land interests has

---

<sup>47</sup> Ibid at 75.

<sup>48</sup> Ibid at 76.

<sup>49</sup> The Treaty of Waitangi 1840, as included in Schedule 1 of the Treaty of Waitangi Act 1975.

<sup>50</sup> *WAI 304*, supra n1 at 58.

<sup>51</sup> Ibid at 60.

been recognised internationally.<sup>52</sup> This has been affirmed in New Zealand by the Court of Appeal:<sup>53</sup>

The duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.

The fact that the protection of indigenous customary land interests is buttressed by the Treaty has also been acknowledged:<sup>54</sup>

A breach of a Treaty provision must in my view be a breach of the principles of the Treaty.

In its findings the Waitangi Tribunal stated:<sup>55</sup>

the Crown had acted in breach of its Treaty duty to protect the owners' interests in Parahirahi C Block and that it had also acted in breach of article 2 of the Treaty in not ensuring that the owners willingly and knowingly alienated Parahirahi C Block and the hot springs taonga located on the block.

Further to this, the Tribunal recommended that the portion of the Parahirahi block that had been acquired by the Crown and vested in the name of Her Majesty the Queen as a reserve, be returned to Maori ownership.

It is interesting that, even after their eviction in 1964, the authority of Nga Hapu as holders of mana whenua continued to be recognised by outsiders wanting to engage in commercial enterprises. At present, although the Bay of Islands County Council is the appointed administrator of the Ngawha Hot Springs Domain, it too, continues to acknowledge local hapu interest in the resource. The co-operation of local hapu was negotiated in a joint venture to develop and administer the recreational pools facility that operates today under Maori trust administration.<sup>56</sup>

---

<sup>52</sup> Per Dickson J, *Guerin v The Queen* [1985] 13 DLR (4th) (SCC), 321, 334. In this case Dickson J introduced the concept of the relationship between the Crown and indigenous people being "akin" to a fiduciary relationship.

<sup>53</sup> Per Cooke P, *NZ Maori Council v Attorney General* [1987] 1 NZLR 641, 664.

<sup>54</sup> Per Somers J, *ibid* at 693.

<sup>55</sup> *WAI 304*, *supra* n17 at 78.

<sup>56</sup> *Ibid* at 79.

## *The Geothermal Resource*

The Tribunal also considered the rights of the hapu over the sub-surface geothermal manifestation. In its deliberations, it reflected upon the wording and intent of New Zealand legislation pertaining to water-power, geothermal steam and energy, and the Resource Management Act 1991.<sup>57</sup> The Tribunal found that the Crown had acted in breach of Tiriti/Treaty principles by failing to adequately ensure that the Tiriti/Treaty rights of the Ngawha claimants had been fully protected.<sup>58</sup>

Finally in consideration of the 1894 land alienation which disenfranchised Ngapuhi of their access rights and rangatiratanga over all but a small portion of a surface manifestation of the geothermal system, the Tribunal concluded that the hapu interest in the underlying resource was completely extinguished:<sup>59</sup>

By consequence the claimants no longer own or have rangatiratanga over the entire Ngawha geothermal resource. Instead they own or have rangatiratanga over the land and springs contained in the one acre block that is part of the former Parahirahi C Block.

In conclusion the Tribunal recommended that an amendment be made to the Resource Management Act to reflect the importance of taonga such as the geothermal resource, and that all officials exercising functions and powers under the Act do so in a manner consistent with the principles of te Tiriti/Treaty.<sup>60</sup>

## **The Outcome**

The Ngawha geothermal field was tapped for the production of power in 1998. The power station was constructed by Top Energy and the Tai Tokerau Maori Trust Board.<sup>61</sup> Accordingly, Ngapuhi still maintain a type of authority over the resource. In response to Waitangi Tribunal Findings and Recommendations, constant monitoring of the geothermal resource is undertaken by the local

---

<sup>57</sup> Ibid at 122-136.

<sup>58</sup> Ibid at 143.

<sup>59</sup> Ibid at 135.

<sup>60</sup> Ibid at 148.

<sup>61</sup> Northland Regional Council Annual Environmental Monitoring Report (2001 -2002), Northland Regional Council, 2002, 105.

council, in order to ascertain the physical impact on both the resource and the surrounding environs and to maintain compliance with the Resource Management Act. The resource is currently considered to be sustainable.

## CONCLUSION

Throughout Aotearoa/New Zealand, Maori land has been alienated through a colonising process that has employed confiscation, legislation and misappropriation. In the process of alienation, philosophical differences in perceptions of land tenure made it possible for the Crown to ignore Maori, while highlighting the integrity of its own processes. As land has fallen out of Maori customary control rangatiratanga has been compromised and the physical manifestations of ahi kaa have grown cold. Yet an inseverable connection remains between tangata whenua and the land to which they belong.

The principle of mana whenua provides an excellent illustration of how tikanga is formulated through the interweaving of several principles. From Durie's introductory definition which connects privilege to obligation in a Hohfeldian sense, to the Ngawha hapu claim that their geothermal resource can only be viewed holistically, interconnectivity prevails. Everything is viewed by virtue of its relationship to everything else. Whenua, taonga, whakapapa and mauri are woven into a rich tapestry of tikanga.

The Ngawha Waitangi Tribunal Claim illustrates that as long as kaumatua are prepared to maintain the vigil, and continue petitioning to be heard, a form of authority similar to the concept of "sovereignty" is maintained over the land and other taonga. By application to the Tribunal this authority undertakes a jural metamorphosis which can successfully reinforce claims under te Tiriti/Treaty. It is apparent that so long as iwi such as Ngapuhi do not forsake their authority, the exercise of mana whenua remains as an inchoate right over the land. Even without legal recognition, it is still very much in existence.



## SIMON FITNESS



My name is Simon Gerardus Francis Fitness. I was born in Hamilton, in May 1981, the second of four children.

On my father's side, I am a 6<sup>th</sup> generation New Zealander. My early ancestors emigrated to New Zealand from England in the early 1850s settling in the Razorback/Bombay area before moving to Ngaruawahia in the early 1900s. I have English, Irish and Swedish links through my father.

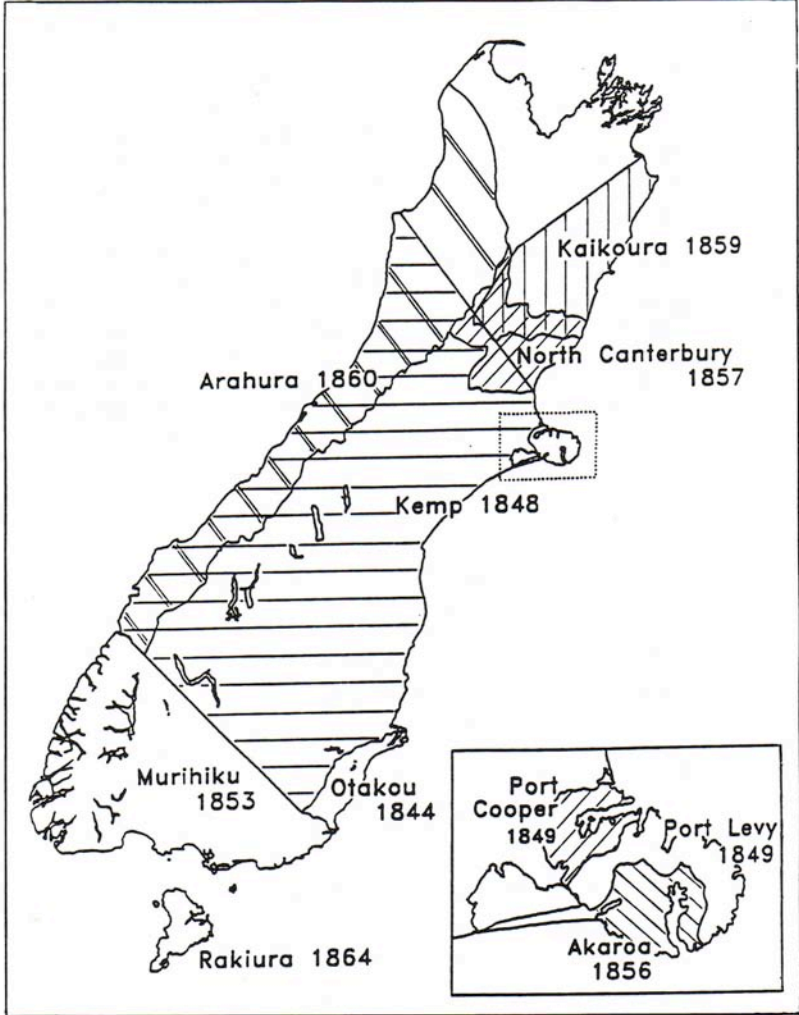
My mother is Dutch. Her parents, my Oma and Opa, emigrated to New Zealand in 1950 wanting to get far away from war torn Europe. While I do not speak any Dutch, I am particularly proud of this part of my heritage and would love to visit the Netherlands some time in the near future.

I have a great interest in my family tree and heritage though with a relatively diverse cultural background I would not describe myself as anything but a New Zealander.

Moving to Auckland when I was 10, I attended Sacred Heart College, in Glen Innes. College was a very formative period for me. Sacred Heart provided me with a wide range of public speaking, sporting, religious, academic and leadership opportunities. I thank Sacred Heart for much of what I am today. Leaving the College in 1999, I am now in my fourth year at Auckland Law School. I am also completing a BA in Ancient History.

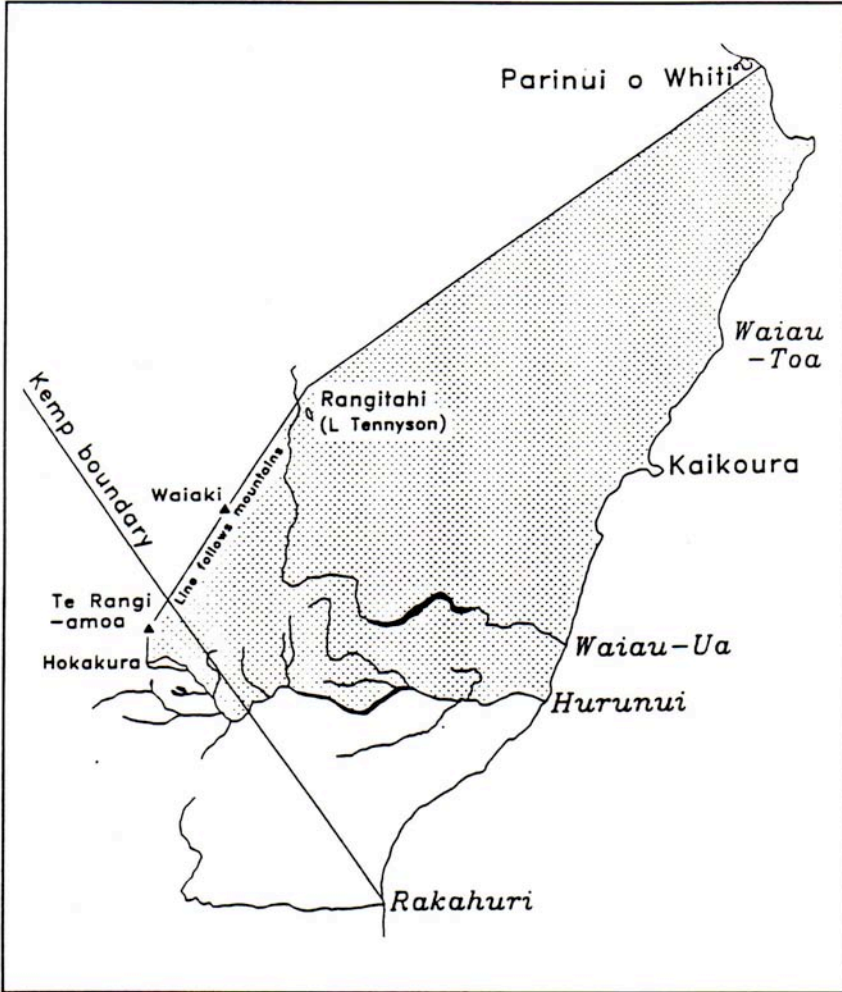
I am a strong Catholic. I am also an Officer in the New Zealand Army and enjoy pretty much any outdoor pursuits, especially rugby. At present I am a Summer Clerk at Chapman Tripp and look forward to a career in the law. Long-term, however, I would like to enter politics.

**LOCATION MAP 1  
NGAI TAHU PURCHASES**



Source: Waitangi Tribunal, *Ngai Tahu Report*, Vol 1, 1991, 6.

**LOCATION MAP 2  
KAIKOURA PURCHASES**



Source: Waitangi Tribunal, *Ngai Tahu Report*, Vol 2, 1991, 670.

# MANA WHENUA AND THE NGAI TAHU WAITANGI TRIBUNAL CLAIM

SIMON FITNESS

## **Kei raro i te tarutaru, te tuhi o nga tupuna<sup>1</sup>**

*The signs (marks) of the ancestors are embedded below the roots of  
the grass and herbs*

### INTRODUCTION

“Mana Whenua” is a concept that has been the subject of a lot of discussion in both the courts and the Waitangi Tribunal in recent years. “Whenua” (land), is recognised in Te Ture Whenua Maori Act 1993 (“the Act”), as a taonga tuku iho of the Maori people.<sup>2</sup> However, “mana whenua” as a self-complete jural principle, is not universally accepted as an authentic, pre-European Maori construct.

In an authoritative text dealing with customary Maori land tenure,<sup>3</sup> Norman Smith sets out the obligations that must be fulfilled in order to establish and maintain Maori mana over whenua. One of these obligations is the duty to “keep warm” the whenua within a rohe. This duty of maintaining warmth is linked to the principle of “ahi kaa”, a Maori concept defined in section 2 of the Act as “fires of occupation”.

There is general agreement amongst Parliamentarians, judges and academics that “ahi kaa” is a fundamental concept of Maori

---

<sup>1</sup> Waitangi Tribunal, *Te Roroa Report—WAI 38*, Brooker and Friend, Wellington, 1992, 49.

<sup>2</sup> Section 2(2) Te Ture Whenua Maori Act 1993. Although “Taonga tuku iho” is not defined in the Act it can be roughly translated as “something of great value handed from generation to generation of Maori since time immemorial”.

<sup>3</sup> N Smith, *Maori Land Law*, Reed, Wellington, 1960, 111.

customary land tenure. In contrast, both the content and application of mana whenua are currently the subject of much debate.<sup>4</sup>

In this essay I discuss the content of “mana whenua”, and argue that it is a broad concept of which ahi kaa is an integral part. I also argue that mana whenua is the modern, common law equivalent of “rangatiratanga” as guaranteed under the Maori text of te Tiriti o Waitangi in 1840. I further argue that mana whenua must be accepted as reaching further back than 1850. My conclusion is that mana whenua ought to be given wider application by the Maori Appellate Court and the Waitangi Tribunal than is presently the case.

### ***Mana Whenua – Traditional Maori Concept or Modern Invention?***

Maori concepts have often had their application narrowed in New Zealand law as the result of courts trying to reconcile them with English common law concepts. “Ahikaa”, for example, is most often defined as “physical occupation”. “Rangatiratanga” is interpreted as referring only to “property rights” and not the fuller dominion that attaches to sovereignty. Sometimes a preferred translation can be linked to the difficulty of finding analogous terms. At other times it is a means of resolving a power conflict between two competing systems of law.

The “fundamental disjunction between the two systems”<sup>5</sup> is not, however, the major barrier to recognition of mana whenua as a fundamental principle of Maori custom law. The barrier to greater legal recognition is the lack of acceptance of mana whenua by the Maori Land Court as a legitimate concept of Maori custom law. The earliest judicial negation of mana whenua as an authentic principle of Maori custom law is that of Chief Judge Fenton in 1890:<sup>6</sup>

There is no such thing as mana of land. Mana is personal. A chief may or might have had ... sufficient mana to greatly influence his power of managing ... withholding from sale of land, but this power is derived from his position as pater populi, enabling him to protect what he thinks to be the interests of his

---

<sup>4</sup> See discussion of “Directions, memoranda on procedure, evidence and issues in the inquiry into the Ngati Awa, Tuwharetoa, and other claims of the Eastern Bay of Plenty as at end October 1994, *WAI 46*, Doc #2.59, 11 Nov 1994” and discussion in T Bennion ed., *Maori LR*, November 1994, 4.

<sup>5</sup> *Supra* n3 at 111.

<sup>6</sup> See comments of Chief Judge Fenton in PP 1890 G1, 15, *ibid* at 111.

tribe. He may have no interests in a piece of land, yet be able to retain it from sale ... . None of the old Judges recognised such a thing as land mana as conferring a title of land recognisable by the Court.

If Chief Judge Fenton is correct then “mana whenua” is a self-contradictory term. However, his reasoning confuses three totally different perceptions held by Maori. The first is the attribution of mana by tangata whenua (people of the land: Maori) to land as Papatuanuku (earth mother). The second is the attribution of mana (power/authority) by tangata whenua to humans. The third is the exercise of mana over others living on the land, by rangatira. While the first two are natural, inherent qualities of land and people, the authority of the rangatira is more practical, being dependent on group acceptance and group strength. The exercise of mana on the land by rangatira, included an ability to allocate land rights to others.

The precedent force of the statement made by Chief Judge Fenton is at least partially responsible for the later view expressed by Smith, that unless founded upon one of the five recognised ‘take’ to whenua,<sup>7</sup> no direct proprietary interest could be claimed by a group.<sup>8</sup>

### *The Ngai Tahu Claim*

The legitimacy of mana whenua as a pre-existing Maori customary principle has also been raised in the Waitangi Tribunal claims process. In 1986 the Ngai Tahu Trust Board lodged a general claim with the Waitangi Tribunal challenging the move by the Crown to transfer significant areas of Crown pastoral leases and other Crown lands into the hands of State Owned Enterprises. In the months that followed a series of detailed amendments were lodged specifying land, fisheries and inland water claims.

The major grievances of Ngai Tahu were: the Crown’s past failure to meet contractual obligations; disputes over the geographical areas included in certain purchases; inadequate compensation, and denying access to and protection of, mahinga kai (food resources) and pounamu (greenstone).<sup>9</sup> Ngai Tahu also claimed that the earlier

---

<sup>7</sup> Take raupatu (conquest), take tuku (gift), take taunaha (discovery), take takahi (walking the land), take tupuna (ancestry).

<sup>8</sup> Supra n3 at 111.

<sup>9</sup> Waitangi Tribunal, *Ngai Tahu Report (Part 1)*—WAI 27, Brooker and Friend, Wellington, 1991, 8-10.

purchase by the Crown of Kaikoura and Kaiapoi from Ngati Toa exerted unfair pressure on Ngai Tahu to sell on unfavourable terms.<sup>10</sup>

The Ngai Tahu claim prompted several northern South Island iwi to lodge counter claims based on their holding mana whenua over areas of land included in the claim.<sup>11</sup> Kurahaupo-Rangitane stated that they had occupied and enjoyed Kaikoura and Arahura Blocks in 1840, and that the Crown had wrongly deprived them of possession by purchasing from Ngai Tahu without the consent or agreement of the chiefs and people of Kurahaupo-Rangitane. The Waitangi Tribunal referred the conflicting claims to the Maori Appellate Court. The Court was asked to determine:<sup>12</sup>

- Which Maori iwi, according to customary law principles or “take” and occupation or use, had rights of ownership in respect of all or any portion of the land contained in those respective deeds at the dates of those deeds.
- If more than one iwi held ownership rights, what area of land was subject to those rights and what were the iwi boundaries?

### *Application of Mana Whenua to the claims*

The challenge to Ngai Tahu mana whenua by other northern South Island iwi came before the Maori Appellate Court in 1990 by an indirect route. It was by way of a suit taken by Ngai Tahu (*Ngai Tahu*) against the Crown, seeking recognition of its own mana whenua.<sup>13</sup> There were, in fact, four claimants seeking recognition of mana whenua. They were Ngai Tahu, Rangitane Ki Wairau, Te Runanganui O Te Tau Ihu o Te Waka a Maui Incorporated (representing the tribes of Nelson and Marlborough) and Ngati Toa.

The Court began by clearly setting out its jurisdiction to deal with the matter. The Treaty of Waitangi Act 1975 directs the Court to make decisions as to the boundaries between iwi rohe. In order to do this it must take account of Maori custom relating to ownership of lands.

---

<sup>10</sup> Ibid at 8.

<sup>11</sup> See Location Map 1.

<sup>12</sup> Supra n9 at 25.

<sup>13</sup> *Re a claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board*, 12/11/90, Maori Appellate Court, Te Waipounamu District, Case Stated 1/89, 4 South Island Appellate Court Minute Book, folio 673, 1.

This includes “customary take” and “occupation” or “use”.<sup>14</sup> The Court recognised four principal customary take as being developed prior to the arrival of Europeans in New Zealand. They were:<sup>15</sup>

- Discovery (taunaha whenua)
- Ancestry (take tupuna)
- Conquest (take raupatu)
- Gift (take tuku)

These four take do not, on their own, give rise to any proprietary rights. It is only when the take are supported by physical occupation of the land that proprietary rights result.<sup>16</sup> Ahi kaa is the essential ingredient required to both establish and maintain these rights. Thus, if a hapu/iwi left an area and did not return within three generations,<sup>17</sup> was defeated in battle and the victors remained and occupied the land or gifted it to others, the prior occupants would lose their rights.

The Maori Appellate Court in *Ngai Tahu* stated unequivocally, however, that in its view, and despite many claimants including references to mana whenua in their evidence, the term “mana whenua” had only become notable in the 1850s.<sup>18</sup> In its view, the more appropriate term to use in relation to land was “rangatiratanga”, particularly as te Tiriti o Waitangi (Maori Text) had used that word.<sup>19</sup>

If the Maori Appellate Court view prevails, the result of excluding mana whenua as a legitimate basis for Maori customary claims is dire for future parties. In *Ngai Tahu* the Court ruled that post Tiriti/Treaty land rights can no longer be acquired by take raupatu, yet that the other incidents of title remain intact.<sup>20</sup> This creates problems. Take taunaha as a means of acquiring new title was obsolete by 1840. No land can reasonably be claimed to have been discovered after this time and any land discovered prior to 1840 would now be subject to take tupuna. The Court’s pronouncement therefore implies that the

---

<sup>14</sup> See section 6A of the Treaty of Waitangi Act 1975.

<sup>15</sup> Supra n13 at 3.

<sup>16</sup> Supra n3 at 88.

<sup>17</sup> Supra n13 at 2.

<sup>18</sup> In direct contrast to this, Waerete Norman, a noted Maori expert on tikanga Maori as it applies in the Muriwhenua region has stated that similar circumstances in the Muriwhenua region during pre-European times gave rise to “mana whenua”. See W Norman, “The Muriwhenua Claim”, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, IH Kawharu ed., Oxford University Press, Auckland, 1989, 201-202.

<sup>19</sup> Supra n13 at 1.

<sup>20</sup> Ibid at 4.



only two take that can be recognised post 1840, as the basis of customary Maori land rights, are take tuku and take tupuna. This leaves a clear gap in Maori custom law. If a hapu or iwi came into occupation of land after 1840, either through raupatu or another means not covered by take tuku or take tupuna, they would be unable to establish a clear claim in accordance with Maori custom law. This could dispossess iwi of otherwise legitimately gained proprietary rights, especially if it is aligned to the current Court practice of fixing hapu and iwi boundaries at 1840.

Even prior to 1840, when take raupatu was an accepted take, without mana whenua as a source of rights there is still a gap in Maori custom law. This became apparent in *Ngai Tahu* when the Court turned its attention to the Ngati Apa claim to mana whenua over lands in the vicinity of Kawatiri (Westport).<sup>21</sup> The Court found that Ngati Apa had settled at Kawatiri after fleeing south and being taken in by the local hapu. Because Ngati Apa were unable to claim take tupuna, take tuku or take raupatu, the Court, having discounted mana whenua, found that there was insufficient evidence to establish support of more than a right of residence.<sup>22</sup>

In *Ngai Tahu* the Court's observations concerning "rangatiratanga" could equally apply to "mana whenua". It considered several deeds of sale, including one in 1853 under which Ngati Toa ceded all rights to the "Northern part of the South Island" to the Crown. The Court found that Crown payments for land did not limit the Court's ability to consider Maori custom law relating to rights of ownership, when determining recompense. Also crucial was the Court's finding that the deeds of sale were not a reliable means of determining iwi boundaries.<sup>23</sup>

The very fact that within the space of 13 years the Crown entered into a number of agreements which overlapped, thereby purchasing in some cases the same lands from different tribes, is evidence that the status of the respective deeds in determining 'ownership' was questionable.

The Court correctly ruled that the favoured treatment received by Ngati Toa, as the recognised spokesperson for Ngati Awa, Ngati Koata, Ngati Rarua, Rangitane and Ngai Tahu, in the 1853 deed

---

<sup>21</sup> Ibid at 19-20.

<sup>22</sup> Ibid at 20.

<sup>23</sup> Ibid at 6.

referred to above, was not an acknowledgement of rangatiratanga over the territories conceded.<sup>24</sup>

In order for Rangitane's adverse claim (based on "mana whenua" but reconstituted by the Court as "rangatiratanga"), to be substantiated, the group had to establish that it had maintained rangatiratanga over the lands in question, up until the time of the signing of the deeds of sale.<sup>25</sup>

Rangitane argued that it had customary title to the Wairau and as far south as Waiau-toa prior to 1828 and before Te Rauparaha lead his raupatu of the area. Rangitane stated that the Waiau-toa had long been recognised as its boundary with Ngai Tahu, and further, that Tapuae-o-eunuku was their sacred mountain. Rangitane also argued that it had defeated Ngai Tahu in battle in the late 1700s at Matariki on the north bank of the Waiau-toa. Ngai Tahu rebutted Rangitane claims by pointing out that it had subdued Rangitane north of Waiau-toa, treating them as a subject people. Later when Rangitane became fractious, Ngai Tahu had completely defeated them in battle beneath the Pa at Pukatea (Whites Bay). According to Ngai Tahu, after this battle Rangitane were confined to Wairau where they were later overrun by Ngati Toa.

Ngai Tahu were able to produce independent documentation to show that in 1848 they claimed Parinui-o-whiti as their iwi boundary. In 1857, a report by Crown land purchase agent, Donald McLean, stated:<sup>26</sup>

The Rangitane, now almost extinct ... might possibly maintain some kind of claim as far south as Waipapa or Waiau-toa. They seem, however, to have been hemmed in on both sides by Ngati Toa and Ngai Tahu ... South of Waipapa, ... the Ngai Tahu title is incontrovertible.

This documentary evidence, while not proof of take, was evidence that regardless of any claim laid by Rangitane, nearly thirty years after their defeat by Ngati Toa they continued to be restricted to an area outside of that claimed by Ngai Tahu. The Court found that even if Rangitane could establish a take, their claim must fail because

---

<sup>24</sup> Ibid at 6.

<sup>25</sup> Ibid at 6-11.

<sup>26</sup> Ibid at 9.

they could not re-establish ahi kaa within the lands over which they claimed to hold mana whenua.

What is of note in the approach taken by the Court with respect to rangatiratanga over the lands claimed by the Rangitane, is that by focusing on the need for ahi kaa it has, inadvertently perhaps, conducted an inquiry into mana whenua. Therefore, it may well be that future recognition of mana whenua will be as the common law equivalent of the Tiriti concept of “rangatiratanga”.

A similar investigation was carried out by the Court regarding the Ngati Toa claim to mana whenua.<sup>27</sup> It stated that while Ngati Toa may have ventured as far south as Kaiapoi, possibly even to Akaroa, there was little evidence that it exercised ahi kaa south of the Wairau. The Court’s discussion of ahi kaa is worth noting.

In attempting to establish take raupatu, Ngati Toa needed to establish ahi kaa. Evidence was put forward of an isolated group of Maori in the area of Waiau-toa who were apparently of Ngati Toa descent, being descended from Tuhere Nikau. The Court ruled, however, that as no traditions by which the Ngati Toa linked themselves to Waiau Toa were advanced, the mere existence of a handful of isolated people, whom it was uncertain even maintained links to their original iwi, was insufficient to establish ahi kaa. As ahi kaa is a central aspect of mana whenua, this observation gives a clear guideline as to the criteria necessary for mana whenua to be recognised.

A second important result of this judgment is the Court’s ruling that Ngati Toa had not merely established control of an area in Wairau but had begun cultivating areas of land to a degree sufficient to demonstrate rangatiratanga and ahi kaa. This occurred despite the period of only twelve years elapsing between the raupatu and 1840. This approach shows that the Court is willing to apply Maori customary principles flexibly.<sup>28</sup> If the Court is prepared to take a flexible approach to ahi kaa, why then does it still maintain a rigid stance on mana whenua?

The remainder of the *Ngai Tahu* case was dealt with in a conventional manner. The Court first considered whether Ngai Tahu had one or more of the necessary take and found that prior to the invasion of the northern iwi they held customary title. This was based on a

---

<sup>27</sup> Ibid at 11-19.

<sup>28</sup> New Zealand Law Commission, *Maori Custom and Values in New Zealand Law: Study Paper 9*, Wellington, 2001, 3.

combination of take that could not be separated due to the duration and nature (intermarriage, conquest, ancestry) of Ngai Tahu occupation of the lands in question. Having established “take” the Court then looked to “ahi kaa”. It found that although Te Rauparaha and his allies had defeated Ngai Tahu at Kaikoura, Omihi and in the second campaign at Kaiapo, they had then left the Ngai Tahu domain.

Ngai Tahu argued that within two years of these defeats they had sought battle with Ngati Toa north of Parinui o Whiti. They also claimed to have continued to fish and hunt over the northern portion of their claimed lands as well as living in the areas. The Court was not satisfied that such occupation was to the exclusion of other iwi. It noted that the land could not be considered kainga tautohe (land over which rights are enjoyed by more than one iwi), as Ngati Toa withdrew northwards and there was no evidence of any sharing between Ngai Tahu and any other iwi. Ngati Toa also claimed proprietary rights south of the Wairau valley based on evidence that some of their principal chiefs had been killed there and that they had exterminated the Ngai Tahu residents. These claims were rejected on the basis that they did not establish ahi kaa and were an attempt to import a take that was not recognised by the Court.

The Court ultimately ruled that while in 1840 no iwi could establish rangatiratanga over the lands in the Kaikoura deed, Ngai Tahu had reoccupied the land and rekindled ahi kaa, after 1840.<sup>29</sup> This was permissible as the rekindling of ahi kaa was not the result of conquest but rather due to the release of Ngai Tahu slaves taken by Ngati Toa, who subsequently reoccupied their former homes.

With regard to the claims of Ngati Rarua and Ngati Tama to portions of the Arahura purchase, the Court ruled that both iwi had a claim to areas of the West Coast for a period after 1827 by virtue of take raupatu. The claim of Ngati Tama was lost, however, after the group was defeated by Ngai Tahu in battle at Tuturau, where their chief Te Puoho was killed and the rest of his taua enslaved. With regard to the claim of Ngati Rarua, there was dispute as to whether their claim ought, more appropriately, to be based on take tuku. It was suggested that they were in fact in friendly occupation with local iwi. The Court found that this was irrelevant however, as Ngati Rarua withdrew north after the defeat of Te Puoho and thus abandoned the land and lost any rights they may once have held<sup>30</sup>.

---

<sup>29</sup> Supra n13 at 15.

<sup>30</sup> Ibid at 18-20.

Once again it is noted that had the Maori Appellate Court acknowledged mana whenua as put forward by the claimants, rather than supplanting it with rangatiratanga via the Treaty, the outcome in this case as far as land rights is concerned, would have been the same.<sup>31</sup>

### *Where to now?*

In the *Ngai Tahu* case<sup>32</sup> the Court held that “mana whenua”, or “mana-o-te-whenua” is a modern concept that came into vogue with the advent of the Kingitanga movement. According to the Court, mana whenua arose as a traditional veto mechanism by which members of the Tainui confederation, resisting ongoing pressure from Crown purchasing agents to sell their land, and fearful of law changes aimed at taking their land, granted their paramount rangatira, Potatau, “mana-o-te-whenua” (authority over the land). The purpose of this was to legitimate the referral of all future land purchase requests from the Crown to Potatau, who, because he held mana-o-te-whenua would be responsible for making decisions about the land. The Court found no evidence to suggest that the transfer of mana-o-te-whenua had any adverse effect on the rights of the occupants of the land who maintained their ahi kaa.

Four years later, in 1994, the view of mana whenua as a modern concept was reaffirmed by the Maori Land Court in the case of *Ngati Toa Rangatira*.<sup>33</sup> In *Ngati Toa Rangatira* the Court had to determine a number of issues relating to iwi representation, including who had the right to speak on behalf of Ngati Toa in Crown consultation processes. The Court followed the *Ngai Tahu* approach and ruled that the tikanga surrounding mana-o-te-whenua could not demonstrate any proprietary ownership rights being held by any one group appearing before it.<sup>34</sup>

A similar conclusion seems to have been reached in the general courts by the Court of Appeal in *McRitchie Kirk v Taranaki Fish and*

---

<sup>31</sup> Ibid at 25; The decision of the Maori Appellate Court was delivered to the Waitangi Tribunal on 15 November 1990. The decision of the Maori Appellate Court is binding on the Waitangi Tribunal – see section 6A (6) of the Treaty of Waitangi Act 1975.

<sup>32</sup> Ibid at 4.

<sup>33</sup> *Ngati Toa Decision*, MAC 8 December 1994, 21 Nelson MB 1.

<sup>34</sup> Ibid at 9-10.

*Game Council*.<sup>35</sup> In this case, the defendant, McRitchie, was a member of the local hapu. He was caught fishing for trout in the Mangawhero River in breach of fisheries regulations. The Wanganui River has always been an important source of food for the hapu. As a member of the hapu, McRitchie was often required to fish for hui (official gatherings). The Court of Appeal accepted that in asserting “mana whenua”, the hapu sought recognition “of the power and influence associated with the possession of their taonga ... and its capacity ... to produce food”.<sup>36</sup> Additionally, in seeking recognition of tino rangatiratanga, Maori were asking for “acceptance of their mana or authority to control the resource”.<sup>37</sup> This subtle distinction indicates a perceived disparity in the Courts between “mana whenua” and “ownership rights”. Rangatiratanga, due to its presence in Te Tiriti o Waitangi/the Treaty of Waitangi, is widely accepted as being a claim for ownership and especially control rights. Mana whenua, however, is either viewed as a less fulsome right than rangatiratanga, as in *McRitchie*, or is completely displaced by rangatiratanga as the proper basis for a claim as in *Ngai Tahu*.<sup>38</sup>

The Waitangi Tribunal, probably guided by the earlier Maori Appellate Court decisions, has recently stated that not only was mana whenua a 19<sup>th</sup> century attempt to frame Maori authority in terms of English law, but that it was an unhelpful innovation which did “violence to cultural integrity”.<sup>39</sup> The Tribunal’s view is not however, consistent. In the *Te Roroa Report*, the manner of its rejection of mana whenua clearly envisages it existing prior to its adoption by the Kingitanga movement in the 1850s:<sup>40</sup>

Traditions record that Manumanu had mana whenua over Waipoua, meaning that he neither owned the land nor had authority appropriate to existing rights of usufruct.

The view that mana whenua existed as a working concept of Maori custom law prior to the 1850s has several proponents. Claudia

---

<sup>35</sup> *McRitchie Kirk v Taranaki Fish and Game Council* [1999] 2 NZLR 139.

<sup>36</sup> *Ibid* at 156.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Supra* n13 at 4. Despite the claimants’ use of the term “mana whenua” when presenting their claims, the Maori Appellate Court stated that the more appropriate term to use in relation to land was “rangatiratanga” and reconstrued the applications accordingly.

<sup>39</sup> Waitangi Tribunal, *Rekohu (Chatham Islands) Report, (Part I)—WAI 64*, Brooker and Friend, Wellington, 2001, 28.

<sup>40</sup> Waitangi Tribunal, *Te Roroa Report — WAI 38*, Brooker and Friend, Wellington, 1992, 5.

Orange cites as one of the reasons for the assurance of tino rangatiratanga in Te Tiriti, the concern of Maori that if they signed a treaty the “mana of the land might pass from them”.<sup>41</sup> In 1985, two major hui held at Turangawaewae and Waitangi issued statements to the effect that mana and rangatiratanga had never been ceded and could never be ceded and declared that Maori “Mana Tangata, Mana Wairua, Mana Whenua, supersede the Treaty of Waitangi”.<sup>42</sup> For mana whenua to supersede te Tiriti/Treaty, it must have been in existence in 1840.

In line with Orange, Waerete Norman in her writings on Muriwhenua, agrees that the concept of mana whenua pre-dates European contact.<sup>43</sup> Norman states that mana whenua refers to the physical dimension of the collective title of the group as secured by ahi kaa. It is described as an alternative basis for establishing land rights that is linked to mana tupuna (rights inherited through and validated by whakapapa). The ambit of mana whenua in this sense, therefore, extends beyond the confines set by the Maori Land Court. It is more than mere authority, it is synonymous with control over land, and is akin to sovereignty being vested in a group and exercised by rangatira within an area. Norman’s usage of mana whenua advocates a right to land that is broader than mana tupuna.

In Norman’s depiction, ancestral land is the place where tupuna were born, lived, died, and left their mark by reference to whakapapa. The stronger claim to land rests with those who not only have whakapapa links but also have the added link of continuing to live on the land. Mana whenua thus seems to be related to “ahi kaa” and “ahi tere” in that people can have mana tupuna within the area to which they whakapapa but can only have mana whenua if they maintain their links with the land.

Given the regular assertion by the Waitangi Tribunal that it is Maori interpretations of Maori concepts that matter it is odd that the Maori Appellate Court should consistently adopt such a minimalist and restrictive interpretation of mana whenua. In my view, the concept has the potential to be highly influential in determining questions of

---

<sup>41</sup> C Orange, *The Treaty of Waitangi*, Allen and Unwin, Wellington, 1987, 58.

<sup>42</sup> A Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s*, Oxford University Press, Auckland, 1997, 90.

<sup>43</sup> W Norman, “The Muriwhenua Claim”, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, IH Kawharu ed., Oxford University Press, Auckland, 1989, 201-202.

agency - who had mana and rangatiratanga, over people and taonga - and how this might be transmuted into authority to speak and claim proprietary rights. Orange states:<sup>44</sup>

In 1840 Maori had known the connection between mana and rangatiratanga and of both with taonga; they still did, and still claimed them on the grounds of an indistinguishable right.

Notwithstanding the Maori Appellate Court's outright denial of mana whenua as a traditional concept, the door to its greater recognition remains open.

Both the Courts and the New Zealand Law Commission recognise that definitions adopted in the application of Maori customary law will vary between iwi.<sup>45</sup> The rejection of mana whenua as a proprietary right by the Maori Appellate Court in *Ngai Tahu* and *Ngati Toa* may be limited to their facts in future cases. In *Ngati Toa* the rejection of mana whenua was explicitly linked by the Court to the fact that the information put forward by the claimants was by Tainui kaumatua – thus the link to the Kingitanga set out in the earlier *Ngai Tahu* case.<sup>46</sup>

Conversely, a development toward recognition may also be noted in the preliminary views on the meaning of mana whenua for the Chatham Islands claims written by Chief Judge Durie (as he then was), when he stated that mana whenua may have two meanings. One of these meanings was that of Judge Fenton, the other related to long-term ancestral connections with the land.<sup>47</sup> This statement indicates a move towards recognition of a wider definition of mana whenua which takes traditional concepts such as those discussed by Waerete Norman, into account.

Chief Judge Durie also stated that words must be used carefully so they do not develop a tyranny of their own, especially where the Maori thinking behind them has not been fully explored.<sup>48</sup> While Durie intended to warn against accepting mana whenua without

---

<sup>44</sup> Ibid at 301.

<sup>45</sup> Supra n27 at 8-9.

<sup>46</sup> Supra n32 at 9-10.

<sup>47</sup> See “Preliminary views on the meaning of “mana whenua” for the Chatham Islands claims: *WAI 64* and other transcripts, 13 Oct 1994. Chief Judge Durie” and discussion in T Bennion ed., “Preliminary views on the meaning of “manawhenua” for the Chatham Islands claims”, *Maori LR*, October 1994, 5.

<sup>48</sup> Ibid at 5.



sufficient tikanga supporting it, his statement is equally applicable in the reverse. The Court must be wary of limiting mana whenua, because if it can be established that Maori scholars such as Norman are correct, the implications for hapu and iwi whose claims do not fall within currently recognised take, are dire. The likelihood of their ever being able to receive a proprietary remedy for Crown breaches is significantly decreased.

The statutory definition of mana whenua does not really assist in determining the nature of the concept. The Resource Management Act 1991,<sup>49</sup> Fisheries Act 1996,<sup>50</sup> Conservation Act 1987<sup>51</sup> and Reserves Act 1977<sup>52</sup> all give the definition as “customary authority of an iwi or hapu or individual in an identified area”. The use of the terms “authority ... *in* an identified area” as opposed to “authority ... *over* an identified area”, while possibly coincidental, seems to imply a right to speak and be consulted with regard to an area, rather than a right to control that area. The Waitangi Tribunal recently challenged this definition in the Rekohu Claim<sup>53</sup> because it equated tangata whenua status with those who hold mana whenua.

The narrow approach taken by the Courts and that argued for by academics is seemingly irreconcilable. Because of these differences, I believe that the most workable definition of mana whenua, albeit not perfect, may be that provided for by statute,<sup>54</sup> that mana whenua is the “customary authority of an iwi or hapu or individual in an identified area”. This definition is compatible with the approach of the Courts in that it allows arguments to remain within the bounds of established New Zealand law. It also gives enough leeway for those who agree with the approach of Norman to argue that “authority ... in an identified area” ought to be read as representing a more comprehensive right than mere influence, and could be the basis of a claim to greater proprietary rights.

---

<sup>49</sup> Section 2 (1) Resource Management Act 1991.

<sup>50</sup> Section 2 (1) Fisheries Act 1996.

<sup>51</sup> Section 2 (1) Conservation Act 1987.

<sup>52</sup> Section 2 (1) Reserves Act 1977.

<sup>53</sup> *Supra* n39 at 24-26.

<sup>54</sup> Section 2(1) Fisheries Act 1996; Section 2(1) Conservation Act 1987; Section 2(1) Reserves Act 1977; Section 2(1) Resource Management Act 1991.

## CONCLUSION

It is of no significant advantage to consider the motivation of the Maori Appellate Court in making the decision that “rangatiratanga” is more appropriate than “mana whenua” as a basis of land claims and ought, therefore, to supplant it. What is relevant is the impact that this choice could have on future claims.

With the possible exception of the Ngati Apa claim, it is doubtful that any of the conclusions reached by the Court in *Ngai Tahu* would have been different had they been considered under mana whenua instead of rangatiratanga supported by ahi kaa. Yet the very existence of a possible situation where rights may be denied due to an error in definition ought to be sufficient basis for investigating whether there is a need for changing the current approach.

The supplanting of “mana whenua” with “rangatiratanga” is, if Norman is right, a rejection of a legitimate claim under tikanga to proprietary rights. If the Court is correct, then it is time to consider whether rangatiratanga can be expanded or an understanding of mana whenua adopted to fill the void in the application of tikanga demonstrated above. As the New Zealand Law Commission has recognised, Maori custom law is dynamic, therefore this development should be considered progress.<sup>55</sup>

In my view, the present stance of the Maori Appellate Court in rejecting mana whenua through restricting it conceptually to a post European development of the term “mana-o-te-whenua” amounts to the rejection of a legitimate basis for claims under Maori custom law. This undermines the claims of Maori for self determination in relation to Maori land and risks perpetuation of injustice in cases where the take claimed cannot fit under the accepted concepts of take tuku and take tupuna, or where mana whenua is the only basis for the claim.

---

<sup>55</sup> Supra n28 at 2.



## ADINA THORN

I am 23 years old and live with my parents in Auckland. My Mum is a primary school teacher, and Dad is a Civil Engineer. I have one younger sister, Caroline and a kitten, Charlie. My Mum was raised in St Heliers, Auckland, and Dad on a cattle farm out of Whangarei. When I was young we lived in Orewa, and attended school there. As Deputy Head Girl at Orewa College I learnt the importance of being tolerant of other people and of being resourceful. That role taught me to be self-motivated. I have positive memories of living in Orewa, and would like to return there one day. I now live in Northcote on Auckland's North Shore.

I started University in 1999 and have completed a Bachelor of Property (BProp). I have just completed writing a dissertation on the law of restitution to complete my LLB(Hons) degree. I hope to have a challenging and exciting career in the law, and would like to be involved in property transactions. I would like to perhaps become a judge one day!

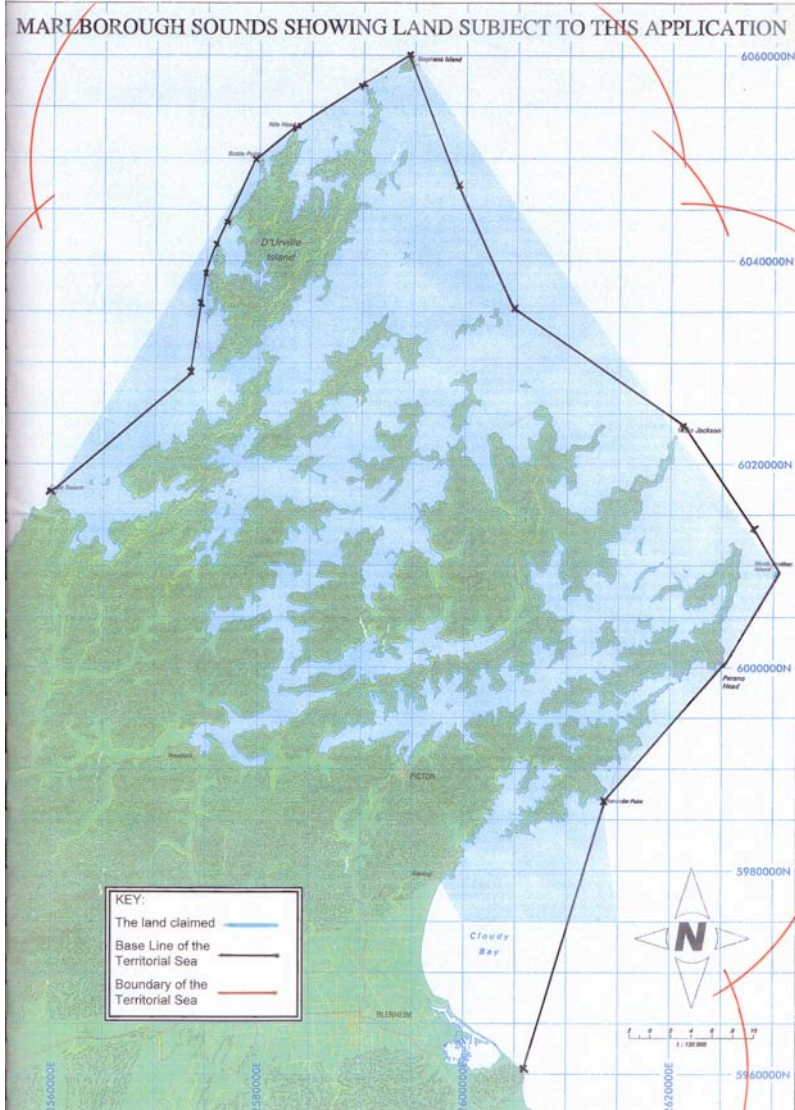


However, in the immediate future I would like to learn to cook!!! And I would really like to tutor Legal System, because I enjoy helping other people and think I would be good at it.

I summer clerked at Simpson Grierson and have worked in Stevens Home and Giving, and as personal assistants, for merchant bankers and a real estate agent for a number of years.

I have travelled quite a bit with my family - I have been to many of the Pacific Islands, (Fiji, Vanuatu, and the Cook Islands) the Chathams, United States, around NZ, and to Australia 5 times. I also spend as much time as possible at my family's bach at Whangamata on the Coromandel Peninsula where I read books, shop and spend time with friends and family.

**LOCATION MAP  
AREA CLAIMED IN *NGATI APA v AG*  
3 [2003] NZLR 643**



**MANA WHENUA AND THE NGATI APA DECISION**

## INTRODUCTION

This essay examines the way that mana whenua, as a principle of Tikanga Maori (Maori custom law), fits within the English-based New Zealand legal system. Part I of the essay identifies some of the problems associated with translating the principle of “mana whenua” into English. Part II demonstrates the application of mana whenua in the context of the Ngati Apa et al (“*Ngati Apa*”)<sup>1</sup> claim to the seabed and foreshore in the Marlborough Sounds.

### PART I - DEFINING MANA WHENUA

According to Justice Durie, the Maori legal order is based on principles rather than prescribed rules.<sup>2</sup> These principles are dynamic, and, unlike rules, can be changed without recourse to modifying legislation. In similar fashion, Hirini Mead stresses that Maori principles are continually being reviewed according to the social conditions of the time.<sup>3</sup>

In his jurisprudential writings Ronald Dworkin,<sup>4</sup> like Durie and Mead, also believes that principles are a necessary and valuable part of the law. While Dworkin was writing in the context of the Anglo-American common law, and more specifically, within the positivist tradition, his reasoning in support of principles being regarded as part of the law is equally applicable to Maori principles such as mana whenua. This is because principles provide important *values* that can be weighed against each other in the administration of law. While rules may be set aside when outweighed by other rules, principles

---

<sup>1</sup> *Ngati Apa v AG* [2003] 3 NZLR 643.

<sup>2</sup> E Durie, “Custom Law: Address to New Zealand Society for Legal and Social Philosophy” (1994) 24 VUWLR 325, 331.

<sup>3</sup> H Mead, “The Nature of Tikanga” Paper presented to Mai I te Ata Hapara Conference, Te Wananga o Raukawa, Otaki, 11-13 August 2000, 16.

<sup>4</sup> R Dworkin, “The Model of Rules I”, *Taking Rights Seriously*, in R Dworkin ed., Duckworth, London, 1977, 26-28.

survive to prevail in other instances. Dworkin believes that the values underpinning principles are integral to any system of law.

In my view, the principle of *mana whenua* best fits within the limited category of custom law that has been incorporated and recognised by the English common law. More precisely, it constitutes one of the three categories that William Blackstone<sup>5</sup> believes comprise the common law. As such, it became part of the existing law when English law was established in Aotearoa (New Zealand) following the signing of the Treaty of Waitangi in 1840.

Finding a precise English definition for “*mana whenua*” is difficult. Most commentators on Maori custom and values, and land claimants do not use the term. Even when it is used, it is often not defined.<sup>6</sup> There are several possible reasons for this. The most obvious is that Maori who use the term have a general understanding of how it applies within the specific contexts they regard as important, thus making translation unnecessary for them. When it is necessary, there are pitfalls associated with the process of translation. First, as Nin Tomas notes,<sup>7</sup> there are inherent dangers in defining Maori concepts by reference to seemingly analogous English terms. She says that, in the process of translation, a traditional Maori concept drawn from a unique cultural context faces the real risk of losing its original meaning and becoming redefined according to English cultural norms.

Second, Willard Quine<sup>8</sup> suggests that language is indeterminate anyway, so that translation can never equate exactly the same meaning to two different words. Thus, when language *x* (Maori) is mapped onto language *y* (English) there is no way for a translator of *x* into *y* to know that he or she has assigned a word of equivalent

---

<sup>5</sup> W Blackstone, *Commentaries on the Laws of England*, 1<sup>st</sup> edn, Murray, London, 1857.

<sup>6</sup> The Waitangi Tribunal in the following reports asserted “*mana whenua*”, but did not explain its meaning: *Te Roroa Report—WAI 038*, 1992; *The Pouakani Report—WAI 033*, 1993 and *Te Whanau O Waipareira Report—WAI 414*, 1998. The following texts which are frequently cited as authoritative also do not explain what “*mana whenua*” means: J Metge, *The Maoris of NZ, Rautahi*, Routledge and Kegan Paul, London, 1976; R Firth, *Economics of the New Zealand Maori*, Government Printer, Wellington, 1972.

<sup>7</sup> N Tomas, “Implementing Kaitiakitanga under the RMA 1991” (1994) 2 *New Zealand Environmental Law Reporter* 39.

<sup>8</sup> W Quine, *Word and Object*, Technology Press of the Massachusetts Institute of Technology, Cambridge, 1960, chapter 2.

meaning. Quine gives the example of an English speaking person observing a speaker of another native language (Maori) watching a rabbit and saying “gavagai”. The first English person may translate “gavagai” to be XYZ. A second English person seeing exactly the same event may translate “gavagai” to be ABC. The meanings assigned to “gavagai” are not equivalent because neither translator knows exactly what is subjectively meant by the Native speaker (Maori) when he or she says “gavagai”. She may be referring, for instance, to the whole rabbit, part of the rabbit, or an undetached rabbit part. Thus, according to Quine’s theory, when an English translator defines Maori words, the English and Maori words can never be equivalent.

Finally, Durie and Boast both believe that the lack of definition surrounding Maori jural terms is at least partially referable to the lack of scholarship and research into Maori legal values to date.<sup>9</sup> They attribute this to a misguided belief held by the legal fraternity that Maori do not have “laws” that English-based New Zealand law can give effect to, but instead possess only “lores”, being a loose set of disparate values, stories and tales. A recent example of this is provided by Judge Whiting in *Heta v Bay of Plenty Regional Council*,<sup>10</sup> a case concerning the granting of permits to dredge and dispose of sediment in a harbour, where the judge stated “this Court is a statutory-constituted court of law. It is not a court of ‘lore’”.

Despite the inherent risks set out above, it is necessary to define “mana whenua” in order to provide a clear principle by which to analyse the *Ngati Apa* decision.<sup>11</sup> I believe that there are two connected aspects to mana whenua. First, “whenua” (land) is the heart and source of a person’s identity, and second, “mana whenua” refers to “sovereignty” or absolute authority of and over the land.

The first aspect of mana whenua refers to whenua (land) as being at the heart and source of one’s identity.<sup>12</sup> Edward Douglas notes that

---

<sup>9</sup> Durie, *supra* n2; R Boast et al ed., *Maori Land Law*, Butterworths, Wellington, 1999, 6.

<sup>10</sup> Environment Court, Auckland, AO 93/00, 1 August 2000, noted [2000] BRM Gazette 121 and T Bennion ed., *Maori LR*, Oct 2000.

<sup>11</sup> Section 2 of the Resource Management Act 1991 defines “mana whenua” as “customary authority exercised by an iwi or hapu in an identified area”. However, the point made here is that a more in depth consideration of the meaning of “mana whenua” is required.

<sup>12</sup> E Douglas, *Mana Whenua, Mauri Tangata: exploring the relationship between Maori identity and the land*, University of Waikato Centre for Maori Studies and Research, Hamilton, 1983, 1-5.



land is viewed as the source of both group and individual identity and that before the arrival of Europeans in Aotearoa there was “an intimate association of Maori people to their lands”.<sup>13</sup> He also says that “without land, the people cease to exist. Land is a unifying force, for the tribe and the family”.<sup>14</sup> Asher and Naulls add that “traditionally the land was a source of cultural, spiritual, emotional and economic sustenance, and that remains true today”.<sup>15</sup>

The word “whenua” in te reo (Maori language) also means “placenta”.<sup>16</sup> This meaning recognises the Maori practice of burying a child’s placenta in his or her ancestral land after birth.<sup>17</sup> This physical connection establishes a direct and ongoing relationship with a particular area of land, so that from the time the placenta is placed in the earth the land becomes part of the child’s being.<sup>18</sup> Although this may later serve as the basis of a land occupation claim, it is more important in terms of establishing turangawaewae (standing place) so that a person will always belong “here”.

Further, Maori view the land as a living phenomenon. According to Douglas,<sup>19</sup> Maori personify the land by naming specific features and claiming personal associations. The mountains, hills and rivers are named as ancestors “and treated as though the Western distinction between myth and tribal history did not exist”. Thus, when the land is lost, part of the peoples’ identity is lost with it. By way of example, Douglas draws an analogy with the Palestinian people, and believes that their loss of land has led to a situation in which they too “are struggling to maintain their identity as a people”.<sup>20</sup>

Not only is the land a source of identity for its current occupants, it also links that identity to past ancestors.<sup>21</sup> When occupying the land, Maori experience strong emotional connections to their relations and whakapapa (ancestors). Thus the proverb: “noku te whenua, o oku tupuna” / “mine is the land, the land of my ancestors”.<sup>22</sup> According to Justice Durie, “the land was seen as shared between the dead, the

---

<sup>13</sup> Ibid at 1.

<sup>14</sup> Ibid at 3.

<sup>15</sup> G Asher and D Naulls, *Maori Land*, Preliminary Paper 29, New Zealand Planning Council, Wellington, 1987, 2.

<sup>16</sup> Ibid at 4.

<sup>17</sup> Ibid.

<sup>18</sup> Durie, supra n2 at 328.

<sup>19</sup> Douglas, supra n12 at 3.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid at 2; Metge, supra n6 at 107.

<sup>22</sup> Firth, supra n6 at 368.

living and the unborn. Current generations were as caretakers, holding on behalf of the ancestors for the generations still to come”.<sup>23</sup> Thus, I believe that one aspect of the meaning of “mana whenua” is the perception that land is the source and heart of a person’s identity.

Second, mana whenua has been described as referring to “mana” or authority through governance, control, or “ownership” of the land.<sup>24</sup> It is difficult to reconcile this with the type of land tenure recognised either by the English common law or the Torrens system that presently operates in Aotearoa. Under the classification of legal estates under common law, land is ranked hierarchically according to the number of rights that attach to it, from the highest estate or fee-simple ownership, to a “user-right”, a limited right to use the land for a particular purpose, such as an easement.<sup>25</sup> By way of contrast, land governed by Maori was held by the hapu or iwi collectively, and the right to possession extended to the hapu or iwi as a whole.<sup>26</sup>

Mana whenua has been variously interpreted and is often linked to other concepts. Some research institutions and academics assert that mana whenua is akin to “fee-simple ownership” or an aspect of it, while others equate it to “sovereignty”. The New Zealand Education Department has stated that mana whenua is part of the “tino rangatiratanga” guaranteed under Te Tiriti o Waitangi (Maori text).<sup>27</sup> Tomas defines tino rangatiratanga as “retention of absolute control over resources and self”, which is more than the mere possession of existing property as set out in the English text of the Treaty of Waitangi.<sup>28</sup> Firth, when discussing “mana and the land”, although not

---

<sup>23</sup> Durie, supra n2 at 329. Further, Metge, supra n6 at 107: “it is land of our ancestors” and Asher and Naulls, supra n15 at 3: “the continued occupation of a piece of land was the most obvious sign of a link between generations – between the dead, those living and those yet to come”.

<sup>24</sup> New Zealand Law Commission, *Maori Custom and Values in New Zealand Law: Study Paper 9*, Wellington, 2001, paras 137-138; New Zealand Education Department, *Maori Language Glossary*: <[http://www.tki.org.nz/r/ncea/geo\\_maoriglossary.doc](http://www.tki.org.nz/r/ncea/geo_maoriglossary.doc)> (at 18 November 2003); Durie, supra n2 at 330.

<sup>25</sup> See Hinde, McMorland and Sim, *Land Law in New Zealand*, Butterworths, Wellington, 1997, 30-33.

<sup>26</sup> Boast, supra n9 at 27.

<sup>27</sup> New Zealand Education Department, supra n24. The meaning of “tino rangatiratanga” has been strongly contested since it was expressed in Article 2 of te Tiriti o Waitangi (the Maori text) in 1840.

<sup>28</sup> N Tomas, “Land, Sovereignty and Tino Rangatiratanga”, in *Work in Flux*, Greenwood et al ed., University of Melbourne, Australia, 1995, 32.

specifically referring to mana whenua, believes that while mana has a variety of meanings, with respect to land it means:<sup>29</sup>

... the superior power or prestige and intimacy of association which a tribe possesses with regard to its territory as compared with the relation of other tribes to it. The possession of *mana* over the land is correlated with supreme right of ownership, though not with mere occupation.

That Firth's definition would equate mana whenua to the highest form of ownership in land is further evidenced by his statement that "the native conception of *mana* in relation to land is thus most nearly akin to the idea of sovereignty".<sup>30</sup> "Sovereignty" is a difficult concept to define. Unfortunately, Firth does not elaborate on the precise nature of the rights that attach to his idea of sovereignty. Malcolm Shaw believes that it is about the legal supremacy of internal governmental institutions on the one hand, and the state as a legal person in an external international sense on the other.<sup>31</sup>

I see mana whenua as being connected to both sovereignty as discussed by Firth and the absolute authority or autonomy put forward by Tomas and the New Zealand Education Department. In fact, sovereignty and absolute authority are similar in that both denote absolute control over territory.

Within the English common law, "sovereignty" is not a concept that directly equates to "fee-simple ownership". Sovereignty is a wide reaching concept of public international law that concerns state selfhood<sup>32</sup>, whereas fee-simple is a concept specific to private land law. Thus, a right in fee-simple is not on par with sovereignty in terms of its reach. Also, while fee-simple ownership tends toward being both individualistic and private, sovereignty tends to invoke a broader range of widely held political considerations.

Another consideration is that the exclusive possession of land that attaches to the notion of fee-simple ownership does not coalesce easily with Maori custom law. Land was held communally under Maori custom law. While certain individuals may have been granted particular rights to certain areas, these rights were generally not

---

<sup>29</sup> Firth, *supra* n6 at 391.

<sup>30</sup> *Ibid* at 392.

<sup>31</sup> M Shaw, *International Law*, Cambridge University Press, New York, 1997, chapter 1.

<sup>32</sup> *Ibid*.

viewed as being to the exclusion of the rest of the iwi or hapu.<sup>33</sup> Further, it was common for iwi or hapu to transfer specific user-rights to other groups.<sup>34</sup> Boast submits that it would be more correct to view the holder of these rights, whether individual, hapu or iwi, as owning “rights in the land”, rather than “ownership of the land”.<sup>35</sup> Thus, the holder owns the “right” and not the land. His statement that:<sup>36</sup>

... these competing claims of rights coupled with the intricate system of overlapping and intersecting rights held by the members of different kinship groups, makes it difficult to say who “owned” the land

could be viewed (perhaps incorrectly) as reading down Maori rights to land. It is natural, and if Quine is right perhaps even inevitable, that non-Maori will use a fee-simple framework of reference when evaluating land tenure under Maori custom law. Given this, Boast’s submission that Maori have “user-rights” to the land could lead to further diminution of Maori entitlements because no indication is given as to the inherent content or regulatory force attaching to these rights.<sup>37</sup> If mana whenua is about absolute authority or sovereignty then the rights that attach to it must not be subjected to any greater rights. The danger of Boast’s “user-rights” definition is that it potentially undermines the supremacy aspect of mana whenua. Even if the term “absolute user-rights” was employed to emphasise that these user-rights are not subject to any greater rights of possession, I believe that “sovereignty” is still the better term because, within an English legal framework of thinking, it includes greater regulatory authority.

Notwithstanding this, in terms of alienation, Boast states that a holder of land had full discretion to grant rights to other hapu and iwi, and to decide what conditions attached to the grant.<sup>38</sup> Asher and Naulls posit that the hapu or iwi held a veto right to prevent land being passed outside the iwi indefinitely.<sup>39</sup> According to Andrew Erueti, while rangatira (leader/s) had authority to give other hapu or iwi user-rights, they did not have authority to transfer absolute ownership to

---

<sup>33</sup> Boast, supra n9 at 28; Firth, supra n6 at 377.

<sup>34</sup> Ibid; Asher, supra n15 at 5.

<sup>35</sup> Boast, supra n9 at 28-29.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid at 28.

<sup>39</sup> Asher, supra n15 at 5.

the land.<sup>40</sup> Firth adds that rangatira could not transfer the land in its entirety unless the hapu or iwi consented.<sup>41</sup>

In summary then, “mana whenua” is comprised of the two elements outlined above. First, “whenua” relates to the source and heart of one’s identity and, as such, is of paramount importance to Maori. Second, “mana whenua” denotes sovereignty or absolute authority over the land. The terms “user-rights” and “absolute user-rights” do not adequately capture this meaning. “Sovereignty” provides a closer approximation.

## **PART II - RECOGNITION OF MANA WHENUA WITHIN THE NEW ZEALAND LEGAL SYSTEM**

It is arguable that mana whenua does, in an indirect way, give rise to a cause of action in the Maori Land Court and the Waitangi Tribunal where Maori custom law has been included in the statutes that establish and regulate both bodies, as well as in the Resource Management Act 1991. However, outside these areas, mana whenua is not yet recognised as giving rise to a direct cause of action in New Zealand courts.

According to Blackstone, the English common law is comprised of three groups of laws: (1) general universal rules; (2) particular laws for the courts; and (3) laws of a “particular custom which for the most part affect only inhabitants of particular districts”.<sup>42</sup> Mana whenua, being Maori custom law affecting the inhabitants of different areas of Aotearoa, fits within this third category. When English-based law was introduced in 1840, it became part of the law applicable from that time within Aotearoa. The New Zealand Law Commission includes Maori principles as an essential part of the pre-existing custom law covered by the Doctrine of Aboriginal Rights, stating:<sup>43</sup>

aboriginal rights and titles are continued as a matter of law after a declaration of sovereignty and the imposition of English law

---

<sup>40</sup> Boast, supra n9 at 30.

<sup>41</sup> Firth, supra n6 at 396.

<sup>42</sup> Ibid; Blackstone, supra n5 at 67; *Halsbury’s Laws of England*, 4<sup>th</sup> edn, Vol 12(1), Butterworths, London, 1998, paras 601, 602, 605 and 606.

<sup>43</sup> NZ Law Commission, supra n24 at para 47.

throughout a particular territory”, irrespective of the means of acquisition.

For custom law to be legally recognised in accordance with Blackstone’s third category, *Halsbury’s Laws of England* states that it must be: (1) immemorial; (2) reasonable; (3) certain, and (4) continued without interruption since its origin.<sup>44</sup> Several cases demonstrate the use of this category when dealing with the rights of indigenous peoples within the British Commonwealth. They include *Mullick v Mullick*,<sup>45</sup> in which the Privy Council held that “a Hindu idol, according to long established authority, founded upon the religious customs of the Hindus, and the regulations thereby by courts of law, is a ‘juristic entity’”, and *Le Tagaloa Pita et al v AG*<sup>46</sup> in which Cooke P held that the Samoan Constitution *must* be read by reference to traditional settings. *Guerin v R*,<sup>47</sup> a decision of the Supreme Court of Canada, and *Mabo v State of Queensland*,<sup>48</sup> a decision of the High Court of Australia, are more recent examples concerning pre-existing native land rights which show that the courts are capable of construing Blackstone’s third category flexibly.

Although Tomas views Maori custom law as a separate “indigenous” source of law that is self-complete, the “imported” New Zealand legal system does not currently recognise any competing system, as such. Instead, for Maori custom law principles to be considered valid and enforceable under New Zealand law they must fit within the framework of Blackstone’s analysis, and, if they are to have any concrete outcome in terms of legal rights, be supported by proof sufficient to satisfy the *Halsbury’s* tests.

The orthodox position under New Zealand law is that the *only* protection afforded to Maori custom law principles such as mana whenua is by way of statute, “customary title,” as defined under Te Ture Whenua Maori Act 1993, or via the “doctrine of aboriginal title” which is sometimes also referred to as “customary title”.

### ***The Ngati Apa Claim To The Seabed And Foreshore In The Marlborough Sounds***

---

<sup>44</sup> *Halsbury’s*, supra n42 at para 606.

<sup>45</sup> (1925) LR 52 Ind App 245, 250

<sup>46</sup> [18 December 1995] CA, Western Samoa, CA 7/95.

<sup>47</sup> (1984) 2 SCR 335.

<sup>48</sup> (1992) 175 CLR 1.

Ngati Apa claim that they have mana whenua over the seabed and foreshore of the Marlborough Sounds. They assert that these resources are a source and essential aspect of their identity, that they traditionally had authority or absolute user-rights over those resources, and that their authority should be legally recognised. They are particularly concerned about the Government issuing private licences to third parties under section 12(1) and (2) of the Resource Management Act 1991, thereby excluding Maori from these areas.<sup>49</sup>

In 1997 Ngati Apa sought declaratory orders from the Maori Land Court that the seabed and foreshore in the Marlborough sounds was Maori customary land “held by Maori in accordance with tikanga Maori” under section 129 (2)(a) of Te Ture Whenua Maori Act 1993, (“the Act”). Further, Ngati Apa argued that title should be investigated under section 132 of the Act.<sup>50</sup> In the alternative, the claimants sought a declaration that the Crown holds the land in a fiduciary capacity for their benefit under s 18(1)(i) of the Act. The Crown argued that the claimants could not be successful because customary title to the seabed and foreshore had been extinguished by case law and legislation.<sup>51</sup>

Judge Hingston, giving an interim decision in the Maori Land Court, distinguished *In re the Ninety-Mile Beach*<sup>52</sup> and held that legislation had not extinguished customary title. The Attorney-General and others appealed to the Maori Appellate Court, which granted leave for the decision to be heard in the High Court. Ellis J in the High Court<sup>53</sup> held that the Maori Land Court did have jurisdiction under the Act but declared that the land below high water mark was beneficially owned by the Crown at common law and was further declared to be so by section 7 of the Territorial Sea Contiguous Zone, and Exclusive Economic Zone Act 1977, and section 9A of the Foreshore and Seabed Endowment Revesting Act 1991. Thus it

---

<sup>49</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).

<sup>50</sup> The Maori Land Court and High Court can make status orders under s131(1) that the land is Maori customary land. Once a status order is made, the Maori Land Court has exclusive jurisdiction under s132 to investigate title, and it may make a vesting order under s132(4). The effect of a vesting order is that the land’s status changes from customary land to Maori freehold land.

<sup>51</sup> [1963] NZLR 461.

<sup>52</sup> Maori Land Court, 22A Nelson MB 1, 22 December 1997; noted in *Maori LR Dec 97/Jan 98*, 4; [1998] NZ Law Review 485.

<sup>53</sup> [2002] 2 NZLR 661.

could not be, or have been, Maori customary land.<sup>54</sup> Instead it was held that the Crown was the beneficial owner of the seabed and foreshore.

I question how the Crown could become the “beneficial owner” of the seabed and foreshore for Maori in the traditional sense, without there first being a splitting of legal and beneficial interests.<sup>55</sup> If there had been a splitting of legal and beneficial interests, Ellis J is silent as to how this has occurred.

Ngati Apa appealed the decision. Thus, the Court of Appeal had to determine whether the Maori Land Court had jurisdiction to determine whether the claimants had customary title to the seabed and foreshore.

### *The “Ngati Apa” Court of Appeal Decision*

In the Court of Appeal, Elias CJ was careful to emphasise that the Court was deciding only the preliminary question of whether the Maori Land Court had jurisdiction to determine whether the claimants had “customary title” as defined by the Act and not the secondary question as to whether they had *in fact established customary title*:<sup>56</sup>

... the significance of the determinations this Court is asked to make should not be exaggerated ... the outcome of this appeal cannot establish that there is Maori customary land below high water mark ... . Whether or not the appellants [the claimants] will succeed in establishing in the Maori Land Court any customary property in the foreshore and seabed lands ... remains conjectural.

The Court of Appeal unanimously held that the court’s ability to establish whether customary title to the seabed and foreshore had been extinguished, remained extant.<sup>57</sup> That *mana whenua*, as part of customary law, was also preserved is supported by Tipping J’s reasoning that “Maori customary title is no different from any other

---

<sup>54</sup> Ibid.

<sup>55</sup> Per Lord Browne-Wilkinson, *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669 (HL).

<sup>56</sup> Per Elias CJ, *Ngati Apa v AG* [2003] 3 NZLR 643, para 7-8.

<sup>57</sup> A full bench of five judges heard this case. The decision comprises 4 separate judgments each of which reaches the same conclusion.



common law interest which continues to exist unless and until it is lawfully abrogated”.<sup>58</sup>

What then is the interest preserved? Having been incorporated into New Zealand law, *mana whenua* retains neither its purity nor its supreme strength as a principle of Maori custom law. In the process of incorporation, it became less than sovereign and no longer absolute. Maori customary law under *Te Ture Whenua Maori Act* is re-aligned in accordance with the doctrine of aboriginal title to fit within the parameters of the New Zealand legal system. Thus, it is a fallacy to equate *mana whenua* as it is recognised by Maori custom law with *mana whenua* as it is recognised by New Zealand law.

The doctrine of “aboriginal title” is not derived from any rights Maori have under *Te Tiriti o Waitangi*/the Treaty of Waitangi. Neither is it derived from the wholesale application of English common law into the Aotearoa (pre-colonial) and New Zealand (colonial) jural contexts. Aboriginal title is the product of mixing politics and law to produce a practical doctrine of constitutional law which accepts imperial expansion into foreign territories and legitimates the establishment and imposition of the new governing institutions over any prior inhabitants or governing institutions.<sup>59</sup> What is essential to note is that in this process, and despite Maori having pre-existing and indigenous status, the “legality” of *mana whenua* and any other Maori legal principles becomes reliant on the New Zealand courts for recognition and enforcement. Probably the clearest enunciation of the nature of aboriginal/customary title to date is found in the 1994 Court of Appeal decision of *Te Runanganui o te Ika Whenua Inc Society vAG*,<sup>60</sup> in which it was stated:<sup>61</sup>

... on the acquisition of the territory [New Zealand] ... the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, the title vests in the Crown. But ... the

---

<sup>58</sup> [2003] 3 NZLR 643, para 185.

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

<sup>60</sup> [1994] 2 NZLR 20.

<sup>61</sup> Per Cooke P, [1994] 2 NZLR 20, 23-24. This position is consistent with the law in other countries where English common law was introduced. *Inter alia* (1) Marshall CJ in the United States Supreme Court in *Johnson v M'Intosh* (1823) 21 US (8 Wheaton) 543, 574, 603, held that the Crown's interest in land was charged with the Natives right to possession. (2) The Privy Council, on appeal from Canada, in *St Catherine's Milling and Lumber Co v The Queen* (1888) 14 App Cas 46, held that the Crown's estate “is encumbered by the rights of the Indian inhabitants”.

radical title is subject to the existing native rights ... . 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 statute.

However, the Court unanimously agreed that a future Act of Parliament could successfully extinguish title to the seabed and foreshore.<sup>62</sup> Tipping J stated that customary title could be extinguished by:<sup>63</sup>

... a decision of a competent court amending the common law. But in view of the nature of Maori customary title, underpinned as it is by the Treaty of Waitangi, and now by the Ture Te Whenua Maori Act, no court having jurisdiction in New Zealand can properly extinguish Maori customary title.

Tipping J's reasoning that "a competent court" *could*, in certain circumstances extinguish customary title is open to debate. I have not been able to find any precedent to support it, and believe that a competent court could not extinguish customary title, because if the court rather than the Crown could remove customary title it would mean that the relationship would always be subject to third party intervention. Furthermore, if the court is able to set aside a legal relationship of the Executive (or Crown), it will violate the constitutional separation of powers. The courts have consistently asserted that the onus of proving that customary title has been extinguished rests with the Crown.<sup>64</sup> While this statement does not suggest that only the Crown through Parliament can remove customary title, it does suggest that the Crown *should* be the only body because it bears the onus of proof.

A less radical interpretation of Tipping J's comments is to read them as meaning that, in the process of interpreting the law, a court may hold that aboriginal title has been extinguished. *Ngati Apa* shows that the standard to be met before statutory extinguishment can occur is extremely high. In order for the Crown to extinguish customary title, it must demonstrate a "clear and plain" purpose<sup>65</sup> or "make its

---

<sup>62</sup> N Tomas and K Johnston, "Who Owns the Foreshore and Seabed of Aotearoa?", [2003] NZ Law Review, 462.

<sup>63</sup> *Ngati Apa*, supra n56 at para 185.

<sup>64</sup> *R v Sparrow* [1990] 1 SCR 1075,1099; *Mabo v Queensland* (1988) 166 CLR 186, 213-214; *Te Runanga O Muriwhenua v AG* [1990] 2 NZLR 641, 655.

<sup>65</sup> Per Keith J and Anderson J, *Ngati Apa*, supra n56 at para 148.

intention crystal clear”.<sup>66</sup> Tipping J stated that, in the absence of express words, a “necessary implication” could extinguish customary title.<sup>67</sup> As to the meaning of “necessary implication”, Tipping J cited dicta of Lord Hobhouse in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*<sup>68</sup>:

... it is one which necessarily follows from the express provisions of the statute construed in their context ... a necessary implication is a matter of *express language* and logic *not* interpretation”. (emphasis added)

With respect, an implication is not a matter of express language but is a matter of construction by reading in words that are not themselves contained in a document. If “[a necessary implication] *follows* from the express provisions”, it is indeed a matter of interpretation external to the document. The Court of Appeal in *Ngati Apa* held that the legislation<sup>69</sup> referred to had not extinguished customary title to the seabed or foreshore.

Finally, the majority held that the 1963 decision of *In re the Ninety-Mile Beach*<sup>70</sup> had been wrongly decided. That decision held that if the land contiguous to the foreshore had lost the status of customary land, then Maori had also lost title to the foreshore. Tipping J, in accordance with Blackstone’s third category, states that *In re the Ninety-Mile Beach* did not begin from the correct starting point, that Maori customary title was part of the common law from the time English sovereignty was proclaimed.<sup>71</sup>

In summary, the Court of Appeal held that: (1) the Maori Land Court had jurisdiction to decide on customary title to the seabed and foreshore; (2) Maori customary title to the seabed and foreshore had not been extinguished by case law or by legislation; and (3) the decision of *In re the Ninety-Mile Beach* had been wrongly decided.

---

<sup>66</sup> Per Tipping J, *ibid* at para 185.

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

<sup>68</sup> [2002] 2 WLR 1299, 1131. This dicta was adopted as authoritative by the Privy Council in *Russell McVeagh v Auckland District Law Society* [19 May 2003] PC 34/02.

<sup>69</sup> Namely the following enactments: Harbours Acts 1878 and 1950; Territorial Sea and Fishing Zone Act 1965; section 7 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977; sections 9 and 9A of the Foreshore and Seabed Endowment Revesting Act 1991, and the Resource Management Act 1991.

<sup>70</sup> [1963] NZLR 461.

<sup>71</sup> *Ngati Apa*, *supra* n56 at para 204.

## Proving Customary Title

Until legislation is passed to prevent it happening, the *Ngati Apa* decision enables the claimants to bring a case before the Maori Land Court. Regardless, in order for claimants to have their customary title to the seabed and foreshore recognised, they must first overcome the hurdle of proving their entitlement.

Former Attorney General and Minister in charge of Treaty Negotiations, Douglas Graham, has proposed an amended five-part *Halsbury*-type test under which claimant groups must prove the following elements on the balance of probabilities:<sup>72</sup>

1. exclusive possession at the time the Crown acquired sovereignty; and
2. continuing possession up to the present time; and
3. continuation of customary practices; and
4. maintainence of a physical link with the land; and
5. that the claimants' practice has not been abandoned (because once abandoned it is lost permanently).

This is an extraordinarily difficult test to satisfy because it requires the claimants to show, for example, that they have used resources in the sea and foreshore since the time of English colonisation, and that this practice has never been abandoned. It pays no regard to the effects of colonisation or to any Crown actions based on the erroneous view that it held an unburdened title to the seabed and foreshore. As the Crown has issued private licences to many areas,<sup>73</sup> many customary practices have been forcibly abandoned. The test breaches equitable principle preventing anyone relying on their own prejudicial actions or a mistaken interpretation of the law. Instead it establishes both as legitimate bases for preventing many future applicants gaining their rightful legal entitlements.

---

<sup>72</sup> D Graham, *The Legal Reality of Customary Rights for Maori*, Stout Research Centre, Victoria University of Wellington, Wellington, 2001, 7-9. Graham does not suggest that this test is specifically designed to resolve the seabed and foreshore issue even though it contains some of the "standard requirements" set out by the courts as being necessary to prove customary ownership under early native land legislation and English common law.

<sup>73</sup> These have been granted under sections 12(1) and (2) of the Resource Management Act 1991, legislation allowing foreshore and seabed exploitation for commercial purposes and various fisheries legislation prohibiting Maori access to their resources.

Even if the Maori Land Court establishes that claimants do in fact have customary title under section 131 of Te Ture Whenua Maori Act 1993, the Maori Land Court has a discretion as to whether to vest title to Maori freehold land under section 132. Tipping J suggests that, for policy reasons, the Maori Land Court may decide not to vest the land in the claimants.<sup>74</sup> If the land is found to be customary land, however, but is not vested in the customary owners, it is uncertain how the land would be administered. Further, Gault P,<sup>75</sup> and to a lesser extent Elias CJ,<sup>76</sup> suggest that if the customary interest is established, this may consist of an interest of a different, and quite possibly lesser type, than is capable of being registered under the Land Transfer system. The Maori Land Court may not be able to give legal effect to it because the principle of the Act is to enable Maori customary land to be brought under the Land Transfer system,<sup>77</sup> and the Land Transfer Act does not presently recognise such interests. Also, since the interest is in the sea the type of interest able to be recognised may be constrained by other legislation<sup>78</sup> and private grants to other users.

### **Implications For The Future Application Of Mana Whenua**

Tomas and Johnston believe that the real difficulty of recognising customary title is that of working out the incidents of ownership.<sup>79</sup> They note that, in accordance with *Halsbury's*, there is no *prima facie* public right of passing along the seabed and foreshore that would compete against the claimants' mana whenua interest, unless legally effective public rights have been granted.<sup>80</sup> In England, *Halsbury's* rebuttable presumption is that the seabed and foreshore is *prima facie*

---

<sup>74</sup> *Ngati Apa*, supra n56 at para 196.

<sup>75</sup> *Ibid* at para 106. His Honour notes: "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 [of the Act] are concerned".

<sup>76</sup> *Ibid* at para 10.

<sup>77</sup> *Ibid* at para 104.

<sup>78</sup> See for example the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

<sup>79</sup> Tomas and Johnston, supra n62 at 1.

<sup>80</sup> *Halsburys*, supra n42 at paras 9 and 18. At para 9: "the public has no right of passing along or across the foreshore, except in the exercise of the rights of navigation of fishery, or in respect of lawfully dedicated right of way from one place to another over the foreshore; there is no right of stray or recreation use".

vested in the “common right of the Crown, unless it has passed to a subject by grant or by possessory title”.<sup>81</sup> However, the circumstances which give rise to the English common law presumption are not the same as exist in Aotearoa/New Zealand where Maori have a legitimate pre-existing claim based on mana whenua over the foreshore and seabed.

Overseas cases in which customary title has been recognised suggest that proving “ownership” of foreshore and seabed is a question of fact in each case. A spectrum of different rights have been established ranging from a right to mere occupation,<sup>82</sup> to a right that relegates the Crown’s radical title “to a comparatively limited right of administrative interference”.<sup>83</sup> Viscount Haldane in *Amodu Tijani v Secretary, Southern Nigeria*<sup>84</sup> stated that establishing the nature of the right “involves the study of the history of the particular community and its usages in each case”.

Some incidents of title have been recognised under New Zealand law. Fenton CJ, when discussing customary title to mudflats, acknowledged the possibility of absolute ownership but awarded rights similar to a “privilege or easement” for policy reasons.<sup>85</sup> Further, when the Maori Land Court vested rocky outcrops off Great Barrier Island in Ngati Rehua, it vested the land in the resident iwi “as kaitiaki for themselves and, in accordance with the tikanga of whanaungatanga”.<sup>86</sup>

Likewise, if future claimants are to establish customary title, it will be a question of fact in each case whether it exists and a question of law what its incidents are.

---

<sup>81</sup> Ibid at para 9.

<sup>82</sup> *St Catherine’s Milling and Lumber Co v The Queen* (1888) 14 App Cas 46, and the *William Webster Claim* (reproduced in FK Nielsen, *American and British Claims in Arbitration*, Government Printing Office, Washington DC, 1926).

<sup>83</sup> *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 410. Further, the Supreme Court of Canada in *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 110-119, held that such a right may be anything from usufructory rights to exclusive ownership.

<sup>84</sup> [1921] 2 AC 399, 404.

<sup>85</sup> *Kauwaeranga* (1884) reported in A Frame, “Kauwaeranga Judgment” (1994) 14 VUWLR 227, 241.

<sup>86</sup> *Application by John Di Silva*, 23/2/98, Maori Land Court, Taitokerau District, 30.

## CONCLUSION

As stated in Part I of this essay, there are two important aspects of mana whenua. One of these is individual and group identity, which is tied to particular areas of land by specific tikanga. This can be extended to areas of foreshore and sea as well, even if the legal definitions under New Zealand law mean that it has to be artificially construed as a right to land. Hapu and iwi group identity is not restricted to areas that are held in fee-simple title by Maori, but is tied to a territoriality that is unconstrained by physical possession or ownership. Since 1840, iwi territoriality has stabilised, although disputes regarding boundaries and representation of groups are now major issues facing Maori. That hapu and iwi identity is linked to territoriality has already been recognised by the Crown in its dealings with Maori over fisheries resources and legislatively, under the Resource Management Act 1991 and other legislation.

The second important aspect of mana whenua identified is its sovereign regulatory power or “autonomy” under Maori custom law. Mana whenua, in compliance with Blackstone’s third category, is part of New Zealand law. However, legal orthodoxy shows that on integration into the New Zealand legal system it is subsumed beneath western foundational political/legal principles such as the “undivided sovereign” and also becomes subject to New Zealand governmental processes, including those of Parliament and the courts. The unavoidable consequence of this is that it then becomes realigned to fit English common law ideas about customary rights, the strictures of *Halsbury’s* tests and any derivatives of those tests.

Although mana whenua has limited recognition under New Zealand law, it remains a fully autonomous concept under Maori custom law, as recognised and supported by practices carried out by Maori. Furthermore, while there is legislative inclusion of mana whenua in a number of statutes,<sup>87</sup> it remains only a consideration to be taken into account, and does not give rise to a substantive and recognised legal cause of action. I believe that, in order for mana whenua to have stronger force under New Zealand law, the regulatory authority that attaches to it under Maori custom law must be legally acknowledged and recognised. Otherwise, it will remain an ephemeral concept of limited consequence outside of Maori communities.

---

<sup>87</sup> See for example section 8 of the Resource Management Act 1991.

