

ABORIGINAL RIGHTS IN THE OFFSHORE

Māori Customary Rights under the *Foreshore and Seabed Act 2004* (NZ)

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This article considers the new *Foreshore and Seabed Act 2004* (NZ). This Act was passed in response to the Court of Appeal decision in *Ngāti Apa* in 2003, which determined that Māori customary rights had not been extinguished in the foreshore. The Act constitutes one of the more significant international developments in Aboriginal rights in recent years. This article will situate the main aspects of the Act within Commonwealth native title jurisprudence. In particular, it contrasts the approach of the New Zealand courts, and the subsequent legislation, with that of the High Court of Australia, and to a lesser extent the Supreme Court of Canada, in recent years. The article concludes that the New Zealand Act constitutes a particularly ungenerous approach to Aboriginal rights: one that imposes significant hurdles on claimants, even in comparison to Australian native title law.

Introduction

In 2004, amid significant controversy, the New Zealand government passed the *Foreshore and Seabed Act* (NZ) (FSA).¹ The Act was a response to the 2003 Court of Appeal decision in *Ngāti Apa*, which determined that the Māori Land Court (Te Kooti Whenua Māori) had jurisdiction to consider applications for investigation of customary title to the foreshore.² While the issue in *Ngāti Apa* was framed as a narrow jurisdictional point, it had considerable ramifications for the distribution of property rights in foreshore and seabed area. For Māori, it raised the possibility of applying for investigation of customary title and consequential conversion of that title to fee simple in traditionally owned foreshore areas. Conversely, for many non-Māori, it raised the spectre of private Māori ownership of the foreshore and the possible exclusion of the public. With public opinion running high, the government moved quickly to legislate to return to what it termed 'the status quo': namely, public ownership of the foreshore. In so doing, it was also required to address issues of potential Māori claims to, and rights in, the foreshore and seabed.

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¹ *Foreshore and Seabed Act 2004* (NZ) (hereafter *FSA*).

² *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (NZCA) (hereafter *Ngāti Apa*).

Rather than leaving issues of customary rights to the courts, the New Zealand government chose to legislatively create a new regime.

As an overview, the *FSA* does three things. First, it vests full and beneficial ownership of the public foreshore and seabed in the Crown. Second, it creates a new jurisdiction in the Māori Land Court to hear non-territorial customary rights claims over the foreshore or seabed, referred to as Customary Rights Orders, or CROs. Third, the Act extinguishes aboriginal title to the foreshore and seabed, and replaces it with a statutory claim known as a territorial customary rights claim, or TCR. Under this limb of the Act, Māori can argue before the High Court that they would have been able to establish aboriginal title 'but for' its extinguishment by the Act. If successful, they can approach the government to enter negotiations for redress. However, the Act does not provide a guaranteed right of redress.

Despite the controversy which surrounded this Act, it is now a reality, and *iwi*, *hapū* and *whānau* are beginning to assess the possibilities of CROs and TCRs.³ The purpose of this article is twofold. First, it discusses the new provisions and locates them within Commonwealth Aboriginal rights jurisprudence. In so doing, it looks particularly at Canadian and Australian native title law, as cases from both of those jurisdictions have been influential on the final form of the *FSA*. Through this examination, the article looks at the significant hurdles facing Māori claimants under the Act, and assesses the choices available to *iwi*, *hapū* and *whānau*. What kinds of claims are being made and why? How are claimants responding to the challenges of the Act? Perhaps somewhat surprisingly, given that New Zealand is often regarded internationally as having a comparatively good record with regard to the recognition of indigenous claims, the picture that will emerge is of an Act which arguably goes further towards denying Māori a genuine opportunity to establish aboriginal title than comparative regimes which concern Indigenous land rights in any other common law country. Second, and more modestly, the article simply seeks to draw the attention of scholars engaged with issues relating to indigenous rights to land to a significant, and yet not well known, piece of legislation — one which dramatically impacts on Māori rights in New Zealand, and which will undoubtedly in time contribute to the growing body of Commonwealth Aboriginal rights jurisprudence, particularly in relation to offshore claims. In particular, the New Zealand (and Australian) experiences may also provide some guidance as to how such claims may proceed in Canada, a jurisdiction in which it seems 'likely that aboriginal title to sea spaces will emerge as an issue of importance within the very near future'.⁴

³ Crudely put, *iwi* are tribes/peoples/nations, while *hapū* are a slightly smaller social unit, generally a 'sub-tribe' or clan. The smallest unit is *whānau* (extended family).

⁴ Brown and Reynolds (2004), p 451. The Supreme Court of Canada has yet to consider an application for aboriginal title in the offshore. While the Haida Gwaii aboriginal title claim to the Queen Charlotte Islands has only recently been lodged, the claim area does including the seabed resources of over half of Hecate Strait and 320 kilometres out into the Pacific Ocean. This case may eventually provide

Customary Rights and the Foreshore and Seabed in New Zealand: A Very Short History

There is currently almost no Māori customary land left in New Zealand, and this distinguishes New Zealand from other so-called post-colonial common law jurisdictions such as Canada and Australia. This is mainly (but not exclusively) the result of two processes. The first was pre-emptive purchases by deed by the Crown prior to 1862. It has long been accepted in New Zealand that beneficial ownership of land belonged to Māori and that customary title had to be extinguished before the Crown could pass any title to third parties. In other words, that customary title was inalienable except to the Crown and that it must be acquired by purchase.⁵ This, of course, broadly reflected practice in North America, but differed significantly from that in Australia. By 1862, approximately two-thirds of the country had passed out of Māori ownership by this method.⁶

Second, in 1862 and 1865 the first *Native Lands Acts* were passed.⁷ These are the forerunners of the current *Te Ture Whenua Māori Act*.⁸ Two features of these Acts should be noted: the Crown's waiver of its general right of pre-emption; and the institution of a process whereby Māori could convert their land from customary title to Crown-granted freehold.⁹ The waiver is found in the preamble to the 1862 Act: 'AND WHEREAS ... Her Majesty may be pleased to waive in favour of the Natives so much of the said Treaty of Waitangi as reserves to her Majesty the right of pre-emption of their lands'. The result of the waiver was that customary title could now be alienated to third parties. A voluntary process of investigation and conversion was established. Claimants had to prove that, according to *tikanga Māori*, they were the owners of the land.¹⁰ If successful, they were issued with a certificate of title by the court, which could be exchanged for a Crown grant in freehold. This, of course, rendered the land freely alienable and, in combination with the pre-1862 purchases, has led to the situation whereby almost no customary land exists, leaving little or no operation for the doctrine of aboriginal or native title.¹¹ The possible, but contentious, exception was the foreshore.¹²

that court with an opportunity to contribute to this area of aboriginal rights jurisprudence.

⁵ This was judicially confirmed in the famous decision in *R v Symonds* (1847) NZPCC 387.

⁶ Boast et al (2004), p 66.

⁷ *Native Lands Act 1862* (NZ); *Native Lands Act 1865* (NZ).

⁸ *Te Ture Whenua Māori Act/ Māori Land Act 1993* (NZ) (hereinafter *TTWMA*).

⁹ For the provisions on the investigation process, see ss 2, 7, 9. In their modern form, these provisions are found in *Te Ture Whenua Māori Act/ Māori Land Act 1993* (NZ).

¹⁰ *Tikanga Māori* is defined in *Te Ture Whenua Māori Act/ Māori Land Act 1993* (NZ) s 3 as 'Māori customary values and practices'.

¹¹ It was made clear, however, by Cooke P in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (NZCA) that aboriginal title is part of the law of New Zealand. Cooke P briefly outlined the main features of

According to Boast et al: 'In the twentieth century one of the more pressing problems for the Native Land Court became that of whether the Court had jurisdiction to issue certificates of title to ... the foreshore.'¹³ The Crown proceeded on the basis that it owned the foreshore by prerogative. As is well known, the foreshore and seabed were historically considered to be owned by the Crown by prerogative right. As stated by Lord Hershell in *Attorney-General v Emerson*:

it is beyond dispute that the Crown is prima facie entitled to every part of the foreshore between high and low water mark, and that a subject can only establish a title to any part of the foreshore ... [by] grant from the Crown ...¹⁴

In a number of jurisdictions, including Australia and Canada, this assumption was later embedded in legislation that 'vested' the foreshore in the Crown or deemed it to be the 'property' of the Crown.¹⁵ Nevertheless, the Native Land Court (later Māori Land Court) did, during the course of the twentieth century, hear applications for investigations of customary title involving the foreshore.¹⁶ In the famous decision of *In Re Ninety-Mile Beach*, a determination of the Māori Land Court involving a foreshore application was appealed to the Court of Appeal.¹⁷ In a strange decision, ultimately overturned in 2003 in *Ngāti Apa*, that court held not that the Crown owned the foreshore

aboriginal title at 23, 24. See also *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (NZCA); *Ngai Tahu Māori Trust Board v Director General of Conservation* [1995] 3 NZLR 553 (NZCA). These cases are briefly returned to below.

¹² For a scholarly and detailed history of early cases relating to the foreshore and seabed in New Zealand, see Boast (2005). See also McHugh (1984).

¹³ Boast et al (2004), p 103.

¹⁴ *Attorney-General v Emerson* [1891] AC 646 at 653. See also *Benest v Pipon* (1829) 12 ER 243; *Gann v Free Fishers of Whitstable* (1865) 11 ER 1312; *Attorney-General v Chambers* (1854) 43 ER 486. A number of earlier cases also held that the Crown owned the soil of the seabed: see, for example, *Attorney-General v Chambers* (1854) 43 ER 486; *Gammell v Commissioners of Woods and Forests* (1859) 3 Macq 419. For a colonial example see *Secretary of State for India v Chelinkani Rama Rao* (1916) LR 43 Ind App 192. Crown ownership of both the foreshore and seabed was supported in *New South Wales v Commonwealth (The Seas and Submerged Lands case)* (1975) 135 CLR 337 (HCA) at 392 (Gibbs J), at 418–19 (Stephens J) (both in dissent); see contra, for example at 363, 367–68 (Barwick CJ). Also contra see *Commonwealth v Yarmirr* (2001) 184 ALR 113 (HCA), at 176–77 (McHugh J) (hereinafter *Yarmirr*). According to Callinan J (at 215): 'Whether the claim that Britannia rules the waves was an overly ambitious one or not ... Britannia never owed them, or what lay beneath.' See also contra *In Reference Re Ownership of Off-Shore Mineral Rights* (1967) SCR 792.

¹⁵ See, for example, *Harbours Act 1955* (Qld).

¹⁶ See Boast (2005), Ch 7 generally.

¹⁷ *In Re Ninety-Mile Beach* [1963] NZLR 461 (NZCA).

by prerogative, but that if the Māori Land Court had already investigated title to adjacent coastal blocks, this effectively extinguished customary title to the foreshore. According to North J, after investigation of customary title and issuing of fee simple grant, land to the seaward side of the grant remained with the Crown 'free and discharged' of obligations. The 'title was complete'.¹⁸ This analysis was later adopted in *Keepa v Inspector of Fisheries* with respect to fishing rights. In that case, the court held that the grant of a freehold title to blocks adjacent to the foreshore extinguished customary fishing rights in the foreshore.¹⁹

Offshore Native Title: *Ngāti Apa* and *Yarmirr* Compared

The 2003 decision of the Court of Appeal in *Ngāti Apa* took some — but mostly notably the government — by surprise.²⁰ Nevertheless, there had been indications that the decision of *In Re Ninety-Mile Beach* might not stand, particularly the rejection of the *Keepa* decision in the 1986 case of *Te Weehi*²¹ and a host of academic criticism of the decision.²² Like *In Re Ninety-Mile Beach*, *Ngāti Apa* began as an application to the Māori Land Court under *TTWMA* to investigate customary title in the foreshore.²³ The litigation began as a response to certain government policies relating to marine farming in the Marlborough Sound area.

This decision in *Ngāti Apa* essentially nullified that of *In Re Ninety-Mile Beach*, holding that the Māori Land Court had jurisdiction to investigate areas below the high-water mark, not only to the foreshore but also the seabed, thereby effectively holding that they were Māori customary land within the terms of *TTWMA*. In *Ngāti Apa*, the Attorney-General and others objected to the claim in the Māori Land Court on the basis that it could not succeed as a matter of law. However, they did not argue that the foreshore was owned by prerogative.²⁴ Rather, the Crown's statement of defence argued that Māori

¹⁸ *In Re Ninety-Mile Beach* [1963] NZLR 461 (NZCA) at 473.

¹⁹ *Keepa v Inspector of Fisheries* [1965] NZLR 322 (SC).

²⁰ At the time of the decision in *Ngāti Apa*, the Court of Appeal was the peak court within New Zealand, with the Privy Council as the ultimate court. On 1 January 2004, appeals to the Privy Council were ended and the new Supreme Court of New Zealand was established: *Supreme Court Act 2003* (NZ). Notably, the original makeup of the Supreme Court was the same as the Court of Appeal in *Ngāti Apa*. Two judges have since retired.

²¹ *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (NZHC) (hereinafter *Te Weehi*), discussed below.

²² In particular, see Boast (1993, 1996).

²³ In general, the Māori Land Court derives its jurisdiction from *Te Ture Whenua Māori Act/Māori Land Act 1993* (NZ), in particular section 18. Of relevance to the current discussion is the court's power to deal with the status of land. Section 131 provides that: 'The Māori Land Court shall have jurisdiction to determine and declare, by a status order, the particular status of any parcel of land, whether or not that matter involves a question of law.'

²⁴ Strangely, given its simplicity, the argument that the common law relating to Crown ownership of the foreshore by prerogative extinguished Māori interests had

customary title no longer existed in the foreshore due to a number of acts of extinguishment.²⁵ With respect to the seabed, they 'argued that there was no recognised Māori customary title to it and in any event s 7 of the Territorial Sea Act "prevents any declaration of Māori customary title to the seabed under *Te Ture Whenua Māori Act*".'²⁶

In *Ngāti Apa*, the Court of Appeal rejected the suggestion that that all titles to land, including all Māori title, derived from the Crown. Rather, according to Elias CJ: 'The Crown has no property interest in customary land and is not the source of title to it.'²⁷ The court confirmed the approach of Brennan J in *Mabo (No 2)* and held that the Crown did not acquire full and absolute dominium at the point of acquisition of sovereignty.²⁸ Rather, the Crown acquired a radical title. In so determining, the Court of Appeal followed earlier comments to this effect by the same court in *Te Runanganui o Te Ika Whenua Inc Society*.²⁹ On the particular matter of the foreshore, Elias CJ held that English common law rules relating to Crown ownership of the foreshore and seabed did not displace New Zealand common law relating to the recognition and protection of native title. Essentially, the prerogative was displaced by local circumstance.³⁰ She stated that:

Similarly, the reliance by Turner J [in *In Re Ninety-Mile Beach*] upon English common law presumptions relating to ownership of the foreshore and seabed (an argument in substance rerun by the respondents in relation to seabed in the present appeal) is misplaced. The common law as received in New Zealand was modified by Maori customary proprietary interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption drawn from English common law. The common law of New Zealand is different.³¹

As for the seabed, the court appears to have extended the concept of radical title to the offshore, holding that the 'vesting' of property in the Crown

been rejected in *In Re Ninety-Mile Beach*. Gresson J stated that such an argument would 'in effect amount to depriving the Maoris of their customary rights over the foreshore by a side wind': *In Re Ninety-Mile Beach* [1963] NZLR 461 (NZCA) at 478. Ironically, of course, that court's determination that alienation of coastal blocks effectively extinguished Māori rights in the foreshore amounted to just such a 'side-wind'.

²⁵ Statement of Defence on Behalf of Attorney-General, 1 May 2000, Crown Law Office (HM Aikman), para 3.1, in *Boast* (2005) at para 8.1.

²⁶ *Boast* (2005), para 8.1.

²⁷ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 659.

²⁸ *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 (HCA) (hereinafter *Mabo (No 2)*).

²⁹ *Mabo (No 2)* (1992) 175 CLR 1 (HCA) at 655; *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (NZCA) at 24 (Cooke P).

³⁰ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 660.

³¹ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 668.

under territorial seas legislation did not effect an extinguishment, but rather conferred radical title on the Crown.³² This is a point of departure from Australian understandings. In *Yarmirr*, the majority of the High Court — Gleeson CJ, Gaudron, Gummow and Hayne JJ — were ambivalent about extending the concept of radical title to the offshore area. Rather, radical title ‘provides an explanation in legal theory of how the two concepts of sovereignty over land and existing native title rights and interests *co-exist*’.³³ According to the majority, radical title is not a necessary precondition to native title. It is merely an analytical tool which aids in identifying that the Crown’s interests and native title interests can coexist over land. Hence it is not necessarily appropriate to use the same tool in analysing rights over the territorial sea.³⁴ As a matter of theory, this would seem correct. Radical title is, after all, not a title, but ‘a technical and notional concept’³⁵ — or, as Brennan J put it, simply ‘a logical postulate to support the doctrine of tenure’.³⁶ As the doctrine of tenure does not apply below the low water mark, it is not necessary to extend its ‘reach’ to the offshore in order to recognise native title. For the High Court of Australia, the matter is one of inconsistency, as determined by examining the Crown’s sovereign rights and interests over that area under both domestic and international law and determining whether the claimed native title rights can coexist with those sovereign rights. Where inconsistent, in the language of *Wik*, the native title rights must ‘yield’.³⁷

While the court in *Ngāti Apa* makes a clear determination that the traditional principle of Crown ownership of foreshore by prerogative has been modified to meet local circumstances in New Zealand, recent cases in Australia reveal some confusion with respect to the status of the foreshore. From a simple reading of the High Court decision in *Yarmirr*, it might be inferred that the distinction between foreshore and seabed which characterised the decision in *Ngāti Apa* is not found in Australian law. In *Yarmirr*, the key legal issue before the High Court did not concern the inter-tidal zone, or foreshore. Rather, argument centred around the issue of whether the common law ‘operated’ beyond the low water mark (the traditional ‘limits of the realm’) so as to be able to ‘recognise’ native title.³⁸ The Crown made no particular submissions about the foreshore before the High Court.³⁹ Nor were any particular arguments as to the foreshore (or inter-tidal zone, as it is

³² *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 663 (Elias CJ) at 674 (Gault J).

³³ *Commonwealth v Yarmirr* (2001) 184 ALR 113 (HCA) at 131. For a more detailed account of the High Court decision in *Yarmirr*, see Strelein (date unknown) (last accessed 2 December 2004).

³⁴ *Commonwealth v Yarmirr* (2001) 184 ALR 113 (HCA) at 131–32.

³⁵ *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 655 (Elias CJ).

³⁶ *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 (HCA) at 50.

³⁷ *The Wik Peoples v Queensland* (1996) 141 ALR 129 at 190 (HCA) (Toohey J).

³⁸ *Yarmirr* (2001) 184 ALR 113 (HCA) at 127. See also *New South Wales v Commonwealth (The Seas and Submerged Lands Case)* (1975) 135 CLR 337 (HCA).

³⁹ *Yarmirr* (2001) 184 ALR 113 (HCA) at 138.

commonly referred to in native title decisions) made before the trial judge in *Yarmirr*. The reason for this was simple. In *Yarmirr*, the land of the inter-tidal zone was excluded from the claim, as title to the claim areas had already been granted in fee simple down to the low-water mark to the relevant trust body by the Crown some years before under the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).⁴⁰ However, this did leave open the question of whether the waters might still be claimed. In the end, Olney J found native title rights of a non-exclusive kind with respect to the land and waters below the low water mark, and the waters of the inter-tidal zone.⁴¹

In *Lardil People*, Cooper J takes a traditional view of the Crown's interest in the inter-tidal zone. His Honour notes that: 'The common law recognised, in respect of the foreshores and beds of tidal rivers, a full beneficial title in the Crown. The title of the Crown was presumed and any person claiming title [to these interests] had to prove a prior grant from the Crown.'⁴² His Honour then points out that this common law position was given statutory expression in the legislation, namely the *Harbours Act*, by deeming the foreshore to be 'property of the Crown'.⁴³ The result, according to Cooper J, was the extinguishment of any 'right or interest of the applicants, if it had not been earlier extinguished at sovereignty, which was inconsistent with the Crown right, title, interest or estate in the land in the foreshore'.⁴⁴ With respect, these statements raise more questions than they answer. What exactly was the Crown's traditional interest in the foreshore? If it was a beneficial one, should that not extinguish native title entirely? Yet Cooper J finds a non-exclusive native title right to the waters of the inter-tidal zone, thereby — despite his comments on extinguishment — effectively following the inconsistency approach of *Yarmirr*. Cooper J specifically referred to the High Court decision in *Ward* as authority for the proposition that similar considerations as to exclusivity and inconsistency apply in with respect to both the inter-tidal zone and offshore areas.⁴⁵

In the recent decision in *Gumana*, Selway J also considered the peculiar position of the inter-tidal zone at common law. In that case, His Honour takes a quite different view of the status of the foreshore, but ultimately comes to an almost identical finding as to the nature of native title in this area. This examination of the status of the foreshore occurred in the context of

⁴⁰ *Yarmirr v Northern Territory* (1998) 156 ALR 370 (FCA) para 25, per Olney J. Similarly, in *Gumana v Northern Territory* [2005] FCA 50 (FCA) Selway J (discussed below) title had also been granted to the inter-tidal zone under the same Act.

⁴¹ *Yarmirr v Northern Territory* (1998) 156 ALR 370 (FCA) at 441 (Order, para 3); *Yarmirr* (2001) 184 ALR 113 (HCA) at 122 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁴² *Lardil People v State of Queensland* [2004] FCA 298 (hereafter *Lardil People*) at para 221.

⁴³ *Harbours Act 1955* (Qld) s 77.

⁴⁴ *Lardil People* [2004] FCA 298 at paras 221–24.

⁴⁵ *Lardil People* [2004] FCA 298 para 166, citing *Western Australia v Ward* (2000) 191 ALR 1 (HCA) at 114 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), at 225 (Callinan J) and at 135 (McHugh J agreeing with Callinan J on this issue).

considering the effect of the grant of a fee simple interest in trust in the inter-tidal zone to the Yolgnu under the *Aboriginal Land Rights (Northern Territory) Act*. His Honour noted that 'special common law rules applied in relation to the land above the low water mark that was covered or affected by sea'.⁴⁶ Selway J suggested, quite briefly, that in the context of the inter-tidal zone, the Crown prerogative functioned differently in Australia than in England. In England, the traditional view holds sway: the 'Crown's rights to the foreshore seem to have been treated as a separate prerogative of the Crown'. However, 'in Australia they can perhaps be treated as part of the broader prerogative of the Crown in relation to wastelands'.⁴⁷ Hence the Crown's prerogative over the foreshore amounted not to beneficial ownership, but something analogous to radical title.⁴⁸ In particular, he noted that the Crown's prerogative rights were subject to the common law public rights, as were any grants made by the Crown in fee simple.⁴⁹ This approach is not dissimilar to that of the New Zealand Court of Appeal in *Ngāti Apa*, and it is clear from the list of authorities in that case that His Honour had read that decision.⁵⁰ Ultimately, Selway J found that, pursuant to the fee simple grant under the *Aboriginal Land Rights Act*, the Yolgnu had exclusive rights to land other than the inter-tidal zone, but otherwise held non-exclusive native title rights to the sea and inter-tidal zone.⁵¹

On the question of extinguishment generally, the New Zealand Court of Appeal held that customary rights generally had not been extinguished. With specific respect to the foreshore, the court found that, on proper construction, customary rights had not been extinguished by general legislation, such as the *Harbours Acts* or the *Foreshore and Seabed Endowment Revesting Act*, although they left undecided the effect of a number of specific enactments relating to particular local areas. However, none of the Acts which were claimed to have extinguished native title in the foreshore were specific 'vesting Acts'. To the contrary, however, there was such an Act with respect to the seabed: the *Territorial Seas Act*.⁵² Section 7 of that Act stated that the 'the seabed and subsoil of submarine areas ... shall be deemed to be and always to have been vested in the Crown'.⁵³ Despite this, all judges found that this legislation did not extinguish customary title. The vesting provisions were not inconsistent with Māori customary rights. Rather, they vested radical title only and were concerned to establish international zones, not property rights, as well as to facilitate mining of the seabed.⁵⁴ A similar conclusion had been

⁴⁶ *Lardil People* [2004] FCA 298 at para 61.

⁴⁷ *Lardil People* [2004] FCA 298 at para 61.

⁴⁸ *Lardil People* [2004] FCA 298 at para 61.

⁴⁹ *Lardil People* [2004] FCA 298 at para 63.

⁵⁰ *Lardil People* [2004] FCA 298 at para 63.

⁵¹ *Lardil People* [2004] FCA 298 at para 3.

⁵² *Territorial Seas, Contiguous Zone and Exclusive Economic Zone Act 1977* (NZ).

⁵³ Section 7 was repealed by *Foreshore and Seabed Act 2004* (NZ)s 31.

⁵⁴ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 687–88 (Keith and Anderson JJ).

reached in the Australian High Court decision of *Yarmirr*. Examining equivalent legislation — namely the *Seas and Submerged Lands Act 1975* (Cth) and the *Coastal Waters (Northern Territory Title) Act 1980* (Cth), that court found that nothing in those Acts was necessarily inconsistent with the continued existence of native title.⁵⁵

However, a final mention must be made of the qualification made to native title rights in the foreshore and seabed by the High Court of Australia. Both that court and the New Zealand Court of Appeal found that, in general, rights in the foreshore — such as Crown grants — were subject to public rights to fish, public rights of navigation and the international right of innocent passage.⁵⁶ In *Yarmirr*, the majority therefore determined that native title in the offshore could not include a right of exclusive possession, as such a right would be fundamentally inconsistent with the public rights to fish and of navigation.⁵⁷ According to the majority:

there is a fundamental inconsistency between the asserted native title rights and interests and the common law public rights of innocent passage. The two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that the exercise of native title rights and interests is to be subject to other public and international rights.⁵⁸

In contrast, Kirby J held that these public and international rights merely qualified exclusivity, rather than destroying it. He looked at the reasons for, or principles behind, the public rights to see whether they were inconsistent with native title. He held that the principle behind innocent passage and navigation is the fundamental principle of freedom of movement and the common heritage of humanity. Even so, they only qualify, not deny, exclusivity. While these are significant rights, there are many aspects of native title which remain untouched by them. His Honour noted that, at common law, it was possible for the Crown to grant exclusive fisheries that, although qualified by rights of navigation, nevertheless retained their character of exclusivity.⁵⁹

In *Ngāti Apa*, the court was less forthcoming about the possible effect of these public rights on aboriginal title. This is not surprising, given that the central issue in *Ngāti Apa* was a jurisdictional point, not an actual claim for

⁵⁵ *Yarmirr* (2001) 184 ALR 113 (HCA) at 139 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁵⁶ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 679–80 (Gault J); *Yarmirr* (2001) 184 ALR 113 (HCA) at 145.

⁵⁷ See on the same point the earlier case of *Harper v Minister for Sea Fisheries* (1995) 186 CLR 314 (HCA) at 329 (Brennan J: 'The right of the owner of the soil over which the [tidal] waters flow ... to enjoy the exclusive right of fishing in those waters ... is qualified by the paramount right to fish vested in the public.')

⁵⁸ *Yarmirr* (2001) 184 ALR 113 (HCA) at 145. See also *Gumana v Northern Territory* [2005] FCA 50 (FCA) at para 34; *Lardil People* [2004] FCA 298 at para 166.

⁵⁹ *Yarmirr* (2001) 184 ALR 113 (HCA) at 193–94.

aboriginal title. Nevertheless, it is likely that the New Zealand approach would have more in common with the judgment of Kirby J than with that of the majority in *Yarmirr*. The authorities quoted by the various members of the *Ngāti Apa* court clearly held that, where freehold grants were made by the Crown in tidal areas, those grants were subject to such public rights but that this did not detract from their character as freehold grants.⁶⁰ Further, to find a 'qualified exclusivity' would be in keeping with the approach of New Zealand courts generally to Māori rights to resources and land. For example, it is suggested that to determine that these public rights destroyed any possibility of a customary title amounting to exclusive possession would arguably be contrary to Art II of the *Treaty of Waitangi*, which guarantees Māori 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries'.⁶¹ New Zealand courts have continually shown their willingness to find that on importation into the colony of New Zealand, the common law has been modified by local circumstance. The Crown's ownership of the foreshore by prerogative in *Ngāti Apa* itself is an example. The *Treaty*, although not enforceable *per se*, can according to Keith and Anderson JJ in *Ngāti Apa*, constitute just such a 'local circumstance', and it seems unlikely that New Zealand courts would so lightly override Art II.⁶² One could also make the obvious point: that the approach of the majority in *Yarmirr* simply does not stand up to scrutiny.⁶³ As any property law student should understand, just because there may be some incursions upon, or limitations to, the bundle of rights that make up ownership, does not mean that ownership ceases to exist.⁶⁴ Even the majority in *Yarmirr* acknowledged that there was not necessarily any reason why the 'qualified' exclusivity proposed by the claimants could not accommodate the common law public rights and international rights. They just felt that the doctrine of inconsistency was too strong to resist.⁶⁵

In summary, the decisions in *Yarmirr* and *Ngāti Apa* have much in common. The basic analysis of the Crown's interest, the availability of offshore claims, the effect of vesting legislation which implements the various international rights over sea zones, and the existence of traditional common

⁶⁰ On this same point, and coming to the same conclusion, see Boast (2005), para 5.2.

⁶¹ It should be noted that the Māori text of Art II does not refer to 'exclusive and undisturbed possession, etc', but rather states that Māori are guaranteed '*te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa*' (the unqualified exercise of chieftainship over their lands, villages and all their property/treasures).

⁶² *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 679. See also *Baldrick v Jackson* (1910) 30 NZLR 343 at 344, in which Stout CJ held that the Crown's prerogative ownership of whales did not form part of the law of New Zealand as it was contrary to Article II of the *Treaty of Waitangi*.

⁶³ For similar confusion as to the majority's approach, see Boast (2005), para 5.5.

⁶⁴ This point was forcefully made in the context of ownership of human cells in the powerful dissent of Mosk J in the famous case of *Moore v Regents of California* 793 P 2d 479 (Cal 1990).

⁶⁵ See Strelein (date unknown).

law public rights of fishing and navigation are much the same. The key difference may lie in the effect of those public rights on aboriginal title, an issue not addressed directly in *Ngāti Apa*, and one which may now never be directly adjudicated on by the courts.

Yarmirr and *Ngāti Apa* provide potential guidance as to how issues of aboriginal title in the offshore may be dealt with in Canada. Given that Canada, New Zealand and Australia share the same common law heritage, it seems likely that similar arguments would be raised in the Canadian context as in *Yarmirr* and *Ngāti Apa*. The law in Canada on the foreshore, for example, is similar to that of the other two jurisdictions,⁶⁶ and legislation vesting sovereign rights in the offshore conforms to a similar pattern to other common law jurisdictions. For example, section 8(1) of the *Oceans Act* provides that the soil and subsoil beneath the waters of the territorial sea are 'vested' in the Crown.⁶⁷ One could venture (or perhaps hope) that a Canadian court might, given the constitutional protection of aboriginal rights under section 35(1) and the now extensive legal culture that surrounds that provision, be more inclined to the approach of the Court of Appeal in *Ngāti Apa* and Kirby J in *Yarmirr* than that of the majority of the High Court of Australia.

The Foreshore and Seabed Act

The New Zealand government moved quickly in the wake of the decision in *Ngāti Apa*. The response was the *Foreshore and Seabed Act*. This Act has proven to be one of the most controversial in recent years. Protests were held across the nation, culminating in a *hikoi* joined by thousands of marchers from around the country.⁶⁸ Ultimately, the controversy was the catalyst which led to the formation of a new political party, the Māori Party, which currently holds four seats (out of 121) in parliament. The Māori Party has announced its intention to introduce a Private Member's Bill to repeal the legislation, although at the time of writing no Bill has yet been introduced into parliament.⁶⁹ It is worth noting that the Special Rapporteur, Committee on

⁶⁶ See *Attorney-General (British Columbia) v Attorney-General (Canada)* [1914] AC 153 (PC).

⁶⁷ *An Act Respecting the Oceans of Canada* RSC 1996 c 31. Notably, s 8(2) further provides that: 'Nothing in this section abrogates or derogates from any legal right or interest held before February 4, 1991.' Such a 'legal right' could well include Aboriginal rights, thereby strengthening any claimants' position.

⁶⁸ A *hikoi* is a march. Many groups started in their home towns and marched towards Wellington. Groups converged along the way, culminating in a final march on parliament.

⁶⁹ A number of opposition and minor parties may support the Bill — not, in some cases, because they support Māori land rights, but for quite the opposite reason. National and ACT, for example voted against the Act originally, on the basis that it undermined private property rights and investment opportunities. On the other side of the political spectrum, the Greens have indicated that they would support repeal. They initially voted against the *FSA* on the grounds that it insufficiently supported Māori rights and in fact actively extinguished customary rights without in turn protecting the foreshore from exploitation.

Human Rights, United Nations Economic and Social Council, has just released his report on his 2005 Mission to New Zealand. Paragraph 92 recommends that the *Foreshore and Seabed Act* be repealed or amended to recognise inherent Māori rights to the foreshore and seabed.⁷⁰ The Act is, according to the report, a 'step backwards' in the recognition of Māori rights.⁷¹

We will probably never know how New Zealand Courts, and in particular the new Supreme Court, would have responded to the challenge of developing a New Zealand jurisprudence on aboriginal or native title. While the courts will still adjudicate claims, these will be initiated under the new foreshore and seabed regime which, as will be seen, places significant constraints on what can be claimed and the provisions of which will in part dictate the final form of native title in New Zealand. If one visits the website of the New Zealand Department of Justice, however, one finds the statement that the *FSA* 'codifies the common law'.⁷² This reflects statements made by the Deputy Prime Minister, the Honourable Dr Michael Cullen, in introducing the Bill:

All this Bill does is to codify in statute what the best received expert advice is on what those common law tests [for Territorial Customary Rights] should be, so that they are placed beyond doubt ... We have not imported anything new in that respect; we have tried as far as possible, to reflect what the state of the law actually is.⁷³

This is a noteworthy introduction to the Act, given that, for the reasons outlined above, there is virtually no common law of aboriginal title in New Zealand. There are only the brief *obiter* comments in famous Court of Appeal cases of the 1990s, such as *Te Runanganui o Muriwhenua v Attorney-General* and *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, as well as the comments in *Ngāti Apa* itself.⁷⁴ In *Te Runanganui*, Cooke P briefly outlined the main features of aboriginal title. However, little can be gleaned

⁷⁰ Stavenhagen, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (2006). For similar comments by the CERD Committee, see Charters and Erueti (2005) 36 *VUWLR* 257.

⁷¹ Stavenhagen, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (2006) at para 55.

⁷² Ministry of Justice, www.justice.govt.nz.

⁷³ Honourable Dr Michael Cullen 621 NZPD 17208 (16 November 2004).

⁷⁴ *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (NZCA); *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (NZCA); *Ngai Tahu Māori Trust Board v Director General of Conservation* [1995] 3 NZLR 553 (NZCA). While there are earlier decisions on customary fishing rights, these earlier cases were generally predicated on the assumption that any rights did not have an independent existence at common law, but are derived from statute. See *Waipapakura v Hempton* (1914) 33 NZLR 1065. For a discussion of earlier cases see McHugh (1984); Boast (2005), Ch 7. The most notable exception is the decision in *Te Weehi* [1986] 1 NZLR 680 (NZHC) discussed below.

from this judgment. According to Cooke P, 'the nature and incidents of aboriginal title are matters of fact dependent on the evidence in the particular case'. In so saying, Cooke P relied on the early New Zealand case of *R v Symonds*, as well as the High Court of Australia decision in *Mabo (No 2)*. In *Ngāti Apa*, the Court of Appeal held that customary title is 'determined as a matter of the custom and usage of the particular community'.⁷⁵ Again, this is too general to be able to state with any certainty how the law may have developed had it been left to the courts. Whether customary title in New Zealand would have developed along the lines of native title in Australia, as may perhaps be indicated by these brief statements, rather than the Canadian aboriginal rights/title approach, cannot be more than a matter of mere speculation.

Given the paucity of New Zealand doctrine, therefore, 'the common law' appears to refer to the more developed bodies of law in Canada and Australia, a presumption reinforced by the fact that the language of the Act incorporates an uneasy amalgam of Canadian and Australian law.⁷⁶ That Canadian and Australian law should be looked to is, however, not surprising. As McHugh has noted:

with the decision to replace the common law jurisdiction with a statutory version, it became necessary to form some idea, however speculative, of what was being replaced. By that measure the Government's proposals could be gauged. Political circumstance made inevitable the speculative exercise that the Court of Appeal had properly seen as unnecessary.⁷⁷

However, what is perhaps surprising is the understanding of what native title or aboriginal title is that emerged from this 'speculative exercise'. As will be seen, it is questionable whether the *FSA* does in fact codify 'the common law'. First, the common law relating to aboriginal rights or native title is hardly uniform across common law countries, and the Act 'picks and chooses' between jurisdictions. Second, in parts the Act moves beyond existing 'tests', or amalgamates approaches from divergent jurisdictions. Finally, the provisions cover some issues which remain unclear at common law, thereby effectively determining the outcome of several battles which are still to be had before the courts in both Canada and Australia.

In brief, the Act creates two statutory jurisdictions. The first of these is created in the High Court. Aboriginal title is extinguished and section 10 of the *FSA* abolishes the inherent jurisdiction of the High Court to hear any

⁷⁵ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 656, 660 (Elias CJ).

⁷⁶ Notably, the evidence given by Dr Paul McHugh on behalf of the Crown to the Waitangi Tribunal as to what native title might look like in New Zealand was based on an amalgam of Canadian and Australian jurisprudence: see Brief of Evidence of Dr Paul Gerard McHugh, Dated 13 January 2004, in the Matter of the Treaty of Waitangi Act 1975 and of Applications for an Urgent Inquiry into the Foreshore and Seabed Issues, WAI 1071.

⁷⁷ McHugh (2004a), pp 141–42.

customary rights claim and replaces it with a statutory jurisdiction to determine territorial customary rights (TCRs) in accordance with the provisions of the Act.⁷⁸ Under section 74, that court also has jurisdiction to determine non-territorial customary rights claims (CROs) brought by non-Māori or, as the Act puts it, by a 'group of natural persons'.⁷⁹ The Māori Land Court, on the other hand, is given a new jurisdiction to determine non-territorial rights claims (CROs) and may hear applications from *whānau*, *hapū* or *iwi* with respect to activities, uses or practices which are integral to *tikanga Māori*.

The *Foreshore and Seabed Act* is predicated on a distinction between territorial and non-territorial customary rights. Strictly speaking, this dichotomy is not found in common law jurisprudence on native title or aboriginal rights either in Canada or Australia. However, it appears to owe more to the Canadian approach than the Australian. In Canada, the Supreme Court has noted that there is a 'spectrum' of rights available. According to Lamer CJ in *Delgamuukw*:

The picture which emerges ... is that the aboriginal rights which are recognized and affirmed by s 35(1) fall along a spectrum with respect to their degree of connection with the land. At one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive culture of the group claiming the right. However, the 'occupation and use of the land' where the activity is taking place is 'not sufficient to support a claim of title to the land' ... In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately connected with a particular piece of land. Although an aboriginal group may not be able to demonstrate title to land, it may nevertheless have a site-specific right to engage in a particular activity ... At the other end of the spectrum is aboriginal title itself ... What aboriginal title confers is the right to the land itself.⁸⁰

Thus the severability of aboriginal rights from the soil has generally been accepted in Canada. In *Côté*, Lamer CJ held that aboriginal rights to fish do not necessarily rest on an underlying claim to aboriginal title over that

⁷⁸ *Foreshore and Seabed Act 2004* (NZ), s 50. In Australia just such an attempt to extinguish native title and replace it with a statutory right was made in 1993 when Western Australia enacted the *Land (Titles and Traditional Usages) Act 1993* (WA). This Act was, of course, declared invalid as contrary to section 10 of the *Racial Discrimination Act 1975* (Cth.). This Act domestically implements the *Convention on the Elimination of All Forms of Racial Discrimination* 660 UNTS 195, entered into force on 4 January 1969. For comments on the discriminatory nature of the FSA, see the Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, WAI 1071 (Wellington: Waitangi Tribunal, 2004).

⁷⁹ *Foreshore and Seabed Act 2004* (NZ), s 74. While section 74 does on its face apply to Māori applicants, the Act then limits the High Court's jurisdiction by stating that it may not inquire into a claim which is 'able to be recognised and protected by an order made by the Māori Land Court under Part 3': s 73(1)(a)(i).

⁸⁰ *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 256 (SCC).

territory.⁸¹ Similarly, in New Zealand, it has long been held that fishing rights can exist separately from underlying title. In *Te Runanga o Muriwhenua Inc*, the Court of Appeal noted that: 'The survival of fishing rights even though land titles have been extinguished was recognised even as to the foreshore by Chief Judge Fenton in his *Kauwaeranga Judgment* of 1870.'⁸² The leading New Zealand case in this area is the 1986 High Court decision in *Te Weehi v Regional Fisheries Officer*, in which Te Weehi was charged with possessing undersized *paua* (abalone). As a defence he argued, pursuant to section 88 of the *Fishing (Amateur Fishing Regulations) 1983*, that he was undertaking a 'Māori fishing right', and was therefore exempt from the regulations. In order to succeed, Te Weehi had to establish a non-territorial customary right to take *paua*.⁸³ It was held that a customary fishing right could exist independently of customary title to the land, just as at common law fishing rights can exist independently of ownership of the land.⁸⁴

In Australia, the situation is somewhat different in theory, although in some cases similar facts may lead to similar outcomes. The High Court has taken a 'normative' approach.⁸⁵ No distinction is made between aboriginal title and aboriginal rights. Rather, the doctrine of native title potentially encompasses both. The content of native title is determined by examining the customs and traditions of the claimant group.⁸⁶ This could amount to an interest in land tantamount to beneficial ownership (as in the *Mabo* case itself), or some lesser activity on land, such as hunting and fishing. Thus hunting or fishing rights could exist as an incident of a more compendious native title right. Importantly, however, the courts have continually reiterated the need for an 'ongoing connection with the land'.⁸⁷ Thus, while it is not necessary to establish an underlying title as such, an ongoing (probably) physical connection to the claim area is required.

Notably, however, since *Mabo (No 2)*, court decisions have continually narrowed the doctrine of native title so as to in reality only comprehend the middle part of the sliding scale identified by Lamer CJ.⁸⁸ On the one hand,

⁸¹ *R v Côté* (1996) 138 DLR (4th) 385 (SCC) at 400. See also *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC) at 333-334 (L'Heureux-Dubé J). To similar effect in the United States, see *United States v Winans* 198 US 371 (1905) and *Lac Court Oreilles Band v Voight* 700 F 2d 241 (1983).

⁸² *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 655 (NZCA).

⁸³ At the time, section 155 of the *Māori Affairs Act 1953* (NZ) prohibited claims against the Crown based on customary title to land. Therefore Te Weehi could not bring a territorial claim. That provision has since been repealed.

⁸⁴ *Te Weehi* [1986] 1 NZLR 680 (NZHC) at 690.

⁸⁵ *Members of the Yorta Yorta Community v Victoria* (2002) 194 ALR 538 (HCA) (hereinafter *Yorta Yorta*).

⁸⁶ See generally *Mabo (No 2)* (1992) 175 CLR 1 (HCA), particularly the judgment of Brennan J. The issue of proof has been significantly complicated by the provisions of the *Native Title Act 1993* (Cth).

⁸⁷ *Yorta Yorta* (2002) 194 ALR 538 (HCA).

⁸⁸ See, for example, *Western Australia v Ward* (2000) 191 ALR 1 (HCA).

Aboriginal rights not intimately connected with land would not be recognised as native title because they would most likely fail to meet the requirement of a connection to the land as required in the *Native Title Act* and as interpreted by the High Court in *Yorta Yorta*.⁸⁹ On the other hand, while the High Court has not ruled out the possibility of making determinations of exclusive possession, and hence a right to the land itself, it appears increasingly unlikely to do so.⁹⁰ Despite the differences between Australian and Canadian aboriginal rights jurisprudence, elements of both can be discerned in the *FSA*. The provisions for establishing rights are largely reflective of Canadian law, while the extinguishment provisions build upon the Australian 'inconsistency' test. This is, however, not surprising, as law relating to extinguishment is more developed in Australia. Section 35(1) of the Canadian *Constitution Act* has limited opportunities for common law development in this area.⁹¹ Section 50 of the *FSA*, for example, concerns applications for CROs.⁹² Before issuing an order, the Māori Land Court must be satisfied, *inter alia*, that:

the activity, use, or practice for which the applicant seeks a customary rights order—

- (i) is, and has been since 1840, integral to *tikanga Māori*;
- (ii) has been carried on, exercised, or followed in accordance with *tikanga Māori* in a substantially uninterrupted manner since 1840, in the area of the public foreshore and seabed specified in the application; and
- (iii) continues to be carried on, exercised, or followed in the same area of the public foreshore and seabed in accordance with *tikanga Māori*.

Thus the CRO provisions have what might be termed a 'combined Canadian/Australian approach'. The first requirement, of establishing 'activities, uses and practices ... carried on in accordance with *tikanga Māori* in a substantially uninterrupted manner since 1840' reflects the Australian normative approach and its requirement of an ongoing connection. Layered on to this is the Canadian requirement that those activities, uses and practices be 'integral' to *tikanga Māori*.

⁸⁹ *Native Title Act* 1993 (Cth).

⁹⁰ Of course the one case in which exclusive possession was granted is *Mabo (No 2)* (1992) 175 CLR 1 (HCA).

⁹¹ See, however, *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR. (3rd) 513; *Delgamuukw v R* (1993) 104 DLR (4th) 470 (BCCA), particularly the judgment of MacFarlane JA. These judgments imply that a higher threshold for extinguishment may be necessary in Canada. In *Delgamuukw*, two members of the British Columbia Court of Appeal considered that a grant in fee simple may not in all circumstances demonstrate sufficient clear and plain intention to effect extinguishment: at 532 (MacFarlane J), 670 (Lambert JA).

⁹² See also *Foreshore and Seabed Act 2004* (NZ), s 74, which is the parallel provision under which the High Court may make customary rights orders.

Section 32 defines territorial customary rights, and provides that:

- (1) In this Act, territorial customary rights, in relation to a group, means a customary title or an aboriginal title that could be recognised at common law and that—
- (a) is founded on the exclusive use and occupation of a particular area of the public foreshore and seabed by the group; and
 - (b) entitled the group, until the commencement of this Part, to exclusive use and occupation of that area.

Thus the territorial customary rights provisions incorporate a factual approach which is similar to that of the Canadian case law, in particular that of *Delgamuukw*.

Territorial Customary Rights Orders (TCRs)

Territorial customary rights are rights that would, at common law, have been called aboriginal or customary title. They are based on the exclusive occupation and use of a particular area of the public foreshore and seabed. Any group of Māori or non-Māori who can prove exclusive occupation and use, and meet the other criteria in the Act, can claim territorial customary rights.

In summary, the criteria that applications to the High Court must meet are:

- that the group has had exclusive occupation and use of the relevant area of public foreshore and seabed;
- that the group has occupied and used the area of the public foreshore and seabed without substantial interruption since 1840;
- that the group has had title to the land adjoining the area of foreshore and seabed (or a significant part of that area) since 1840 and continues to have title;
- that, in the past, the group has controlled entry and occupation of others to the area.

If the High Court makes a finding that a group would previously have had territorial customary rights, the applicant group can ask the court either to establish a foreshore and seabed reserve over the area or to refer this finding to the Attorney-General and the Minister of Maori Affairs who will enter into negotiations with the applicant group to discuss redress.⁹³

There are a number of problematic aspects of the TCR provisions. For present purposes, three are worth some brief consideration: the criterion of exclusive use and occupation; the requirement of continuous title to contiguous land; and the lack of redress under the Act for extinguishment of aboriginal title.

Exclusive Use and Occupation

What might constitute exclusive use and occupation of the foreshore/seabed? Section 32(1) specifies that territorial customary rights means a 'customary

⁹³ *Foreshore and Seabed Act 2004 (NZ)*, ss 32, 36, 37.

title or an aboriginal title that could be recognised at common law and that (a) is founded on the exclusive use and occupation of a particular area of the public foreshore and seabed. Exclusive use and occupation further requires a group to demonstrate that the area of the claim was used and occupied to the exclusion of all persons who did not belong to the group without substantial interruption since 1840.⁹⁴ In addition, spiritual or cultural association cannot found exclusive use and occupation unless that association is manifested in a physical activity or use related to a natural or physical resource.⁹⁵

The requirement of 'exclusive use and occupation' appears to be based on the Canadian 'factual approach' to aboriginal title.⁹⁶ This formulation was adopted despite the fact that it seems clear that the Crown proceeded on the assumption that territorial customary rights in the foreshore based on exclusive use and occupation were unlikely to form part of the common law.⁹⁷ This appears to have been mostly derived from a reading of the majority judgment of the High Court of Australia in *Commonwealth v Yarmirr*.

McHugh suggests that the fact that section 33 of the *FSA* allows for an order by the High Court that territorial customary rights would have existed but for the vesting of ownership should 'answer the recognition question in the affirmative' for New Zealand courts.⁹⁸ In other words, as a result of this provision:

A New Zealand court would reason that in enacting [section 33] Parliament was recognising the legal possibility of exclusive Maori ownership, and in that regard has provided for more than the common law by itself would have allowed.⁹⁹

In the end, the legislation incorporates a somewhat 'Kirby-like' understanding of exclusive use and occupation, the so-called 'qualified exclusivity' approach, by specifically providing that the right of a group to exclusive use and occupation of a particular area is not lost merely because rights of navigation have been exercised in the area.¹⁰⁰ However, this still leaves the question of what might, in this context count as exclusive use and occupation.

⁹⁴ *Foreshore and Seabed Act 2004* (NZ), s 32(2)(a). See also section 32(5), which further provides if the area over which the claim is made was at any time used or occupied by persons who did not belong to the claim group, the right is regarded as terminated unless those persons were there with permission or recognised the group's authority to exclude them.

⁹⁵ *Foreshore and Seabed Act 2004* (NZ), s 32(3).

⁹⁶ *Delgamuukw v British Columbia*, (1997) 153 DLR (4th) 193 at 256 (SCC); *R v Marshall*; *R v Bernard* (2005) 255 DLR (4th) 1.

⁹⁷ Brief of Evidence of McHugh dated 13 January 2004, in the Matter of the *Treaty of Waitangi Act 1975* and of Applications for an Urgent Inquiry into the Foreshore and Seabed Issues, WAI 1071; McHugh (2004a), p 160.

⁹⁸ McHugh (2004a), p 160.

⁹⁹ McHugh (2004a), p 160.

¹⁰⁰ *Foreshore and Seabed Act 2004* (NZ), s 32(4).

Some guidance may be gleaned from the recent decision of the Supreme Court of Canada in *Marshall*, albeit that this decision did not relate to the offshore. In *Marshall* the Supreme Court of Canada held that aboriginal title 'is established by aboriginal practices that indicate possession similar to that associated with title at common law'.¹⁰¹ It was further clarified that 'occupation' means physical occupation, determined by assessing the types of activities undertaken on the land, the size of the group, resources, the nature of the land and technological capabilities.¹⁰² Exclusive possession further connoted intention and capacity to retain exclusive control by the claimant group. The presence of other groups on the land was not necessarily fatal. This last requirement is reflected in section 32(5) of the *FSA*. Nevertheless, despite this, a claim would depend on whether the use and occupation demonstrated on the evidence was comparable to title at common law.

Despite the majority's determination that, in interpreting the requirement of 'exclusive use and occupation', both aboriginal and common law perspectives should be taken into account,¹⁰³ it seems that the common law understanding dominated. While McLauchlin CJ stated that 'possession at common law is a contextual, nuanced concept', she further stated that: 'In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out.'¹⁰⁴ The predominance of the European perspective did not escape the notice of the minority judges, LeBel and Fish JJ. LeBel J stated that:

In my view, aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights.¹⁰⁵

His Honour was concerned that, under the test propounded by McLauchlin CJ, nomadic and semi-nomadic groups would never establish aboriginal title,¹⁰⁶ although her Honour specifically did not foreclose this possibility.

Nevertheless, as all property lawyers know, a wide spectrum of use will found an adverse possession claim at common law. In fact, every year most of us give our students' examples of what can found sufficient possession for such a claim, including examples such as *Red House Farms* in which shooting

¹⁰¹ *R v Marshall* (2005) 255 DLR (4th) 1 at 22 (McLauchlin CJ, Major, Bastarache, Abella and Charron JJ).

¹⁰² *R v Marshall* (2005) 255 DLR (4th) 1 at 21, quoting from *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 256 (SCC) (Lamer CJ).

¹⁰³ *R v Marshall* (2005) 255 DLR (4th) 1 at 20.

¹⁰⁴ *R v Marshall* (2005) 255 DLR (4th) 1 at 25.

¹⁰⁵ *R v Marshall* (2005) 255 DLR (4th) 1 at 43-44 (Fish J concurring).

¹⁰⁶ *R v Marshall* (2005) 255 DLR (4th) 1 at 43 (LeBel J).

over marshy land which was unsuitable for agriculture was enough to found an adverse possession claim.¹⁰⁷ We also tell students that use can in certain circumstances be intermittent or peripatetic. Evidence of use of part may be evidence of the whole. This is in keeping with the decision in *Delgamuukw*, in which the court stated that 'regular use of definite tracts for hunting, fishing or otherwise exploiting its resources' may show physical occupation.¹⁰⁸ Given that it has been emphasised that the *FSA* is a new statutory jurisdiction, even if it is claimed that it is also a codification of the common law, it is certainly open to the High Court to construct a contextual test for 'use and occupation', which interweaves the perspectives of both the common law and *tikanga*. In the particular context of the foreshore, one could argue that regular definite use of the foreshore for fishing, gathering and other activities should be enough to found title. However, if this were so, admittedly the dividing line between a TCR based on such activities and a CRO (non-territorial right) based on such activities becomes blurred. This may be the inevitable result of incorporating a strict dichotomy between territorial and non-territorial rights into the Act, rather than the more nuanced sliding scale of the Canadian approach.

Most difficult, however, is the requirement that the use and occupation be exclusive. This is particularly problematic in light of the fact that, until recently, it was assumed (at least by the Crown) that it owned the foreshore. In light of this assumption, it acted as owner — even granting freehold estates to private individuals in a number of locations. Further, given the ruling in the *Ninety-Mile Beach* case, few attempts were made to claim the foreshore or to maintain exclusivity. This requirement of exclusivity is required have been maintained without substantial interruption from 1840 to 2004. In light of these assumptions about ownership, it is suggested that few will be able to meet this criterion.

Continuous Title to Contiguous Land

Section 32(2)(b) of the *FSA* states that 'a group may be regarded as having exclusive use and occupation of land of an area of the foreshore and seabed only if ... the group had continuous title to contiguous land'. Contiguous land is defined in section 36(2) as:

any land that is above the line of mean water springs and that —
(a) is contiguous to the area of the public foreshore and seabed in respect of which the application is made or to any significant part of that area; or

¹⁰⁷ *Red House Farms (Thorndon Ltd) v Catchpole* [1977] 244 *Estates Gazette* 259. This case was actually referred to by McLachlin CJ in her judgment in *R v Marshall* (2005) 255 DLR (4th) 1 at 22. See also *Cadija Unmar v S Don Manis Appu* [1939] AC 136 (cutting and selling of grass from swampy land).

¹⁰⁸ *Delgamuukw v British Columbia*, (1997) 153 DLR (4th) 193 at 256 (SCC) at 256 (Lamer CJ, Cory, Major JJ). While McLachlin CJ acknowledged this in *Marshall*, she was of the opinion that hunting and fishing or other resource-gathering would 'more typically translate into a hunting or fishing right': *R v Marshall* (2005) 255 DLR (4th) 1 at 23.

- (b) would, but for the presence of any of the following kinds of land be contiguous to that area or any significant part of that area ...¹⁰⁹

For the purposes of section 32(2), continuous title to contiguous land requires the land to have been at all times, since 1840, held by the applicant group or any of its members. That title can have been held in any form.

This section did not exist in the original Foreshore and Seabed Bill. Clause 28 of the Bill simply required that the rights of the group had to be able to be recognised as customary rights at common law and amount to a right of exclusive use and occupation at common law.¹¹⁰ The basis on which the requirements for a TCR were modified prior to the final form of the Bill is unclear. It seems unlikely that it was on the basis of political compromise. The contiguous land provision is quite technical and the compromises made public were generally more concerned with how to express Crown ownership of the foreshore than with the detail of the claims provisions. However, it does appear that some legal advice given to the Crown supported the contiguous land provisions. For example, in his submissions to the Select Committee, Paul McHugh stated that:

The continuous ownership and control of land fronting the sea would likely be a necessary but not sufficient condition for a TCR. The High Court may (or may not) set a standard for 'exclusivity' over and beyond that, bearing in mind the need to ensure that the TCR and CRO provisions have as much operative scope as possible.

...

Under both the Canadian and Australian approaches, as well as a synthesised approach, continuous and continued ownership of contiguous land would surely be set by the High Court as a necessary though perhaps not sufficient condition for a TCR. The Committee should consider making this aspect clearer, not least to give a consistent bottom line for court set standards ... and negotiations ... The High Court may set a higher probative threshold beyond contiguous ownership.¹¹¹

Despite criticism from many Māori and Green Party MPs, the contiguous land provisions were included in the final Act. Unfortunately, it is not clear in these submissions where exactly in common law jurisprudence the contiguous

¹⁰⁹ The exceptions in section 36(2)(b) include, *inter alia*, esplanade reserves, Māori reserves, roads, railway lines: see *Foreshore and Seabed Act 2004* (NZ), s 36(2)(b)(i)–(vi).

¹¹⁰ Foreshore and Seabed Bill 2004, cl 28(b).

¹¹¹ Submissions by Dr Paul McHugh to the Select Committee Hearing of the Foreshore and Seabed Bill (August 2004) The Fisheries and other Sea-related Legislation Committee, 'The Foreshore and Seabed Bill (129-1) presented 4/11/2004', www.clerk.parliament.govt.nz/publications/committeereport, pp 54, 57.

land provisions have been derived. In his submission, McHugh has further suggested that:

Under the fact-based [Canadian] approach, it would be impossible to contemplate situations other than this [where indigenous people have ownership of coastal land adjoining the claim areas] giving rise to a TCR, since proof of *de facto* exclusivity and control of access will be too difficult to establish without ownership of contiguous land.¹¹²

On a practical level, McHugh has a point. Without good access to the coastal areas claimed, it may be difficult for claimants to establish the required level of occupation or possession for a TCR. However, with respect, this confuses evidential matters with legal principle. The level of control or occupation is an evidential matter, to be raised before the court. It is not, and has never been, a common law principle and to enshrine it in the *FSA de facto* raises it to this level by making it a necessary precondition to establishing title. In fact, not only are the contiguous title provisions not derived from common law jurisprudence, but they appear to be in out of step with the Court of Appeal's decision in *Ngāti Apa*. In that case, the Court of Appeal overturned that particular part of the decision in *In Re Ninety-Mile Beach*, where it was held that customary rights to the foreshore were extinguished once an investigation into the title of bordering land had been determined.¹¹³ In *Ngāti Apa*, Elias CJ stated that:

An approach which precludes investigation of the fact of entitlement according to custom ... because the sea was used as a boundary for individual titles on the shore is wrong in law.¹¹⁴

Elias CJ further stated that:

Just as the investigation through the Māori Land Court of the title to customary land could not extinguish any customary property in contiguous land on shore beyond its boundaries, I consider that an investigation and grant of coastal land cannot extinguish any property held under Māori custom in lands below the high water mark. Whether there are any such properties is a matter for the Māori Land Court to investigate in the first instance as a question of *tikanga*. On the facts it may be that where the sea was described as the boundary for land sold or in respect of which a vesting order was obtained, any inference can be drawn that the customary interest of the seller or grantee is exhausted ... That is a matter of fact for the Māori Land Court to consider.¹¹⁵

¹¹² McHugh (2004a), p 185.

¹¹³ *In Re Ninety-Mile Beach* [1963] NZLR 461 (NZCA) at 473 (North J).

¹¹⁴ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 669 (Elias CJ).

¹¹⁵ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 669 (Elias CJ).

The contiguous land provisions create significant hurdles for many *iwi*. Their effect is to act as a *de facto* extinguishment of title in circumstances where adjoining coastal land has passed out of Māori ownership. A significant portion of coastal land has been alienated. Despite this, local *iwi* may, as a matter of practice, still have had access to the foreshore and be continuing traditional practices in the area, and should not therefore be disentitled from at least making a claim simply because of the possible difficulties of meeting the proof threshold.

Current debate lies around the effect of the word 'significant' in section 32(6)(a). To reiterate, that section provides the definition of 'contiguous', and requires continuous title to land contiguous to the claim area, 'or to *any significant part* of that area'.¹¹⁶ The Act does not, in turn, define 'significant' and a number of interpretations are open to the High Court. The most obvious is that 'significant' means 'considerable' in a geographic sense — in other words, that the claimants must have title to 'most' or 'much' or 'quite a lot of' or a 'sizeable amount' of the contiguous foreshore. Exactly how this will be quantified is unclear, but it does leave scope to the courts to develop a test which may in part mitigate the harshness of this provision. Presumably, what is meant by 'significant' will, in any case, vary depending on the facts of the case at issue.

The other interpretation is that 'significant' means important in the sense of valuable. In this context, significant could mean *wāhi tapu* areas and other areas of cultural importance. In fact, it appears that some *iwi* sensibly intend to take a combined approach, arguing title to an amount of contiguous land, some of which is extremely culturally important. It is similarly open to the High Court to develop an interpretation of this provision which takes both ideas of 'significant' into account. One would hope, in the light of the somewhat questionable ancestry of these provisions, that courts would lean towards an interpretation of 'significant' which in some way goes to mitigate their otherwise potentially harsh effects.

Redress

Perhaps one of the most unfortunate parts of the legislation is the fact that there is no guarantee of compensation once an order recognises that territorial customary rights would have existed had it not been for the legislation. Section 38 specifically provides that no redress is possible other than that given by the Crown. Rather, the legislation provides that the High Court may make an order referring a finding of territorial customary rights to the Attorney-General and Minister of Māori Affairs (section 36). Section 37 further provides that:

the Ministers must enter into discussions with the applicant group for the purpose of negotiating an agreement as to the nature and extent of the redress to be given by the Crown in recognition of the finding of the High Court.

¹¹⁶ Emphasis added.

The legislation neither mandates the way or manner in which redress is to be given, nor the form of that redress. Further, it does not mandate that compensation be given. As intimated above, even in Australia — notably a conservative native title jurisdiction — claims for compensation can be made in all cases of extinguishment. The March 2006 report of the Special Rapporteur singled out the lack of redress under the *FSA* as a ground of criticism.¹¹⁷

A group that would rather enter into negotiations with the government directly can request that the Minister of Māori Affairs and the Attorney-General enter into discussions. Any agreements reached will need to be confirmed by the High Court as meeting the criteria for territorial customary rights.

Undoubtedly, as a result of settlements made as a result of reports of the Waitangi Tribunal, there is much expertise to be drawn upon in determining claims for redress. However, if compensation is to be given for extinguishment of aboriginal title, this brings into play a potentially different array of principles and need for a mechanism to determine how to value that aboriginal title. This is, of course, an area which has proven problematic in Australia.

Non-territorial Customary Rights Orders (CROs)¹¹⁸

In summary, in order to establish a CRO, the claimants must show that there is a relevant activity, use or practice which:

- is, and has been since 1840, integral to *tikanga Māori*; and
- relates to a physical activity or use related to a natural or physical resource; and
- has been exercised in a substantially uninterrupted manner since 1840; and
- continues to be exercised today in the same area of public foreshore and seabed; and
- is not prohibited or extinguished by law.¹¹⁹

The CRO provisions are clearly drafted on the understanding that CROs will be granted with respect to small-scale, physical site-specific activities such as gathering and *waka* (canoe) landing. These provisions are hugely complex, and encompass a number of problematic requirements. Only a few can be covered here.¹²⁰

¹¹⁷ Stavenhagen, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (2006), para 51.

¹¹⁸ For a more in-depth discussion of how the CRO provisions in particular might be interpreted, see Dorsett and Godden (2005). This section is drawn in part from that work.

¹¹⁹ *Foreshore and Seabed Act 2004* (NZ) ss 49(2), 50, 51.

¹²⁰ For a critique of other matters, in particular the requirement in section 50(b)(i) that the activity, use or practice for which a customary rights order has been obtained must have been carried on 'in a substantially uninterrupted manner since 1840', see Dorsett and Godden (2005) and McNeil (2006).

Limits to What Can be Claimed

It is, of course, at this stage unclear what kinds of rights will be recognised under section 50. There are few clues in the Act as to the potential content of a CRO. However, given the language of 'activity, use or practice' and the requirement of a physical manifestation, it seems likely that a similar range of rights to those recognised in Australian offshore native title cases will be encompassed by the provision. The wording of the section immediately conjures a 'listing' or 'bundling' approach to the recognition of rights.¹²¹ The problem with the bundling approach or the 'site-specific' approach, of course, is that it reflects a Western common law understanding of property rights.¹²² Access rights generally, and to *wāhi tapu* — in particular, the right to gather some coastal flora, possibly some rights to take sand, rights of navigation and landing, for example — all seem likely to be recognised. In fact, this is a similar list to the native title rights recognised in the Australian decisions of *Yarmirr* and *The Lardil Peoples*.¹²³

If the Act does not provide much information as to what might be included in a CRO, it does specify a number of activities that cannot be included. In fact, the possible ambit of CROs is drastically limited by section 49 of the *FSA*. A notable exclusion is that a CRO cannot include commercial or non-commercial fishing rights as covered sections 9 and 10 of the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*.¹²⁴ More problematically, however, a CRO also cannot include any activity, use or practice regulated by or under the *Fisheries Act 1996*.¹²⁵ This latter exclusion considerably narrows the range of rights that can be recognised. The *Fisheries Act* covers not just the obvious — fishing — but also, for example, gathering activities, such as the taking of seaweed.¹²⁶ Protected wildlife and marine mammals are excluded by section 49(1)(c). The result is that those rights which can be the subject of a CRO are considerably narrower than the rights which may be the subject of a native title determination in Australia.

'Integral'

Section 50(b)(i) requires that the 'use, activity or practice' for which the applicant seeks a customary rights order 'is, and has been since 1840, integral to *tikanga Māori*'. Thus it is not sufficient that it be shown that the use, activity or practice is *tikanga Māori*, but it must in addition be a use, activity

¹²¹ This accords with the description of aboriginal rights given to the Waitangi Tribunal by McHugh (2004b), p 52.

¹²² For a discussion of how native title rights are framed against the parameters of Western property concepts, see Godden (2003).

¹²³ See the trial judges determination *Yarmirr v Northern Territory* (1998) 156 ALR 370 (FCA) (Olney J); *Lardil People* [2004] FCA 298.

¹²⁴ *Foreshore and Seabed Act 2004* (NZ), s 49(1)(a)(i) and (ii).

¹²⁵ *Foreshore and Seabed Act 2004* (NZ) s 49(1)(b).

¹²⁶ Interestingly, it appears that, although the drafters of the legislation did intend to exclude fishing rights, a few unintentional gaps may exist. It appears, for example, that whitebait, a favoured delicacy in New Zealand, may still be claimed.

or practice which is integral to *tikanga*. This begs the question of how one distinguishes between something 'integral' and the rest — presumably peripheral.

The 'integral' test clearly comes from Canadian jurisprudence and is, one might argue, entirely inappropriate in the New Zealand context. While it is true that the various judgments in *Ngāti Apa* did not enter into the specifics of customary title, the Court of Appeal simply stated that customary rights were based custom and usage.¹²⁷ There is no indication in the judgment of any criteria which resembles the 'integral' requirement in section 50(b)(i). The 'integral test' is, of course, drawn from cases on section 35(1) of the *Canadian Constitution Act 1982*, the section which protects existing aboriginal rights. There is no similar protection or provision in New Zealand. It is always problematic to import tests which have arisen in a particular context to another jurisdiction. In Canada, this test is designed to identify practices which are 'core' or 'central' to an aboriginal society. Only these practices deserve constitutional protection under section 35(1). As Lamer CJ stated in formulating this test in *Van der Peet*, the Supreme Court cannot 'ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society'.¹²⁸ According to *Van der Peet*, the 'integral to the distinctive culture' test is 'directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans'.¹²⁹ Such practices must be 'significant and fundamental'.¹³⁰ They must be connected with the self-identify and self-preservation of the claimants' aboriginal society.¹³¹ If interpreted in this manner, the requirement of 'integral' clearly functions as a limit on what can be claimed. When read in conjunction with the exclusion provisions of section 49, it is particularly problematic. It is notable that the test has received strong criticism in Canada itself.¹³²

According to section 50(1)(b)(i), not only must the activity, use or practice be integral to *tikanga Māori*, but it must also have been integral since 1840. Thus, a connection is required between the activities, practices and acts undertaken today and those undertaken in 1840. How closely must the right claimed now be identifiable with activities, uses and practices undertaken 140 years ago? Can these activities and practices have evolved and changed, as

¹²⁷ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 656, 660 (Elias CJ).

¹²⁸ *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC) at 300 (Lamer CJ, La Forest, Sopinka, Gonthier, Cory, Lacobucci and Major JJ).

¹²⁹ *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC) at 310. See also *R v Gladstone* (1996) 137 DLR (4th) 648 (SCC); *R v NTC Smokehouse* (1996) 137 DLR (4th) 528 (SCC).

¹³⁰ *R v Pamajewon* [1996] 2 SCR 821 (SCC) at 839 (L'Heureux-Dubé).

¹³¹ *R v Pamajewon* [1996] 2 SCR 821 (SCC) at 839.

¹³² In this context, see Kent McNeil's critique (forthcoming 2006) of both of the 'integral' test itself, and the use of the term 'integral' in section 50. See also Borrows (1997); Morse (1997); Chienhan Cheng (1997).

they will inevitably have done as a response to the impact of colonialism? Or are Māori claimants limited to claiming essentially pre-contact practices? If it can be recognised that cultures evolve, change and adapt over time, to what extent can this have occurred? This is, of course, an issue which has been before courts both in Australia and Canada. In neither jurisdiction have the results been particularly encouraging for claimants.¹³³

The connection between pre-contact practices and modern activities which underpins the 'distinctive to the integral culture test', as well as the 'integral' requirement itself in the *Foreshore and Seabed Act*, means that the approach taken to characterising the modern right is crucial. Obviously, what can be recognised depends on the approach taken to the initial characterisation. Generally, Canadian courts undertaking this characterisation begin with the modern rights, and seek to not only find a similar set of practices rooted in the past, but also to show that these practices were integral or central to the distinctive culture of the group.¹³⁴ By starting with the modern right and then trying to find evidence of that right being practised in the past, it is almost guaranteed that the claim will fail. As Brad Morse has stated, the exercise becomes 'a judicial assessment of historical, sociological and anthropological evidence of what constitutes an integral, central, significant, defining or distinctive part of a culture that was freeze-dried at the time of contact with Europeans'.¹³⁵

The problems of the 'frozen in time approach' have been acknowledged judicially in New Zealand. In the *Taranaki Fish and Game Council case*, the issue arose as to whether the taking of a species of fish (trout) which was introduced post-1840 could be a Māori fishing right.¹³⁶ This case has similar facts to that of *Te Weehi*. A Māori fishing right was argued as a defence to breach of the *Conservation Act 1987* (NZ), namely taking sport fish during an open season without a licence to so do. Beecroft J held that a wide interpretation must be given to the idea of Māori fishing rights, as aboriginal rights are 'virtually synonymous' with rights under the Treaty of Waitangi. Thus aboriginal and treaty rights were to be interpreted and applied down the ages in accordance with the treaty's principles.¹³⁷ In that case, however, the *Conservation Act* did specifically state that the Act shall be interpreted and administered so as to give effect to the principles of the treaty (section 4), a provision notably missing from the *Foreshore and Seabed Act*. In the course of his judgment, Beecroft J did acknowledge that 'in my view "aboriginal rights" have been interpreted and construed more strictly. They are arguably more easily "frozen in time" than treaty rights which are "living" and take into

¹³³ See generally McNeil (forthcoming, 2006); Borrows (1997); Morse (1997); Chienhan Cheng (1997).

¹³⁴ See *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC); *R v Gladstone* (1996) 137 DLR (4th) 648 (SCC).

¹³⁵ Morse (1997), p 1031.

¹³⁶ *Taranaki Fish and Game Council v Richie* [1997] DCR 446 (Beecroft J).

¹³⁷ *Taranaki Fish and Game Council v Richie* [1997] DCR 446 at 464.

account development and change since the treaty was signed.¹³⁸ His Honour also noted, however, that 'there is strong obiter comment from the Court of Appeal in the *Muriwhenua* case to the effect that for practical purposes there is little difference between the rights'.¹³⁹ It may be, therefore, that the effect of Treaty jurisprudence will, indirectly if not directly, influence the courts towards a more generous outcome in New Zealand than that which has characterised courts in Australia and Canada.¹⁴⁰

Extinguishment

In any CRO application, the final step of the 'proof stage' is that the activity, use or practice claimed must not be 'prohibited by any enactment or rule of law'.¹⁴¹ If an activity, use or practice has been prohibited, then it is effectively removed from the 'factual matrix' that is being claimed as a CRO. The phrase 'enactment or rule of law' is broad. It covers not only legislation and regulations, but the common law or equity. Problematically, regulatory prohibitions on takings under conservation legislation are potentially caught by this subsection. While this inquiry is not, strictly speaking, one into extinguishment, but rather proof, the reality is that it functions as an extinguishment test. Any activity prohibited by an enactment or rule of law cannot be claimed. Thus, if the taking of a particular type of seaweed is prohibited by regulation, then it falls out of the factual matrix which constitutes the CRO. This has the potential to place considerable further restrictions on claimable rights. As a matter of principle, it is also a flawed proposition. Prohibiting something by regulation is not necessarily a permanent matter. Prohibitions for reasons of conservation, for example, can be — and are — lifted. Yet, if the prohibition exists at the time of the CRO application, the right is excluded rather than merely regulated. Should the prohibition be lifted in the future, this would have no effect on the CRO. It would not include that right. It is also problematic insofar as the line between regulation and prohibition is often not clear. Would, for example, a regulation which prohibits the taking of driftwood between May and September each year fall within this section? The issue of regulation versus extinguishment is one

¹³⁸ *Taranaki Fish and Game Council v Richie* [1997] DCR 446 463.

¹³⁹ *Taranaki Fish and Game Council v Richie* [1997] DCR 446.

¹⁴⁰ For Australia, see *Yanner v Eaton* (1999) 166 ALR 258 (HCA) in which the majority of the High Court did allow a defence of exercising a native title right to a charge under the then *Fauna and Flora Act* (Qld). The majority held that the taking of a juvenile estuarine crocodile with a spear gun and using a fuel-powered motor boat could be the exercise of a traditional native title right. See, however, the comments of Callinan J in *Yorta Yorta*: 'The matter [of how far custom may evolve] went uncontested in *Yanner v Eaton*, although I myself may have questioned whether the use of a motorboat powered by mined and processed fuel, and a steel tomahawk, remained in accordance with a traditional law and custom, particularly one of alleged totemic significance.'; *Yorta Yorta* (2002) 194 ALR 538 (HCA) at 592.

¹⁴¹ *Foreshore and Seabed Act 2004* (NZ), s 50(1)(b)(iv).

that has been considered by courts in both Canada and Australia. In Canada, the Supreme Court has held that regulation does not constitute extinguishment, while in Australia there is no definitive determination on the matter. Nor is one necessarily possible. As Gummow J has pointed out, the matter is one to be determined on a case-by-case basis.¹⁴² The *FSA* appears to be predicated on the view that prohibition at least does extinguish, thus determining a matter still under consideration by courts in other jurisdictions.¹⁴³

The actual extinguishment provisions are in section 51. Thus, even if the claimants survive the barrier posed by section 50(1)(b)(iv), an examination must then be made to ensure that the rights have not been extinguished. As a prerequisite to the granting of a CRO, the Māori Land Court must be satisfied that the right to carry on or follow the activity, use or practice has not been extinguished as a matter of law.¹⁴⁴ This provision appears to be based on the Australian 'legal inconsistency' approach. Section 51(2)(a), (c) provide that the right to carry on activities, uses or practices, which are in turn to be relied upon to establish customary rights, have been extinguished where:

- (a) legal title has been vested by any means in a person or group other than the whānau, hapū or iwi on whose behalf the order is sought; or ...
- (c) an interest has been established that is legally inconsistent with the activity, use, or practice for which the customary rights order is sought.

It is the issue of extinguishment on which the *Ngāti Apa* court gave the most guidance as to how a common law doctrine of aboriginal title might look in New Zealand. Keith and Anderson JJ held that, as in the United States and Canada, the standard for extinguishment is any intention to so do must be clear and plain.¹⁴⁵ Further, the onus is on the Crown to show that there is a clear and plain intention to extinguish.¹⁴⁶ Their Honours went on to confirm, for example, that the vesting of title to the territorial sea, contiguous zone and exclusive economic zone in the Crown by legislation did not extinguish, as there was no clear and plain legislative intention to so do.¹⁴⁷ However, it seems that, as in Australia, that clear and plain intention may be determined by inconsistency between the customary right and the Crown-derived interest.¹⁴⁸

¹⁴² *Yanner v Eaton* (1999) 166 ALR 258 (HCA) at 289. For a strict view of the effect of regulation and prohibition, see *Western Australia v Ward* (2000) 191 ALR 1 (HCA) at 230 (Callinan J).

¹⁴³ Of course, arguments will undoubtedly be made as to what is meant in section 50(1)(b)(iv) by 'prohibition'.

¹⁴⁴ *Foreshore and Seabed Act 2004* (NZ), s 50(1)(c).

¹⁴⁵ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 684.

¹⁴⁶ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA).

¹⁴⁷ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 688.

¹⁴⁸ This approach would, however, seem to be contrary to the earlier decision of the High Court in *Faulker v Tauranga District Council* [1996] 1 NZLR 357 (HC), in

Keith and Anderson JJ use the language of inconsistency, albeit in a passing reference, while Elias CJ confirmed that the grant of a freehold title would extinguish any pre-existing Māori customary property interest with which it was inconsistent.¹⁴⁹ Her Honour stated that:

whether any such [customary] interests have been extinguished is a matter of law. Extinguishment depends on the effect of the legislation and actions relied upon as having that effect.¹⁵⁰

As is the case with the common law test in Australia, and in keeping with the above comments by Elias CJ, the extinguishment provisions contained in section 51(2) of the *Foreshore and Seabed Act* emphasise that it is *legal* interests, rather than *factual* circumstances, which extinguish customary rights.¹⁵¹ Section 51(2) provides a (non-exhaustive) list of ways in which legal title may have been vested in relation to the area of the foreshore and seabed in the application, thus extinguishing the activity, use or practice on which the application is based. These include Crown grant, common law, statutory vesting or administrative action. It is accepted in overseas jurisdictions that extinguishment can occur because of either Crown grant or statutory vesting. However, the references to common law and administrative action are, as McHugh has commented, 'mysterious'.¹⁵² In particular, the reference to 'administrative action' is concerning. Most administrative action which is accepted in other jurisdictions to extinguish native title should be caught already by the provision that the Crown grants extinguish customary rights. This subsection, if interpreted liberally, could allow the Crown to extinguish by administrative action in situations in a wide range of situations which would not amount to extinguishment at common law. In combination, sections 51(1) and 51(2) potentially create a more draconian extinguishment regime than exists in either Canada or Australia. Much will depend on the evidentiary threshold levels established by the courts in relation to these provisions.

Finally, section 51(2)(c) further provides that an activity, use or practice will be extinguished if an interest has been established with which it is legally

which it was stated that: 'It is well settled that customary title can be extinguished by the Crown only by means of a deliberate Act authorised by law and unambiguously directed towards that end.' (at 363, Blanchard J)

¹⁴⁹ *Faulker v Tauranga District Council* [1996] 1 NZLR 357 (HC) at 688 (Keith and Anderson JJ), at 662 (Elias CJ).

¹⁵⁰ *Ngāti Apa* [2003] 3 NZLR 643 (NZCA) at 660.

¹⁵¹ See *The Wik Peoples v Queensland* (1996) 141 ALR 129 at 190 (HCA). Extinguishment by factual circumstance is, however, as indicated above, provided for in the *Foreshore and Seabed Act 2004* (NZ), ss 50(1)(b)(iv) and 51.

¹⁵² McHugh (2005), p 28. It is unclear what is comprehended by 'common law'. One possibility is adverse possession. While no claim can now be brought for adverse possession of a foreshore area (section 24), any claim previously made and finalised would presumably be covered by either section 51(2)(a)(ii) 'common law' or section 51(2)(a)(iv) 'administrative action' (covering the transfer of title to the adverse possessor).

inconsistent. This seems to be a 'catch-all' provision, as it is hard to imagine what interests could fall under this section that would not already have been covered by section 51(2)(a). The *Foreshore and Seabed Act* has no definition of legally inconsistent. While the notion of 'legally inconsistent' may appear straightforward, it has not proved always to be in Australia. Although interests which establish rights of exclusive possession are considered to be legally inconsistent,¹⁵³ the Australian High Court has developed a significant jurisprudence with respect to lesser interests — in other words, those which do not necessarily carry exclusive possession.¹⁵⁴ Thus it seems likely that the courts will pay significant attention to the common law tests for extinguishment, particularly the Australian 'inconsistency test', in interpreting section 50.

Section 51 arguably incorporates a greater range of extinguishing events than would be acknowledged at common law in either Australia or Canada. There is in addition considerable overlap between both the provisions in s 51(2) and (3), as well as with the earlier provisions which are designed to remove rights from the factual matrix. As a direct result of the inclusion of s 51(2)(c), and as further result of the fact that it is unclear in what circumstances some of the subsections in 51(2)(a) are intended to operate, the common law test for extinguishment may provide an important guide to interpreting this provision.

CROs versus TCRs: The State of Play

To date, all claims lodged have been for CROs. No claims have been lodged in the High Court for TCRs. Five CRO applications have been filed with the Chief Registrar of the Māori Land Court. They are all in various, early stages of proceedings. Already, however, these applications show that claimants will seek to 'stretch' the restrictive wording of the legislation. The first application by Whakatohea from the eastern Bay of Plenty was lodged in April 2005, and relates to a 40 kilometre stretch of coastline between Te Horo and Te Rangi, near Whakatane in the North Island. At the time of writing this claim remains the most advanced and has passed the interlocutory stage, in which the Chief Judge reviews the claim to see whether it complies with the Act and whether it is ready to proceed to public notification. The deadline for objections has just closed. Ten objections were received — primarily from commercial organisations and several Crown agencies. This first claim has sought to extend the boundaries of the statutory language of the Act, as it includes claims for *rangātiratanga* and *kaitiakitanga*.¹⁵⁵ While it is encouraging that

¹⁵³ *The Wik Peoples v Queensland* (1996) 141 ALR 129 at 190 (HCA); *Fejo v Northern Territory* (1998) 195 CLR 96.

¹⁵⁴ *Western Australia v The Commonwealth (The Native Title Act case)* (1995) 183 CLR 373 at 422. See also *The Wik Peoples v Queensland* (1996) 141 ALR 129 at 190 (HCA) and *Fejo v Northern Territory* (1998) 195 CLR 96.

¹⁵⁵ *Rangātiratanga* is derived from *rangatira* (chief) and *tanga* (indicating an abstract noun). Thus it is literally 'chieftainliness', but can refer to sovereignty, autonomy,

these claims have passed interlocutory stage, only now — seven months after lodging — can the claimants begin to build their case.

While a few claims were clearly lodged very quickly after the legislation came into force, there was generally a period of 'down time' in which *iwi* and their lawyers struggled with the uncertainties that riddle the Act. In the near future, a number of new CRO applications will certainly be filed. Most will contain claims for *rangātiratanga* and *kaitiakitanga*, and claims will likely continue to do so until such time, if ever, that the Māori Land Court (or a higher appeal body) rules these out. Some *iwi* will hold off to see how the early claims fare, and how they are argued, and some will make claims because they don't want to be 'left behind', especially if claims are made by neighbouring *iwi*.

Why have all claims lodged so far been for CROs? The obvious answer may seem to be that it is because TCR claims are too difficult — the claimants face too many hurdles. Like any native title type claim, they take forever to prepare. Yet the view amongst *iwi* and their lawyers is that the complexity of the provisions is not a particular deterrent. As most of us know, native title/aboriginal rights claimants and lawyers are creative, and generally not put off by complex claim procedures. Māori and their lawyers are no different. As one person put it to me informally: 'It's not because its too complex — if it was worth it we'd have figured it out and would be doing it.'

Rather, CRO applications are being preferred largely because they are cheaper. An application to the Māori Land Court requires a form and a filing fee of less than \$100. No supporting affidavits are needed. Lawyers are familiar with the procedures, and there is no need to brief Counsel. In contrast, High Court applications cost far more in terms of court filing fees and the requirement of supporting affidavits. In addition, smaller firms would probably have to brief Counsel. Legal aid for either process is highly doubtful. Many law firms do not expect to make much money at all from CRO or TCR claims. Given the lack of legal aid, some firms will end up taking on cases for long-standing clients virtually pro bono. From this perspective, putting a CRO through the Māori Land Court is less concerning for clients than committing themselves to the financial risk of High Court proceedings. CRO applications are also seen as a 'lower risk' first step to a later TCR application. If certain rights can be established, these can be used as a basis for a later, larger application. Having a CRO does not preclude later applying for a TCR determination.

Perhaps the main reason why TCR applications are not being lodged with the High Court is that there is still a lot of uncertainty about whether any real advantage is to be gained. Simply put, what do you get that is worth having? After all, the end of the process is not a recognition of territorial customary rights — there is simply the possibility of negotiation with no guaranteed redress. Given that initial applications may well go all the way to the Supreme Court, such an application constitutes a high financial commitment with no

self-government. *Kaitiakitanga* encompasses notions of stewardship, custodianship and guardianship.

certainty about what the financial outcome might be. Many groups who might be in a position to claim a TCR are already in negotiation with the government as part of the Waitangi Tribunal settlement process, and foreshore/seabed issues can simply be factored into those negotiations.

Given the uncertainty as to the TCR process, the emerging strategy is to go directly into negotiations. The Department of Justice has a Foreshore Group which is handling negotiations on behalf of the government. Thus groups will negotiate with government over what redress might look like and, if this is worthwhile, embody this in a recognition agreement, which is then ratified by the court. This makes considerable financial sense. *Iwi* can get a sense of what the government would be willing to consider as redress before the process begins, not at the end of expensive litigation. They still have to show that their claim meets the criteria, but only after they know 'what it is worth'. Thus, in some ways, the absence of applications to the High Court is a little deceptive. Groups are interested in pursuing them, but are doing so quietly behind the scenes. Examples of groups choosing this route are Ngāti Porou and Whānau a Apanui who still have much coastal land, and probably the strongest chance of success. It is likely that this will become the default practice for TCR applications.

Conclusion

The *FSA* is a potentially draconian piece of legislation. It sets standards for proof of territorial and non-territorial rights which are stricter than the common law that the Act supposedly codified. In particular one could point to the contiguous land provisions in the context of TCRs. With respect to CROs, there are layered extinguishment tests, problems of what is meant by 'integral' and the simply vast exclusions from the ambit of what can be claimed. As to the current applications, they will take a long time to proceed through the Māori Land Court. And presumably they will be appealed all the way to the Supreme Court. Anyone who has been involved in native title/aboriginal rights claims knows how long and expensive the process can be. This new statutory system will be no different. However, it does seem that New Zealand may have much to offer the growing body of Commonwealth Aboriginal rights jurisprudence in the not too distant future.

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