The foreshore and seabed - Māori customary rights and some legal issues

Executive summary

- Māori customary rights to the foreshore and seabed can be recognised under both Te Ture Whenua Maori Act 1993 (TTWMA) and the common law doctrine of aboriginal title.

- Extinction of customary rights requires clear and plain legislative or executive direction. Customary rights can also be extinguished by voluntary surrender to the Crown.

- Ngati Apa in the Court of Appeal confirms the jurisdiction of the Maori Land Court to investigate the status and ownership of land as Māori customary land, in relation to the foreshore and seabed.

- Rangatiratanga and kaitiakitanga status and obligations as affirmed in Te Tiriti o Waitangi encompass a wider application than possession, occupation and use rights as captured under TTWMA and the common law doctrine of aboriginal title.

- For a range of information resources regarding the foreshore and seabed see the Parliamentary Library’s Hot Topic site (intranet access only) at:

  [http://www.findit.govt.nz/library/Library/Hot/Foreshore/Timeline.htm](http://www.findit.govt.nz/library/Library/Hot/Foreshore/Timeline.htm)
Introduction

The release of the *Ngati Apa* decision of the Court of Appeal in June this year has brought the issue of Māori customary rights to the foreshore and seabed to the attention of the public and Parliament.

This paper offers information about what customary rights are, two legal regimes for their recognition, the bases for establishing their existence and concludes with an overview as to the interrelationship of customary rights and the Treaty of Waitangi.

The paper does not address the Government’s response to *Ngati Apa* nor does it address the role of Parliament in dealing with the issues involved.

*Ngati Apa* as heard in the Maori Land Court, the High Court and the Court of Appeal is also canvassed.

Setting the scene

‘Māori customary rights’ is a term used to describe the freedom to undertake a whole spectrum of activities according to Māori custom law.

Such rights range from marriage, adoption and inheritance through to rights in relation to land.

In respect of land, these rights are often called Māori customary title rights and they range from use and access through to ownership.

Under the common law these customary title rights are recognised and protected under what is known as the ‘doctrine of aboriginal title’ (also called native title, original Indian title and right of occupancy), and judicial observation has confirmed that the terms Māori customary rights and aboriginal rights (including land rights) are interchangeable.

In New Zealand, the United States and most of Canada, aboriginal title to lands was recognised and then extinguished very early on. By 1900 most Māori customary title (in the ownership sense) to dry land had been extinguished by Crown purchase, confiscation and the workings of the Maori Land Court.

Contemporary customary title rights claims in New Zealand have therefore tended to relate to use and access rights rather than ownership. However, as confirmed by the Court of Appeal in *Ngati Apa*, the question of Māori customary title (including ownership) in land covered by the sea, that is, the foreshore (land between high and low tide mark) and the seabed (land below low tide mark), remains open.

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2. However, limited coverage of the Government’s proposed changes to the jurisdiction of the Maori Land Court is included at p.10 of this paper
4. The New Zealand Law Commission has defined custom law as a phrase used to describe the body of rules developed by indigenous societies to govern themselves. In New Zealand, the term ‘Māori custom law’ is used. *Maori custom and values in New Zealand Law / Law Commission*, Wellington, The Commission [2001], p.15 E.T. Durie has defined Māori custom law as “[t]he values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct.” pp.15-16. The nearest equivalent to custom law in Maori is tikanga. Hirini Moko Mead describes tikanga as follows, “Tikanga embodies a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do…” p.16 The word “tikanga” derives from the adjective “tika” meaning right (or correct) and just (or fair). The addition of the suffix “nga” renders it a noun which, in this context, may be defined as “way(s) of doing and thinking held by Maori to be just and correct, the right Maori ways.” p.16
In contrast, Australia and British Columbia have only recognised aboriginal title rights in the later stages of the 20th Century. They are dealing with contemporary customary title claims involving not only access and use, but also ownership rights over vast amounts of land within their territories.

Long recognition and conversion of Māori customary title to land (in the ownership sense) into freehold title has been dealt with under Te Ture Whenua Maori Act 1993 (TTWMA) and its predecessors going back to 1862-1865. This conversion results in the extinguishment of the original customary title.

These then, form two alternative legal regimes for the recognition of Māori customary title rights in relation to the foreshore and seabed: customary title as codified under TTWMA and aboriginal title as provided for under the common law. However, under both TTWMA and the common law doctrine of aboriginal title the question of whether or not customary title rights have been extinguished will raise similar issues.

Basic propositions about the common law doctrine of aboriginal title and relevant case law forms the whole of this section of the paper. In the next section Māori customary title as dealt with under TTWMA is looked at. The last section of the paper will look at the interrelationship between Māori customary title and the Treaty of Waitangi.

Understanding what the doctrine of aboriginal title is and how it has come to exist within English law begins with understanding feudal theory. Under this theory the Crown is the sole source of title to land at common law and this forms the basis of English land law.

The Crown’s sovereignty therefore includes the feudal blend of imperium (the right to govern) and dominium (the Crown's paramount ownership of its territory otherwise known as its radical or underlying title).

However, in the situation where the Crown has colonised countries with indigenous peoples, the common law will recognise the pre-existing property rights of those indigenous peoples as a qualification on the sovereign title of the Crown. This arises through the simple fact that the indigenous peoples were already there, living in communities according to their own laws and customs.

President Cooke of the Court of Appeal, as he then was, explained the doctrine in *Te Ika Whenua* as follows:

> Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title, which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights.

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5 *Te Runanganui o te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20, p. 23
7 Erueti, Andrew ‘Native title claims to sea country’ in *New Zealand Law Journal* Nov 2001:415-417, p.415
8 Ibid
10 Ibid p.238
11 *R v Van der Peet* [1996] 2 SCR 507, paragraph 30 per Chief Justice Lamer
12 *Te Runanganui o te Ika Whenua Inc Soc v Attorney-General* p.23
Aboriginal title has its origin in and is given its content by, the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of aboriginal title must be ascertained as a matter of fact by reference to those laws and customs.

Aboriginal title rights have been described as sui generis (of its own kind, unique) and can only be extinguished by or surrendered to the Crown. Great caution has been expressed against trying to understand aboriginal title rights by reference to English property rights. In *Amodu Tijani v The Secretary, Southern Nigeria* the Privy Council stated:

There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely...

The danger in trying to conceptualise aboriginal title rights as being analogous to English property rights is twofold. It may be dismissive of customary interests which are less than recognisable English legal estates and it may cause lesser customary interests to be inflated to conform to familiar legal estates.

Aboriginal title rights range from hunting, fishing and other types of food gathering (classed as being similar in nature to rights to take and rights of access and passage), through to exclusive ownership. This range of rights, in relation to specific sites or areas of land, has been recognised in the Canadian case *Delgamuukw* where Justice La Forest said:

I find it necessary to make a distinction between: (1) the recognition of a general right to occupy and possess ancestral lands; and (2) the recognition of a discrete right to engage in an aboriginal activity in a particular area.

In respect of (1) immediately above, *Delgamuukw* recognised that joint aboriginal ownership claims to land based on shared exclusivity were possible. This would result in ownership rights to those aboriginal groups with whom possession is shared, but not to others. Furthermore, rights in respect of (2) above could take the form of non-exclusive, but site specific rights, so that aboriginal groups who hunted in a particular site, but could not show exclusivity amounting to ownership, would nevertheless be entitled to hunting rights over that site.

In *Delgamuukw* there was further recognition of an aboriginal right to engage in non-site specific activities. Such an activity might be the gathering of wild plants for medicinal purposes in varied locations.
In New Zealand, McHugh has long advocated that there are territorial and non-territorial aboriginal title rights. McHugh cites *Te Weehi* as an example of a non-territorial aboriginal right to fish remaining over Crown land.

In *Te Weehi* Justice Williamson treated ‘Māori fishing rights’ protected in the Fisheries Act 1983 as customary rights under the common law doctrine of aboriginal title. Tom Te Weehi was being prosecuted for taking undersized pāua. Justice Williamson was of the view that Māori customary fishing rights could exist independently of ownership in the foreshore.

...a customary right to take shellfish from the sea along the foreshore need not necessarily relate to ownership of the foreshore.

Justice Williamson went on to note:

...the customary right contended for in this case is not based upon ownership of the land or upon an exclusive right to a foreshore or bank of a river. In that sense this claim is a “non-territorial” one. The customary right involved has not been expressly extinguished by statute and I have not discovered or been referred to any adverse legislation or procedure which plainly and clearly extinguishes it. It is a right limited to the Ngai Tahu tribe [in this particular case] and its authorised relatives for personal food supply.

The consequences of the divisibility of aboriginal title in this way are stated by McHugh as being.

[it recognises that, absent statutory extinguishment or tribal relinquishment, Crown land can be burdened by a non-territorial aboriginal title. The mere vesting of legal title in the Crown, whether by statute or other extinguishment of the ‘customary title,’ is not enough. One cannot assume that removal of the territorial aboriginal title, has taken with it the non-territorial aboriginal title.

The distinction becomes important when the possibility of non-territorial rights to resources such as minerals, sands and petroleum in the foreshore or seabed are raised. However, the Waitangi Tribunal did not think it wise to venture a view either way as to the existence of a non-territorial aboriginal title right in petroleum in its *Petroleum* report. While not ruling out the possibility, the Tribunal found that the evidence presented to it in this particular case did not justifiy such a finding. The Tribunal found instead that Māori had a treaty interest in petroleum. However, the Government did not find a treaty interest, (as opposed to a customary right or a taonga under the Treaty) persuasive enough to warrant recognition.

Sinclair has argued that there is no such thing as a non-territorial aboriginal title right and that all customary rights are territorial in nature based as they are on use, varying from common to exclusive, of a particular area or territory and the

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24 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680
26 *Te Weehi v Regional Fisheries* p.690
27 Ibid p.692
28 McHugh, Paul ‘The legal basis for Maori claims against the Crown’ p.14
30 Ibid pp.42-43
resources to be put to use from that locale.\textsuperscript{32} Once territorial aboriginal title (that is, in the ownership sense) to any area is extinguished, all other rights in the area are also extinguished, unless specifically reserved.

The content of aboriginal title rights is not restricted to those activities or customary practices carried out pre-sovereignty. This is sometimes termed a right to development. In \textit{Ngai Tahu Maori Trust Board}\textsuperscript{33} there was judicial observation that although commercial whale-watching was not a customary practice prior to 1840 there was sufficient analogy with pre-sovereignty Māori fishing and inshore whaling rights and the exercise of rangatiratanga over these resources to find that the Crown, acting in good faith as a Treaty partner, was obliged to recognise the special interests that Ngai Tahu had developed in the use of these coastal waters, which amounted to more than an empty obligation to consult. However, the Court did not find that such rights would amount to an exclusive commercial whale-watching right:\textsuperscript{34}

\textit{\ldots}it is obvious that commercial whale-watching is a very recent enterprise, founded on the modern tourist trade and distinct from anything envisaged in or any rights exercised before the treaty\ldots A right of development of indigenous rights is indeed coming to be recognised in international jurisprudence, but any such right is not necessarily exclusive of other persons or other interests…

Judicial observation in \textit{Delgamuukw} showed that aboriginal title has an inherent limit upon it in that proprietary interests claimed that are inconsistent with the special relationship of the indigenous inhabitants with their land will not receive protection:\textsuperscript{35}

\textit{\ldots}if occupation is established with reference to the use of land as a hunting ground, then the group that successfully claims aboriginal title to the land may not use it in such a fashion as to destroy its value for such a use (e.g. by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship…

However, this inherent limit must not be construed as to go so far as to limit the rights of development:\textsuperscript{36}

\textit{This is not, I must emphasize, a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land. The approach I have outlined above allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land.}

In \textit{Van der Peet} the Supreme Court (Canada) required that an aboriginal right, in the non-territorial and non-site specific sense, could only be made out where the particular practice, tradition or custom (carried out pre-sovereignty and continuing to the present, but not necessarily without interruption) could be shown to be an "element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."\textsuperscript{37} This has been criticised as freezing aboriginal title rights to those activities carried out pre-sovereignty and hindering development.

\textsuperscript{33} \textit{Ngai Tahu Maori Trust Board v Attorney-General} [1995] 3 NZLR 553
\textsuperscript{34} Ibid pp.559-560
\textsuperscript{35} \textit{Delgamuukw} paragraph 128
\textsuperscript{36} Ibid paragraph 132
\textsuperscript{37} \textit{R v Van der Peet} paragraph 46
Extinguishment of aboriginal title

The legal tests for extinguishment of aboriginal territorial title are very strict. The High Court of Australia has held that extinguishment may be either by executive or legislative act, but in either case there must be “a clear and plain intention to do so.”

Extinguishment may also occur by native consent, such as in the case of sale or surrender of those rights to the Crown. On the Australian ‘bundle of rights approach’ they may also be extinguished where the Crown makes a grant inconsistent with those rights.

Aboriginal title rights are seen primarily as property rights. Therefore, upon extinguishment of those rights compensation should be paid, unless the statute also denies such compensation. However, it is doubtful whether some aboriginal rights such as a right to cross land, would attract compensation.

An historical example of a statute clearly extinguishing Māori customary title to lands and denying compensation may be seen in the New Zealand Settlements Act 1863. Under this Act the land of ‘any tribe or section of a tribe’ or ‘any considerable number thereof’ deemed to have been in rebellion [against her Majesty’s authority] since 1 January 1863 could be declared a ‘district’ within the provisions of the Act. Land in that district could then be set apart as ‘eligible sites for settlements for colonization’, and such sites would become ‘Crown land freed and discharged from all Title Interest or Claim of any person whomsoever’. Compensation would be paid to those with title interest or claim to such lands, provided they had not themselves been in rebellion or aided, assisted, or comforted those who had.

Another historical example of clear extinguishment is section 157 of the Maori Affairs Act 1953 (repealed by the Te Ture Whenua Maori Act 1993). By subsection (1) lawful extinguishment of Maori customary title to lands through proclamation by the Governor-General was provided for. By subsection (2) the effluxion of time (where the land in question had been in the continuous possession of the Crown for a period of 10 years) allowed for the extinguishment of Maori customary title.

The Australian approach to aboriginal title rights and their extinguishment can be seen in the case *Western Australia v Ward* where aboriginal title is described as a “bundle of rights, the separate components of which may be extinguished separately.” In *Ward*, the High Court accepted the principle that where pursuant to statute, there has been a grant of rights to third parties, the test is whether the rights are inconsistent with the alleged native title rights and interest. Where the rights are inconsistent, there will be extinguishment of the native title rights and interest to the extent of the inconsistency and if they are not inconsistent, there will be no extinguishment.

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38 *Mabo* paragraph 75 per Justice Brennan
39 See discussion on the ‘bundle of rights’ at text connected to footnotes 41 –44 below
40 This analysis of the New Zealand Settlements Act 1863 has been taken from Riseborough, Hazel *The Crown’s engagement with Maori customary tenure in the nineteenth century* Wellington, Waitangi Tribunal 1997, p.82
41 *Western Australia v Ward* [2002] HCA 28
42 Ibid paragraph 76
43 This test is known as the “Inconsistency of incidents” test, ibid paragraph 82
44 Ibid
Aboriginal title rights can expire by usurpation or abandonment or disappearance of the traditional group.\textsuperscript{45} Expiry involves the absence of the factual basis for the title, whereas extinguishment means rights, that still might be claimed and exercised in point of fact, lack status at law.

McHugh points out that common law protection of aboriginal title does not resurrect rights that existed prior to the imposition of sovereignty, but customs, practices and activities that are currently being observed by indigenous peoples and which have their source or tradition in custom law pre-sovereignty:\textsuperscript{46}

Common law aboriginal title was and remains concerned with protecting extant aboriginal use and association with land. It is essentially preservative rather than restorative in scope. It is a modern doctrine designed to protect modern, continuing rights.

The Canadian approach

In aboriginal title claims to ownership of land, elements put forward as necessary to prove that ownership are:\textsuperscript{47}

- The land must have been occupied prior to sovereignty
- If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation
- At sovereignty, that occupation must have been exclusive

In respect of non-territorial and non-site specific aboriginal rights the approach required is the ‘integral to the distinctive culture’ test as laid down in Van der Peet.\textsuperscript{48} In Van der Peet an aboriginal right to fish for the purposes of selling or trading those fish could not be made out because it was found that it was not a practice or custom carried out pre-sovereignty and therefore could not be ‘integral to the distinctive culture’ of the aboriginal woman claiming the right.

The Australian approach

Australia’s first recognition of aboriginal title took place with the \textit{Mabo} case in 1992. This case involved a claim to ownership of the Murray Islands by its indigenous inhabitants. The ownership right was found to be made out because the claimants could prove exclusive occupation as at sovereignty, and had continued to maintain a substantial connection to the land through their continued physical presence upon it, to the present day.\textsuperscript{49}

Developments since \textit{Mabo} in Australia have moved the concept of aboriginal title rights away from ownership (although not altogether) to rights to carry out particular activities over specific areas of land. In other words, non-territorial and non-site specific use, access and passage rights. This approach is typified in the ‘bundle of rights’ approach as shown in \textit{Western Australia v Ward}.\textsuperscript{50}

Proving these lesser rights requires that claimants can define them with a high degree of specificity, are currently practicing or engaged in them, and finally,

\textsuperscript{45} McHugh, Paul ‘Proving aboriginal title’ in \textit{NZLJ} Aug 2001, 303-308, p.304
\textsuperscript{46} ibid
\textsuperscript{47} Delgamuukw paragraph 143
\textsuperscript{48} See discussion on this test at text connected to footnote 37
\textsuperscript{49} See commentary on \textit{Mabo} by Erueti, Andrew Translating Maori customary title into a common law title p.222
\textsuperscript{50} See commentary on \textit{Ward}, by Erueti, Andrew Translating Maori customary title into a common law title ibid
that they are derived from practices, customs or activities sourced in traditional custom law pre-sovereignty.\textsuperscript{51}

On the question of whether or not continued physical presence is required to establish aboriginal title rights, \textit{Ward v Western Australia} (Federal Court) held that aboriginal title rights could be sufficiently proved if it is shown that cultural responsibility and spiritual association over the land is retained.\textsuperscript{52} On appeal, the majority of the High Court in \textit{Ward} found no need to express a view on when a claimed "spiritual connection" would be sufficient for the purposes of establishing Native title, but it did elaborate on the exercise to be undertaken in determining whether such a spiritual connection would suffice.\textsuperscript{53}

...it requires first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a "connection" of the peoples with the land or waters in question. No doubt there may be cases where the way in which land or waters are used will reveal something about the kind of connection that exists under traditional law or custom between Aboriginal peoples and the land or waters concerned. But the \textit{absence of evidence of some recent use} of the land or waters does not, of itself, require the conclusion that there can be no relevant connection. [emphasis added]

However, Justice Callinan was adamant that a physical presence was required.\textsuperscript{54}

I do not think that a religious connexion with the land, in the absence of an actual physical presence, can give rise to native title rights in relation to the land.

\textbf{Fiduciary aspect of aboriginal title}

In \textit{Mabo}, the Court discussed fiduciary relationships and whether or not one existed between the Aboriginal people and the Crown. An explanation of what a fiduciary relationship is, was given in the following commentary of Justice Toohey.\textsuperscript{55}

In a fiduciary relationship, the fiduciary (that is, the person owing the duty) must act in the interests of another person when exercising a power that will affect those other person’s interests in a legal or practical sense. This is because the fiduciary is in a special position of being able to exercise power to the detriment of the other person. The other person is vulnerable if the fiduciary abuses the power...The relationship arises out of the Crown’s power to extinguish traditional title; it does not depend on an exercise of that power.

A fiduciary-like relationship between Māori and the Crown has been recognised in New Zealand courts\textsuperscript{56} as arising out of the Treaty of Waitangi, in the form of an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards each other. How this form of fiduciary duty squares with those arising separately under common law aboriginal title remains to be seen. It is likely that New Zealand courts will see the Treaty–based one as accentuating the common law one.

\textsuperscript{51} Ibid
\textsuperscript{52} The Federal Court is more fully quoted by McHugh, Paul Proving aboriginal title p.307
\textsuperscript{53} \textit{Western Australia v Ward} paragraph 64
\textsuperscript{54} Ibid paragraph 650
\textsuperscript{55} This explanation has been taken from Butt, Peter \textit{Mabo, Wik & native title} Sydney, The Federation Press, 1998, p.63
\textsuperscript{56} See especially \textit{New Zealand Maori Council v Attorney-General} [1987] 1 NZLR 641
Having looked at recognition of Māori customary title under the common law doctrine of aboriginal title, this section of the paper will look at the treatment of Māori customary title under TTWMA.

The role of the Maori Land Court, processes under TTWMA for dealing with Māori customary title and bases for establishing such title will introduce the section. Following this, two major cases in which Māori customary title rights to the foreshore and seabed have been established, will be looked at. These cases are *Kauwaeranga*\(^{57}\) (in the Native Land Court) and *Ninety-Mile Beach*\(^{58}\) (in the Maori Land Court).

This section concludes with a look at *Ngati Apa* as heard in the Maori Land Court, the High Court and the Court of Appeal.

The Maori Land Court had its genesis in the Native Lands Acts legislation of the 19\(^{th}\) century. The primary function of the Native Land Court as it was then known, was to convert Māori customary title to land into freehold title. Boast describes the process as follows:\(^{59}\)

- The owners of a block of Maori land had to prove that according to Maori customary law they were its owners, and if successful would be recorded as owners in the Court’s records and issued with a Court certificate of title.
- The Court’s certificate was then produced to the Governor as the Crown’s representative in exchange for a Crown grant in freehold.

This process allowed for the substitution of land rights as held according to Māori custom law, for rights derived from the Crown in accordance with feudal tenure\(^{60}\) (where all rights to land are derived from the Crown). Such rights in relation to freehold are characterised by individual exclusive ownership and alienability through sale.

The Maori Land Court’s ability to give recognition to rights of a lesser or non-exclusive or non-territorial nature is uncertain\(^{61}\) and this has been signalled as one of the potential areas for change in its jurisdiction by the Government.\(^{62}\)

Likely changes to the jurisdiction of the Maori Land Court as proposed by the Government include:\(^{63}\)

- Removing the ability of the Maori Land Court to issue orders vesting ownership of Māori customary land, in the owners thereof where that land is below the high tide mark
- Creating a jurisdiction in which, and mechanisms with which, the Maori Land Court can recognise mana over and ancestral association with, particular places in the foreshore and seabed, including tools for the recognition of specific use rights

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\(^{57}\) A full copy of the judgment is published in *Victoria University of Wellington Review* (1984) 14:227

\(^{58}\) *Ninety-Mile Beach* (1957) 85 Northern MB 126

\(^{59}\) Boast, P *Maori land law* Wellington, Butterworths, 1999 p.52

\(^{60}\) Ibid

\(^{61}\) *Ngati Apa* paragraph 46 per Chief Justice Elias


\(^{63}\) Paraphrased, Ibid pp.2-3
• Applying this regime to:
  o all claims currently before the Maori Land Court and;
  o all future claims, whether in the Maori Land Court or in the
    common law courts under the doctrine of aboriginal title

Māori customary title under the Act

Māori customary land is defined in the Act as 'land that is held by Maori in accordance with tikanga Maori'.

The Court has the ability to investigate the status of the land (to see whether or not it has the status of Māori customary land) without vesting ownership. The significance of this is that it results in a status order, not a vesting order creating freehold title. Māori customary land can remain Māori customary land where only its status is being investigated.

Once land has the status of Māori customary land the Court has jurisdiction to investigate the ownership of that land. If it makes an order vesting Māori customary land in the ownership of named persons, the land changes status to Maori freehold land: the owners now own the land according to a Crown derived title and the customary title has been extinguished.

Maori freehold land, while having certain restrictions attached to it in relation to alienation, is the same in nature as land held in fee simple. This means that the owners are able to exclude others by refusing to allow entry onto the property and sue in trespass where people nevertheless enter after being refused permission to do so, or are there for an unlawful purpose.

S 6(1A) of the Limitation Act 1950 provides that “where any action to recover land that is Māori customary land within the meaning of [Te Ture Whenua Maori Act 1993] is brought against the Crown…this Act shall apply to this action”. Erueti notes the effect of this provision is to bar all claims against the Crown, including aboriginal title claims, with respect to land that may be characterised as Māori customary land under TTWMA, where the action is not brought within 12 years of the alleged violation.

Establishing customary title under the Act

Establishing the status of land as Māori customary land under TTWMMA requires applicants to show that the land is held in accordance with tikanga Māori. Any vesting of ownership will also be done according to tikanga Māori.

Under tikanga Māori (Māori custom law) there were five ways (take) in which rights to land were acquired:

• take tupuna (inheritance from one’s ancestors)
• take raupatu (conquest)
• take tuku (gifting)
• take taunaha, (naming during discovery and exploration), and
• take ahikaa (keeping the home-fires burning)

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64 Te Ture Whenua Maori Act 1993, s 129(2)(a). By s2 “tikanga Maori” means “Maori customary values and practices.” “For a definition of ‘tikanga’ see also, discussion at footnote 4. For discussion on tikanga in relation to land see ‘Establishing customary title under the Act’ below
65 Te Ture Whenua Maori Act 1993 s131
67 Te Ture Whenua Maori Act 1993 s132(1)
68 Ibid s132(4)
69 Ibid s141(1)(c)
70 Ruru, Jacinta p.2
71 Erueti, Andrew Native title claims to sea country, p.416
72 Boast, P p.42
These take complemented each other and a claim of right required a mix of different take.\textsuperscript{73}

Ballara has described the relationship of these take in the following way:\textsuperscript{74}

Land ownership in Maori society required that ancestral claims go hand in hand with inherited mana over the land, plus occupation or other use. Yet descent from an owning ancestor alone was insufficient; it had to be from an ancestor whose descendants had continued to occupy it. Descendants who lived elsewhere eventually lost their rights – their claims grew cold. Inheritance of land was from that limited group of ancestors known to have first cleared and cultivated or otherwise used the resources of the land, and who had handed down their rights from generation to generation of people who also occupied the land. The concept of ahikaa roa (long burning fires) presupposed continuous occupation or use of the land by descendants of ancestors with mana to the land.

Durie has described the nature of Māori rights to land in the following discourse:

\ldots Maori saw themselves not as masters of the environment but as members of it. The environment owed its origins to the union of Rangi, the sky, and Papatuanuku, the earth mother, and the activities of their descendant deities who control all natural resources and phenomena. The Maori forebears are siblings to these deities. Maori thus relate by whakapapa (genealogy) to all life forms and natural resources. There are whakapapa for fish and animal species just as there are for people. The use of a resource, therefore, required permission from the associated deity. In this order, all things were seen to come from the gods and the ancestors as recorded in whakapapa.\textsuperscript{75}

There are at least two classes of land rights – the right of the community associated with the land, and the use rights of individuals or families.\textsuperscript{76}

\ldots while individuals or particular families had use rights of various kinds at several places, the underlying or radical title was vested in the hapu. This served to prevent a transfer of use rights outside the descent group without general hapu approval. In addition the allocation of use rights within the group was regularly adjusted by the rangatira (chiefs). The essential point however is that the land of an area remained in the control and authority of an associated ancestral descent group, and, like fee tail, neither the land as a whole, nor a use right within it, could pass permanently outside the bloodline.\textsuperscript{77}

Individual land rights accrued from a combination of ascription and subscription, from belonging to the community and from subscribing to it on a regular basis. While the community’s right to land, in pure terms, was by descent from the earth of that place, the individuals right required both membership and contribution. Descent alone was not enough. Descent gave a right of entry, but since Maori had links with many hapu and could enter any one, use rights depended as well on residence, participation in the community, contribution to its wealth and the observance of its norms.\textsuperscript{78}

Land rights were thus inseparable from duties to the associated community, from being part of it, contributing to it, and abiding its authority and law. There was not room for absentee ownership, only the right of absentees to return.

\textsuperscript{73} Ibid
\textsuperscript{74} Quoted by Boast, P p.43
\textsuperscript{76} Ibid p.329
\textsuperscript{78} Ibid
Similarly no land interest existed independent of the local community or which was freely transferable outside of it. Probably the nearest cultural equivalent to the Māori use right arrangement was an entailed license to the use of a particular resource, without prescribed rent but with obligations to return benefits to the community to the fullest, practicable extent. Moreover the right was to a particular resource. There were no [individual] exclusive rights to all types of use of a defined parcel, or no exclusive [individual] right to a prescribed land block.  

Cases in which Māori customary title rights to the foreshore and seabed have been found to exist

Kauwaeranga 1870

Māori claims to the foreshore and seabed have a long history. Perhaps one of the most well known cases concerning ownership of the foreshore and seabed is the Kauwaeranga judgment delivered by Justice Fenton in the Native Land Court on 3 December 1870.

Justice Fenton did not make an order granting title to the foreshore and seabed as requested by the applicants. Instead he held that the interest owned by Māori was an exclusive right of fishery, even though acts of ownership to the soil were readily provable.

The rationale for Justice Fenton’s view on the matter would seem to be that he did not believe there was any traditional Māori customary practice of claiming exclusive rights to the foreshore or the seabed unless it was in relation to a prized fishery. Justice Fenton was of the opinion that ‘native title’ as legislated for under the Native Lands Act could include recognition of a right less than the fee simple, in this case the exclusive right to the fishery.

In speaking before the Native Affairs Committee on the Courts practice as regards fisheries Justice Fenton said:

The rule of law is simply this – when I say rule of law I mean Maori common law – that where native, native family, or tribe, have established as a matter of fact the exclusive exercise of rights of fishing in any locality, and have maintained it against others in the old days, that is before British law was established in the Island, then we have given a title to those rights as an easement. We have never recognised any rights below the surface, but simply an easement, and the easement in this case I suppose would be the right to use the surface of the soil and all above it, but nothing below it, and excluding others from interfering with those rights... I do not remember that I have ever had a case below low water mark, although I think it is quite possible that such exist...

On being questioned as to whether he would apply that doctrine to the sea beach or to any tidal river or mud-flat, and had he ever done so? Justice Fenton replied:

I do not think I would, but I should not say so decidedly...No, I have not. There is a valuable shell fishery on the West Coast between Hokianga and Kaipara called Toheroa, where the natives obtain a large clam. That fishery is of great value to them, but whether they have exercised rights of property to the exclusion of others I do not know, but that is the essence of their title to my judgment. They must prove exclusive use.

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79 Ibid
80 Sinclair, Fergus p.5
82 As quoted by Sinclair, Fergus p.14
83 Ibid
Nineteen-Mile Beach in the Maori Land Court 1957

In this case Justice Morrison did not have any difficulty with finding that Māori customary title to the soil of the foreshore and seabed could be established in the ownership sense. With the overruling by Ngati Apa of the Court of Appeal and High Court judgments for *In Re the Nineteen-Mile Beach* the judgment of the Maori Land Court remains the definitive statement as to Māori customary title pertaining to the foreshore. In this case the Māori claimants were able to prove exclusive possession and control of access and use according to tikanga Māori as at 1840.

Evidence produced in the case before Justice Morrison clearly demonstrated:

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

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

That the two tribes occupied their respective portions of the beach to the exclusion of other tribes. 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 know as Maunganui Bluff.

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, paroro, herrings, rock cod, yellow-tail, kingfish and shark.

That for various reasons from time to time rahuis were imposed upon various parts of the beach and the sea itself.

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

Justice Morrison found that the evidence was sufficient to prove ownership. At pages 127-128 of the judgment he says:

These 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 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.

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85 Nineteen-Mile Beach pp.126-127
Unlike Kauwaeranga and Ninety-Mile Beach (in the Maori Land Court) above, the Ngati Apa decisions did not concern an investigation of title or ownership. At all times the cases were concerned rather, with the question of whether or not the Maori Land Court was able to conduct Māori customary land title investigations or status investigations in respect of land in the foreshore and seabed under TTWMA.

Litigation culminating in the Ngati Apa decision in the Court of Appeal started with an application brought by seven hapū of the Marlborough Sounds to the Maori Land Court in 1997. The application was opposed by the Attorney-General, the New Zealand Marine Farming Association Incorporated, Port Marlborough Limited and the Marlborough District Council.

Ngāti Rarua kaumatua, Wiremu Stafford is reported as saying that the history of the Sounds case stems from the “wanton issuing of marine farm permits by the Marlborough District Council in areas within the Marlborough Sounds of special significance to local iwi.”

In Re Marlborough Sounds foreshore and seabed (the beginning of Ngati Apa)

This case involved an interim decision on the question of whether or not Māori customary title to the foreshore and seabed had been extinguished by the operation of the common law or by statute. If it had been extinguished, this would mean that the Maori Land Court would be unable to investigate any customary title or status claims in respect of such land. Justice Hingston found that it had not been extinguished. A large part of his finding hinged on whether or not he considered he was bound by the then, leading authority on this question, being In Re the Ninety-Mile Beach 1963, (in the Court of Appeal).

The Court of Appeal in In Re the Ninety Mile Beach made the following findings in relation to Māori customary title to the foreshore as summarised by the Waitangi Tribunal in its National Overview publication.

While the Court of Appeal decided for the Crown, it did not entirely accept the Crown’s argument that the Maori Land Court had never had jurisdiction over the foreshore...[Nor did it accept the statutory extinguishment basis adopted by Turner J in the Supreme Court]. If Maori were to be deprived of rights over the foreshore by legislation, the legislation would have to state that explicitly; such an outcome could not be simply inferred from legislation, like the Harbours Act, that had been passed for some other purpose entirely. There had to have been an express enactment; Maori could not be deprived of their customary rights incidentally, by a ‘side wind’. The Court of Appeal, however, held that the Maori Land Court had, since 1865, investigated all the Maori land along the coast...if the Maori Land court, in issuing titles to these blocks, had not stipulated that the foreshore was included in the title, then Maori rights to the area must be treated as having been extinguished.

Justice Hingston was able to distinguish In Re the Ninety-Mile Beach (in the Court of Appeal) on the basis that the case before him did not involve a full investigation of title, as was the case there.

In respect of the seabed, he found that s 7 of the Territorial Sea and Exclusive Economic Zone Act 1977 did no more than statutorily vest the seabed in the Crown for the purposes of spelling out to the international community the limits of New Zealand’s territorial sea boundaries and fishing zones. The statute did not expressly extinguish Māori customary interests in the seabed.

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86 Pinker, Kylie ‘Sound thinking?’ in The Press, 28 June 2003 D4
87 In Re Marlborough Sounds foreshore and seabed 22A Nelson MB 1.22 December 1997
**Attorney-General v Ngati Apa**

The interim decision of the Maori Land Court was appealed to the Maori Appellate Court by the Attorney-General and all other parties who were not the claimants. The Maori Appellate Court stated a case for the opinion of the High Court on points of law, framed as eight questions which can be summarised as follows:

- what is the extent of the Maori Land Court’s jurisdiction under TTWMA to determine the status of the foreshore and seabed and the waters related thereto?
- does the law of New Zealand recognise any Māori customary title to all or any part of the foreshore?
- is *In Re the Ninety-Mile Beach* still good in law and do any instruments evidencing extinguishment of Māori customary title with the sea as the boundary need to expressly include the foreshore for Māori customary rights (if they exist) over the foreshore, to be extinguished?
- do statutes vesting the foreshore and the bed of the sea in the Crown, local bodies and other persons extinguish any Māori customary title over those areas?

Justice Ellis held that land below low water mark (seabed) in New Zealand was beneficially owned by the Crown at common law and was declared to be so owned by s 7 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 and s9A of the Foreshore and Seabed Endowment Revesting Act 1991. Accordingly, it could not be Māori customary land.

Justice Ellis accepted that the Maori Land Court had jurisdiction under TTWMA to inquire into whether foreshore land between the high and low water marks was Māori customary land. But he applied *In Re the Ninety-Mile Beach* in holding that any Māori customary property to the foreshore had been extinguished once the contiguous land above high water mark had lost the status of Māori customary land. Such status could be lost by Crown purchase or vesting orders made by the Maori Land Court where the sea was described as the boundary.

**Ngati Apa v Attorney-General**

In *Ngati Apa* the Court had a very narrow issue to decide upon. The question to be answered was whether or not the Maori Land Court had jurisdiction to investigate Māori customary title to the foreshore and seabed of the Marlborough Sounds. The Court of Appeal answered in the affirmative, and overruled the longstanding authority of *In Re the Ninety-Mile Beach* (as decided in the Court of Appeal).

Chief Justice Elias made the following findings at paragraph 13 of the judgment:

I have had the advantage of reading in draft the judgments of the other members of the Court. Like them, I am of the view that the appeal must be allowed and the applicants must be permitted to go to hearing in the Maori Land

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88 *In Re the Ninety-Mile Beach* [1963] NZLR 461 (CA)
90 Ibid
91 *Attorney-General v Ngati Apa* [2002] NZLR 661 (HC)
92 *Ngati Apa v Attorney General*, (CA 173/01 CA75/02, 19 June 2003)
Court. I am of the view that the judgment of Judge Hingston in the Maori Land Court was correct…I consider that in starting with the English common law, unmodified by New Zealand conditions (including Maori customary proprietary interests), and in assuming that the Crown acquired property in the land of New Zealand when it acquired sovereignty, [as seems the premise of Judge Ellis], the judgment in the High Court was in error. The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with law. I agree that the legislation relied on in the High Court does not extinguish any Maori customary property in the seabed or foreshore. I agree with Keith and Anderson JJ and Tipping J that In Re the Nine-Mile Beach was wrong in law and should not be followed. In Re the Ninety-Mile Beach followed the discredited authority of Wi Parata v Bishop of Wellington (1877) 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”.

President Gault (President of the Court of Appeal) however, dissented on the matter of In Re the Ninety-Mile Beach. President Gault was of the view that the reasoning in that judgment was not flawed and that it applied in respect of any Crown purchases of land with the sea as the boundary in the Marlborough Sounds, therefore meaning that Māori customary title over such land, if it ever existed, had been extinguished:

Interests in Native lands bordering the sea, after investigation by the Native Land Court…were extinguished and substituted with grants in fee simple. It does not seem open now to find that there could have been strips of land between the…land bordering the sea and the sea that were not investigated and in which interests were not identified and extinguished once Crown grants were made.93

It appears to me that …there can be no different approach in the case of the foreshore in the Marlborough Sounds. If land adjacent to the sea was the subject of Crown purchase which specified the sea as the boundary, there would not remain any strip between the land and the sea that could be the subject of a vesting order as Māori customary land.94

The land between high water mark and the sea to low water mark (as well as the seabed beyond) are presumed to belong to the Crown by prerogative right. However, this prerogative, sourced in the common law, is limited in its application to New Zealand where Māori customary rights are inconsistent with it. As put by Chief Justice Elias:95

…the reliance placed upon English common law presumptions relating to ownership of the foreshore and seabed…is misplaced. The common law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interest in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.

Chief Justice Elias concluded her judgment by saying that:96

…an approach which precludes investigation of the fact of entitlement according to custom because of an assumption that custom is displaced by a change in sovereignty or because the sea was used as a boundary for individual titles on the shore is wrong in law.

93 Ibid paragraph 121
94 Ibid paragraph 122
95 Ibid paragraph 86
96 Ibid paragraph 89
Chief Justice Elias was careful to point out that the outcome of the appeal could not establish that there is Māori customary land below high water mark. This exercise takes place in the Maori Land Court upon investigation. The Chief Justice went on to say:97

the assertion that there is some such [Maori customary] land faces a number of hurdles in fact and law…

Jurisdictional problems were also commented on by the Chief Justice concerning the ability of the Maori Land Court or the High Court to recognise lesser Māori customary title rights.98

Depending on the nature of any interest accepted by the Maori Land Court as a matter of tikanga, subsequent questions of law may arise. They could include, for example, whether the Maori Land Court (in its statutory jurisdiction) or the High Court (in its inherent jurisdiction) can recognise interests in land not equivalent to rights of ownership of the fee simple and whether any interest is affected by the terms of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992…If the land below high water mark is mainly Crown land, as the respondents maintain, it is not clear whether there may be a basis on the facts for the application under s18(1)(i) of Te Ture Whenua Maori Act for a declaration that it is held in a fiduciary capacity.

This last section of the paper looks at the relationship between Māori customary title and the Treaty of Waitangi.

The orthodox position is that the Treaty guarantees in Article II to protect the exclusive possession and rangatiratanga over lands, forests, fisheries and taonga are not enforceable in New Zealand law unless provided for in statute.

It has been asserted that the Treaty of Waitangi merely declares aboriginal title, given that the doctrine would have applied with or without the Treaty. In R v Symonds Judge Chapman said:99

It follows …that in solemnly guaranteeing the Native title, and in securing what is called the Queen’s pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.

In Te Ika Whenua there was judicial observation that the Treaty of Waitangi has been acquiring some permeating influence in New Zealand law, but also that Treaty rights and Māori customary rights (aboriginal rights) tend to be partly the same in content.100

Based on the foregoing it is well established that common law customary rights are not based on or sourced in the Treaty of Waitangi. However, can it be said that the Treaty of Waitangi is constrained by the common law doctrine of aboriginal title and are they indeed one and the same?

This question becomes relevant when it is remembered that aboriginal rights, including title rights, can be lawfully extinguished by express statutory direction, whereas duties associated with rangatiratanga such as kaitiakitanga, and preserved in the Māori text of the Treaty - Te Tiriti o Waitangi - are inalienable.

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97 Ibid paragraph 8
98 Ibid paragraph 9
99 (1847) [1840-1932] NZPCC 387 (NZSC), p.390
100 Te Runanganui o te Ika Whenua Inc Soc v Attorney-General p.27
and cannot be abrogated.\textsuperscript{101}

The Waitangi Tribunal in its \textit{Muriwhenua} report pointed out that the one is not determinative of the other, and that both have an aura of their own. In the view of the Tribunal the Treaty supplements the doctrine, while the doctrine upholds a right where the Treaty has no application.\textsuperscript{102}

Certainly in affirming rangatiratanga, Te Tiriti went further than protecting property rights. Rangatiratanga denotes authority and control in addition to ownership rights.\textsuperscript{103} In its \textit{Aquaculture and marine farming report} the Waitangi Tribunal commented on the relationship between Māori and taonga such as the oceans and bays.\textsuperscript{104}

The relationship exists beyond mere ownership, use, or exclusive possession; it concerns personal and tribal identity, Maori authority and control, and the right to continuous access, subject to Maori cultural preferences.

Of particular concern to Māori is the encroachment upon their authority as kaitiaki\textsuperscript{105} in the form of the Resource Management Act 1991 (RMA) which places authority in various Ministers, their Departments and the local government sector for the management, control and use of natural resources. Even where Māori customary title in the Maori Land Court is established and results in freehold Maori title, this will not address the ongoing difficulty faced by Māori in exercising their kaitiaki role\textsuperscript{106} – given that kaitiaki concerns or jurisdiction are not accorded priority in decision making processes under the RMA and are not provided for under TTWMA.

Furthermore, freehold title does not reflect tikanga Māori concerning land in regards to Māori land being inalienable outside of the descent group. As asserted by Margaret Mutu:\textsuperscript{107}

\begin{quote}
[Maori] are more than the owners, it's much bigger than ownership...The key thing that freehold title does is allow the ability to sell, and that's the only part of freehold title that we are not interested in...That's why...when we settle our claims, whatever comes back is inalienable.
\end{quote}

Perhaps the most crucial difference between rights recognised in the Te Tiriti and rights under either the common law or TTWMA is their source and mandate. The latter mechanisms are derived from English legal systems and as such are controllable within those systems.\textsuperscript{108}

Rangatiratanga however, is sourced in and controllable according to tikanga Māori. It is in this context that the issue becomes a constitutional one.

\textsuperscript{101} Jackson, Moana ‘There are obligations there: a consideration of Maori responsibilities & obligation in regard to the seabed and foreshore’ in \textit{Takutai Moana: economics, politics & colonisation, volume 5} International Research Institute for Māori and Indigenous Education, [Auckland?] 2003 25-27, p.27
\textsuperscript{103} Waitangi Tribunal \textit{Finding of the Waitangi Tribunal on the Manukau claim} Wellington, Government Printer, 1985, p.90
\textsuperscript{104} Waitangi Tribunal \textit{Ahu moana: the aquaculture and marine farming report} Wellington, Legislation Direct, 2002, p.57
\textsuperscript{105} See Appendix one for definition and discussion in respect of kaitiakitanga
\textsuperscript{106} Te Ope Mana a Tai \textit{Discussion framework on customary rights to the foreshore and seabed} August 2003, p. 7
\textsuperscript{107} As quoted by Walsh, Frances ‘Forecast: stormy’ in \textit{Metro} November 2003 269: 44-51, pp.49-50
\textsuperscript{108} Jackson, Moana, p.26
Conclusion

As looked at in this paper, the common law doctrine of aboriginal title and TTWMA do provide legal mechanisms for the recognition of Māori customary rights in the foreshore and seabed. *Ngati Apa* has confirmed that the Maori Land Court has jurisdiction to determine the existence and extent of such rights under TTWMA. The finding that these rights have not been extinguished by various pieces of legislation or the common law means that investigation of such rights can also be carried out in the common law courts (for example, the High Court), under the doctrine of aboriginal title.

Any impending clarifying statutory process for dealing with Māori customary rights may need to be of such flexibility as to allow for identification and recognition of rights across a spectrum which includes use, access, and ownership but also kaitiaki obligations held by tangata whenua. This flexibility will need to encompass both the present and the future, without precluding developmental rights. Furthermore, who is able to do what in terms of the Maori Land Court and the common law courts, may also need clarifying.

Findings of the Waitangi Tribunal, which is conducting its foreshore and seabed hearing early next year, will also help in the process of clarifying and working through the issues.

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Appendix

Kaitiakitanga – definition, nature of and the attendant tikanga of rāhui

Kaitiakitanga is a very important tikanga in relation to the coastal marine area as well as other natural resources.

The term ‘tiaki’ whilst its basic meaning is ‘to guard’ has other closely related meanings depending upon the context. Tiaki may therefore also mean, to keep, to preserve, to conserve, to foster, to protect, to shelter, to keep watch over.\(^{109}\)

The prefix ‘kai’ with a verb denotes the agent of the act. A ‘kaitiki’ is a guardian, keeper, preserver, conservator, foster-parent, protector. The suffix ‘tanga’ added to the noun means guardianship, preservation, conservation, fostering, protecting, sheltering.\(^{110}\)

Kaitiakitanga is intricately linked with tikanga such as tapu, mana, rangatiratanga, mauri and whakapapa and it is for these reasons that the inclusion of kaitiakitanga in the RMA 1991 divorced from tikanga Māori is seen as ineffective and even dangerous as kaitiakitanga loses its traditional meaning.\(^{111}\)

The intricacy of kaitiakitanga can be seen in this interpretation of kaitiakitanga adopted by the Board of Inquiry into the New Zealand Coastal Policy Statement:\(^{112}\)

Kaitiakitanga is the role played by kaitiaki. Traditionally, kaitiaki are the many spiritual assistants of the gods, including the spirits of deceased ancestors, who are the spiritual minders of the elements of the natural world. All elements of the natural world, the sky father and earth mother and their offspring; the seas, sky, forests and birds, food crops, winds, rain and storms, volcanic activity, as well as people and wars are descended from a common ancestor, the supreme god. These elements, which are the world’s natural resources, are often referred to as taonga, that is, items which are greatly treasured and respected. In Maori cultural terms, all natural, and physical elements of the world are related to each other, and each is controlled and directed by the numerous spiritual assistants of the gods.

These spiritual assistants often manifest themselves in physical forms such as fish, animals, trees or reptiles. Each is imbued with mana, a form of power and authority derived directly from the gods.

Man being descended from the gods is likewise imbued with mana although that mana can be removed if it is violated or abused. There are many forms and aspects of mana, of which one is the power to sustain life.

Maoridom is very careful to preserve the many forms of mana it holds, and in particular is very careful to ensure that the mana of kaitiaki is preserved. In this respect Maori become one and same as kaitiaki (who are, after all, their relations), becoming the minders for their relations, that is, the other physical elements of the world.

As minders, kaitiaki must ensure that the mauri or life force of their taonga is healthy and strong. A taonga whose life force has been depleted, as is the case


\(^{110}\) Ibid

\(^{111}\) See generally, Thomas, Nin ‘Implementing kaitiakitanga under the RMA’ in New Zealand Environmental Law Reporter July 1994 1(2): 39-42

\(^{112}\) Report and recommendations of The Board of Inquiry into the New Zealand Coastal Policy Statement Wellington, Department of Conservation, 1994 pp.16-17
for example with the Manukau Harbour, presents a major task for the kaitiaki. In order to uphold their mana, the tangata whenua as kaitiaki must do all in their power to restore the mauri of the taonga to its original strength.

In specific terms, each whanau or hapu (extended family or subtribe) is kaitiaki for the area over which they hold mana whenua, that is, their ancestral lands and seas. Should they fail to carry out their kaitiakitanga duties adequately, not only will mana be removed, but harm will come to members of the whanau and hapu.

Thus a whanau or hapu who still hold mana in a particular area take their kaitiaki responsibilities very seriously. The penalties for not doing so can be particularly harsh. Apart from depriving the whanau or hapu of the life sustaining capacities of the land and sea, failure to carry out kaitiakitanga roles adequately also frequently involves the untimely death of members of the whanau or hapu.

An important tikanga concerned with kaitiakitanga is the rāhui. Rāhui was a prohibition or ban instituted to protect resources.¹¹³

The operation of rāhui is described in the following passages:¹¹⁴

Within the tribal territory a certain area would be placed under Rahui and posted as being out of bounds to hunters, fishers, harvesters, etc… Other areas would remain open for use. This was a form of rotation farming. When the resource was considered to have regenerated itself, then the Tapu would be lifted and that area restored to general use. Another area might be placed under the tapu of rahui in order to allow it to regenerate. Thus the rotation method ensured a constant and steady source of supply.

This type of rahui must not be confused with another form, which was applied when an aitua, misfortune resulting in death occurred. If a person was drowned at sea or a harbour, that area was placed under a rahui because it had become contaminated by the tapu of death. After a certain period of time when those waters were deemed to have been cleansed then the rāhui was lifted and those waters opened for use.

The institution of rahui was designed to prohibit exploitation, depletion, and degeneration of a resource and the pollution of the environment to the point where the pro-life processes latent within the biological and ecosystems of Papatuanuku might collapse.¹¹⁵

¹¹³ Marsden, Maori p.21
¹¹⁴ Ibid
¹¹⁵ Marsden, Maori p.23