A POLITICALLY FUELLED TSUNAMI:
THE FORESHORE/SEABED CONTROVERSY
IN AOTEAROA ME TE WAI POUNAMU / NEW ZEALAND

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In New Zealand, on 19 June 2003, the Court of Appeal released its most significant decision on native title: *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (Elias CJ, Gault P, Keith, Tipping, Anderson JJ). It indicated, to the horror of the Government and the public majority, that Māori should be allowed the opportunity to prove, in New Zealand courts, their customary ownership of foreshore and seabed. Described as a “tsunami”, the decision polarised the country. The Government, in its attempt to find a “win-win solution”, announced it would legislate to ensure that Māori never hold exclusive title in the foreshore and seabed. Facing an inevitable redefinition of native title, the decision of the Court of Appeal, and the Government’s reaction to it, form the discussion of this article.

AOTEAROA/NEW ZEALAND: OUR IMAGE

To the public majority, New Zealand is thought to have an enviable reputation on indigenous issues. New Zealand is positively portrayed as a clean green country where the peoples live together in harmony, embracing Māori culture as one people, proud of their haka and pounamu pendants. Our country, after all, has at its heart the Treaty of Waitangi, a document signed between Māori and the British Crown in 1840. While it is a document that does not enjoy “supreme” law status, its principles are enshrined in several statutes, forcing decision-makers to take some degree of consideration of it.1

There is, of course, also the Waitangi Tribunal. It can hear Māori grievances concerning alleged Crown breaches of the Treaty of Waitangi dating back to 1840.2 Since its establishment in 1975, the Tribunal has handed down numerous reports recommending the Crown take action to remedy its breaches. In some instances, the Crown has responded favourably.3 Additionally, we have Kohanga Reo, Kura Kaupapa Māori and Whare Wananga (pre-school, primary and tertiary) learning institutions premised on tikanga and te reo Māori (Māori culture and language). Moreover, te reo Māori is recognised as an official living language,4 visually obvious with many towns and street names expressed in te reo.
But the image of New Zealand as a world leader on indigenous issues is dangerously illusory. Behind the façade, statistically, the picture is one of widespread disparity, little different to other colonised countries. While Māori constitute 15 percent of the population, they are three times more likely to be unemployed, incarcerated and on the negative side of the health statistics. As well, close to 40 percent of Māori have no education qualifications (see <www.tpk.govt.nz> “Māori in New Zealand”).

When attempting to discuss Māori issues and in spite of these statistics, advocates for Māori are constantly bombarded with the slogan: “But we are all New Zealanders.” For instance, Bill English, when he was leader of the National Party, often asserted “We can only move forward as a country—not on different paths but on one path—by fulfilling citizenship, not dividing it” (2002:258). Such assertions come under the banner of “a single standard of citizenship for all” and remains to date firm National Party policy (see <www.national.org.nz>). Attempts to question this line of discussion are often met with the phrase, “but that is apartheid”. In other words, it is apartheid to suggest “special” rules for Māori.5

It is in this environment that the country now attempts to grapple with the implications of the Court of Appeal “foreshore and seabed” decision, released 19 June 2003. The underlying issue at the heart of the current debate is native title and its applicability in New Zealand.

SETTLEMENT OF AOTEAROA/NEW ZEALAND

Māori, the indigenous peoples of New Zealand, believe the land is our Papatuanuku, our Earth Mother. Māori worldview gives an encompassing and holistic understanding of the world order: who we are is what our environment is. Land and water is one entity: our earth mother. For hundreds of years, Māori managed individual and group access and use rights to this environment. There was no distinction made between dry land and land under water. The foreshore and seabed was simply viewed as “part of my garden” (Boast 1996:22). That garden was heavily relied upon. It provided Māori with the very means to survive in a land covered in dense bush—birds, plants, fish and shellfish were the only available food.

In the late 18th century, British explores, sealers and whalers began arriving on the shores of New Zealand. In 1840, the British, wishing to create a colony that encapsulated a “Better Britain” on the other side of the world, proposed the Treaty of Waitangi. It consists of three articles. In short, Māori gave the British Crown the right to govern, Māori retained their chieftainship over their own affairs, and Māori were guaranteed the same rights and privileges as British citizens living in New Zealand.6
Following the signing of the Treaty, English common law was imported into the country. An integral component of this legal system is the doctrine of native title. The doctrine holds that upon a transfer of sovereignty the property rights of the original inhabitants must be fully respected. So long as the English-based legal system could ascertain these property rights, the rights were to be preserved. Clear and plain legislation is required if such a property right is to be altered or extinguished. Put simply, the doctrine holds that native customary title, until lawfully extinguished by clear and plain legislation, encumbers the radical title claimed by the Crown. That is, the Crown has no beneficial interest in property held according to native title. The doctrine has been endorsed by the judiciary in the colonies of New Zealand, Australia, Canada and the United States, and by New Zealand’s highest court, the Privy Council. It is the Court of Appeal’s most recent endorsement of the doctrine that has the country in a political turmoil.

BACKGROUND TO THE LITIGATION

All land in New Zealand was once Māori customary land (land held by Māori in accordance with tikanga Māori). As accepted by Chief Justice Elias in the Ngati Apa foreshore and seabed case, it was property in existence at the time Crown colony government was established in 1840 (para 14). The Treaty of Waitangi did not create, alter or extinguish this property. The English common law ensured the Māori property right in Māori customary land continued despite the change in sovereignty. The doctrine of native title protected the property of the indigenous peoples: “A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners” (Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399 (Privy Council) at 407). Their property interest in the land, classified as Māori customary land, was protected according to the doctrine. The Treaty of Waitangi allowed Māori to alienate the land, but only to the Crown (for the Crown’s right of pre-emption, see article 2 of the Treaty). If Māori were unwilling to part with the land, the only recourse available to the Crown to alter or extinguish the property right in the land was to enact clear and plain legislation.

Twenty years after the signing of the Treaty, in the early 1860s, the Government sought the means to actively encourage the conversion of the property in land owned by Māori to the new settlers. It established the now named Maori Land Court (see Native Lands Acts 1862 and 1865). The Court’s mandate was to enable the speedy British settlement of New Zealand. The legislation declared the waiver of the Crown’s right of pre-emption. It created a process whereby Māori were to apply to the Court
for the issuance of a fee simple title which would, in effect, change the status of Māori customary land to Māori freehold land. Once a freehold title was issued, Māori were encouraged to alienate (sell, gift, lease, mortgage etc.) their land to the new settlers. The founding legislation clearly envisioned the “assimilation as nearly as possible to the ownership of land according to British law” to result in “the peaceful settlement of the Colony and the advancement and civilization of the Natives” (Preamble of the Native Lands Act 1862). Within decades the goal of freeing up large tracts of land had been achieved.10

Indicative of the historical success of the assimilation policy, the percentage of Māori customary land on dry soil today is so little it cannot be quantified.11 That is, the native title property right in land on dry soil in New Zealand is minute. Today, it is more common for the land to bear the status of Māori freehold land, General land owned by Māori, General land, Crown land, or Crown land reserved for Māori.12 The controversial question, however, concerns whether land under water, such as the foreshore and seabed, has remained Māori customary land—land protected by the doctrine of native title. Before discussing the recent litigation and reaction, it is prudent to provide a brief background of how the doctrine has been viewed in this country.

A sparse amount of litigation in New Zealand has focused on the common law doctrine of native title. Instead, the preference, at least in recent decades owing to Treaty-inclusive legislation, has been to focus on the Treaty of Waitangi jurisprudence. Nonetheless, sparse as it may be, the native title doctrine has been endorsed and applied from time to time by our judiciary. In fact, a leading text on land law, the Guide to New Zealand Land Law (Alston et al. 2000:254), begins its discussion on native title: “Arguably, common law [native] title has received its strongest endorsement in New Zealand.” The claim is substantiated with reference to a High Court decision made in 1847 in R v Symonds ((1847) NZPCC 387). The judge in that case held that Māori customary interests were to be solemnly respected and were not to be extinguished without the free consent of Māori. The author of the text book states, “that comment remains one of the strongest assertions of native title in any of the jurisdictions in which it has been recognised” (Alston et al. 2000:254). For instance, both the leading native title cases in Canada and Australia cite Symonds approvingly (see Delgamuukw v British Columbia [1997] 3 SCR 1010 (Canada) and Mabo v Queensland (No. 2) (1992) 175 CLR 1 (Australia)).

However, the assertion that native title has received its “strongest endorsement” in New Zealand is to gloss over the post-Symonds reality. In 1877, Chief Justice Pendergast, in Wi Parata v The Bishop of Wellington
((1877) 3 NZ Jur (NS) 72:78), wrote, “So far indeed as the Treaty of Waitangi purported to cede the sovereignty… it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist.” In effect, the doctrine of native title must likewise be rendered irrelevant for, according to Pendergast, there were no laws or rights in property existing before 1840.

Generations of historians and lawyers followed Pendergast’s precedent including, most recently, the Crown lawyers appearing before the Court of Appeal in the foreshore and seabed case. This has occurred even though the Privy Council, on an appeal from a New Zealand court, overruled Wi Parata back in 1901. The Privy Council in the Nireaha Tamaki v Baker ([1901] AC 561:577-78) case rejected the thinking in Wi Parata and held that it was “rather late in the day” for arguments of native title having no application to have been made in a New Zealand court.

Nonetheless, the legacy of Wi Parata has been outstanding. In 1963, the precedent set in Wi Parata led the New Zealand Court of Appeal to hold that all foreshore in New Zealand which lies between the high and low water marks, and in respect of which contiguous landward title has been investigated by the Maori Land Court, is land in which Māori customary property has been extinguished (In re the Ninety Mile Beach [1963] NZLR 461). Accordingly, only foreshore contiguous to Māori customary land on the shore is thus capable of being Māori customary land. But as the amount of Māori customary land on the dry soil is so little it has never been quantified, the case essentially established that native title in the foreshore had been extinguished, not by clear and plain legislation, but by the granting of title contiguous to the foreshore! The case—known as the Ninety Mile Beach case—was decided using Wi Parata reasoning. It was not until the release of the Court of Appeal Ngati Apa decision in 2003 that the ludicrousness of the Ninety Mile Beach was finally overruled.

THE LITIGATION

In brief, several hāpū at the top of the South Island, frustrated at being denied the ability to establish marine farms over land that they believed was customarily theirs, applied to the Maori Land Court for relief. They sought a status order declaring the foreshore and seabed in their area to be customary land—land held according to tikanga Māori and protected as their property by the doctrine of native title.

The Resource Management Act 1991 states that land in the coastal marine area (defined as including the foreshore and seabed; see, section 2 “coastal marine area”) vested in the regional council can only be occupied if
expressly allowed by a rule in regional coastal plan or by a resource consent (section 12(2)). Without a resource consent, the hāpū had no right to occupy the foreshore and seabed for the purposes of erecting a marine farm. But the procedure of applying to the Marlborough District Council for a resource consent had been fruitless; the Council denied their marine farm applications. The hāpū therefore sought to challenge the Council’s mandate by seeking to have the land declared Māori customary land.

In December 1997, the hāpū asked the Maori Land Court to make an order under Te Ture Whenua Maori Act 1993 (the Maori Land Act) declaring that certain land under water in the Marlborough Sounds is Māori customary land. The Maori Land Court has jurisdiction to determine and declare, by status order, land in New Zealand (see section 131(1)). The Act states that no land can acquire or lose the status of Māori customary land other than in accordance with the Act, or as expressly provided in any other Act (see section 130). That direction is a reflection of the common law doctrine of native title—native title can only be extinguished by clear and plain legislation.

The Maori Land Court’s interim decision, which was favourable to the hāpū (In Re Marlborough Sounds Foreshore and Seabed, 22A Nelson MB 1, 22 December 1997, Hingston J), was appealed to the Maori Appellate Court by the Marlborough District Council. Concerned with several legal implications, including the precedent set by the higher court in the Ninety Mile Beach case, the Maori Appellate Court opted to state a case for the High Court to answer (Crown Law Office v Maori Land Court (Marlborough Sounds) 1998/3-9 Te Waipounamu ACMB, 19 October 1998, Durie CJ, Smith, Carter, Isaac JJ). The High Court released its decision in 2001 (Re Marlborough Sounds Foreshore and Seabed Decision [2002] 2 NZLR 661). It found in favour of the Council: the foreshore and seabed is not Māori customary land, but Crown land. The hāpū appealed. The Court of Appeal heard the case in July 2002, and a year later released its unanimous decision: Ngati Apa. All five Court of Appeal judges held that the Maori Land Court does have jurisdiction to investigate and determine, if the evidence warrants, that foreshore and seabed is Māori customary land.

The Court of Appeal decision effectively:

- reiterated the long forgotten Privy Council announcement that Wi Parata was wrong in law;
- overruled the Ninety Mile Beach case;
- had little problem defining foreshore and seabed as ‘land’;
• dismissed the legislation presented to it (including the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977, the Foreshore and Seabed Endowment Revesting Act 1991, and the Resource Management Act) as not clear and plain in its intent to extinguish native title in the foreshore and seabed; and
• held that the Maori Land Court should be allowed to hear evidence of the Māori claimants association with the foreshore and seabed and determine, if the evidence warrants it, that the foreshore and seabed is Māori customary land, land held according to tikanga Māori and thus protected by the doctrine of native title.

In regard to native title, the Court of Appeal judges discussed the doctrine as an established common law rule that holds that any property interest of the Crown in land over which it acquired sovereignty depends on any pre-existing customary interest and its nature (para 31). Chief Justice Elias summarised, “The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with the law” (para 13). The content of such customary interest is a question of fact discoverable, if necessary, by evidence. As a matter of custom, the burden on the Crown’s radical title might be limited to use or occupation rights held as a matter of custom (para 31). Nonetheless, the Court stated, the customary rights might be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference (para 31).

In reaching these conclusions the Court relied on overseas jurisprudence, including Delgamuukw (Canada) and Mabo No. 2 (Australia). The Court endorsed the Delgamuukw ratio:

The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructory rights to exclusive ownership with incidents equivalent to those recognised by fee simple title (Ngati Apa: para 31).

The New Zealand Court of Appeal has thus extended this reasoning to apply to land under water; native title can exist in regard to land under water, and it can exist to the extent of exclusive ownership—akin to a fee simple title. Avoiding any declaration that such land exists in reality in New Zealand, the Court of Appeal simply held that Māori should not be prevented from proceeding their application of this nature to a hearing before the Maori Land Court.
REACTION

So persuasive was the precedent of the *Wi Parata* case, few in Government believed that the Court of Appeal would allow the Maori Land Court the opportunity to determine the status of foreshore and seabed land. The Government was not prepared for the 19 June 2003 Court of Appeal decision. However, Emeritus Law Professor Jock Brookfield (2003:297) commented, “the decision is no judicial novelty and ought to have been expected by the legal critics”. For example, the *Ninety Mile Beach* case had been criticised as wrong in law and heralded as only a matter of time before it would be overruled (see Boast 1993:169-70 and 1996:75).

Public, Māori and Government reaction to the unanimous Court of Appeal decision has been immense. Just days after the released decision, the Prime Minster announced, “Government is proposing to enshrine in law Crown ownership of the foreshore and seabed” (see *Otago Daily Times* 24 June 2003:1). The announcement effectively signalled the overruling of the decision of the Court of Appeal to allow Māori to take their claims to the Maori Land Court. The announcement signalled the passing of clear and plain legislation that would abruptly extinguish Māori property rights in their land under salt water. The Government’s hard line was met with outrage from many Māori. The Government reacted, announcing that it urgently sought a solution that would be attractive to “middle New Zealand”: a win-win solution where Māori retained customary rights without Pākehā being denied access.

In August 2003 the Government released its *Protecting Public Access and Customary Rights* consultative paper (see <www.beehive.govt.nz/foreshore>). It proposed a solution that is premised on four principles: access, regulation, protection and certainty. The paper, at page 4, explains that:

- The foreshore and seabed should be public domain, with open access and use for all New Zealanders;
- The Crown is responsible for regulating the use of the foreshore and the seabed, on behalf of all present and future generations of New Zealanders;
- Processes should exist to enable the customary interests of whanau, hapu and iwi in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected; and
- There should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions.
The public had until 3 October 2003 to make submissions. The time-frame was incredibly short for those who wished to comment on how, or even if, foreshore and seabed legislation should be drafted. However, the public reacted swiftly. A total of 2171 written submissions were received (New Zealand Government, Report on the Analysis of Submissions December 2003:3).

In a show of unity, Māori, who attended hui (meetings) held throughout the country, unanimously rejected the Government’s proposals (see <www.tokm.co.nz> and <www.teope.co.nz>). Māori also reacted by lodging applications with several judicial bodies. On one front, hāpū applied to the Māori Land Court for a status order declaring that parts of the foreshore and seabed in their takiwa (territory) are Māori customary land. While the Court of Appeal had clarified that the Court does in fact have the jurisdiction to hear such applications, the intervention of the Government and likely legislation caused the Maori Land Court to stay proceedings. On another front, hāpū lodged applications for urgency with the Waitangi Tribunal. The Tribunal has jurisdiction to inquire into claims made by Māori that they are, or are likely to be, prejudicially affected by acts or omissions of the Crown which are inconsistent with the principles of the Treaty of Waitangi (section 6(1) of the Treaty of Waitangi Act 1975).

On 19 December 2003 the Government announced its policy on the foreshore and seabed (see <www.beehive.govt.nz/foreshore>). The paperwork is extensive. Its Summary Report (para 1) begins by stating:

The policy proposes a new framework to provide a clear and unified system for recognising rights in the foreshore and seabed, as well as practical initiatives to develop effective working relationships between whanau, hapu and iwi, who hold mana and ancestral connection over an area of foreshore and seabed, and central and local government decision makers.

The Summary Report outlines the policy in the following manner. The four principles of access, regulation, protection and certainty have been retained. Two new land titles are proposed: public domain land and customary land. The public domain land title will vest full legal and beneficial ownership of the foreshore and seabed in the people of New Zealand (para 3). The customary land title will be awarded by the Maori Land Court and will sit alongside the public domain title (para 7). It is proposed that the customary title will recognise whanau, hāpū or iwi connection over particular areas of the foreshore or seabed, and identify specific customary rights (see para 7 and paras 14-20). The customary title will not alter reasonable and appropriate public access (para 8).
The creation of new bodies is proposed: a Commission and regional working groups. The independent statutory Commission will identify those that hold *mana* and ancestral connection over particular foreshore and seabed areas (para 9). The Commission will make recommendations to the Maori Land Court on where and to whom customary titles should be issued. The 16 regional working groups will comprise central government, *whanau*, *häpū* and *iwi*, and local government (para 12). The purpose of the working groups will be to reach an agreement in each region on the ways in which *whanau*, *häpū* and *iwi* will participate in the management of the coastal marine area. Once regional agreements are concluded, they will then be formally recognised by the Crown so that the commitments in them become legally enforceable (para 13).

As the Government policy presented no significant surprises or departure from its original consultative paper, response to the policy has been typical to that of past reaction. The week following the Government’s release of its policy, the Waitangi Tribunal confirmed it would hear, in urgency, the *häpū* claim concerning the foreshore and seabed (announced 23 December 2003, see <www.waitangi-tribunal.govt.nz>). At the date of writing, the Tribunal is scheduled to hear the proceedings in January 2004 and to publish its recommendations in March 2004. At the date of writing, Government is drafting its foreshore and seabed legislation. It is expected that the legislation will be introduced into the House in March/April 2004. In the meantime, Māori are seeking ways to publicise their perceived property rights in the foreshore and seabed. The diverse demonstrations which are taking place on beaches throughout the country, are designed to stimulate better public education on the issue (see <www.teope.co.nz>). All-in-all, 2004 is set to be a decisive year for settling the issue one way or the other.

**COMMENT**

The Government’s decision to drastically amend current law in reaction to a judicial decision not of its liking is a serious constitutional undertaking. As Brookfield (2003:297) warned, “Whatever the difficulties, they should not be solved by a wholesale destruction of legal rights, imposed by statute.” Accordingly, “to pass legislation to annul the court decision would be in clear and serious breach of constitutional convention, for which there could be no justification…. The skies after all will not fall if the application of the *iwi* proceeds to its conclusion in the Land Court.”

Picking up on Brookfield’s last comment, what, in fact, is the current law—that is, the law post the *Ngati Apa* decision and pre-Government enacted foreshore and seabed legislation? The current law is that the Maori
Land Court has jurisdiction to determine the status of the foreshore and seabed as land held in accordance with *tikanga Māori*, as Māori customary land. Assuming that the Court had heard a claim from a *hāpū* who had sought a declaration by order that parts of the foreshore and seabed in their *takiwa* (territory) are Māori customary land, then the Court would have had to be satisfied on two specific fronts. First, that the rendered evidence by the *hāpū* is sufficient to establish that the foreshore and seabed in question is in fact held according to *tikanga* Māori, and, second, that there exists no legislation that has clearly and plainly extinguished that property right.

Assuming that the Court held in favour of the *hāpū* and determined that certain stretches of the foreshore and seabed are Māori customary land and held by the *hāpū* to the extent of exclusive ownership, the current law would still impose significant use restrictions. For instance, Māori customary land cannot be alienated by any method (s 145 of TTWMA). The law is crystal clear on this point. Alienation is defined in Te Ture Whenua Maori Act to include every form of disposition including sale, lease, easement, mortgage and so on (section 4 “Alienation”). If the *hāpū* desired to alienate such foreshore and seabed land, then a change of status order would be required. The *hāpū* would have to apply to the Maori Land Court to change the status of the land to Māori freehold land (s 132 of TTWMA). But, even if successful, owners of Māori freehold land are restricted in their use of the land.

For example, the present law makes it extremely difficult for Māori freehold land to be alienated (s 146 TTWMA). Many legal hurdles exist. Depending on who owns the land, be it individuals, trustees, or a Māori Incorporation, the standard test is to require proof that at least 75 percent of the owners agree to the proposed alienation (see sections 150A-150C) and that the Maori Land Court is satisfied that the alienation should proceed (section 152). While the 75 percent threshold test may appear low, in reality it is very difficult to attain. Māori land, unlike general land, is commonly owned by hundreds of people. If the Maori Land Court had proceeded to hear a foreshore and seabed status of land application, and had awarded the status order, it would have been extremely implausible for the Court to have made the order in favour of select individuals. The evidentiary test required concerned *tikanga* Māori. Individual ownership of tracts of land is antithetical to *tikanga* Māori.

Moreover, the present law makes it just as difficult for owners of Māori freehold land to utilise their land as it does owners of general land. The Resource Management Act and its onerous resource consent process would still need to be adhered to if the owners of the foreshore and seabed with the status of Māori freehold land desired to establish a marine farm.
Nonetheless, while the current law is that the Maori Land Court has jurisdiction to determine the status of the foreshore and seabed as land held in accordance with tikanga Māori, hāpū are never going to have the opportunity to pursue this legal avenue. In 2004 the Government will introduce and enact law to ensure otherwise. While the Government, as a sovereign power, has the ability to do this, the constitutional implications are great. The Government, in response to a judicial decision not of its liking, will introduce legislation to annul a Court of Appeal decision. Depending on the nature of the legislation, the effect will be the overriding of a peoples’ property right—a right to hold land in accordance with tikanga Māori. As Law Professor Jane Kelsey (2003:34) has asked:

What is it that makes the prospect of Maori exercising mana whenua over the foreshore and seabed so much more scary than the profit-driven transnational corporations whose sole mission is to maximise their profits and move on to plunder somewhere else in the world?

She answers:

Part of the answer is deeply embedded racism, built on a legacy of colonial arrogance, ignorance and self-interest and fuelled by opportunist politicians and profit-driven media.

Sadly, such discussion has not entered the mainstream.

Instead, the issue has tended to resonate with a phantom belief that Māori, as an entire group, are seeking to claim exclusive ownership in order to ban all others from enjoying traditional beach activities like family picnics, swimming and walking the family dog. A glance at the photos contained in the Government’s Protecting Public Access and Customary Rights document (August 2003) illustrates such emotion. There are numerous shots of young children playing on the foreshore, be it walking, skipping, playing on the rocks or swinging from a rope. The portrayal of the issue in this sense is somewhat dishonest. The reason why hāpū in the Marlborough Sounds region sought to apply for a status order to declare stretches of foreshore and seabed as Māori customary land lay, not in a wish to prohibit public access, but in order to assert mana whenua and have a better opportunity to participate in the commercial use of the land.

It is unfortunate that the media coverage and Government discussion of the issue has not encouraged the public to proactively understand who holds mana whenua in our local regions, what tikanga Māori entails, and what this might mean for local use of the foreshore and seabed. Rather we are greeted with front-page media titles like “What Maori want” (New
Zealand Herald July 2003:19-20, as if property interests in the foreshore and seabed had been a new right dreamed up by Māori in recent years. Such stories deny the public the knowledge of the very legal principles that make the country operate. The doctrine of native title is a fundamental legal principle derived from English common law. It is like hundreds of other English common law doctrines which have been established to protect peoples’ rights and interests. The doctrine of native title is unique in only that it concerns indigenous peoples’ rights and interests.

As mentioned above, the doctrine of native title has been endorsed overseas. However, the issue of whether or not other indigenous peoples have retained native title in the foreshore and seabed is of little value to the New Zealand situation. Domestic legislation is at the heart of an examination of whether or not native title has been retained. This is because the doctrine holds that native title exists unless clear and plain legislation holds otherwise. Bearing this in mind, other indigenous peoples have certainly claimed that they have retained the property interest in the foreshore and seabed. In Canada the issue is gaining prominence with the Haida Nation commencing litigation in March 2002 declaring native title in the seabed surrounding the Queen Charlotte Islands (see Wilson Clark 2003). In Australia, the issue has already been decided in some regions. In October 2001, the Australian High Court released a decision which has been dubbed “The Mabo of the Seas” (Commonwealth of Australia v Yammirr (1999) 168 ALR 426). In that case, the Aboriginal claimants applied under the Australian Native Title Act 1993 for determination of native title over the sea and seabed in the Croker Island region of the Northern Territory. The Australian Court held that native title rights do exist, but to the non-exclusive extent only. In effect, native title comprises free access to the sea and seabed within a claim area in accordance with traditional laws and customs for limited purposes of travelling through or within the area, fishing and hunting, visiting and protecting places that are of cultural and spiritual importance, and safeguarding cultural and spiritual knowledge.

The value of these overseas cases for New Zealand lies not in whether the courts find native title to exist in the foreshore and seabed, but rather in how the courts have defined the nature and extent of that title. For example, does it constitute exclusive title, or something less? While the ambit of this introductory article does not permit an examination of comparative native title, it is prudent to make one point. As discussed earlier, the New Zealand Court of Appeal, in Ngati Apa, concurred with the Canadian court that native title can potentially extend to exclusive ownership akin to a fee simple title. The limiting of native title to usufructory type rights in the recent Australian High Court Yammir decision is indicative of the restrictive
nature of native title emerging in that country. The case has been criticised by many, including Indigenous Australians.13 The New Zealand Government’s definition of the nature and extent of native title in the foreshore and seabed—limited to traditional/customary interests not amounting to exclusive ownership—is close to the Australian rendition. This should cause concern. Australia’s practice is not something we should be modelling our indigenous rights on.14

At the time of writing (January 2004), New Zealand public awaits the next phrase of our foreshore and seabed controversy: the release of the Waitangi Tribunal’s foreshore and seabed report, and the introduction of the legislation in Bill form into the House of Representatives. Whatever the recommendations and content, the ramifications of this Government going ahead and legislating property rights in the foreshore and seabed will be of interest to many. One thing is for certain, our understanding and application of native title will be forever altered.

NOTES

2. Note that initially the Tribunal’s jurisdiction was restricted to claims arising on or after 10 October 1975 (Treaty of Waitangi Act 1975). In 1985 its jurisdiction was extended back to 1840 (see Treaty of Waitangi Amendment Act 1985).
3. For example, see the Ngai Tahu Claims Settlement Act 1998. However, not all reports have met with a favourable response. One recent example is the Tribunal’s Petroleum Report (Wai 796, 2003). In a press release dated 21 November 2003, the Government confirmed that it did not agree with key elements of the Tribunal’s findings and would not act on its recommendations.
5. For example, the public debate concerning legislating for Māori representation on the Bay of Plenty Regional Council—see commentary by Sullivan (2003:151).
6. To cite a copy of the Treaty, see first schedule to the Treaty of Waitangi Act 1975.
8. See Ngati Apa (2003). Numerous legal writings exist examining the judicial decisions. As a beginning point, see Havemann 1999 and Ivison et al. 2000.
9. As defined in section 129(2)(a) of Te Ture Whenua Maori Act 1993.
10. See Williams 1999.
12. See section 129(1) of Te Ture Whenua Maori Act 1993.

14. For an excellent account of Australia’s social and political climate, see Behrendt 2003.

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