REPORT

ON THE CROWN'S

FORESHORE AND SEABED POLICY

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FORESHORE AND SEABED POLICY

WAI 1071

WAITANGI TRIBUNAL REPORT 2004

The cover design by Cliff Whiting invokes the signing of the Treaty of Waitangi and the consequent interwoven development of Maori and Pakeha history in New Zealand as it continuously unfolds in a pattern not yet completely known

A Waitangi Tribunal report
ISBN 1-86956-272-0
www.waitangi-tribunal.govt.nz
Typeset by the Waitangi Tribunal
Published 2004 by Legislation Direct, Wellington, New Zealand
Printed by SecuraCopy, Wellington, New Zealand
Set in Adobe Minion and Cronos multiple master typefaces

The diagram on page 119 was taken from Gerard Willis, Jane Gunn, and David Hill, 'Oceans Policy Stocktake: Part 1 – Legislation and Policy Review', report prepared for the Oceans Policy Secretariat, 2002, and is reproduced here by permission of the Ministry for the Environment. It was originally adapted from one in Parliamentary Commissioner for the Environment, *Setting Course for a Sustainable Future: The Management of New Zealand's Marine Environment* (Wellington: Parliamentary Commissioner for the Environment, 1999).

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ABBREVIATIONS

AJHR	*Appendix to the Journal of the House of Representatives*
app	appendix
c	circa
CA	Court of Appeal
Cth	Commonwealth
ch	chapter
doc	document
ed	edition, editor
fol	folio
inc	incorporated
J	justice (when used after a surname)
ltd	limited
NZLR	*New Zealand Law Reports*
P	president of the Court of Appeal (when used after a surname)
p, pp	page, pages
para	paragraph
QC	Queen's counsel
ROI	record of inquiry
s, ss	section, sections (of an Act)
sec	section (of a book, this report, ect)
sess	session
vol	volume

'Wai' is a prefix used with Waitangi Tribunal claim numbers

Unless otherwise stated, footnote references to claims, papers, and documents are to the record of inquiry, which is reproduced in appendix II.

A glossary of Māori terms is to be found at the end of the report.

ACKNOWLEDGEMENTS

It is very important that we recognise that this report would not have been possible in the time available without the dedicated assistance of staff members Grant Phillipson, Charles Dawson, Claire Mason, and Ewan Johnston. All of these staff members played important roles in research and report production, and Grant Phillipson's efforts in management, coordination, and writing were entirely beyond the call of duty. The team worked long, hard, and extremely well, and we are extraordinarily grateful for their contribution. We acknowledge too the work of Pam Wiki and Hemi Pou as claims administrators.

The Honourable Parekura Horomia
Minister of Māori Affairs
Parliament Buildings
WELLINGTON

The Waitangi Tribunal
110 Featherston Street
WELLINGTON

4 March 2004

Tēnā koe

Enclosed is the Report on the Crown's Foreshore and Seabed Policy, the outcome of an urgent hearing in Wellington from 20–23 and 28–29 January 2004.

The topic of the report is well known to you and your colleagues. We set out our main findings, the prejudice, and our primary recommendation in the introduction to the report, which also functions as an executive summary. The report itself provides background and explanation for our conclusion that the policy breaches the Treaty of Waitangi in ways that we regard as fundamental and serious. Our primary and strong recommendation is that the Government accede to the claimants' request to go back to the drawing board and engage with Māori in proper negotiations about the way forward.

Nāku noa

Nā Judge Carrie Wainwright
Presiding Officer

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INTRODUCTION

The Process to Date

This report is the outcome of an urgent inquiry into the Crown's policy for the foreshore and seabed of Aotearoa–New Zealand. The many claimant groups represented in the inquiry comprised most of the coastal iwi.[1]

The urgent inquiry was sought after the Crown announced its response to the Court of Appeal's decision in the Marlborough Sounds case.[2] In that decision, the Court of Appeal departed from the previous understanding that the Crown owned the foreshore and seabed under the common law. This opened the way for the High Court to declare that Māori common law rights in the foreshore and seabed still exist, and for the Māori Land Court to declare land to be customary land under Te Ture Whenua Māori Act 1993.

The Crown supported the claimants' application for an urgent inquiry, and the timeframes were all tailored to the Crown's requests. The changing needs of the Crown meant that a proposed hearing in November 2003 was adjourned, and we made time available in January. We tried to balance the need on the one hand for claimants to have sufficient time to prepare for a very significant hearing, and the need on the other for our report to be available to Ministers before planned legislation is introduced. The result was that the hearing took place over six days at the end of January 2004, and we have had four weeks in which to produce our report.

Terminology

From the outset, it is essential to be clear what we are talking about when we refer to the foreshore and seabed. First, what is the foreshore? It is the intertidal zone, the land between the high- and low-water mark that is daily wet by the sea when the tide comes in. It does not refer to the beach above the high-water mark. The seabed is the land that extends from the low-water mark, and out to sea.

The need to distinguish the foreshore from the adjacent dry land and seabed arises from the English common law, which developed distinct rules for that zone. In Māori customary terms, no such distinction exists.

1. A full list of the claimant groups is contained in the record of inquiry, which is appendix 11. Ngāti Porou and Ngāi Tahu withdrew late in the day, for reasons that were not disclosed.

2. *Ngati Apa and others v Attorney-General* [2003] 3 NZLR 643. Although this case is now often referred to as simply 'Ngāti Apa', we prefer to call it the Marlborough Sounds case, because the appellants included not only Ngāti Apa but a number of iwi with mana in the Marlborough Sounds. Ngāti Kōata, Ngāti Kuia, Ngāti Rārua, Ngāti Tama, Ngāti Toa, and Rangitāne were also first appellants. Te Ātiawa Manawhenua ki te Tau Ihu Trust was the second appellant.

We wanted to take our language out of the English legal paradigm. We raised with Sir Hugh Kawharu, a witness in our inquiry, whether there was a Māori term that clearly embraced the whole of the foreshore and seabed. Te takutai moana was a term that he felt may be variously understood by different groups in different situations. To some, it had more of an inshore connotation, whereas others might understand it as also connoting the high seas. The word papamoana, meaning simply the bed of the sea, did not seem to be as widely used.

We have therefore reluctantly resorted to the English terminology, foreshore and seabed. We recognise, and chapter 1, 'Tikanga', makes it very clear, that this terminology is culturally specific.

The Context

The Government's resolve to step in as soon as the Court of Appeal's decision was released to implement another regime very quickly, combined with the apparently widespread fear that Māori will control access to the beach, has led to an emotional response across the whole country. It is necessary to have an understanding of complex legal concepts to discuss foreshore and seabed in an informed way. Perhaps that is why the public discourse has generally been so unsatisfying, oversimplifying the issues and thereby distorting them. It appears to us that polarised positions (not necessarily underpinned by good information) have quickly been adopted, and real understanding and communication have been largely absent.

The Crown released the first version of its foreshore and seabed policy in August 2003. It elicited a storm of protest from Māori. In the following weeks, the Crown held a number of hui around the country to consult with Māori about the policy. We have heard a lot of criticism about the Government's consultation, but we decided early on that we would not inquire into the alleged deficiencies of that process. We felt that to do so would only be to confirm what everybody already knew: the consultation process was too short; and it was fairly clear that the Government had already made up its mind. The policy was further developed between August and December 2003, but was not changed in any of its essentials.

The Nature of our Task

In embarking upon our report, we are conscious that while it is our job to consider the Crown's position on the policy, and the policy itself, in light of the Treaty, ultimately the Government is free to do what it wishes. Our jurisdiction is recommendatory only, and power to govern resides with the Government. We have no say in how much or how little regard is paid to our views. We hope that the Government will properly consider what we have to say and, if it is cogent, will be influenced by it.

As a quasi-judicial body standing outside the political process, we proceed in the expectation that governments in New Zealand want to be good governments, whose actions although carried by power are mitigated by fairness. Fairness is the value that underlies the norms of conduct with which good governments conform – legal norms, international human rights norms, and, in the New Zealand context, Treaty norms. We think that even though governments are driven by the need to make decisions that (ultimately) are popular, New Zealand governments certainly want their decisions to be coloured by fairness. In fact, we think that New Zealanders generally have an instinct for fairness, and that a policy that is intrinsically fair will, when properly explained, ultimately find favour.

We see it as part of our role in the present situation to ensure that the Government has before it all the matters it needs to know in order that its decision-making is fair. In the Waitangi Tribunal, consideration of what is fair is always influenced by the agreements and understandings embodied in the Treaty, but fairness in Treaty terms is not the only relevant norm. There is a fairness that can be distilled independently of the Crown's commitments under the Treaty, and we think that wider fairness has relevance in the present situation. This is an important theme of our report.

The Policy

The Crown told us that:

> In brief, the Government's policy seeks to establish a comprehensive, clear and integrated framework which provides enhanced recognition of customary interests of whanau, hapu and iwi in foreshore and seabed, while at the same time confirming that foreshore and seabed belongs to, and is in principle accessible by, all New Zealanders.[3]

We have closely examined the policy, and the Crown's claims for it. We have been unable to agree with any of the Crown's assertions about the benefits that will accrue to Māori. On the other hand, it does seem to us that the policy will deliver significant benefits to others – reinstatement of (effectively) Crown ownership,[4] elimination of the risk that Māori may have competing rights, and the ability of the Crown to regulate everything.

As we see it, this is what the policy does:

- It removes the ability of Māori to go to the High Court and the Māori Land Court for definition and declaration of their legal rights in the foreshore and seabed.
- In removing the means by which the rights would be declared, it effectively removes the rights themselves, whatever their number and quality.

3. Document A24 (Crown), para 2

4. We note that we do not attach any importance to the distinction drawn in the policy between ownership of the foreshore and seabed by the people of New Zealand and ownership by the Crown. The difference is symbolic only, and is most unlikely to have any significant legal implications.

- It removes property rights. Whether the rights are few or many, big or small, taking them away amounts to expropriation.
- It does not guarantee compensation. This contradicts the presumption at law that there shall be no expropriation without compensation.
- It understates the number and quality of the rights that we think are likely to be declared by, in particular, the Māori Land Court under its Act. We think that the Māori Land Court would declare that customary property rights exist, and at least sometimes these would be vested as a fee simple title.
- In place of the property rights that would be declared by the courts, the policy will enact a regime that recognises lesser and fewer Māori rights.
- It creates a situation of extreme uncertainty about what the legal effect of the recognition of Māori rights under the policy will be. They will certainly not be ownership rights. They will not even be property rights, in the sense that they will not give rise to an ability to sue. They may confer priority in competing applications to use a resource in respect of which a use right is held, but it is not clear whether this would amount to a power of veto.
- It is therefore not clear (particularly as to outcomes), not comprehensive (many important areas remain incomplete), and gives rise to at least as many uncertainties as the process for recognition of customary rights in the courts.
- It describes a process that is supposed to deliver enhanced participation of Māori in decision-making affecting the coastal marine area, but which we think will fail. This is because it proceeds on a naïve view of the (we think extreme) difficulties of obtaining agreement as between Māori and other stakeholders on the changes necessary to achieve the required level of Māori participation.
- It exchanges property rights for the opportunity to participate in an administrative process: if, as we fear, the process does not deliver for Māori, they will get very little (and possibly nothing) in return for the lost property rights.

Treaty Breaches and Prejudice

These are fundamental flaws. The policy clearly breaches the principles of the Treaty of Waitangi. But beyond the Treaty, the policy fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state. These include the rule of law, and the principles of fairness and non-discrimination.

The serious breaches give rise to serious prejudice:

(a) The rule of law is a fundamental tenet of the citizenship guaranteed by article 3. Removing its protection from Māori only, cutting off their access to the courts and

effectively expropriating their property rights, puts them in a class different from and inferior to all other citizens.

(b) Shifting the burden of uncertainty about Māori property rights in the foreshore and seabed from the Crown to Māori, so that Māori are delivered for an unknown period to a position of complete uncertainty about where they stand, undermines their bargaining power and leaves them without recourse.

(c) In cutting off the path for Māori to obtain property rights in the foreshore and seabed, the policy takes away opportunity and mana, and in their place offers fewer and lesser rights. There is no guarantee to pay compensation for the rights lost.

Recommendations

When considering what recommendations to make, we were mindful that many of the claimants accepted that, realistically, there was no prospect of a regime for achieving te tino rangatiratanga over the foreshore and seabed. On the whole, their aspirations were more modest. Most agreed that they would live with the status quo, post-*Marlborough Sounds*. All, however, said that their most preferred option was for the Government to agree to go back to the drawing board, and engage with Māori in proper negotiations about the way forward. We agree that this would be the best next step, and that is our strong recommendation to the Government.

However, like the claimants, we have sought to be pragmatic. We recognise that the Government may not wish to follow our recommendation. So we offer for consideration further options that we think would ameliorate the Crown's position in Treaty terms, and at the same time achieve the essential policy objectives of public access and inalienability. Our suggestions are premised on our view that (1) in terms of the legal status quo, the least intervention is the best intervention; and (2) it is critical that the path forward is determined by consensus.

Our Report

In many ways, the Marlborough Sounds case and the Government's response to it has proved to be a catalyst for new thinking about race relations in our country. Some of that thinking has been positive, but much of it seems to us to have been negative. We recognise that the Government, in coming now to finalise its approach to the foreshore and seabed, has some very difficult decisions ahead.

We have had the opportunity to analyse the issues closely and dispassionately. We sit outside the political arena, so we can test the arguments for their cogency, and probe the legal

concepts underlying them, in a way that is neutral but, we hope, rigorous. We were grateful that from the outset, the Crown was keen to have our input, recognising we think that the time for consultation had been short, and that the temperature of public debate militated against genuine exchange of ideas.

We come to these issues with a desire to make a positive contribution. We hope that our report will be of interest and assistance both to Ministers and to the wider public, and that it is not too late for more informed discourse.

CHAPTER 1

TIKANGA

In one sense, this inquiry is hardly about tikanga at all. It is about the Treaty, and how the Treaty principles bear on the foreshore and seabed. It is also about the Government's policy, and whether its outcomes are better for Māori than the outcomes available under the current law, through the High Court and Māori Land Court. That part of the inquiry necessarily involves consideration of the Māori Land Court's jurisdiction to declare land to be customary land. The court must determine whether the land is held according to tikanga, which Te Ture Whenua Māori Act defines as 'Māori customary values and practices'.[1] So tikanga has a specific, legal context there, and this will be considered in chapter 3 of our report.

But the analysis set out above is an arid, Eurocentric one. For in another sense, everything is about tikanga, and tikanga is about everything. In the traditional Māori worldview, there is no matter that does not have tikanga attached to it. And the foreshore and seabed – te takutai moana, te papamoana – are quintessentially bound up with tikanga. Tikanga imbues consideration of every aspect of the elements themselves, and how humans interact with them.

1.1 What is 'Tikanga'?

The claimants before us described tikanga and what it means to them. Professor Margaret Mutu referred us first to its dictionary meaning:

- rule, plan method;
- custom, habit;
- anything normal or usual;
- reason;
- meaning, purport;
- authority, control; and
- correct, right.[2]

It is all of these things, but more. Professor Mutu added:

1. Te Ture Whenua Māori Act 1993, s 3
2. Document A30 (Mutu), para 41

1.2

> Tikanga Maori, as Ngati Kahu elders explain the phrase, is the correct way to carry out something in Maori cultural terms. Tikanga Maori is the Maori equivalent of English law. In Te Whanau Moana and Te Rorohuri hapu's case, this is a vast body of knowledge, wisdom and custom. It derives from the very detailed knowledge gained from residing in a particular geographic area for many hundreds of years, developing relationships with other neighbouring communities as well as those further afield, and learning from practical experience what works and what does not. Not surprisingly, this body of law is very different from English law in how it is established, mainly because it cannot be reduced to writing and thereby set in concrete by legislation.[3]

In addition to forming the body of Māori customary law, tikanga includes the cardinal ethics and values of Māori society. Dr Manuka Henare explained that it underpins customary obligations, rights, and interests, and indeed the whole Māori worldview. Tikanga shapes Māori philosophy and religion, and explains Māori motivations and behaviour.[4] This includes the notion of tika as that which is right, and of tikanga as the 'ethic of the distinctive nature of things, of the right way, of the quest for justice'.[5]

Tikanga is not necessarily the same across tribal groups. Hirini Mead stressed in *Tikanga Māori*:

> ideas and practices relating to tikanga Māori differ from one tribal region to another. While there are some constants throughout the land, the details of performance are different and the explanations provided may differ as well. There is always a need to refer to the tikanga of the local people.[6]

1.2 Tikanga in the Context of this Inquiry

From the moment we embarked upon our inquiry, in the very early interlocutory stages, it was apparent that the claimants regarded the tikanga context as pivotal. They wanted to make sure that the strong and enduring tikanga connections of the people with the foreshore and seabed – including the different kōrero of the different claimants groups – were clearly before the Tribunal.

Initially, we were reluctant. We were conscious of the little time available to us to conduct the inquiry, and the great many things that needed to be covered. We felt that detailed consideration of tikanga is the province of the Māori Land Court when or if it comes to consider whether foreshore and seabed land is held in accordance with tikanga Māori. Moreover, we

3. Document A30 (Mutu), para 43
4. Document A86 (Henare), paras 13, 31, 32, 106
5. Ibid, para 32(h)
6. Hirini Moko Mead, *Tikanga Māori, Living by Māori Values* (Wellington: Huia, 2003), p 8

felt as a Tribunal that we had a general familiarity with the relevant concepts, and that there was sufficient material for our purposes already in the Tribunal archive.[7]

In the event, we were persuaded that we should devote part of the urgent hearing to evidence on tikanga associated with the foreshore and seabed. The first two of six hearing days were set aside for this purpose. Two days were certainly not enough for the kōrero that people wanted to give us. Many of the briefs filed were not presented orally, but were taken as read. The presenters were obliged to fit their kōrero into the time available, which was uniformly too short. Nevertheless, claimant counsel and the witnesses managed between them to use the time available to maximum advantage. We heard from a selection of extremely knowledgeable and articulate people whose insights contributed immeasurably not only to the intellectual content of our hearing, but also to its wairua. The coastal zone is full of spiritual significance to Māori, and the presentation of this evidence in Māori, and in the presence of many attentive listeners, transported us for those two days to a place of understanding that engaged not only the mind but also the heart.

The issues before us in the inquiry dictated an approach that was lawyer-focused and technical. That was our preoccupation for the bulk of the hearing. But it was impossible to forget, after hearing such memorable stories, and such profound beliefs, that what is at stake for Māori goes far beyond arguments about the abrogation of property rights.

The Western law focus, necessary though it is in an inquiry like this one, can too easily obscure the fact that the inquiry is also, and more fundamentally, about real people and their real lives. Tikanga is both a consequence and a source of Māori identity. Unlike most Western law, tikanga is not a norm that is external to the person. Without his relationship through tikanga to land by whakapapa, in a fundamental sense, he does not exist. Tikanga defines him; protects him; shapes his idea of himself and his place in the world. If a regime is to be imposed on the foreshore and seabed that cuts across tikanga, that damages and undermines it, then every Māori person who maintains his or her connection with land in the foreshore and seabed of their tribal area is in some way diminished. Some will feel it more than others, of course, because their lives are lived closer to tikanga, and closer to the land and sea.

Tikanga informs our Treaty analysis too. article 2 guarantees te tino rangatiratanga. The exercise of mana by rangatira was underpinned and sustained by adherence to tikanga. The chief whose thoughts and actions lacked that essential and recognisable quality of being 'tika' would not be sustained in his leadership.

In our view, the Crown's guarantee of te tino rangatiratanga is meaningless if the tikanga that sustain and regulate the rangatira and his relationship to the people, and the land, are discounted and undermined. Indeed, we go further. We say that in order properly to fulfil the role of Treaty partner, and actively protect the cultural foundation of what it is to be Māori, the Crown must itself be schooled in the essentials of tikanga.

7. See our collection of material from other Tribunal inquiries, which is document A83 on our record of inquiry.

So the relevance of tikanga to this inquiry is not confined to a role within State-defined legal parameters under Te Ture Whenua Māori Act (although it is of vital importance under that Act). We regard it as having a pervasive relevance, suffusing our understanding of both intellectual and affective dimensions of the matters before us.

1.3 The Tikanga

What follows is in no sense a digest of the tikanga relevant to foreshore and seabed. We seek only to convey a sense of our experience in receiving the evidence, and in seeking to come to terms with its content, both intellectual and spiritual. Obviously, its rendering on a page, and in English, immediately robs it of flavour – and arguably of content too, because some of its wairua lives in its oral delivery in Māori. And the reader is the poorer too because she misses the immediacy and the conviction of the delivery.

There were several main themes in the kōrero on tikanga that were given to us:

- the indivisibility of the natural world, so that all its elements flow together and are seen as one;
- the oneness of the spiritual world and the physical world;
- the mutuality in the relationship between people and land;
- the connection of the people with the land through whakapapa, kōrero and the process of naming; and
- the endless cycle of reciprocity, particularly seen in the example of mana and manaakitanga.

We set out below excerpts from the kōrero we heard that we hope convey something of the essentials of each of these concepts.

1.3.1 The indivisibility of the natural world, so that all its elements flow together and are seen as one

Māori do not share the Western concept of animate and inanimate in the natural world. For Māori, all things have a mauri, or life-force, and a wairua, or spirit. This is part of why Māori conceive their world in different ways from Westerners. The land, sea, sky, and waters are seen as indivisible. Claimant counsel, Ms Sykes, described how energies may change where Papatūānuku meets Tangaroa, 'but Papatūānuku still exists throughout'. Māori do not, therefore, separate land above high-water mark, tidal land, and the seabed, as distinct entities; it is all whenua. Water, in particular, flows in a lifecycle that cleanses and sustains.[8]

8. Document A97(a) (Sykes), pp 13, 19–21

Hohepa Kereopa gave us the following karakia:

Tangaroa piki ake
Tutarakauika piki ake
Ruamano piki ake
Taea nga kino o te wai
Kia puta ki Rangiatea
Ko te Marangai
Tau atu e rea.

Tangaroa rise up
Tutarakauika[9] *rise up*
Ruamano[10] *rise up*

Cleanse the impurities from the waters
So that they may rise to the heavens of Rangiatea
To fall again
Settling and sustaining the earth[11]

Ms Sykes summarises Mr Kereopa's evidence on the links between the realms of Tangaroa and Tane, and the offspring of both:

> Mr Hohepa Kereopa elucidates his connections by discussing his world and some of the many attributes within it. The metaphor of a whare is used by him to depict the realms between heaven and earth. He links the many dimensions of nga Atua through Te Miina a Papatuanuku (The purifying and sustaining fluids of Papatuanuku) that flow from the tops of the mountains out to the sea and emphasises both the physical and metaphysical states of transformation that take place on that intimate journey. These fluids then rise as mist on moonbeams to fall again replenishing the cycle. Mr Kereopa discusses the numerous inter-connections and roles that are played in this cycle from the pohutukawa to the mutton bird, from the paua to the swirling winds. The idiosyncratic qualities of each realm work together to mana-a-ki (fill with mana and care) their mother.[12]

Rima Edwards emphasised the same kinds of connections, and the place of his people in the seamless whole:

9. Document A51 (Kereopa) offers this note (np): 'Tutarakauika epitomises and protects the mauri of Te Whare hukahuka o Tangaroa. Ko te Taiaha ko te poutokomanawa o Te wharehukahuka o Tangaroa. Ko Tutarakauika te mauri. Ko nga uri ko Nga Maihi As the Ika Pounamu a Hapetuarangi is the holder of the mauri of Te Ika a Maui.'
10. Document A51 (Kereopa) offers this note (np): 'The Taniwha, ko Ruamano tetahi tamaiti o Papatuanuku, who protects the mauri of the miina o Papatuanuku, freshwater in all its many forms.'
11. Document A51 (Kereopa), np
12. Document A97(a) (Sykes), para 68, pp 22–23

1.3.2

> The life giving springs of water exude from the tops of these sacred Mountains. They flow down the many streams and out into Te Moana Nui A Kiwa and Te Moana Tapokopoko A Tawhaki, binding the inner land to the Foreshore and the Sea. This is the pepeha that binds the guardianship of Ngapuhi Nui Tonu to their Mountains, to their rivers and their seas under the mana of Tane Mahuta and Tangaroa. This is their permanent standing place in accordance with the mana kaitiaki of their whanau, hapu, Iwi and their marae. This is their supreme authority for the foreshore and the sea that was divinely handed down to them.[13]

1.3.2 The oneness of the spiritual world and the physical world

The relationship between Māori and the natural world is regulated by tikanga. This involves both spiritual and physical dimensions. There are elements of authority (mana) and law, ritual and use, which are rooted in the spirit world and the concepts of tapu (sacred) and noa (ordinary and free from restrictions). The rangatira and the tohunga perform the karakia and rituals that invoke the protection of the atua of the sea and govern use of its bounty. They are the focal point in the complex relationship between the atua of the natural world and the tangata whenua.

Rima Edwards put it like this:

> The essence of these karakia is seeking permission from Tangaroa to bless your going out to sea or your going to acquire food from the sea because it is Tangaroa who is God and Mauri of all these things and it is he who owns the sea and all its treasures within. It is by these values and practices that the life principle of the sea and all things within the sea, will remain fertile in perpetuity. The life principle of the sea remains alive and so man will remain alive.[14]

Ms Sykes submitted that:

> Nga Tangata whenua o Aotearoa have had an intimate and enduring association with, and connection to, the whenua, the moana, the rangi, the hau and to the wai since time immemorial. That association is both physical and spiritual and sustains their way of life, their culture, their political and economic identity. It ensures their survival as distinct peoples; their fundamental interrelationships with the earth, the sky, the wind, the rain, and their links to the past and to the future.[15]

The spiritual dimension informs human use of and care for the resources in a fundamental way. As has been explained by anthropologist Dame Joan Metge, tikanga is a 'coherent system

13. Document A42(a) (Edwards), para 27
14. Document A42(a) (Edwards), English translation, para 22
15. Document A97(a), para 28

which derives from and expresses a philosophy of respect and care for the resources of coast and sea':

> To understand this philosophy it is important to realise that it brings together both practical and spiritual ideas. The various tikanga mo kai moana fall easily into groups which stress: acknowledgement of the mauri (life force) and kai-tiaki (spirit guardians) of the resources and their origin in God, avoiding damage to the physical well-being of mataitai and their environment, avoiding physical and spiritual pollution of both users and mataitai, co-operation in the conservation of group owned assets, treating mataitai with the respect due to people, and encouragement of self-discipline and sharing.[16]

Graeme Christian described how the spiritual and physical dimensions are both past and present, and link the people with their tīpuna:

> The collection of kaimoana was and remains fundamentally something we all did and continue to do. We were taught not only where to go for kaimoana, but also when to go. Collecting kaimoana was part of our childhood, our upbringing. It is important to our wairua and to our mauri to be able to do such things. It brings us in contact with our tipuna and our surroundings when we go to the moana and collect kai.[17]

Rima Edwards described rāhui and the mechanisms by which customary use continues to be governed.[18] Angeline Greensill and Sean Ellison noted that coastal wāhi tapu are still cherished and protected.[19] Dr Manuka Henare emphasised the importance of such sites to Māori.[20] Rima Edwards also described the great spiritual significance of the Muriwhenua coast and foreshore for the spirits of the dead.[21] Hohepa Kereopa and Manahi Paewai described the rongoa (healing practices) associated with the sea and its gifts.[22] These all reflect aspects of the spiritual dimension of the coast and its resources, and are integral to tikanga today.

Professor Mutu summarised the oneness of the spiritual and physical worlds as follows:

> In summary then we can say that Te Whanau Moana's and Ngati Kahu's world view and values are firmly rooted in the spiritual aspects of this world, where humans and all other creations, both physical and spiritual, are imbued with a life force (mauri), mana and tapu by the gods. From the spiritual world proceeds the material physical world of Te Ao Marama

16. Document A83, doc 451 (Metge), para 7.4
17. Document A92 (Christian), para 38
18. Document A42(a) (Edwards), paras 24–25
19. Document A50 (Greensill and Ellison)
20. Document A86 (Henare), para 129
21. Document A42(a) (Edwards), paras 18–19
22. Document A51 (Kereopa), para 14; A84 (Paewai), para 11

(The World of Light) and the spiritual (the higher order) interpenetrates Te Ao Marama (Marsden 1992: 134). In the physical world the genealogical relationships between people are of highest importance.[23]

1.3.3 The mutuality in the relationship between people and land

Flowing from the oneness of the spiritual and physical worlds, and the indivisibility of the natural world (including people as part of that world, not masters of it), there is a mutuality in the relationship between people and land. This is often described today as a kind of conservation ethic, and there are similarities. Rima Edwards described how rāhui are used to conserve scarce resources and ensure the spawning and survival of species:

> Rahui is a practice that the Hapu often place on the sea. At the times when the kaimoana are spawning or depleted the hapu will place a Rahui on those places. A Rahui post is placed into the ground. During the period of the Rahui it is not permitted to take kai from the sea and taking kai resumes only when the Rahui is lifted.[24]

Fundamentally, we think that the concept of kaitiakitanga best explains the mutual nurturing and protection of people and their natural world. For those who misunderstand it, there is a reading of modern Western conservation ethics back into the Māori past. For the claimants before us, however, it was and is fundamentally a matter of spiritual and physical survival.

According to Professor Margaret Mutu:

> in specific terms, each whanau or hapu is kaitiaki for the area over which they hold mana whenua, that is, their ancestral lands and seas. Should they fail to carry out their kaitiakitanga duties adequately, not only will mana be removed, but harm will come to the members of the whanau or hapu. Thus a whanau or hapu who still hold mana in a particular area take their kaitiaki responsibilities very seriously.[25]

Claimant counsel, Ms Sykes, submitted that all claimants assert obligations pertaining to kaitiakitanga. For some, 'the role of kaitiakitanga carries the added obligation of caring for as opposed to caretaking of a taonga'.[26] We received a substantial amount of evidence from claimants about their responsibilities and actions as kaitiaki today. For them, it is an integral part of their mana, their relationship with their taonga, and the rights and obligations imposed by tikanga (in this sense, both law and 'what is right').

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23. Document A30 (Mutu), para 82
24. Document A42(a) (Edwards) para 24
25. Document A30 (Mutu), paras 72–73
26. Document A97(a) (Sykes), para 84

Claimant counsel, Mr Boast, submitted that 'in many cases management and environmental stewardship has had to be undertaken by tangata whenua despite purported Crown regulatory oversight'.[27] Thomas McCausland, Peter Cross, Des Tata, and others gave examples of asking the public and commercial users to respect rāhui, wāhi tapu, and depleted stocks of natural resources, sometimes with success.[28] Professor Mutu explained the role of her iwi in these terms:

> it is Ngati Kahu who regulate, control and administer the Foreshore and Seabed areas within their territory, it is Ngati Kahu that protect the resources contained within the territory and this is all due to the fact that Ngati Kahu are certain that it is they who exercise rangatiratanga and/or dominion over the areas contained within their territory.[29]

This evidence is relevant when we consider in chapter 3 the meaning of the words 'held according to tikanga Māori', under Te Ture Whenua Māori Act 1993.

1.3.4 The connection of the people with the land through whakapapa, kōrero and the process of naming

By naming places, and by reciting relationships (through whakapapa) with places and their resources, and by telling the kōrero relating to them, Māori affirm their connections to places, resources, and the people doing the telling and the listening. This is central to the way in which Māori relate to each other and their world, and how they transmit that relationship through the generations.

Haami Piripi stated:

> Te Rarawa has attempted to establish that the foreshore and seabed are taonga established and understood by our ancestors and bequeathed to us as guardians of its cultural and environmental integrity. We in turn have an obligation to nurture and cherish it. While it is true that the Crown has captured some aspects of that Taonga via legislation (for example, fish) the holistic tangible and intangible cultural heritage remains imprinted through namings, events, histories, genealogies and current everyday practices.[30]

Dr Manuka Henare informed us:

27. Document A55(c) (Boast), para 7.9; see also docs A58, A61. Associate Professor Boast appeared as claimant counsel in this inquiry, and is also the author of a Rangahaua Whanui report to which we refer (doc A11). We refer to him in this report as Mr Boast.

28. Document A88 (McCausland), para 41; A48 (Cross), para 4.8, and in response to a question from the Tribunal, 20 January 2004; doc A31 (Tata), para 22

29. Document A30 (Mutu), para 121

30. Document A37 (Piripi), para 90

> In Māori thought, to name something is the means of establishing a relationship, namely a whakapapa, between the person or group doing the naming and the thing named. It is the basis upon which connections are made, identity clarified and asserted, and mana over that thing is generated.[31]

In this sense, tikanga is 'the physical expression of the obligations derived from mana and whakapapa'.[32] Henare added: 'the identification of taniwha having residence in the harbour and waiata describing the relationship of people with the coastal area are still integral parts of tikanga Māori'.[33]

The whakapapa and kōrero are assertions of a relationship involving mana. As Miria Pomare put it for Ngāti Toa:

> Tauranga waka (traditional canoe landing sites), mahinga mataitai (traditional fishing grounds), nohoanga (breeding grounds), tupuna rocks and so forth, represent important reference points in Ngati Toa whakapapa and traditions and serve to reinforce Ngati Toa's rangatiratanga over its fisheries and marine resources. By keeping such relationships alive and by continuing to utilise the marine resources, Ngati Toa has retained an extensive knowledge of its fisheries and traditional techniques for sustainably managing the marine resource.[34]

The claimants' position was summarised by their counsel, Ms Sykes:

> Waiata and oratory constantly draw upon the characteristics and facets of papamoana – as some of the claimants have identified, whakapapa is dependent on papamoana. Herein lies one facet of the 'use' of papamoana, although counsel submit that 'use' is a pejorative description of the relationship that Maori have with Tangaroa and Papatuanuku and the various other atua. Maori are highly *dependent* on their association with papamoana but this does not amount to a *use*. Perhaps a more appropriate term would be 'interdependence', where connotations of exploitation are discarded. [Emphasis in original.][35]

As a result, the relationship between Māori peoples and the foreshore and seabed is based on whakapapa and is intensely personal. As Professor Margaret Mutu put it:

> To Ngati Kahu and other Maori ways of thinking, it also follows that because man and nature are descended from a common ancestor, they are one and the same. Thus an iwi will talk of being descended from its river or harbour and point out that a violation against that river or harbour is a violation against the people who are that river or harbour.[36]

31. Document A86 (Henare) para 15
32. Ibid, para 130
33. Ibid, para 95
34. Document A61 (Pomare), para 6
35. Document A97(a) (Sykes), paras 100–101
36. Document A30 (Mutu), para 40

1.3.5 The endless cycle of reciprocity, particularly seen in the example of mana and manaakitanga

Finally, we turn to the cycle of reciprocity that maintains balance between communities and between people and the natural world. Although we heard of differences and particularities in tikanga, one of the fundamental characteristics common to all tribes is the obligation of reciprocity, sometimes referred to as utu. The notion of exchange and balance, in which mana is maintained through a cycle of gift-giving and in certain circumstances more forceful means, is a core value in Māori society. It is associated with whanaungatanga, in which the individual is supported and sustained by his or her many relatives, both far and near.[37] Whakapapa is the means of relating to whanaunga. Reciprocity is also involved in the concept or value of manaakitanga, which involves nurturing relationships, looking after people, and being very careful of how people are treated, and expecting the same care in return.[38] This includes relatives but also extends beyond them to all manuhiri. It is one of the key regulators in the interaction of Māori communities, and of Māori and Pākehā (from a Māori point of view).

In his evidence, Dr Henare referred the Tribunal to the work of Dame Joan Metge:

> One of the qualities which characterise a true rangatira is generosity, manaaki ki te tangata, especially to descendants of the same ancestors. The mana delegated to tribal subdivisions involves the right not only to exclude would-be users of the tribal resources but also the right to include them.[39]

Sir Hugh Kawharu stated that 'inclusion was an important value for Māori where sharing (through manaaki) and authority (mana) are applied concurrently'.[40] Sir Hugh described for us the circumstances of Ngāti Whātua's title (restored by the Crown in 1991) to the 150-acre 'Whenua Rangatira' parklands at Ōkahu Bay. He confirmed that 'public access to the foreshore at Okahu Bay has been unrestricted from the day title returned to Ngati Whatua', while 'here at least the mana of Ngati Whatua stands tall, intact, and protected'. The 'key', Sir Hugh concluded, 'is the retention of mana'.[41]

In response to questions from the presiding officer, Judge Wainwright, Sir Hugh explained that:

> those who claim and exercise mana . . . would also expect and be expected by others to exercise manaakitanga in whatever way might be expected. For us mana would be substantially defined both for ourselves and others by our capacity to live up to the obligations as inherent in manaakitanga.[42]

37. Mead, pp 28–29
38. Ibid
39. Document A83, doc 45J (Metge), p 22; doc A86 (Henare), para 123
40. Document A35 (Kawharu), para 52
41. Ibid, paras 58–65
42. Sir Hugh Kawharu in response to questions from Judge Wainwright, 21 January 2004, doc 4.1

Haami Piripi spoke of the many examples of 'Te Rarawa benevolence to arriving immigrant Pakeha communities', including providing access and rights to gather kaimoana.[43] Eriapa Maru Uruamo (for Te Tao Ū) stated:

> Te Tao U would always supply kaimoana to any hui that was taking place within our rohe in order to feed our guests or manaaki tangata. We would distribute the food we gathered and caught from the foreshore and sea within our rohe. It was very important to us that our manuhiri were well looked after. The sea provided sustenance and hospitality for us as tangata whenua and for our manuhiri when they were in our lands.[44]

In the case of the Waikareao estuary, Mr Tata stated:

> Our hapu owns one net that is used by everyone, so we know exactly what is coming out for our people. We also govern the use of our estuary by other people to make sure they don't take too much. If we see them down there too regularly, we speak to them and warn them not to abuse the resource.'[45]

He added:

> We run our own rules there: if we see people taking advantage we throw them out. That's how we take care of our moana, with our whanaungatanga. We let people go in there to feed their families, but only if they take what they need and not too much. We exercise our rights today, we allow people to go and get their pipi and flounders. We don't like people going in there for several days in a row. We don't like nets being set and left unattended overnight, we stay with the net. If someone from another hapu wants to come into our Estuary, they'll come and ask us first.[46]

There is a complex relationship, therefore, between mana and manaakitanga, between tangata whenua and manuhiri, and between whanaunga, all regulated by tikanga. We were encouraged, in light of the Crown's desire to ensure public access and the continued sharing of the foreshore and seabed, to be told consistently and often that public access and some degree of sharing (so long as people behave themselves) is tika.

We end with a thought from Anaru Kira:

Komuruhia te poioneone kia toe ko te kirikiri kotahi.
Ahakoa tana kotahi, e honoa ana ia ki te whenua, mai i te
whenua ki te rangi, te rangi ki te whenua, ki te maunga, ki
te moana, ki te tangata e tu ake nei;
ko au tenei te kirikiri nei

43. Document A37 (Piripi), para 72
44. Document A36 (Uruamo), para 36
45. Document A31 (Tata), para 21
46. Ibid, para 23

Rub away the earthen clump to leave but one lone grain of dirt;
whilst it is but one, yet it is inextricably joined to the land,
from the land to the sky, the sky to the land, to the
mountain, to the sea, to the people;
tis I who is that one lone grain.[47]

47. Document A54 (Kira), para 27

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CHAPTER 2

FROM THE TREATY TO *MARLBOROUGH SOUNDS*

2.1 What Did the Treaty Guarantee and Protect in 1840?

The main focus of these claims is the question of whether the Crown's foreshore and seabed policy is consistent with the principles of the Treaty of Waitangi. We think, however, that there is a prior question. The Marlborough Sounds case and the Crown's policy have not occurred in a vacuum, but rather at the end of 160 years of two peoples living together in a nation founded by the Treaty. We need to ask as a foundation question: What did the Treaty guarantee and protect for Māori, in terms of the foreshore and sea, as at 1840?

2.1.1 The Treaty in 1840

As ever, the starting point of our analysis is the terms of the Treaty and the context in which it was entered into by the Crown and Māori. Lord Normanby, British Secretary of State for the Colonies, instructed Captain Hobson to treat with Māori for the cession of their sovereignty. Māori title to the 'soil and to the Sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government'. Hobson, who was appointed lieutenant-governor of New Zealand, was instructed to 'obtain by fair and equal contracts with the Natives the cession to the Crown of such waste lands as may be progressively required for the occupation of Settlers resorting to New Zealand'. The Secretary of State ordered him not to purchase 'any Territory the retention of which by them would be essential or highly conducive, to their own comfort, safety or subsistence'.[1]

These instructions were carried out in the terms of the Treaty, which provided (in the English version) for Māori to retain 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and such other Properties as they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession'. The Crown's role was to arrange fair and equal contracts for cession by means of pre-emption (the monopoly right to purchase Māori land). The Māori version of Te Tiriti promised 'te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa'. The Crown's right was to have the trade (hokonga) in Māori land. It has been a long-established principle,

1. Normanby to Hobson, 14 August 1839 (cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991) pp 193–196

enunciated by many Tribunals and courts, that te tino rangatiratanga includes but is not confined to possession, ownership, authority, self-regulation, and autonomy. Where there is conflict or uncertainty, the Māori provisions of Te Tiriti, as they would have been understood by the Māori signatories, are to prevail.

We did not hear or consider evidence and arguments on the nature of what the Treaty guaranteed to Māori as at 1840. The main emphasis of our inquiry was the Crown's current policy, and what the existing law might or might not secure to Māori after *Marlborough Sounds*. Even so, a wealth of material has been presented to other Tribunals and is widely available. Some of it was collected and placed on the record for this inquiry.[2] We think that there is enough material for us to reach a view on the question posed above, though with a caveat. We have not carried out an inquiry into historical matters, or claims with regard to past Treaty breaches. That is a matter for claimants to present in the Tribunal's district inquiries. Our views, therefore, are general in nature. They do, however, serve to underpin our later consideration of the policy itself.

2.1.2 The waste lands debate in the 1840s

Successive Secretaries of State promised to uphold the Treaty and instructed governors to carry out its terms. For us, the principal development of the 1840s was the debate over so-called 'waste lands.' We think the answer to the question of what the Treaty guaranteed to Māori with regard to the foreshore and seabed is contained in the outcome of that debate. The context for the debate, and the signing of the Treaty, was the 1837 House of Commons Committee on Aborigines. The committee warned Parliament of the often disastrous consequences of colonisation for indigenous peoples. The Government publicly committed itself to preventing this in New Zealand, and colonising it in a manner fair to both Māori and Pākehā. The question became one of how to provide land for British settlement and development consistent with the Treaty guarantees to Māori. During the early 1840s, there was considerable debate among the British as to what those guarantees meant. If Māori held customary title to the entirety of New Zealand, as one school of thought held, every acre of land for colonisation would have to be ceded by Māori. But if indigenous peoples were entitled only to those pieces of land they occupied with dwellings and cultivations, the Treaty guarantees presented much less of an impediment to colonisation. For some years the matter remained unresolved, as Colonial Office instructions acknowledged Māori land rights, while also seeming to assume such rights could be circumscribed.[3]

In 1846, Earl Grey, the new Secretary of State for the Colonies, issued formal instructions to his namesake, Governor Grey, to assume ownership of unoccupied or 'waste' lands for

2. Documents A83; A24(a); A63(c)
3. Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987), pp 126–131

the Crown. The Crown would recognise Māori title to lands which they had houses on, cultivated, kept cattle on, or could prove that they had expended 'labour' on.[4] The Earl dissented from the commonly held view that 'the aboriginal inhabitants of any country are the proprietors of every part of its soil of which they have been accustomed to assert any title.' He included 'fishermen frequenting the sea-coasts and banks of rivers' as people who had formerly been considered to have a proprietary title but in fact did not.[5]

There was a storm of opposition both in New Zealand and from humanitarian groups in London. The Anglican Bishop, the chief justice, missionaries, and leading colonists protested that the policy was a violation of the Treaty of Waitangi, and would have to be enforced at gunpoint. Every 'acre of land in this country, whether occupied or not, is claimed by the aborigines', wrote the inhabitants of Auckland.[6] The ariki Te Wherowhero and the rangatira of Waikato Tainui wrote to the Queen: 'e kui kia rongo mai koe, e haere ana te rongo ri ko nei koou [*sic*] kaumatua e mea ana ria tangohia noatia to te maori whenua na ka pouri te ngakau' ('Madam, listen, news is going about here, that your Ministers are talking of taking away the land of the native without cause, which makes our hearts dark').[7] Robert Maunsell, a Church Missionary Society missionary who had been involved in Treaty negotiations, reminded the Crown that Māori had 'his valuable plants, his fisheries, and localities sacred in his regards as having been the abodes of his forefathers, the scenes of their triumphs, and the resting places of their bones'; all of these were the 'guaranteed possessions of our friends and allies' under the Treaty.[8]

The Government backed down, and the Crown's policy was restated to recognise that Māori, by their own customs and laws, owned the entire land surface of New Zealand. This much, the Crown accepted, had been guaranteed and protected by the Treaty. Earl Grey's proposal was a might-have-been that would not be enforced. Instead, Crown pre-emption (rather than Crown proclamation) became the means by which Māori land was to be obtained quickly and cheaply, in advance of the needs of settlers.[9] Other Tribunals have found serious Treaty breaches in the Crown's conception and application of pre-emption.[10] Nevertheless, it is to the Crown's credit that it has never since resiled from the position that Māori owned all the 'land' of New Zealand. When pre-emption was ended in 1862, the Native Lands Act continued to recognise Māori customary ownership of all unceded lands. In successive Native Land Acts, the Crown devised a system to transform customary ownership

4. The Queen's Instructions, ch 13, in Earl Grey to G Grey, 23 December 1846, GBPP, 1846–47, vol 5, p 541
5. Earl Grey to G Grey, 23 December 1846, GBPP, 1846–47, vol 5, pp 67–70
6. Petition of the inhabitants of Auckland, GBPP, 1847–50, vol 6, 1002: p 79
7. Te Wherowhero and others to the Queen, 8 November 1857, GBPP, 1847–50, vol 6, 1002: p 16 (translation made at the time)
8. Robert Maunsell to G Grey, 18 October 1847, GBPP, 1847–50, vol 6, 1002: p 8
9. GBPP, 1847–50, vol 6, 1002: pp 144, 154–157; 1120: pp 22–25: & passim
10. See, for example, Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991)

into freehold titles. We note that in doing so, it did not thereby end tikanga Māori, which has continued to exist (and adapt) after the creation of such titles.

We turn next to the significance of the outcome of the waste lands debate for the foreshore and seabed. The centre of this discussion is a consideration of tikanga Māori and the nature of customary authority as it related to tidal waters and the sea.

2.1.3 Tikanga Māori: customary rights in the foreshore and sea

It has been Crown policy from 1848 to the present day to recognise that Māori, according to their own customs and usages, had rights equating to ownership of the entire land surface of New Zealand. As far as it goes, this policy is consistent with the terms and principles of the Treaty. The only departure from it appears to have been a Crown policy, followed in different ways over the past 160 years, that the foreshore and navigable waterways were not included in that recognition. Instead, the foreshore and waterways were not owned by Māori under tikanga but should and did belong to the Crown. The Tribunal does not need to describe this policy and its various enactments here, but provides a brief analysis below in section 2.2 of our report.

Here, we emphasise that we see no reason why Māori custom should stop where or when the tide comes in. Indeed, the claimants before us showed a much stronger connection to and use of the beach and its resources than they might have done to the mountainous interior and some of the ostensibly unoccupied acres that so much troubled Earl Grey. As claimant counsel Ms Sykes argued, and claimant witnesses demonstrated before us, Māori have a holistic view that does not compartmentalise the beach and sea into dry land above high tide, tidal land uncovered at low tide, land permanently covered by the sea, and the waters of the sea itself. Māori law, use, authority, and rights extended seamlessly from land fronting the beach, out into the ocean. How far, it is not necessary for this Tribunal to consider, though we note the views of the *Report on the Muriwhenua Fishing Claim* and the *Fisheries Settlement Report 1992* with regard to the 'open' seas.[11] We also note the map provided by claimant counsel, Mr Boast, which showed the overwhelming importance to Māori of coastal pā and the resources of the sea.[12] We think that the Crown's decision in 1848, when it abandoned the waste land policy, applied with equal force to the foreshore, the inshore seabed, and the exercise of te tino rangatiratanga over both.

For the claimants, the foreshore/seabed is papamoana, the continuation of whenua into and beneath the sea.[13] We were reminded of a world view in which Māori extended their deep sense of spirituality to the whole of creation, acknowledging atua who bequeathed all of

11. Waitangi Tribunal, *The Fisheries Settlement Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 18 (cited in doc A24(a))
12. Document A55(a) (Boast). The map is attached to this submission.
13. Document A97(a) (Sykes), para 54–58V

nature's resources to them, in their creation stories.[14] We heard of the interrelationships of the various atua, especially of Tangaroa and Papatūānuku, and the merging of their energies with those of Ranginui where they meet on the papamoana, forming a lasting mauri.[15] For some claimants, though customs differ, the waters lapping on the beach are part of the amniotic fluids nourishing the whenua and the tangata whenua.[16] As we explained in chapter 1, the evidence of Hohepa Kereopa, Hector Busby, Angeline Greensill, and others showed that Māori relationships with beach and sea, based on whakapapa and reflected in complex tikanga, have been passed to the present generation from the tūpuna who have gone before. They described resource use, regulation and management (through rāhui), and control of access not merely to food and resources, but to wāhi tapu and other sacred sites. They see the beach and sea, and their gifts, as taonga, to which obligations of kaitiakitanga are owed.[17] We think it axiomatic that such concepts would have applied with absolute force when the Crown made its Treaty promises in 1840.

The claimants filed evidence from Dr Angela Ballara, which analysed written historical records up to 1850. Ballara argued that Māori custom provided for ownership and control of fisheries, fishing places, and coastal sites. Stakes and rocks to mark fishing grounds could, as at the Bay of Islands, be quite far out to sea. The right to fish and the fishing place were owned or controlled. The wider environment for fishing, the open sea itself, she saw as a free highway for all groups. 'This is not to say,' she added, 'that specific groups did not own stretches of rivers, coasts or specific swamps and streams. Waters were like lands; they lay under the mana of the recognised local but paramount or independent chief'. Chiefly ownership and control, in the historical documents, constituted a net of specific use-rights and also kaitiakitanga (translated as protection) of the mauri (translated as life force) of the waters.[18]

This accords with the views of the Muriwhenua fishing Tribunal and others. To an extent, authority extended as far from the beach as it could be enforced. The example of Te Rauparaha in Raukawa Moana, as put to us by Ngāti Toa, indicates that this could be far indeed.[19] In 1955, eight members of the Taumata Kaumatua o Ngapuhi ('Speaking Elders of Ngapuhi') brought a claim to the Māori Land Court for appointment as trustees of Te Moana Nui a Kiwa ('the Pacific Ocean'). The claim encompassed 'the ocean around New Zealand' and the sea routes from Hawaīki to Aotearoa. The kaumātua gave evidence of how their rights came from the gods and were exemplified, under tikanga, in pou (pillars of fire and pillars of cloud).[20] Although the court rejected the claim on the basis that it did not have jurisdiction, the kaumātua of Ngā Puhi wanted their rights placed on record:

14. Ibid, para 29
15. Ibid, paras 54–55, 77
16. Ibid, paras 68–69
17. Document A51 (Kereopa); doc A68 (Busby); doc A50 (Greensill and Ellison) and others
18. Affidavit of Angela Ballara, doc A69(a) (McDouall), exhibit 'HMD2', pp 30–31 & passim
19. Document A57 (Solomon)
20. A Mikaere, N Tomas, and K Johnston, 'Treaty of Waitangi and Māori Land Law', *New Zealand Law Review*, 2003 pt 3, pp 467–468

2.1.4

We apply to the Court in respecting what we have said so that our ancestors Tangaroa, Maui, Kupe, Nukutawhiti will take note that we their descendants have not forgotten their wisdom in providing us with Te Moana Nui a Kiwa.[21]

In considering the question of how far te tino rangatiratanga extended offshore, we have the report of the Muriwhenua fishing Tribunal to guide us. The Tribunal, which heard detailed evidence on that particular district, concluded that there was an 'inner' zone related to the continental shelf, stretching 12 miles out from shore. The hapū and tribes of Muriwhenua had full control over fishing and passage inside that zone. They claimed the same rights further out, but only insofar as they could be enforced against challengers. In the 'Maori idiom the hapu and tribes of Muriwhenua held the "mana" or "authority" of the whole of the Muriwhenua seas' within a minimum of the 12-mile zone. The nearest British cultural equivalent, the Tribunal found, 'is to consider that they exercised "dominion" over that part, or "owned" it as part of their territorial waters'.[22] We accept this view that Māori tribes had dominion over their territorial waters as at 1840, and that in the particular circumstances of the Muriwhenua district, it extended for at least 12 miles out to sea.

2.1.4 The Crown's argument

Before us, the Crown argued that, while all dry land was claimed by various tribes, the sea was not. It accepted that fishing grounds were named and regarded as exclusive property. There was, however, 'little evidence that the sea itself was "owned" by Māori in a territorial sense.' Instead:

- the sea was 'hostile, formless, unstable and uncontrollable' in classical Māori thought;
- the sea was a common highway, in comparison to land, where people of peaceful intent could only cross with permission;
- coastal land purchase deeds, or Māori statements of land-holding in coastal areas, have boundaries that end at or travel along the beach, but do not enter the sea.

The Crown concluded that claims of ownership of the sea are a twentieth-century development in Māori thinking. Customarily, the open seas were open, and mana did not extend 'far' from the shoreline, though as far as it could in practice be enforced.[23]

The Crown's evidence for this position was a report by a linguist and historian, Lyndsay Head.[24] In addition, the Crown cited some statements by Professor Hirini Moko Mead and

21. Cited in Mikaere, Tomas, and Johnston, p 468

22. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), pp 196–198

23. Document A24 (Crown), paras 47–57

24. L F Head, 'Māori Land Boundaries', report commissioned by the Waitangi Tribunal, December 1993 (Wai 167 ROI, doc A23)

Judge H K Hingston with regard to the terms 'mana whenua' and 'mana moana'. It also relied on the Tribunal's *Fisheries Settlement Report 1992*.[25]

We do not accept that the Crown's evidence substantiated its position:

- First, it seems to us that the Crown's statements only challenge Māori ownership of the open sea. The Crown does not challenge the concept that Māori had mana over the foreshore or inshore sea as at 1840, though it denies that Māori could still prove exclusive ownership today. It seemed to us that Crown counsel accepted that Māori had mana at least a short distance out to sea, as part of their authority in 1840 over adjoining land.[26] Counsel also cited a finding in the *Report on the Manukau Claim* that Māori rights in the harbour were not exclusive, which Ms Ertel rightly reminded us was qualified by the *Whanganui River Report* as unsustainable in the light of further historical inquiries.[27] We think that the *Te Whanganui a Tara me ona Takiwa* report considered the Manukau Tribunal's position as a starting point only, while specifically not commenting on the issue of customary ownership as the question was before the courts.[28]
- Secondly, the ownership of fishing grounds was not disputed by the Crown, though in fact such grounds were often located well offshore – at the very least within a 12-mile zone, and sometimes (as the Ngāi Tahu and Muriwhenua fishing Tribunals reported) much further out. This does not equate with a situation where Māori mana was restricted to the inshore sea.
- Thirdly, the sea was treated with healthy respect, but it was not feared. It could (under tikanga) be controlled and subdued by karakia, or stirred up as a weapon against others. Ms Sykes replied to the Crown that, while fear of the sea may have been a feature of classical Western thought, the Māori worldview was one of a reciprocal relationship with the appropriate atua, based on tikanga Māori, not fear.[29] The wealth of knowledge of the sea and its fishing grounds, of navigation, and of lore presented to us and to other Tribunals, tends to support Ms Sykes' submission.
- Fourthly, we agree that the 'open' sea was a common highway, but this begs the question of how far out any particular tribe or tribes were able to enforce their exclusive authority. We note here the view of both the Muriwhenua fishing and Ngāi Tahu Tribunals that the coastal seas under the tino rangatiratanga of those tribes went to a distance of (at least) 12 miles out from shore.[30]

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25. Document A24 (Crown), paras 45–47.2
26. Ibid, paras 47–57
27. Document A96(a) (Ertel), para 15
28. Document A24 (Crown), para 48; Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 459–460
29. Document A97(a) (Sykes), paras 109–121
30. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp 109–113; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, pp 196–198

2.1.4

- Fifthly, we do not accept the proposition that nineteenth-century purchase deeds, or statements by Māori of their holdings in coastal areas, always ended at the beach and did not enter the sea. English-language versions of deeds did employ terms like 'till it meets the sea' or 'goes along the sea beach', as Ms Head notes.[31] Mr Boast, on the other hand, cites the opinion of two key Crown purchase agents, Donald McLean and James Mackay, that the Crown believed it was purchasing the foreshore and, in fact, all Māori rights to waters.[32] Without accepting that their interpretation of the purchases was correct, we note their belief of what was included. Head gives an example of a Muriwhenua deed where the boundary was explicitly placed at the high-tide mark: 'ki tatahi ki te tai pari', which was translated as 'to the beach to the high tide line'. But Head's research had not covered this matter in depth; she was not in a position to say whether this was typical of deeds with estuarine boundaries.[33] Also, some deeds crossed bays and it is not clear whether areas of sea were thus included or excluded. Head thought the lack of clarity was an unintentional effect of poor mapping.[34] Head's findings are not as simple, therefore, as the Crown suggests.

  The Tribunal has closely examined the Ahuriri deed in a previous inquiry. The English version of the Ahuriri deed included the phrase: 'we have consented entirely to give up these lands descended to us from our ancestors with their *sea* rivers waters timber and all appertaining to the said land' (emphasis added).[35] Even so, Tareha told McLean and a hui of right-holders in 1850:

> Welcome to your [McLean's] land[,] the water is ours[,] the land you see before you is yours[.] [H]e then named the boundaries[,] all agreeing to them.[36]

  The question of mutuality in deeds is a large one that need not detain us here, but the findings of the Te Whanganui-ā-Ōrotu Tribunal make it clear that the written deed was less important to a rangatira like Tareha than his belief that he was not selling the sea.[37] In any case, the deed explicitly mentioned the sea, and as more than a boundary.

  We could add many other examples of nineteenth-century Māori claims to ownership of the foreshore and sea, in addition to that of Tareha cited here. One example is the statements of rangatira at the 1879 Ōrakei parliament (referred to below at section 2.2.7). Another is the Rohe Potae petition of Ngāti Maniapoto, Ngāti Raukawa, Tūwharetoa,

31. Head, *Māori Land Boundaries*, pp 54–57
32. Richard P Boast, *The Foreshore*, Waitangi Tribunal Rangahaua Whanui Series, 1996, doc A11, pp 30, 31. The Waitangi Tribunal commissioned Mr Boast, now Associate Professor of Law at Victoria University of Wellington, to write a national theme report on the foreshore as part of the Tribunal's Rangahaua Whanui Series.
33. Head, *Māori Land Boundaries*, p 50
34. Ibid, p 53
35. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995* (Wellington: Brooker's Ltd, 1995), p 63
36. Ibid, p 39
37. Ibid

and Whanganui tribes in 1883, lodged by Te Wahanui, Rewi Maniapoto, Taonui, and 412 others. In that petition, the tribes claimed that their coastal boundary, encompassing many miles of the west coast, ran on a line 'twenty miles out to sea'.[38] We do not accept, therefore, the proposition that nineteenth-century deeds and statements by Māori of their land-holdings never mentioned the sea. It follows that we cannot accept the Crown's proposition that Māori claims to ownership of the sea were unheard of before the twentieth century.

- Sixthly, we note that Professor Mead stated in his book:

> Some concepts such as mana whenua and mana moana are avoided because these are political ideas which are used especially in laying claims to resources. Other scholars may choose to explore these terms. The aim here has been to limit the scope of the book because the author is not proposing to write an encyclopaedia. This is an introduction to tikanga Māori, a beginning of serious study of the subject in order to meet a need for information. There is far more to tikanga Māori than is covered in this book.[39]

There is nothing here to support a construction that Professor Mead was rejecting these terms or casting doubt on their validity.[40] Instead, the Crown's position relies essentially on statements by Judge Hingston and by the Fisheries Settlement Tribunal.[41] Judge Hingston stated that mana moana appeared to be a new term, and that 'the guiding principle in fishery control may have been Ringa-kaha.'[42] We do not see how this supports the Crown's position, because if the judge and claimants as cited in that case were correct, the authority claimed by ringa kaha (conquest) would have involved mana and been no less.

All that remains to support the Crown's submission are the views expressed in the *Fisheries Settlement Report 1992*, which were to the effect that the terms tikanga Māori and mana moana (a 'recent expression') might not be appropriate ones to describe the proposed scheme to allocate commercial fisheries benefits. This was because:

> traditionally the mana, or authority, did not extend far from the shoreline, and the central feature of this scheme is the value given to the distant fisheries of modern times. The authority went only as far as it could in practice be enforced, it could be said, and customarily, the open seas were open.[43]

38. AJHR, 1883, vol 3, J-1, cited in Waitangi Tribunal, *The Pouakani Report 1993* (Wellington: Brooker's Ltd, 1993), pp 347–352
39. Hirini Moko Mead, *Tikanga Māori: Living by Māori values*, Wellington, Huia, 2003, p 7
40. Document A24 (Crown), paras 45–46
41. Ibid, paras 47–47.2
42. *Ngati Toa Decision*, 21 Nelson MB 1, 12–13, Per Hingston J, cited in doc A24(a), pp 7–8
43. Waitangi Tribunal, *Fisheries Settlement Report*, p 18

2.1.5

Dr Henare stated, in response to a question from Crown counsel, Mr Doogan, that the terms mana whenua and mana moana were possibly a collapsing or combining of traditional ideas and concepts, rather than being new inventions.[44] We do not, in any case, need to decide this point. We do not rely on the term mana moana in our report, and nor did claimant counsel rely on it to any significant degree in presenting their case.

We are left with one point of uncertainty, as we have already noted above: how far out to sea could the exclusive authority of tribes be said to have run? The Muriwhenua fishing Tribunal reached a conclusion particular to the district before it (at least 12 miles and possibly further). The Ngāi Tahu Tribunal agreed with that conclusion. These matters are rohe-specific. We mentioned above that the Ngāti Maniapoto, Ngāti Raukawa, Tūwharetoa, and Whanganui tribes put their boundary 'twenty miles out to sea' in 1883. We do not determine the general point in this inquiry. We do consider below (sec 2.1.7) the implications of the Treaty principle of development, for the question of how far out to sea the mana of Māori should be considered to run today.

2.1.5 Conclusions on tikanga and te tino rangatiratanga as at 1840

We summarise the claimants' evidence as follows. They described their use of sand and stones from the beach and seabed, their wāhi tapu and sites of importance in the coastal marine area, their use of the plants, kai moana, birds, and other gifts of the beach and sea, and the spiritual connections that nurture and sustain them in a reciprocal relationship with their taonga. Associated with this taonga is a very strong manaakitanga and whanaungatanga. Many so-called 'inland' tribes had rights of temporary occupation and fishing on the coast because of the longstanding importance of that access to them. Tūhoe witnesses reminded us of their rights at Ōhiwa Harbour.[45] The accommodation of others, whether through free passage or fishing or some other use, does not reduce the underlying right. Indeed, as we described in chapter 1, the duty to be generous (manaaki) is inherent in the exercise of mana.[46]

From the claimants' evidence and the guidance of earlier Tribunals, we draw the following conclusions:

- The Māori worldview, though accommodating new ideas, was still fundamentally intact in 1840.[47] Indeed, Dr Henare told us that it has been very slow to change and is still strong today.[48] That appeared clear to us from the evidence of Hohepa Kereopa and others.

44. Oral questioning of Dr Henare by the Crown, 21 January 2004
45. Document A53 (Te Pou)
46. Document A86 (Henare); doc A30 (Mutu)
47. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), pp 2–5, 11–108
48. Dr Henare, in response to questions from the Tribunal, 20 January 2004

- In the Māori worldview as it existed at 1840, atua were the source of tapu. Tangaroa was the atua of the sea, although there were also others, many of them particular to places important to tribes. Papatūānuku personified the earth, or whenua.[49]
- The whenua lies under the sea as well as forming the dry land, and in this sense is called papamoana by some claimants. 'Whenua' is the name of both the earth and the placenta. It nourishes the tangata whenua. It is nourished in its turn by the waters of sky and sea.[50]
- The relationship of the tangata whenua with the whenua is governed by tikanga Māori, which is the Māori equivalent of English law, but, compared to law in a Pākehā framework, was more integrated in and fundamental to people's daily lives.
- In their relationship with the coastal land and waters, iwi Māori exercised the authority of te tino rangatiratanga, under tikanga Māori. This authority included:
    - A spiritual dimension. By his karakia, a tohunga like Ngatoroirangi could stir up and subdue the waters of the sea.[51] By their rāhui, Māori communities made places and species tapu, preventing access and use. By their naming of places, their karakia and kōrero, and their rituals, the tangata whenua created and maintained whakapapa links with their particular foreshore and territorial waters.[52]
    - A physical dimension. Rāhui would be enforced by the community. Also, other tribal groups would have to obtain permission to cross inshore waters or to use fishing grounds or take certain species. Failure to respect the authority of the tribe could lead to punishment in the case of both tribal members and outsiders.[53]
    - A dimension of reciprocal guardianship. The tangata whenua were the kaitiaki of the taonga, and cared for it in such a way as to ensure its survival for future generations. In its turn, the taonga cared for and nurtured the tangata whenua. Professor Mutu, for example, described the kaitiaki who care for Te Whānau Moana. The kaitiaki are both guardian and guarded.[54]
    - A dimension of use, which is sometimes rendered as an equivalent to use-rights under English law. The rangatira and the community had rights to fish, to take seaweed, to hunt sea birds, to use sands, stones, and bitumen (mimiha), to travel by waka, and to exclude others from these practices as they saw fit.
    - Manaakitanga, where, as Professor Kawharu put it, 'sharing (through manaaki) and authority (mana) are applied concurrently'.[55] Other tribes shared the bounty of the sea by invitation, as the host tribe saw fit. Some species were even free to all.

49. Document A97(a) (Sykes), pp 13–29
50. Ibid
51. Ibid, para 118
52. Document A86 (Henare), paras 12–19, 39–58
53. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, pp 32–37, 196–201
54. Document A30 (Mutu), paras 67–74
55. Document A35 (Kawharu), para 17

- Manuhiri from across the seas. The Muriwhenua fishing Tribunal cites instances of Māori agreements to allow certain whalers to fish and to exclude others, and of their levying harbour 'dues' from Pākehā shipping in both islands, prior to the signing of the Treaty.[56] The Ngāi Tahu Tribunal notes evidence that Ngāi Tahu had granted 'he noho noa iho' or a 'squatting license' to whalers, to occupy land for whaling stations and 'to fish along a certain extent of coast, to the exclusion of all others'.[57] Authority did not go without challenge in this area, and was not always capable of enforcement against well-armed whaling ships, but it was none the less claimed and asserted.

- This authority, protected by the Treaty, encompassed all of the aspects noted above and more; it was not merely a right to fish.

2.1.6 Case law confirms Māori had property rights in the foreshore and seabed

We find ourselves confirmed in our view that Māori rights were at the very least ones of property, when we consider the case law cited and described by Mr Boast.[58] Although the jurisdiction of the Māori Land Court, and the tenor and content of judges' decisions, differed over time, there was a consistent theme that Māori had property rights in the foreshore.

Chief Judge Fenton expressed it as an exclusive property of fishery (and *use* of the soil) in *Kauwaeranga*.[59] Boast has noted that the chief judge, in his own words, contemplated 'evil consequences' from 'judicially declaring that the soil of the foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership, especially when I consider how readily they may prove such, and how impossible it is to contradict them if they only agree amongst themselves'. He noted the maxim that 'the honour of the King is to be preferred to his profit'. He decided that there would be 'no failure of justice if the natives have secured to them the full, exclusive and undisturbed possession of all the rights and privileges over the locus in quo [place in question] which they or their ancestors have ever exercised'. In order to do so, he refused to award 'absolute propriety of the soil, at least below the surface'. He did, however, award an exclusive right of fishing and of using the entire surface of the foreshore for that purpose.[60] Other judges followed this approach, as in the 1883 Parumoana decision cited to us by Miria Pomare for Ngāti Toa.[61]

Some Māori Land Court judges went further and thought that Māori could prove customary ownership of the land of the foreshore and seabed, though acknowledging the subsequent question of whether they could lawfully issue a title. Mr Boast cited the Ngakororo and

56. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, pp 58–60
57. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992*, pp 86–87, 89
58. Boast, *The Foreshore*, Document A11; Document A55 (Boast)
59. *Kauwaeranga* (1870) 4 Hauraki MB 236. Reported at (1984) 14 VUWLR 227
60. Document A55 (Boast), paras 4.5–4.8
61. *Parumoana* case (1883) 1 Wellington MB 147, cited in doc A61 (Pomare), Extract 1

In Re Ninety-Mile Beach cases, and the findings of the 1921 Native Land Claims Commission on the Te Whanganui-ā-Ōrotu claim.[62] In the latter inquiry, Chief Judge Jones and his fellow commissioners reported on an issue arising from the 'sale' of Te Whanganui-ā-Ōrotu (Napier inner harbour) in 1851, very close in time to the signing of the Treaty and the waste lands debate. We think it worth quoting the findings of the commission:

> the question then narrows itself down as to whether the Natives had any rights to the tidal waters, and, if so, whether or not in this instance they parted with them. That they had rights according to Maori custom is, we think, undeniable; in fact, Maori rights were not confined to the mainland, but extended as well to the sea. These rights were exercised principally for the procuration of food, and would have special significance in an inland sea of this nature; but they were no less applicable to the ocean. Deep-sea fishing grounds were recognized by boundaries fixed by Maoris in their own way; they were well known, and woe betide any alien who attempted to trespass upon them. The deep-sea fishing usually began with proper ceremonials and functions, and no one dared attempt to fish before the requisite steps had been taken by the proper authority to throw the fishing-grounds open.[63]

The 1921 inquiry had a sequel in the 1990s, when hapu of Te Whanganui-ā-Ōrotu made claims of Treaty breach to the Waitangi Tribunal, in respect of the Crown's acquisition of their harbour. We agree with the *Te Whanganui-a-Orotu Report 1995*, which concluded that the harbour was a taonga of the claimants, guaranteed to them and protected under the Treaty, and that they owned it as fully as any dry land under Māori custom. The Crown could not, the Tribunal found, 'rely on a principle of the common law to deprive Maori of their taonga'. To do so was a breach of the Treaty principle actively to protect the property of Māori.[64] It is not necessary to make a detailed inquiry into the facts of particular harbours to conclude that such reasoning would apply to others.

2.1.7 The right to development as it applies to the foreshore and seabed

Māori tribes, therefore, exercised te tino rangatiratanga over the foreshore and sea in 1840. As a final point, we note that their rights and responsibilities were not frozen as at 1840. We agree with the Muriwhenua fishing Tribunal that new technologies and new opportunities were possible for both Māori and Pākehā after the signing of the Treaty. According to that Tribunal, the development of a deep-sea commercial fishing resource was available to both peoples under the Treaty.[65] The Crown, in the end, agreed with this proposition and entered into a negotiated settlement of Māori commercial fishing claims. It is not our intention to comment

62. Document A55 (Boast), paras 4.9–4.21
63. 'Report 3 of the Native Land Claims Commission', 22 October 1920, AJHR, 1921–22, G-5, p 13
64. Waitangi Tribunal, *Te Whanganui–a–Orotu Report*, p 200, pp 197–205
65. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, pp 233–237

on that settlement, other than to point to the parallel that Māori te tino rangatiratanga over the seabed (and its minerals) was similarly open to expansion as of right. The *Ahu Moana* report came to a similar conclusion with regard to marine farming and aquaculture.[66]

2.1.8 Tribunal finding

We find, therefore, on the basis of the evidence available to us, that the Treaty of Waitangi recognised, protected, and guaranteed te tino rangatiratanga over the foreshore and seabed as at 1840. The foreshore and sea were and are taonga for many hapū and iwi. Those taonga were the source of physical and spiritual sustenance. Māori communities had rights of use, management and control that equated to the full and exclusive possession promised in the English version of the Treaty. This promise applied just as much to the foreshore and seabed as, in 1848, it was found to apply to all dry land. There is in our view no logical, factual, or historical distinction to be drawn. In addition to rights and authority over whenua, Māori had a relationship with their taonga which involved guardianship, protection, and mutual nurturing. This is not liberal sentiment of the twenty-first century but a matter of historical fact.

The Crown's duty under the Treaty, therefore, was actively to protect and give effect to property rights, management rights, Māori self-regulation, tikanga Māori, and the claimants' relationship with their taonga; in other words, te tino rangatiratanga.

2.2 How Has the Crown's Treaty Duty Been Affected by 164 Years of Settlement?

Mr Doogan presented the Crown as managing the intersection between the Māori worldview (as described by Kawharu, Henare, Mutu, Sykes, and others) and the Pākehā worldview. We think that it is incumbent on both Treaty partners to manage this intersection in the interests of all. The Treaty duty we have described in section 2.1.8 sets a high standard by which to measure the Crown's past actions and present policy. But how has the duty been affected by intervening events? Is it the same in 2004, whether in concept or in application, as it was in 1840? We will not give a final answer to this question here, but will briefly address some of the factors which may have modified the situation since 1840.

The evidence and submissions presented to the Tribunal indicated that there are at least four factors that we need to consider:

66. Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), pp 54–77

- the Crown's assumption of ownership of the foreshore and seabed, and the consequences of that (including the creation of public and private rights derived from the Crown);
- the expectation that the Treaty would provide for the sharing and development of land and resources between two peoples for the benefit of both;
- the alienation of the vast majority of land and resources from Māori ownership and control, including most sea-frontage land; and
- the Crown's knowledge throughout of Māori assertions of te tino rangatiratanga over the foreshore and seabed.

2.2.1 The Crown's assumption of ownership

The Crown has gradually asserted common law rights of ownership over the foreshore and seabed of New Zealand. Under the common law, unless private citizens could produce a Crown grant or prove rights of user entitling them to such a grant, the Crown presumed that it owned the foreshore. Its presumption was even stronger for land below low-water mark. Under the common law, the Crown owned the seabed (and the minerals under it) as far out as territorial sovereignty was asserted.[67] Claimant counsel, Mr Powell, has provided us with various examples of private property rights in the foreshore in England prior to the mid-nineteenth century, and some of them prior to the colonising of New Zealand.[68] We note in this respect the view of the Māori Appellate Court in 1942: 'If, under the circumstances of the English people, title to the sea-bed can be established in this way, we see no reason why title should not just as well be established by the Māori people of New Zealand.'[69]

In his Rangahaua Whānui report for the Tribunal, Mr Boast argued that the situation in New Zealand was at first unclear, with some Crown grants including land below the high-tide mark.[70] As noted earlier, Donald McLean, the Crown's chief land purchase officer in the 1850s and 1860s, asserted that he believed the Crown's deeds of purchase of land from Māori included the foreshore. HK Taiaroa asked a question in the House in 1874 about how the Crown obtained legal title to the foreshore. McLean replied that there was a clause in the deeds covering all the rights connected with lands – all waterways and everything above and under the land.[71] In a sense, the Crown's pre-1865 purchasing policy was precautionary (extinguishing rights that might have been proven to exist but not being too explicit about anything). James Mackay also maintained that the Crown had purchased the foreshore with

67. Boast, *The Foreshore*, doc A11, pp 25–49, 92–99
68. Document A113 (Powell), Appendix A, pp 5–10
69. *Ngakororo* case (1942) 12 Auckland NAC MB 137, cited in Boast, *The Foreshore*, doc A11, p 60
70. Boast, *The Foreshore*, doc A11, p 45
71. Ibid, pp 29–30

the main land. Where, however, 'Native title is not extinguished over the main land, the Natives consider – or, at least, the Natives have enjoyed all rights over the tidal flats'.[72]

The matter was put to the test in Hauraki when the Thames foreshore was revealed to have gold under its surface. This issue has been the subject of evidence and submissions in the Hauraki district inquiry. We do not wish to pre-empt any findings of the Hauraki Tribunal, but need to provide a brief account here in order to explain the Crown's claim to ownership of the foreshore.

In summary, the Crown at first recognised that it had to extinguish Māori claims to the Hauraki foreshore by negotiated purchase, but increasingly asserted its prerogative rights by means of legislation. It opposed Māori claims in the Native Land Court, and eventually prevented the court from sitting to hear applications for the foreshore. The culmination of this process was the Harbours Act 1878, which provided that no part of the foreshore could be granted without the special sanction of an Act of Parliament. From then on, the Crown acted on the assumption that it owned the foreshore and that any doubts had been settled by the 1878 Act. It proceeded to grant various areas of foreshore and estuary to harbour boards. Also, the Crown Grants Act of 1866 (and subsequent Acts) had defined freehold grants as applying only to land above the high-water mark.[73]

Boast outlined how the Crown's conviction that it owned the foreshore was tested in the 1930s by the Native Land Court, and that the Crown Law Office was doubtful of the outcome. In 1934, for example, a Crown Law Office opinion stated that, since the law recognised the 'assertability of Native rights in the demesne lands of the Crown':

> it is difficult to find a good ground for excluding any land over which the Crown has imperium, dominium, and mesne ownership, whether it be land covered by air or covered by water, whether the covering water be river, lake or sea, whether tidal or not, and whether the land be above, within, or below the foreshore strip.[74]

Nevertheless, the public stance of the Crown remained firm, and the issue was eventually thought to have been settled by the Court of Appeal's 1963 decision in *In Re Ninety-Mile Beach*.[75] Subsequent statutes continued to assume Crown ownership, as Boast notes, without actually solving the underlying legal problems with the Crown's title.[76] These were revealed, and the legal situation corrected, by the Court of Appeal in *Marlborough Sounds*, which will be the subject of more detailed analysis in chapter 3 of our report.

72. 'Report of the Select Committee on the Thames Sea Beach Bill', AJHR, 1869, F-7, pp 6–7, cited in Boast, *The Foreshore*, doc A11, p 31
73. Boast, *The Foreshore*, doc A11, pp 31–49
74. Ibid, p 42
75. *In Re Ninety–Mile Beach* [1963] NZLR 461
76. Boast, *The Foreshore*, doc A11, pp 39–49

2.2.2 The Crown's provision for public interests in the foreshore and seabed

We note first the maxim that two wrongs do not make a right. Since its assumption of ownership and management of the coastal marine area, the Crown has provided for certain public interests with regard to the foreshore and seas of New Zealand. These include a mix of:

- rights based on the common law:
  - common law right of free passage of seagoing vessels (navigation);
  - common law right of fishing in tidal and offshore waters;

  and
- long-standing privileges that do not amount to legal rights:
  - free public access to the beaches and seas; and
  - recreational uses, including boating.

There has developed an expectation by the general public of free access and use, qualified only by:

- the Crown's regimes of resource management and its various systems of regulation, including regulation of commercial and recreational fisheries; and
- private property rights.

The regimes through which the Crown regulates and manages the coastal marine area are various and do not require description here. They are at issue only in so far as they qualify the rights of the public and private right-holders, and support the official authority and responsibilities which claimants informed us did (and should) belong to them.

2.2.3 The Crown's provision for private property rights in the foreshore and seabed

The category of private rights that have been created is now extensive, and includes:

- rights of private landowners adjoining the foreshore;
- rights to engage in marine farming and aquaculture;
- rights of owners of land vested as private property, often in relation to ports, harbours, and marinas;
- rights of private owners of reclaimed land;
- rights of commercial fishers; and
- rights to take minerals from the foreshore and seabed.

2.2.4 The practical impact of public interests and private rights on te tino rangatiratanga

The impact of these public interests and private rights, derived from the Crown's assumption of ownership, has not been steady in its timing or extent. In some places, such as the Ninety-Mile Beach, settlement was slow to spread. Mr Boast reminded us of Pākehā evidence in that case, when it came to court in the 1950s, that Māori authority was still in full force along the Ninety-Mile Beach in the 1880s. Pākehā visitors had to respect and obey it, some 40 years

after the Treaty.[77] In the case of Porirua Harbour, the Ngāti Toa evidence is that their ability to use and manage the harbour's fisheries was not restricted until the 1940s, when pollution started to damage the resource. Later, Government reclamations began the outright destruction of their foreshore and fisheries, which led to a petition to the Crown in 1960.[78] Professor Mutu said that the impact for Ngāti Kahu came later still. There was some minor Pākehā settlement in the 1960s but the real challenge to their te tino rangatiratanga came with developers in the 1980s.[79] Nothing at all has stopped Ngāti Te Ata's traditional catches of shark for the annual Poukai at Reretewhioi Marae. Roimata Minhinnick told us that the shark is still gathered 'by the same whanau who have done so for centuries'.[80] For Sir Hugh Kawharu and Ngāti Whātua, on the other hand, there was the City of Auckland and early restrictions that have deprived them 'for four or five generations of the capacity to use the bounty of the sea'.[81]

The acquisition, exercise, and impact of public interests and private rights, therefore, has been uneven. It has been accompanied by massive land and resource loss for Māori. This is relevant to the Tribunal's inquiry in two respects. First, te tino rangatiratanga of Māori over the foreshore and seabed has been affected by the loss of ownership of sea-frontage land. Access, and with it some de facto control, has often continued where Māori have retained ownership of land on the coast. Secondly, the degree to which Māori have lost ownership of land and resources, often in breach of the principles of the Treaty, must be a factor in the Crown's Treaty duty with regard to surviving assets today. We note the Petroleum Tribunal's survey of land loss.[82] It concluded:

> This meant that, for people such as these [Taranaki iwi and hapu], expropriation of an extremely valuable resource located beneath the remnant of these once-vast tribal estates hit much harder. Clearly, the smaller the land base, the greater the importance of the income-earning potential of any assets comprised within the land.[83]

2.2.5 Māori loss of almost all land and resources

The Crown argued before us that land alienation and the consequences of Crown policies and settlement between 1840 and 2003, had attenuated what might now remain to Māori under the common law.[84] Mr Williams, for the claimants, pointed out the corollary of this; it

77. Ibid, p 20
78. Document A61 (Pomare), Extracts
79. Document A30 (Mutu), paras 58–62
80. Document A90 (Minhinnick), para 10.14
81. Sir Hugh Kawharu, in response to questions from Judge Wainwright, 21 January 2004. Document 4.1, p 2
82. Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), pp 44–64
83. Ibid, p 64
84. Document A24 (Crown), paras 42–43

is a double-edged sword.[85] The greater the alienation on the one hand, and the more it might have affected the rights that exist (after *Marlborough Sounds*), the greater the Treaty obligation on the Crown to protect and conserve what remains. The *Petroleum Report* cited the well-known conclusion of the Privy Council in *New Zealand Maori Council v Attorney General* that, if the vulnerable state of a taonga can be attributed to past breaches of its obligations by the Crown, this would, 'far from reducing, increase the Crown's responsibility'.[86] That Tribunal concluded that, legally alienated or not, there remained a Treaty interest in the petroleum resource that required a remedy and imposed an obligation on the Crown, over and above its obligations in respect of the land (including land covered by sea) in which the petroleum was located.[87] We agree with the Petroleum Tribunal on this matter.

Here, we note the alienation of most Maori land and resources, often in breach of the Treaty, over the past 164 years. Much of the land fronting the sea was included in those alienations. We note also the historical uncertainty, in terms of the Crown's reliance on extinguishment, about the actual effect of pre-1865 Crown transactions (and others) on the foreshore and seabed.[88] The Te Whanganui-a-Orotu Tribunal found that Maori did not knowingly and deliberately alienate the foreshore and harbour of Te Whanganui-a-Orotu, whatever the deed may have said. We have not had the opportunity to make a detailed inquiry of historical facts, but consider that Tribunal's extensive inquiry to be indicative of what may be involved in other area-specific inquiries.[89]

In any case, the Crown has assumed ownership of the foreshore and seabed, promulgated public rights (and lesser interests) and granted private rights, and created regimes of management. These have been of varied impact.

We now need to consider two factors that bear on these issues. First, the Crown cannot legitimately claim to have acted in ignorance of Maori assertions of ownership of the foreshore and seabed. These assertions have been made since 1840; they cannot by any stretch of the imagination be considered modern invention, nor to have started with *Marlborough Sounds*. Secondly, the Treaty provided both for such claims and for the legitimate extinguishment of some of them. In other words, we agree with the Muriwhenua Tribunal that the Treaty envisaged a society in which both peoples would benefit from and develop its land and resources. Certainly, the Treaty established kawanatanga, but more generally it implicitly conferred a right to settle. What remained with Maori, who retained te tino rangatiratanga, was the authority to control the pace and some of the effects of settlement. We next address these two qualifying points in more detail, beginning with the Treaty's vision.

85. Document A29(a) (Williams), para 12
86. Waitangi Tribunal, *Petroleum Report*, p 64
87. Ibid, pp 65–77
88. Document A29(a) (Williams), para 27
89. Waitangi Tribunal, *Te Whanganui-a-Orotu Report*, pp 198–199

2.2.6 The Treaty envisaged a sharing of land and resources for the benefit of two peoples

We have no doubt that, had the Crown acted in compliance with its Treaty duty as described by us above (sec 2.1.8), Māori would have alienated parts of the foreshore and seabed by voluntary cession. This could have been by sale, lease, or some other arrangement. Our conclusion is not ahistorical. The circumstances of early settlement in New Zealand are well known to the Tribunal. Māori were already sharing the beaches and seas before 1840 with whalers, sealers, and the settlers who provided them with infrastructure. Rights of public navigation were being exercised by tauiwi shipping as well as Māori waka and (for example, with Ngāi Tahu) Māori whaling boats. Some gifts of the sea were available to all under tikanga Māori, and Pākehā were invited to share in those gifts, and to trade for others. Dried kaimoana was a popular article of trade. Accommodations were made on the ground. Ballara described how missionaries and others had to respect rāhui and tapu. They could not travel on the beaches, for example, when rāhui closed them for the ceremonies associated with making nets.[90] On the other hand, as William Yate reported, Māori were sometimes willing to overlook infringements.[91] A social order prevailed which met the needs of both peoples, yet enabled Māori to continue to exercise their tino rangatiratanga in accordance with their tikanga.

These practical accommodations continued in the 1840s and beyond. We noted above the evidence of *In Re Ninety-Mile Beach* that Māori authority was still respected and obeyed by Pākehā visitors in the 1880s. This is doubly significant, in that Pākehā access was both allowed and regulated by tikanga. In the end, however, practical and de facto arrangements like those at Ninety-Mile Beach were vulnerable to changing circumstances. At first, it must have seemed that loss of title to the foreshore had only happened on paper. Eventually, however, it became clear that the authority of Māori rangatira was not underpinned by New Zealand law. This made it gradually more difficult to protect resources from the encroachment of settlers, recreational and commercial users, and regulatory bodies. It was inroads on traditional authority that led to the Ninety-Mile Beach case in the first place.[92] Inevitably, the consequences of the Crown's assumption of ownership and authority continued to grow, and to restrict the exercise of te tino rangatiratanga on the ground.

2.2.7 Crown knowledge of Māori claims to ownership of, and authority over, the foreshore and sea

There is a second major qualification to the general tenor of changes in the past 164 years. That is, that the Crown has had ample knowledge of Māori claims (variously expressed) to ownership, authority, and management of the foreshore and seabed. The Crown, in

90. Affidavit of Angela Ballara, Document A69(a) (McDouall), Exhibit 'HMD2', pp 56–58
91. W Yate, *An Account of New Zealand*, London, 1835, pp 244–246
92. Boast, *The Foreshore*, Document A11, pp 20, 63

preferring its own interpretation of its rights under common law and its own legislation, cannot legitimately deny knowledge of long-standing Māori assertions of right. Examples include:

(1) Claims to the Māori Land Court

Mr Boast cited the case-law examples of *Kauwaeranga*, *Parumoana*, *Ngakaroro*, *In Re Ninety-Mile Beach*, and, of course, *Marlborough Sounds* itself.[93] In addition, lake cases such as *Lake Omapere* were, as the Te Whanganui-ā-Ōrotu Tribunal found, of equal importance.[94]

(2) Representations to Ministers and officials

Kihi Ngatai cited the example of his tupuna, Taiaho Hori Ngatai, who made the following speech to John Ballance, the Minister of Native Affairs, at a Tauranga hui in 1885:

> Now, with regard to the land below high water mark immediately in front of where I live, I consider that that is part and parcel of my own land . . . part of my own garden. From time immemorial I have had this land, and had authority over all the food in the sea. Te Maere was a fishing-ground of mine. Onake, that is a place from which I have from time immemorial obtained pipis. Te Rona is another pipi-bed. Te Karaka is another place. I am now speaking of the fishing-grounds inside the Tauranga harbour. My mana over these places has never been taken away. I have always held authority over these fishing places and preserved them; and no tribe is allowed to come here and fish without my consent being given. But now, in consequence of the word of the Europeans that all the land below high water mark belongs to the Queen, people have trampled upon our ancient Maori customs and are constantly coming here whenever they like to fish. I ask that our Maori custom shall not be set aside in this manner, and that our authority over these fishing-grounds may be upheld. The whole of this inland sea has been subdivided by our ancestors, and each portion belongs to a proper owner, and the whole of the rights within the Tauranga Harbour have been apportioned among our different people; and so with regard to the fishing-grounds outside the heads: those are only small spots. I am speaking of the fishing-grounds where hapuku and tarakihi are caught. Those grounds have been handed down to us by our ancestors. This Maori custom of ours is well established, and none of the inland tribes would dare to go and fish on those places without obtaining the consent of the owners. I am not making this complaint out of any selfish desire to keep all the fishing-grounds for myself; I am only striving to regain the authority which I inherited from my ancestors.[95]

93. Boast, *The Foreshore*, Document A11; Document A55 (Boast)
94. Waitangi Tribunal, *Te Whanganui-a-Orotu Report*, pp 201–203. For the Lake Omapere decision, see A63(c), vol 2, tab 14
95. AJHR, 1885, G-1, p 61 (cited in doc A33 (Ngatai), pp 4–5)

The Tribunal is aware of many other such representations to Ministers and officials. Ballance, the Minister of Native Affairs, was told the same things at Hauraki, for example, where Matiu Pono wanted to stop Europeans from catching flat fish on mudflats, which were 'owned by the Hauraki people. He wishes the Government to stand up for them in this matter.'[96] In 1874, Alexander Mackay reported to Parliament the Ngāi Tahu claim to ownership and control of the foreshore at Riverton. He warned Ngāi Tahu not to try to fence it or exclude the public.[97] Even more importantly, many rangatira had made speeches about the foreshore, sea, and fishing rights at the 1879 Ōrakei Māori parliament. These speeches were tabled in the House and published in the *Appendix to the Journals of the House of Representatives*, and their significance was noted by both the Manukau and Muriwhenua fishing Tribunals.[98]

(3) Representations by Māori members in Parliament

Roimata Minhinnick cited speeches from Henare Kaihau, the member for Western Māori, which reminded Parliament in 1897 and 1904 of Māori claims to own the foreshores and their fisheries.[99] In 1897, for example, Kaihau argued that Manukau Harbour oyster beds (privatised and leased by the Marine Department) belonged to Māori under the Treaty. The rents for the beds should be paid to Māori, who should also have the right to take oysters for themselves. In addition, Kaihau supported the public taking oysters for their use.[100]

The Tribunal is aware of many other examples of Māori members making such claims in both Houses of Parliament. The *Ngai Tahu Sea Fisheries Report 1992* cited speeches to the House of Representatives by Hone Heke and Tame Parata in the late nineteenth and early twentieth centuries, and by H K Taiaroa in the Legislative Council, concerning Māori rights over shellfish beds, seaweed, foreshore, and sea fishing.[101] In 1882, for example, Taiaroa questioned the right of the Crown to take the foreshore without consent or compensation. 'Under the Treaty of Waitangi,' he asserted, 'the Māoris had the right to land between high- and low-water mark.'[102]

(4) Petitions to Parliament

Miria Pomare provided evidence about the Ngāti Toa petition to Parliament in 1960, in which the iwi claimed ownership of the foreshore of Porirua Harbour, arguing that it had been

96. R Anderson, *The Crown, the Treaty, and the Hauraki Tribes, 1800–1885* (Wai 686 ROI, doc A8), p 212
97. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992*, pp 166–167
98. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Government Printer, 1985), pp 66–69; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, pp 88–90; AJHR, sess 2, 1879 G-8
99. Document A90 (Minhinnick), paras 10.10–10.11
100. NZPD, vol 99, 1897, p 711
101. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992*, pp 144–153
102. Ibid, p 169

guaranteed to them under the Treaty and awarded to them (they had thought) by the Native Land Court in 1883. The evidence of Ngāti Toa witnesses in support of the petition underscored their reliance on the Treaty, and their conviction that it entitled them to ownership of the foreshore.[103]

The Tribunal knows of many other petitions to the Crown on the matter of foreshores, the sea, and rights to take the gifts of both (including fisheries, seabirds, and seaweed). The Ngāi Tahu Tribunal noted petitions from that tribe.[104] There were also many Hauraki petitions in the 1860s and 1870s, as the gold-bearing Thames foreshore became the test case for Native Land Court awards and Crown assertions of its own title. The petitions referred to the foreshore as a 'snipe preserve', an area where particular tribal groups had rights to fish and catch snipe (wading birds), and a place where rāhui and stakes driven into the ground set out tribal territory and governed access. Rangatira like Taipiri claimed the authority to exclude others as appropriate. Pipi were free to all comers, according to James Mackay, but other species were reserved to the tribal right-holders.[105]

It is worth quoting from W H Taipiri's petition to the Governor in 1869:

> It [the Thames foreshore] is a place from which we obtained flounders and cockles, and was a snipe preserve from the time of our ancestors even down to us. That land was considered valuable by our ancestors, it has been fought for, and men have been killed on account of those lands from which were obtained fish, cockles, and snipe. We still have the *mana* over those lands. The *mana* over the Island only was given up to the Queen. Now, let the Treaty of Waitangi be justly carried out. That treaty declared that the Maoris were to live properly under the protection of the Queen, that she was to protect all their lands, and the places from which they obtained fish mussels cockles, and birds. Now on the finding of gold at Hauraki it is said that the Queen also has land here.
>
> Now, O friend, do not on any account let that Treaty of Waitangi be trampled upon. If that Treaty be abrogated, we will cease to have *mana* over our lands.[106]

Doubtless other examples could be supplied, but the Tribunal is satisfied that the Māori claim to ownership, in the Pākehā sense, of the foreshore and seabed is not a new one. The evidence available to us suggests that it is a claim sourced in tikanga Māori and brought to the attention of the Crown in various ways during the past 164 years. Even without a full inquiry into the historical facts, the main developments and their outcomes are quite clear to us.

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103. Document A61 (Pomare), extracts

104. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992*, pp 166–172, 180–183

105. R Anderson, *The Crown, the Treaty, and the Hauraki Tribes, 1800–1885*, pp 144–145, 156–165, 208–212; 'Report of the Select Committee on the Thames Sea Beach Bill', AJHR, 1869, F-7, p 7

106. W H Taipiri to Governor Bowen, 11 August 1869 (reproduced in Anderson, *The Crown, the Treaty, and the Hauraki Tribes, 1800–1885*, pp 144–145)

2.2.8 The Tribunal's conclusions

We conclude that the events between the signing of the Treaty of Waitangi and the Court of Appeal's decision in *Marlborough Sounds* have had the following effects:

- Māori exercised te tino rangatiratanga over the foreshore and the sea in 1840. Their use, management, and authority was sourced in tikanga Māori. The coastal marine area was a taonga. Their relationship with their taonga involved mutual guardianship and nurturing. The British legal concepts of dry land, foreshore, and seabed had no relevance in the holistic Māori worldview, although they were of course relevant later to the Crown.
- Under the Treaty, the Crown gave a guarantee to Māori that it would protect te tino rangatiratanga over the foreshore and seabed.
- In terms of te tino rangatiratanga over the sea, we note the findings of other Tribunals that the territorial waters of Muriwhenua and Ngāi Tahu hapū were (at minimum) a zone stretching 12 miles from shore.
- During the past 164 years, the Crown has not protected Māori tino rangatiratanga but has instead assumed ownership of the foreshore and seabed.
- The Treaty provided for Māori and Pākehā to share and develop the country and its resources in the interests of both. It provided for the customs and laws of both to be respected and for both peoples to reach mutual accommodation.
- As at 1840, a situation was being reached where Māori and settlers were using the beach and sea in accordance with their different (and sometimes shared) needs, but with respect for tikanga Māori.
- In 1848, the Crown recognised that every acre of land in New Zealand was claimed legitimately by Māori under tikanga Māori, and has not resiled from that position ever since, except with regard to the foreshore and navigable waterways. We do not think that it was justified in making this exception.
- The Crown's assumption of ownership has resulted in the grant of both public rights and private rights in the foreshore and seabed.
- As part of its assertion of sovereignty, the Crown has also undertaken to regulate and manage the coastal marine area, overlaying the public and private rights conferred by it.
- In the process of colonisation, Māori have lost the great majority of their land and resources, often in serious breach of the Treaty. This has included much sea-frontage land, and along with it usually the ability to assert de facto control.
- There has been a gradual infringement of Māori authority on the ground as a result of these developments, differing from place to place and over time. In some places, such as Auckland, the effect was early and extreme.
- This infringement, the Crown's assumption of ownership, its granting of public and private rights, and its introduction of regulatory regimes, have been carried out in full knowledge of Māori assertion of ownership of, and te tino rangatiratanga over, the foreshore and seabed.

The question now remains to be asked: in light of what the Treaty protected and guaranteed in 1840, and the Crown's failure to carry out its obligations during the intervening years, what is the Crown's Treaty duty when it devises a new foreshore and seabed policy in 2004?

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CHAPTER 3

THE COURTS

3.1 Introduction

Under the Treaty of Waitangi Act 1975, the task of this Tribunal is to assess the Crown's proposed foreshore and seabed policy against the principles of the Treaty and, if the policy is found to be wanting, to consider the prejudice, if any, that would be caused to the claimants. Only then will the Tribunal be equipped to consider the content of any recommendations it may make to the Crown on how to compensate for or remove the prejudice.[1] It is because the Crown's policy seeks to introduce, in place of the current law, a new legal regime for Māori customary rights in the foreshore and seabed, that our assessment necessarily involves comparing the policy's effects, as far as we can gauge them, with the effects of the current law. Complicating this task, however, is the fact that the Marlborough Sounds case has determined that the law that is now in force is different in fundamental respects from what had been declared and assumed about it beforehand. Accordingly, there are no clear and authoritative court rulings on the newly revealed elements of the current law. This leaves the Tribunal – and indeed any other body seeking to compare the effects of the present situation with those of the Crown's proposal – to rely on its own best predictions of those things. In this section we set out our best predictions of the effects of the newly revealed elements of the current law relating to the foreshore and seabed. We begin with an overview of the Marlborough Sounds decision.

3.2 *Marlborough Sounds*: Two Paths for Pursuing Customary Rights in the Foreshore and Seabed

The litigation was commenced in 1997 by eight Marlborough Sounds iwi who were dissatisfied with the management of local marine farming activities. They applied to the Māori Land Court for orders declaring the land below mean high-water mark in the Marlborough Sounds, out to the limits of the territorial sea, to be Māori customary land, as that term is defined by Te Ture Whenua Māori Act 1993. The Attorney-General (for the

1. Treaty of Waitangi Act 1975, s 6(3)

Crown) and other interested parties raised preliminary objections to the applications, on the basis that they could not succeed as a matter of law. They relied on the common law relating to customary rights – in particular the Court of Appeal's 1963 decision *In Re Ninety-Mile Beach*[2] – and on two New Zealand statutes[3] which, they argued, vest the foreshore and seabed in the Crown and so extinguish any Māori customary rights in those areas. Judge Hingston rejected that argument in an interim decision[4] that was then appealed to the Māori Appellate Court. In that court, it was agreed that, to save time and cost, eight questions of law would be put to the High Court for its opinion.[5] Justice Ellis heard the parties' legal submissions in the High Court and provided answers to the questions.[6]

The High Court held that, at common law, land below low-water mark is beneficially owned by the Crown, and that the two New Zealand statutes declare this to be so. The result was that such land could not be Māori customary land.[7] As for the foreshore – the area between high- and low-water marks – the High Court accepted that the Māori Land Court has jurisdiction to inquire whether it is Māori customary land[8] but held, following the Ninety-Mile Beach case, that any customary property in the foreshore was extinguished once the contiguous (adjacent) land above high-water mark lost the status of Māori customary land.[9] The eight iwi appealed from the High Court's decision to the Court of Appeal.[10]

The Court of Appeal considered it appropriate to answer only the first of the questions of law put to the High Court, relating to the Māori Land Court's jurisdiction to determine the status of the foreshore and seabed. The answers to the remaining questions depended on factual matters discoverable only by evidence not before the court. If the court attempted to give answers in the abstract, it was explained, they would be so heavily qualified as to be unhelpful and perhaps misleading.[11] Thus, the judges emphasised, the significance of the decision should not be exaggerated. The question it deals with is of relatively narrow compass. In particular, the decision does not determine whether there is Māori customary land below high-water mark, whether the appellant iwi (let alone any other group) would succeed in establishing any customary property in the foreshore and seabed, or, if they did, what might be the extent and nature of any such interests.[12]

The unanimous decision of the five Court of Appeal judges was that, contrary to the Crown's view of the matter, the Māori Land Court has jurisdiction to determine the status of

2. [1963] NZLR 461
3. Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 7; Foreshore and Seabed Endowment Revesting Act 1991, s 9A
4. Nelson Maori Land Court minute book, 22A, 1
5. Te Waipounamu Appelate Court minute book , 19 October 1998
6. *Attorney-General v Ngati Apa* [2002] 2 NZLR 661
7. Ibid, 683, para 52(3)
8. Ibid, 683, para 52 (1)
9. Ibid, 683, para 52(2)
10. *Marlborough Sounds* [2003] 3 NZLR 643
11. Ibid, 670, para 90, per Elias CJ
12. Ibid, 649, paras 8–9, per Elias CJ

the foreshore and seabed. To reach their decision, the judges needed to consider the application in New Zealand of the common law doctrine of aboriginal title. That set of legal rules applies when British sovereignty over a new colony is achieved. Its primary purpose is to preserve the pre-existing rights that indigenous people have in their lands, according to their own customs. The Court of Appeal's analysis of the doctrine departs in key respects from that which underlay the 1963 Ninety-Mile Beach decision. First, the Marlborough Sounds Court rejected the notion, said to be implicit in the earlier decision,[13] that upon the assumption of sovereignty, the Crown acquired ownership ('dominium') of all New Zealand land and that such acquisition extinguished customary rights.[14] Instead, it was confirmed that, with the Crown's acquisition of sovereignty under the Treaty of Waitangi, it acquired territorial authority ('imperium') over New Zealand, not ownership. In conceptual terms, that authority is depicted as conferring on the Crown a notional 'radical' (root) title to the land of New Zealand which, importantly, is burdened by pre-existing Māori customary property rights. This means that Māori customary rights endure until they are extinguished in accordance with law.[15]

The Marlborough Sounds Court also did not accept the conclusion of the 1963 Court of Appeal that any customary rights in lands below high-water mark would be extinguished when, after investigation by the Māori Land Court, the contiguous customary land changed status. Instead, it held that the extinguishment of customary rights requires either the consent of the right-holder or clear statutory authority.[16] The factual matter of consent was outside the limits of the court's examination but it did consider whether the wording of certain general New Zealand statutes[17] is sufficiently plain to have the effect of extinguishing any customary rights in the foreshore and seabed. Rejecting the Crown's position, all five judges held that the statutes do not have that effect.[18] The remaining matter for the Court of Appeal to consider was whether the provisions of Te Ture Whenua Māori Act, including its references to 'land', can and should be interpreted to enable the Māori Land Court to determine the status of the foreshore and seabed. The court was unanimous in holding there was no sufficient reason to interpret the Act as if 'land' excludes the foreshore and seabed.[19] Therefore, the way is open for the Māori Land Court to determine applications such as those made by the eight Marlborough Sounds iwi.

13. Ibid, 667, paras 79, 84, per Elias CJ
14. Ibid, 650, para 13, per Elias CJ; 672, para 102, per Gault P; 687, para 158, per Keith and Anderson JJ; 693, para 183, per Tipping J
15. Ibid, 656, para 34, per Elias CJ; 672, para 99, per Gault P; 683, para 143, per Keith and Anderson JJ; 693, para 185, per Tipping J
16. Ibid, 668, para 85, per Elias CJ
17. In addition to the two statutes earlier mentioned, the Court of Appeal considered the Harbours Acts 1878 and 1950, and the Resource Management Act 1991.
18. Ibid, 663, paras 59–76, per Elias CJ; 674, paras 113–116, per Gault P; 685, paras 151–170, per Keith and Anderson JJ; 697, para 197–202, per Tipping J
19. Ibid, 661, para 55, per Elias CJ; 674, para 110, per Gault P; 693, para 179, per Keith and Anderson JJ; 695, para 188, per Tipping J

3.2

Alongside the Māori Land Court's newly recognised statutory jurisdiction is the general jurisdiction of the High Court of New Zealand to apply the principles of the common law, which include the doctrine of aboriginal title. The High Court's aboriginal title jurisdiction, by which it can declare the existence of customary rights in land, has been part of New Zealand law since 1840. Its existence is confirmed by section 131(3) of Te Ture Whenua Māori Act 1993, which explicitly refers to the continuing jurisdiction of the High Court 'to determine any question relating to the particular status of any land'.

The High Court's aboriginal title jurisdiction has, however, long been regarded as redundant in relation to the vast majority of New Zealand land. In part, this is because of the success of Māori land legislation, in force since the 1860s, in converting customary interests in dry land to fee simple ownership, thereby extinguishing the customary rights.[20] As for the area below high-water mark, there was a 'general supposition' before the Marlborough Sounds decision that any customary rights in that zone had been extinguished when the customary rights to the contiguous dry land were extinguished.[21] That supposition was 'bolstered' by a belief 'in many quarters' (including influential judicial and legal quarters)[22] that the Crown owned the foreshore and seabed anyway as part of its prerogative right and that New Zealand legislation confirmed that.[23] By overturning those suppositions and beliefs, the Marlborough Sounds decision has revived the ability of the High Court to apply the doctrine of aboriginal title to land below high-water mark.

The result, then, is that the Marlborough Sounds decision opens the way both to the High Court and the Māori Land Court for Māori who claim customary rights in the foreshore and seabed. The likely nature of each of those pathways, and their eventual destinations, were necessarily a major focus of the submissions and evidence presented at the Tribunal's inquiry. That is because the Crown's foreshore and seabed policy proposes to remove both pathways and replace them with a different customary rights regime. In the following sections of this chapter, we explore the two pathways that the Marlborough Sounds case has revealed. First, we provide a brief overview of the claimants' and Crown's positions.

Generally, claimants to the Tribunal maintained that the Māori Land Court path – which recognises interests in land 'held according to tikanga Māori' and provides the opportunity for them to be converted to a fee simple title – is an imperfect means for protecting Māori customary rights in the foreshore and seabed but, nevertheless, is preferable to the High Court path. The High Court path, it was commonly said, is limited by the common law's Anglocentric understanding of the relationship between indigenous people and their environment, as well as by the court's apparent inability to grant anything other than a declaration as to the status of land – a remedy that falls far short of the fee simple title that can be awarded as a result of a Māori Land Court investigation.

20. For an outline of other reasons, see *Marlborough Sounds* 658, para 46, per Elias CJ.
21. Document A23 (McHugh), para 24
22. See *Marlborough Sounds* 652, paras 21–27, per Elias CJ
23. Document A23 (McHugh), para 24

The Crown's response, in summary, was that neither of the current paths can recognise in an efficient and fair manner the range of Māori customary rights in the foreshore and seabed. With particular regard to the Māori Land Court's jurisdiction, the Crown's position was that Te Ture Whenua Māori Act 1993 was enacted at a time when the Ninety-Mile Beach decision was law. Back then, it was understood that the area below high-water mark was beyond the reach of the Māori Land Court's statutory jurisdiction over customary land. In those circumstances, the Crown maintained, for that court now to explore the implications of the Marlborough Sounds decision on a case-by-case basis would be very slow and otherwise problematical. As well, it could happen that the Māori Land Court and High Court, applying their respective jurisdictions, would reach different results on similar facts, thereby creating further confusion about who had what rights in the foreshore and seabed. A significant difference between the two jurisdictions, the Crown argued, was that the common law rules of aboriginal title preclude the possibility that customary rights in the foreshore and seabed might be so extensive as to equate with full ownership whereas, under Te Ture Whenua Māori Act, a declaration that land is customary land can be followed by an order that vests the area in fee simple title – the most complete form of land ownership known to our law.

We turn now to explore the likely effects of the exercise by the New Zealand High Court of its common law aboriginal title jurisdiction in relation to the foreshore and seabed. We then focus on the Māori Land Court's jurisdiction and likely outcomes of its exercise. As will be seen, there is a degree of overlap between the tasks of the two courts, so that our discussion of some matters is relevant to both. This is the case with our discussion of the actions that will extinguish customary rights (see sec 3.3.2) and of the effect of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (see sec 3.6).

3.3 The High Court's Jurisdiction

For reasons already alluded to, the common law doctrine of aboriginal title has not been much applied in New Zealand. This means that no one – neither Crown, claimants, nor this Tribunal – can predict with certainty how the New Zealand High Court would respond to applications to declare the existence, nature and holders of any customary rights in foreshore and seabed areas. We are not without indicators of the High Court's likely course, however. In particular, the Court of Appeal in the Marlborough Sounds case has provided some guidance, and there are relevant overseas court decisions – although they take varying approaches to the issues that arise in the application of the doctrine of aboriginal title.

'Aboriginal title' is a general term that describes various 'sets' of customary rights, ranging from particular use rights (for example, to use a particular area of foreshore as a pathway) through to the fullest possible set of rights, equivalent to land ownership. Important among the features of the common law doctrine of aboriginal title are that:

- It recognises customary rights that pre-dated the Crown's acquisition of sovereignty and that have remained in existence, making it, in essence, a 'preservationist' doctrine and not, for example, one that remedies the loss of customary rights.[24]
- It appreciates that customary rights may be held collectively, are unique (*sui generis*)[25] and are identified in accordance with the traditions and usages of the people who hold the rights.[26]
- Customary rights are inalienable except to the Crown, with the result that such rights cannot be the subject of commercial transactions with third parties: they must first be transformed by lawful means into another kind of right.[27]

3.3.1 The nature and effect of a declaration

The High Court's jurisdiction enables it to make a declaration that customary rights continue to exist in particular land. A declaration is an equitable remedy and so is discretionary in nature. This means that the High Court can decide the circumstances in which it will entertain applications for declarations, as well as the circumstances in which it will grant them. It might decide, for example, to require evidence of some actual or threatened prejudice to the claimed customary rights before it will hear an application. It might decide not to hear applications where the applicants have another remedy available to them.[28] Since the Māori Land Court's jurisdiction under Te Ture Whenua Māori Act (discussed at sections 3.4 and 3.5) may prove to offer an alternative remedy in many, perhaps all, situations in which a High Court declaration might be sought, potentially, the High Court could limit its own aboriginal title jurisdiction in a substantial manner.

It was mentioned earlier that a High Court declaration of customary rights cannot be transformed into a fee simple title registered under the Land Transfer Act 1952.[29] Mr Boast suggested the following lesser effects as possible benefits of a declaration:

- it would clarify that customary rights are subsisting and have not been extinguished;
- it might amount to a determination that any minerals in the land (other than nationally expropriated minerals) were not Crown-owned minerals;[30] and

24. Ibid, para 13–14; doc 4.3, p 24
25. See *Delgamuukw v British Columbia* [1997] 3 SCR 1010 1082–83, per Lamer CJ
26. Document A23 (McHugh), para 44
27. Ibid, paras 58–59
28. Mr Boast noted that while there was some authority that the availability of an alternative remedy is a bar to declaratory relief, including High Court of Australia authority, the House of Lords had rejected it and Australian practice was not consistent with its High Court's ruling: doc A55, para 3.29.
29. This was the submission of Mr Boast (doc A55, paras 3.34–3.35) with which we have no reason to disagree.
30. Crown counsel replied that the effect of a High Court declaration of customary land (or a status order from the Māori Land Court, see section 3.4.5) on mineral ownership was unclear. It was noted, however, that the Crown's policy recognises that Māori may have customary rights in relation to minerals and provides for their protection: doc A24(b) (Crown), paras 12–13.

- it would provide a sufficient basis to maintain an action in trespass.[31]

In response to Tribunal questions on this topic, Crown witness Dr McHugh observed that the jurisprudence of aboriginal rights and remedies is 'dramatically under-explored'. He noted that, overseas, declarations of customary rights had been sought in the context of disputes over the operation of statutory regimes (concerning such things as timber felling and mining) which did not take account of any aboriginal property rights. In those situations, declarations that customary rights existed provided a negotiating tool in settlements of the disputes.[32] That a declaration of customary rights can be valuable as a remedy in a range of situations is supported by a recently published Australasian equity textbook:

> An almost unlimited variety of disputes have been resolved by declaration, in many of which there was either no occasion or no jurisdiction to grant effective consequential or substantive relief. Examples include disputes over title or possessory rights to property . . .[33]

Finally, on the matter of the possible benefits of a declaration, it was suggested to the Tribunal that the Māori Land Court could employ the trust provisions of Te Ture Whenua Māori Act in relation to Māori customary land (see sec 3.4.5). By analogy, and provided the necessary conditions for a trust could be met, it seems that the High Court might apply the general law of trusts to land in which it had declared customary rights to exist. The benefits of a trust would include the convenience for all concerned – for beneficiaries (especially where, as a group, they lack a legal personality) and for third parties – of there being an identified group of trustees with identified responsibilities in relation to the land.

Plainly, until the High Court develops rules to govern the exercise of its jurisdiction, it will be difficult for potential applicants to weigh the possible benefits and costs of obtaining a declaration of customary rights. In addition to the procedural uncertainties identified to this point, there are some large questions, as yet unanswered, about the nature and extent of the High Court's jurisdiction. Before turning to those, there is one comparatively straightforward matter, critical to the jurisdiction of both the High Court and the Māori Land Court, that should be outlined: the circumstances in which customary rights will be held to have been extinguished. The question whether customary rights have been extinguished will be at the forefront of the courts' inquiries in every case where such rights are asserted.

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31. Document A55 (Boast), para 3.36. As to the last suggested benefit, s144 of Te Ture Whenua Māori Act 1993 provides that only the Crown and Māori Trustee can bring certain civil actions (including trespass) concerning Māori customary land. Therefore, the point made by Mr Boast is that the High Court declaration could provide the basis for the bringing of a trespass action by the Crown or Māori Trustee, not that it would give standing to bring the action to those with customary rights in the land.

32. Transcript of questioning (transcript 4.3), p 15

33. G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia and New Zealand*, 2nd ed (North Ryde: LBC Information Services, 2000), p 937

3.3.2 What actions will be held to have extinguished customary rights?

The answer to this question has changed with the Marlborough Sounds decision. It has long been established in New Zealand that customary rights can be lawfully extinguished by their cession; that is, by the free consent of the indigenous people.[34] Since, at common law, customary rights are inalienable except to the Crown, in New Zealand such rights could only be ceded by sale to the Crown until 1865. At that date, the Native land legislation came into effect, empowering the Native Land Court to transform customary rights to freehold title. From that time, the court's operations became the principal manner in which customary title was extinguished.[35]

The other mode of lawful extinguishment is by legislation or executive action where there is a 'clear and plain intention' to extinguish customary rights. The test is applied very strictly. There must be a deliberate, unambiguous expropriatory purpose: customary title does not disappear by a side-wind.[36] This is illustrated by the Court of Appeal's interpretation of the various nationally applicable Acts examined in the Marlborough Sounds case. None was held to be worded so clearly and plainly as to extinguish any customary rights in the foreshore and seabed.[37] Other Acts, described as vesting areas of the Marlborough Sounds in harbour boards, local authorities and other persons, were not, however, examined by the Court of Appeal but left for the Māori Land Court to interpret when it finally determined the applications. About those specific Acts, Chief Justice Elias observed: 'there seems no argument that, if the legislation confers freehold interests, it extinguishes any pre-existing Māori customary property rights inconsistent with such interests'.[38] Her Honour added that she considered it preferable to avoid answering the question posed about those Acts, 'while indicating that any customary property in the areas vested seems unlikely to survive'.[39]

We have already outlined the change in the common law rules of extinguishment resulting from the Marlborough Sounds decision (sec 3.2). It concerns the effect of the Native Land Court's or Māori Land Court's investigation and vesting of title to land contiguous to the foreshore. In the Ninety-Mile Beach case, the Court of Appeal held that upon the investigation and vesting of freehold title to such land, and thus the extinguishment of customary rights in it, any customary rights in the adjoining foreshore and seabed were also extinguished. That conclusion was rejected in the Marlborough Sounds case, which leaves it to be determined, as a question of fact in every case, whether and, if so, what customary rights subsist in the foreshore and seabed. Only one of the five Court of Appeal judges supported, as a matter of fact,

34. The well-known authority is the 1847 decision in *R v Symonds* (1847) NZPCC 387
35. *Marlborough Sounds* 657, para 39, per Elias CJ
36. *Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 363, per Blanchard J
37. *Marlborough Sounds* 663, paras 59–76, per Elias CJ, 674, paras 113–116, per Gault P, 685, paras 151–170, per Keith and Anderson JJ 697, para 197–202, per Tipping J
38. Ibid, 663, para 58
39. Ibid

the conclusion in the Ninety-Mile Beach case that, where the sea is described as the boundary of a vesting or sale of adjoining dry land, that will extinguish the customary interest of the grantee or seller in the foreshore.[40] In such circumstances, President Gault said, he 'would not think it open to reach any other result'. He noted, however, that if the land investigated was not claimed as bordering the sea, the position might be different.[41]

3.3.3 Legal questions about the High Court's jurisdiction

There are several contentious legal issues involved in considering how the High Court will determine that customary rights exist and what range of rights it will recognise. At the Tribunal's hearing, the following questions elicited largely opposing answers from claimants and the Crown:

- Is the common law doctrine of aboriginal title capable of recognising a customary interest in the foreshore and seabed that equates to ownership?
- To obtain a declaration from the High Court, what kind of evidence will be needed of the relationship between the applicants and the foreshore and seabed area?
- To what extent will the court rely on the principles of the Treaty of Waitangi and human rights norms when interpreting the common law doctrine of aboriginal title?
- What is the effect on the High Court's inquiry of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, which embodies the fisheries settlement between the Crown and Māori?

On all but the last of those questions, the Tribunal received the evidence of Dr Paul McHugh, an internationally renowned expert in the law and history of aboriginal title. Although called as an expert witness by the Crown, Dr McHugh emphasised the independence of his views and, at the hearing, conducted himself consistently with that premise. The Tribunal was also assisted to understand the issues by the submissions of several claimant counsel and Crown counsel.

It is plain that the Tribunal cannot resolve the complex legal issues listed above. We can, however, gauge the level of uncertainty that surrounds the law. Such a gauge is useful for two reasons. First, the level of uncertainty determines the extent to which the Tribunal – and anyone else – can predict with confidence the manner of exercise, and so the effect, of the court's application of the doctrine of aboriginal title to the foreshore and seabed. Second, the level of uncertainty is significant because part of the justification for the Crown's foreshore and seabed policy is that the current law is uncertain to an unacceptable degree. We turn now to consider the questions identified above.

40. Ibid, 676, para 121, per Gault P
41. Ibid

(1) Can the common law recognise customary rights amounting to 'ownership' of the foreshore and seabed?

As has been noted, the purpose of the doctrine of aboriginal title is to preserve, after the Crown's acquisition of sovereignty, the pre-existing rights of indigenous people under their own laws. The common law doctrine is not, however, the source of the customary rights that it recognises. That source has been variously described. In Canada, it is said that aboriginal title rights arise from the fact of the prior occupation of Canada by aboriginal peoples.[42] Recent Australian cases have, however, based aboriginal title rights in the fact of continuity of customary property rights upon the Crown's acquisition of sovereignty.[43] In Dr McHugh's view,[44] the Australian 'continuity' approach is more consistent than the Canadian 'prior occupation' approach with the Treaty of Waitangi's cession of kawanatanga to the Crown in return for Crown protection of Māori tino rangatiratanga over all their properties.[45]

The relationship between the common law rules of aboriginal title and the customary rights that they recognise has been depicted as an intersection of two normative (rule-based) systems.[46] That image highlights the point, emphasised by Dr McHugh, that the common law can only recognise customary rights that do intersect with, or that can coexist with, its own norms.[47] Crown counsel adopted the words of the current Canadian chief justice to suggest an alternative image, of customary rights being 'absorbed' into the common law upon the Crown's assumption of sovereignty.[48] A more vivid depiction of the notion that the common law cannot recognise customary rights that are fundamentally inconsistent with common law principles was given in the 1992 Australian High Court case *Mabo (No 2)*. Such inconsistency, it was said, would 'fracture skeletal principles of our legal system'.[49]

With that point in mind, Dr McHugh stated that, compared with land above high-water mark, the foreshore and seabed is a 'special juridical space' over which the Crown's sovereignty has a special character.[50] Underlying this point is the fact that the English common law has taken quite different approaches to ownership of land above and below high-water mark. For land above high-water mark, the law's presumption (that is, its way of explaining the facts of English landholding) is that while the sovereign (now Crown) owns all the land, it has, over time, granted it to English subjects according to the doctrine of estates so that it is now presumed that the current possessor has lawful title unless the contrary is proved. For the foreshore and seabed, however, the presumption of the English common law is to the opposite

42. See *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 114, per Lamer CJ (p 35 of the decision, as reproduced in A63(a) vol 4)
43. See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 58, per Brennan J
44. Document A23, paras 44–45
45. See the English and Māori versions of articles 1 and 2 of the Treaty of Waitangi.
46. See majority judgment in *The Commonwealth v Yarmirr* (2001) 184 ALR 113 (HCA), 120, para 10
47. Document A23, para 46
48. Document A24(b), para 21
49. (1992) 175 CLR 1, 43, per Brennan J
50. Document A23, paras vi, 53

effect. The general principle is that the Crown, by prerogative right, is the presumptive owner of the foreshore and seabed (and beds of tidal rivers), unless the contrary is proved either by a Crown grant or by 'continuous occupation' of sufficient duration to establish a lawful title under the rules of adverse possession.[51]

Dr McHugh maintained that the common law presumption of Crown title to the foreshore and seabed does not mean that the Crown was recognised as having rights equivalent to full ownership of the area. Indeed, he stated, the sovereign's rights in the foreshore and seabed were never regarded that way. That is because the sovereign's rights never included the defining right of full ownership – the right to exclude all comers from (or to control access to) the area. The reason for that, it was said, is that the common law always recognised certain public rights in the foreshore and seabed area – rights of fishing, navigation and innocent passage. The result is that the Crown's rights in the foreshore and seabed, at common law, amounted to a 'bundle of rights' less than full ownership.

On Dr McHugh's argument, the 'historical treatment of the sea as a special juridical space subject to much wider overarching notions of public interest than dry land'[52] is critical to understanding the true nature of sovereignty over the foreshore and seabed. And that understanding is critical in the context of considering the common law doctrine of aboriginal title. The critical point is as follows. Since sovereignty over the foreshore and seabed does not amount to full ownership at common law, then the common law doctrine of aboriginal title cannot recognise customary rights in the foreshore and seabed that amount to full ownership. If it were to do so, it would give rise to a fundamental inconsistency in the law.[53] To put it simply, it would mean that the Crown would be granting something it does not have itself.[54]

The main authority relied on by Dr McHugh is the High Court of Australia's decision in the 2001 case *The Commonwealth v Yarmirr*.[55] There, a majority of the Court (four of seven judges) identified a 'fundamental inconsistency' between the common law public rights of navigation, fishing, and innocent passage and the customary rights asserted, which included rights to exclude all others from any part of the claimed territorial sea area.[56] It was held that the two sets of rights 'cannot stand together' and that it was not sufficient 'to attempt to reconcile them' by providing (as the applicant aboriginal clan group had submitted could be done) that the exercise of the aboriginal title rights[57] would be subject to the other public and international rights.[58] The reason that such a reconciliation was not possible, it was explained, was

51. Boast, *The Foreshore*, doc A11, pp 25–26
52. Document A23, para 54
53. Ibid, para 51; doc 4.3 (McHugh), p 2
54. Doc A24(b) (Crown), para 20
55. (2001) 184 ALR 113 (HCA). Dr McHugh also relied on analogous American cases concerning offshore aboriginal title claims where full rights of native ownership have not been recognised on the basis of conflict with the federal government's interests: doc A23, para 95.
56. Document A23, paras 94 and 98; see *Yarmirr* 145, para 98
57. Also referred to as 'native title' rights in the case.
58. Document A23, para 98; see *Yarmirr* 145, para 98

that the successive assertions of sovereignty over the relevant area of Australia 'brought with them and gave to the public' the rights mentioned. The assertion of sovereignty 'on *those* terms', it was held, 'is not consistent with the continuation of a right in the holders of a native title to the area for those holders to say who may enter the area' (emphasis in original).[59] In summary then: at common law, the Crown's sovereignty over the foreshore and seabed amounts to a 'bundle of rights' less than full ownership; therefore, the common law doctrine of aboriginal title, which has effect because of and at the moment of acquisition of sovereignty, cannot recognise customary rights that are greater than those of the sovereign.

Dr McHugh acknowledged that the reasoning of the majority judges in the Yarmirr case is bare, and that his own evidence attempted to tease it out, consistently with English law.[60] However, he strongly endorsed the legal soundness of the 'bundle of rights not ownership' approach to customary rights in relation to the foreshore and seabed.[61] In his words, the approach reflects the fact that the Crown cannot change the common law's definition of its sovereignty.[62] Finally, Dr McHugh was not swayed from his endorsement of this approach by the reasoning of one Australian High Court judge, Justice Kirby, who dissented from the majority in *Yarmirr* and upheld the aboriginal applicants' customary ownership of the claimed sea area.[63]

Justice Kirby's approach did not tackle head-on the majority judges' reasons for finding a fundamental inconsistency between sovereign rights in the seabed and aboriginal rights amounting to ownership. Rather than identifying flaws in that approach, Justice Kirby justified his adoption of an entirely different approach that led to different conclusions. Influential in determining his approach was the fact that the law to be applied in *Yarmirr* was not simply the common law of aboriginal title but was the law as stated by the Native Title Act 1993 (Cth). This legislation was enacted in response to the 1992 High Court of Australia's decision in *Mabo (No 2)*, which overturned the long-held view that Australia was terra nullius (an empty land) when colonised, a view that meant the doctrine of aboriginal title simply did not apply there. The 1993 Act, Justice Kirby explained, is 'designed to effect the adjustment of the Australian legal system to the recognition of rights and interests of the indigenous peoples of Australia "in connection with" both "land" and "waters"'.[64] Importantly, it provides a tripartite requirement for the establishment of native title under the Act: the rights and interests in

59. Ibid, para 99
60. Document 4.3, p 1
61. Although he did not endorse the same approach in relation to dry land. The same four Australian High Court judges took that approach in *Western Australia v Ward* (2002) 191 ALR 1 (HCA). Document A23, paras 77–84
62. Document 4.3, p 25
63. Nor was Dr McHugh persuaded by the reasoning of the other two judges in the High Court of Australia, both of whom held, for different reasons, that the common law cannot recognise any customary rights in the seabed. Dr McHugh observed that the Court of Appeal's decision in the Marlborough Sounds case was contrary to that reasoning. Document A23, paras 49 and 52 (re Callinan J); doc 4.3, pp 5–6 (re McHugh J))
64. *Yarmirr* 183, para 255

question must be possessed under the relevant traditional laws and customs of the indigenous people affected; those peoples, by law or custom, must have a connection with the place in which the rights and interests are said to exist; and the rights and interests must be 'recognised by the common law of Australia'.[65]

At several points in his judgment, Justice Kirby reveals that his approach to the issue of the applicants' rights to their 'sea country' is influenced by particular features of the Native Title Act regime. For example, the Act explicitly and comprehensively[66] applies to sea waters and its requirement that native title be recognised by the common law 'is shaped, and if necessary, extended by' that fact.[67] Also, the 'modern, "purposive" approach' to statutory interpretation is aptly applied to the requirement that native title rights be 'recognised by the common law of Australia',[68] for that approach is consistent with the 'objects of the Act to protect and uphold native title rights and interests'.[69] Further, just as international human rights norms (particularly those opposed to discrimination on the basis of race) influenced the High Court of Australia in *Mabo (No 2)* to move to a 'new principle of the common law of Australia in respect of native title', so too do such norms 'inform the content of the common law of Australia, including as that expression is used in the Act.'[70] Finally, the very fact that Australian law has so recently recognised aboriginal title is identified as a feature that distinguishes the Australian common law from the common law of England in centuries past.[71] It was in that particular context then that Justice Kirby held that the common law of Australia can recognise aboriginal rights to possess sea country that are exclusive in nature, subject only to certain public rights (of navigation and licensed fishing).[72]

Unfortunately, at the Tribunal's hearing, claimant counsel did not take the opportunity to cross-examine Dr McHugh, preferring to treat his evidence as if it was a legal submission to be responded to by their own submissions. In their submissions, claimant counsel contended that the reasoning underlying the conclusion of the majority judges in the Yarmirr case is open to challenge. One criticism was that it is, in effect, a semantic device to conceptualise sovereign rights in the foreshore and seabed as a 'bundle of rights' that lacks the defining right to control access. The Crown's common law rights to the foreshore and seabed, it was suggested, could equally be conceptualised as full ownership rights that are, however, qualified by the public rights of navigation, fishing and innocent passage also recognised by the common law.[73] This would mean that the nature of the Crown's sovereignty could not be raised as a bar to the common law's recognition of customary rights amounting to ownership

65. Ibid, 178, para 242, per Kirby J, referring to the Native Title Act 1993, s 223
66. See *Yarmirr* 181, para 251, note 323, for a non-exhaustive list of the Act's references to waters, fishing or offshore activities.
67. *Yarmirr* 184, para 259, per Kirby J
68. Ibid, 181, para 253, per Kirby J
69. Ibid, 183, para 258, per Kirby J
70. Ibid, 195, paras 292 and 293, per Kirby J
71. Ibid, 198, para 299, per Kirby J
72. Ibid, 205, para 320, per Kirby J
73. See for example doc A113 (Powell), para 7

of the foreshore and seabed. One counsel summarised the challenge very briefly: 'Seabed and foreshore is *not* a special juridical space' (emphasis in original).[74]

It was also submitted that English common law has recognised a wide range of rights in the foreshore, seabed and navigable riverbed areas, including Crown grants of exclusive ('several') fishing rights in particular places, sometimes accompanied by property rights in the soil itself.[75] Crown counsel's suggestion[76] that the 'very rare' fee simple title situations mentioned by Dr McHugh[77] must be instances of adverse possession being proved, was rejected for being unsupported.[78] Crown counsel's more general response was that the common law doctrine of aboriginal title, which aims to 'absorb indigenous property rights in a colonial setting', has a theoretical basis 'distinct from the rationalisation of marine property rights in England.'[79]

Another submission critical of Dr McHugh's endorsement of the majority approach in *Yarmirr* was that the outcome of the approach is inconsistent with the situation in New Zealand, said to be analogous, where by application of common law rules, there is Māori ownership of lakebeds coexisting with public rights to sail on and fish in the lakes.[80] It was said that issues of fairness among iwi would arise if the law accepted, as it did, Māori ownership of lakebeds but did not accept Māori ownership of foreshore and seabed.[81] Other submissions critical of Dr McHugh's conclusion that the common law can recognise only a 'bundle of customary rights' in the foreshore and seabed, not 'qualified ownership', are outlined at section 3.3.3(3).

It is notable that the Court of Appeal in the Marlborough Sounds case said very little on this issue and did not refer at all to the Yarmirr case. With its focus on the Māori Land Court's jurisdiction, the Court of Appeal did not need to venture too far into the province of the common law's notion of sovereign rights in the foreshore and seabed. Some relevant comments were made, however, and Dr McHugh highlighted, in support of his argument, certain statements made by Justices Keith and Anderson in their joint judgment. Those judges referred to the distinction made by the English lord chief justice in 1667 between the King's right of jurisdiction or royalty and his right of propriety or ownership in marine areas. As to that distinction, Justices Keith and Anderson observed: 'That right of ownership [in marine areas] was however subject to the liberty of the common people of England to fish in the sea and its creeks and arms unless the King or some subject had gained a propriety exclusive of that common liberty.'[82] The judges then referred to early grants being made to English subjects of 'soil

74. Document A112 (Taylor), para 13
75. Document A113 (Powell), para 7, app A, para 2
76. Document A24(b), para 30
77. Document A23, para 52
78. Document A113 (Powell), para 7
79. Document A24(b), para 32
80. Document A55(a) (Boast), para 3.14A
81. Ibid, para 4.29
82. *Marlborough Sounds* 679, para 132, per Keith and Anderson JJ

below low water mark', noting that these were 'again without prejudice to public (or common) rights especially of navigation'.[83] Later in their judgment, when referring back to those grants, the judges summarised the effect of the 'British law' in 1862 as allowing '*property of a non-exclusive character* in the seabed below low water mark *to be held privately*' (emphasis added).[84]

Those references are certainly consistent with Dr McHugh's explanation that the common law does not recognise full rights of ownership in the foreshore and seabed. Less consistent, however, are statements made by the chief justice about the effect of the 'vital' common law rule that governed the reception of English law in New Zealand. The rule is that English law as at 1840 became part of New Zealand law only so far as it was applicable to the circumstances of New Zealand.[85] When considering the relevance of that rule to the foreshore and seabed, the chief justice stated:

> The common law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.[86]

That statement, Dr McHugh suggested, tends to combine two closely related but 'juridically distinct enquiries'. The first is the aboriginal title inquiry which, because it occurs at the intersection of two normative systems, is 'concerned . . . with the nature of Crown sovereignty'. The second is the reception inquiry, which asks the 'essentially different question', and only after Crown sovereignty has been acquired, of whether, in light of local circumstances, particular English laws that existed at the time sovereignty was acquired have or have not been received here. Since the recognition of aboriginal title is 'bound up' with the character of the Crown sovereignty which is asserted at the outset of a colony's creation, and since the nature of the aboriginal rights that are recognised do not 'arise from inside English law', the result is that aboriginal title cannot be the subject of reception analysis.[87] In response to submissions from claimant counsel to contrary effect,[88] Crown counsel provided the following summary explanation:

> The recognition of aboriginal title may only be so far as is consistent with Crown sovereignty. Reception tests relate to the importation of common law rules which apply to those property rights after the assumption of sovereignty. The scope of the recognition may

83. Ibid, 679, para 133, per Keith and Anderson JJ
84. Ibid, 684, paras 146, per Keith and Anderson JJ
85. The rule was given statutory effect in New Zealand in the English Laws Act 1858. See *Marlborough Sounds* 655, para 28, per Elias CJ
86. *Marlborough Sounds* 668, para 86, per Elias CJ
87. Document A23, para 35
88. Document A112 (Taylor), paras 25–27

indeed be very broad, but the nature of the Crown's sovereignty is a different question from which rules of common law property enter a colony subsequently.[89]

We note that Dr McHugh relied on the Te Weehi case[90] and the Crown–Māori fisheries settlement in support of his conclusion that the 'bundle of rights' analysis would be held to apply in New Zealand to customary rights in the foreshore and seabed. As we understand his argument, it is that the Māori fishing right at issue in *Te Weehi*, and the fishing rights dealt with by the settlement, were regarded as 'non-territorial' (that is, part of a bundle of customary rights) and it would be inconsistent for a different approach to be taken now whereby fishing rights could be regarded as part of a hapū's 'qualified ownership' of the foreshore and seabed.[91] We have difficulty with this reasoning, however, because neither the Te Weehi case nor the fisheries settlement was focused on, or considered, the nature of customary rights in the foreshore and seabed. Rather, each dealt only with fishing rights, regardless of any wider context in which those rights might exist. In light of that, we cannot see that it would be inconsistent for it now to be recognised that customary fishing rights could be part of a set of rights relating to the foreshore and seabed that is so extensive as to amount to 'qualified ownership' of that zone.

It remains to note that, while Dr McHugh's evidence opposed the High Court's recognition of Māori customary rights amounting to ownership, he readily acknowledged that there are 'substantial Māori rights over the foreshore and seabed' and that some could be exclusive.[92] In his words, 'Simply because you have a bundle of rights approach doesn't mean you have to have a restrictive bundle of rights.'[93] The Tribunal asked Dr McHugh if it was possible that the use made of a stretch of coast by a hapū could be 'so intensive' that it effectively precluded its use by others. An example was given of the use by a hapū of a favoured tauranga waka – a place for beaching and launching canoes.[94] Dr McHugh acknowledged that the situation was 'perfectly conceivable' and observed that it raised the possibility, in terms of the Māori Land Court's jurisdiction to vest land in fee simple title (see sec 3.4.2), that the situation could have 'an intensity that seems almost, virtually, the kind to justify that kind of order'.[95]

(2) What sort of evidence will support a High Court declaration?

The answer to the previous question will affect the matter of proof of customary rights relating to the foreshore and seabed. In particular, on the 'bundle of rights' approach, it would

89. Document A24(b), para 24
90. *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680
91. Document A23, paras 96; doc 4.2, p 4
92. Document 4.2, pp 3, 10
93. Ibid, p 7
94. Document 4.3, p 11
95. Ibid 4.3, p 12. The Solicitor-General elaborated on Dr McHugh's acceptance of 'exclusive' rights within the 'bundle of rights' by acknowledging that there may be a customary right of such a nature that it enables a particular group to have exclusive use of a particular area (such as 'a reef or bank for the gathering of food') or gives a right to exclude others to protect an urupa. Oral submissions, reply to questions from Judge Wainwright.

seem that each right would need to be proved separately. Dr McHugh stated that the trial judge's order in *Yarmirr*, which was upheld by the High Court of Australia, indicates how the 'bundle' of rights over the foreshore and seabed might be articulated by a New Zealand court.[96]

In the absence of New Zealand authority, Dr McHugh referred to the approach taken by modern Canadian cases to the matter of proving customary rights (including rights amounting to ownership) of dry land and concluded that it would not be adopted by the New Zealand High Court.[97] The reason stemmed from the Canadian Supreme Court's insistence that a customary right must be integral to the culture before European contact, which he said has had 'an extremely ossifying and perverse effect in Canadian law'.[98] Despite a more expansive approach recently to rights equating to full ownership (proven by exclusive use and possession of land),[99] Dr McHugh considered that the Canadian courts' continuing reliance on pre-contact culture to establish the present existence of customary rights would be incompatible with the Treaty of Waitangi.[100] We will consider more closely at section 3.3.3(3) the possible influence of Treaty principles on the High Court's aboriginal title jurisdiction.

Dr McHugh summarised in more detail the High Court of Australia's requirements for proof of existing customary rights. That court requires evidence of a present-day connection between the applicants and the relevant land, where the entitlement to that connection is established under 'traditional law and custom', which means 'the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty'.[101] While it is accepted that traditional law and custom can have a modern form, nevertheless it must have remained 'substantially uninterrupted'.[102] The required continuing connection between the people and the land does not depend on their recent use of it, and such use will not be determinative of the necessary connection. Whether a spiritual connection with an area, unaccompanied by more tangible physical manifestations, will suffice to establish customary rights has not been decided, although there have been indications that it will not.[103]

96. Document A23, para 88. The order identified the rights and interests of the 'common law holders' in accordance with their traditional laws and customs to – (a) 'fish, hunt and gather within the claimed area for . . . personal, domestic or non-commercial communal needs including for the purpose of observing traditional, cultural, ritual and spiritual laws and customs; (b) have access to the sea and sea-bed within the claimed area for all or any of the following purposes: (i) to exercise all or any of the rights and interests referred to [in (a) above]; (ii) to travel through or within the claimed area; (iii) to visit and protect places within the claimed area which are of cultural or spiritual importance; (iv) to safeguard the cultural and spiritual knowledge of the common law holders.' (reproduced in doc A23, para 88).

97. Document A23, paras 60–61

98. Document 4.2, p 8

99. Document A23, para 60. McHugh cites *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 114, per Lamer CJ

100. Document A23 (McHugh), para 61

101. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538, 555, para 86. Cited in doc A23, para 64, note 50

102. *Yorta Yorta* 555, para 87; doc A23, para 64, n 52

103. Document A23, paras 62–63; doc 4.3, p 24

Dr McHugh observed that the Australian requirement for proof of continuity of connection under traditional law and custom is not an insignificant one, especially where oral traditions are involved. There could be difficulties, for example, in establishing the content of traditional law and custom and in identifying developments in that content over time.[104] Further, Dr McHugh was critical of what he referred to as a 'limiting and straitening effect' in Australian judicial statements about the degree of continuity that is required to establish aboriginal title.[105] The majority of the Australian High Court judges seek 'a direct correlation between "then" (pre-sovereignty) and "now"',[106] thereby demanding a 'substantially uninterrupted' continuity of traditional law and custom, 'largely undiluted by the experience of colonialism'.[107] A consequence of that approach, he observed, is that it would allow no greater set of rights than that which existed at sovereignty and which could be shown to have been continuously present since.[108]

Dr McHugh noted with approval that Justice Kirby has taken a 'more organic' approach to the requirement of continuity of customary tradition[109] that would allow custom 'to develop in a manner that flowed from but was not constrained by the nature of things at the time of Crown sovereignty'.[110] Rather than requiring a direct correlation between 'then' and 'now', as do the majority of his judicial brethren, Kirby's approach 'simply requires "now" to be an organic outcome of "then"'.[111] Dr McHugh was of the view that Justice Kirby's 'much more open' approach to the requirement of continuity would be 'probably the test that a New Zealand court would take'.[112] One result of such an approach would be that post-sovereignty developments could be accommodated in the rights recognised in particular situations. We note that a 'more open' approach to the nature of traditional law and custom would be consistent with the Waitangi Tribunal's acceptance of a Māori right of development, including the use of technology unknown in 1840, in relation to the properties specified in the Treaty of Waitangi, including land, forests, and fisheries.[113]

Plainly, the closer the connection between 'then' and 'now' that may be required by the New Zealand High Court before it will grant a declaration of customary rights in relation to the foreshore and seabed, the more likely it is that some claimants will not be able to meet the standard of proof. An idea raised in *Marlborough Sounds*, and by Dr McHugh, is that the greatest difficulties would be faced by those whose physical connections to the foreshore and seabed

104. Ibid, para 65
105. Ibid, paras 66–67
106. Ibid, para 69
107. Ibid, para 71
108. Ibid, para 71
109. Ibid, para 68
110. Ibid, para 71
111. Ibid, para 69
112. Document 4.2, p 9
113. See above, section 2.1.7. See also, Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, pp 253–260; and Waitangi Tribunal, *Muriwhenua Fishing Report*, pp 234–238

have been most strained as a result of the loss of their adjoining dry land.[114] As claimant counsel observed, where Māori have suffered that loss by means that have been in breach of the Crown's Treaty obligations,[115] the prospect of then being judged not to have continuing customary rights in the foreshore and seabed, seems doubly unfair. This relates to the issue discussed next, as to the extent to which the New Zealand High Court would take into account Treaty principles and other legal norms outside the common law when exercising its common law jurisdiction to declare customary rights in relation to the foreshore and seabed.

A final point of note about the matter of proving customary rights is that there is little judicial authority on how to treat competing customary claims to an area. Dr McHugh observed that, overseas, disputes of this type have tended to be resolved outside the courtroom in a mediated setting.[116] It was his view that such contests over the foreshore and seabed could be expected in New Zealand.[117] The High Court would, therefore, need to identify the relevant common law response.

(3) To what extent would the High Court rely on the principles of the Treaty of Waitangi and human rights norms?

In light of the 'well-settled principle that courts will interpret and apply local law in a manner consistent with the country's treaty obligations',[118] it was generally agreed by counsel that the High Court, when exercising its declaratory jurisdiction, would be mindful of the Treaty of Waitangi and human rights obligations. Dr McHugh observed that as New Zealand judges became more involved with common law aboriginal title, 'it may also be expected that they will consciously articulate its parameters in a manner informed by the Treaty of Waitangi'.[119] It would be 'wholly appropriate' for the courts to use the Treaty to inform the path of common law development in the aboriginal title sphere.[120]

As indicated above, the Treaty's influence might be felt in the High Court's articulation of the proof required by common law of the continuity of rights according to custom and law. It may be, for example, that the court would be more inclined, when assessing modern-day manifestations of a claimed right, to recognise constraints on the right's exercise that are imposed by circumstances that did not exist in 1840 (such as the presence of various non-Māori interests in an area). Claimant counsel Mr Taylor made the broader submission that, consistent with New Zealand courts' desire to develop the common law in the most Treaty-compliant manner, the High Court would take a very liberal view of the survival of customary rights when, in all the circumstances, it would be unfair to hold they had expired. He

114. *Marlborough Sounds* 677, para 122, per Gault P ; doc A23, para 72
115. For example, doc A77(a) (Feint), paras 7–11; doc A29(a) (Williams), para 12
116. Document A23, para 73
117. Ibid, para 74
118. Ibid, para 32
119. Ibid, para 32
120. Ibid, para 33

suggested that nothing short of conscious abandonment of customary rights should fail to meet the continuity test.[121] Dr McHugh, however, was clear that the High Court could not take that approach. He reminded the Tribunal that the rationale of the aboriginal title doctrine is to preserve existing rights not to restore lost rights, no matter how unfair the circumstances of the loss. In that sense, he explained, 'it's a closed system', not amenable to change.[122] Crown counsel added that the redress of historic grievances was properly the province of the Crown–Māori settlement process that is now well-established.[123]

3.3.4 Conclusion

Plainly, there are significant questions outstanding, of both process and substance, about the High Court's declaratory jurisdiction. On the fundamental question of the common law's ability to recognise customary rights equating to ownership, there is an internal logic to the 'bundle of rights' position endorsed by Dr McHugh. As well, the legal underpinnings of that position put it on a different 'plane' from the criticisms that were made of it by claimant counsel. In essence, the logic of the 'bundle of rights not qualified ownership' position is that the law cannot recognise for indigenous people what it does not recognise for the sovereign power. It is a variant of the legal maxim: you cannot give what you do not have. Against that position, the only judicial authority providing strong support for the 'qualified ownership' position in connection with the foreshore and seabed is Justice Kirby's judgment in the Yarmirr case. The statutory context for his argument is, however, significantly different from the common law context in which the New Zealand High Court would be operating. Accordingly, we are of the view that it would be a bold New Zealand High Court judge who would decline to follow the approach of the majority in *Yarmirr*. Further, since the issue would likely find its way to the ultimate New Zealand court – now the Supreme Court – there would need to be a majority of bold judges in that court before the conclusion contended for by the claimants could be declared part of the common law of New Zealand. Overall, we consider it unlikely that the law would be so declared. Accordingly, we consider it more likely that a 'bundle of rights' approach would be adopted by the High Court to conceptualise the nature of customary rights in the foreshore and seabed.

On the matter of the evidence required to prove customary rights, there is no disagreement that the New Zealand High Court would be influenced, within the constraints of the common law, by the Treaty of Waitangi and relevant human rights norms. We consider, however, that the inherent constraints of the doctrine of aboriginal title would preclude adoption by the court of the very liberal approach advocated by some claimant counsel. Therefore, it can be expected that the High Court's approach to the connection required between people and land

121. Document A112 (Taylor), para 14
122. Document 4.2, p 20
123. Document A24, para 43

would not freeze customary rights as at 1840. However, it cannot be expected, we think, that the court would depart from the need for continuity of connection to an extent that would, in effect, threaten the preservationist rationale of the aboriginal title doctrine. How the High Court would deal with competing claims to an area of foreshore and seabed is one that, in light of the dearth of authority, we cannot begin to estimate.

Finally, we note that in each case that comes before the High Court, it will need to examine all possibly relevant statutes, executive instruments and transactions that may have extinguished customary rights in the particular area. From the Waitangi Tribunal's substantial experience of historical inquiries, we think there is significant potential for such investigations to involve extensive historical research as well as complex legal argument.[124]

3.4 The Maori Land Court's Jurisdiction

A key element of the Court of Appeal's decision in the Marlborough Sounds case was the determination that the foreshore and seabed are 'land' within the meaning of Te Ture Whenua Māori Act 1993 (the Act). This opened the way for the iwi of the Marlborough Sounds to proceed with their original application for a status order from the Māori Land Court, declaring the foreshore and seabed of their rohe to be customary land.

We deal in this section with the Māori Land Court's jurisdiction. We ask what will Māori encounter if they seek a declaration from that court that areas of the foreshore and seabed are the customary land of iwi, hapū, or whānau? What are the matters bearing on the likelihood of their success, and on the usefulness of what they might obtain? As with the High Court, there are many questions of law that remain at large in relation to this part of the Māori Land Court's jurisdiction. Again, this is because the jurisdiction of the Māori Land Court to declare the status of foreshore and seabed land under the Act is untried.

This Tribunal cannot determine what the law will be when it is applied by the Māori Land Court. For our purposes, it will suffice to examine the range of possibilities reasonably available to the court. Only by making some assessment of what the court might and might not – and also, can and cannot – deliver to Māori in terms of rights to the foreshore and seabed, can we make a comparison with what the Government's policy will deliver. We must make that comparison in order to determine whether the policy breaches the Treaty, and prejudices Māori.

3.4.1 What is a status order?

For the purposes of Te Ture Whenua Māori Act 1993, all land in New Zealand must have one of the following statuses:

124. See, for example, our outline above of the situation in Te Whanganui ā Orotu, in section 2.2.5.

- Māori customary land;
- Māori freehold land;
- general land owned by Māori;
- general land;
- Crown land; or
- Crown land reserved for Māori.[125]

'Māori customary land' is described in the Act as 'Land that is held by Māori in accordance with tikanga Māori' (s129(2)(a)). It is said to be a 'residual' category of property for it comprises all land not held or granted by the Crown.[126] The Court of Appeal has now determined that it can include coastal land covered by water.

Upon an application being made to it, the Māori Land Court has jurisdiction to determine and declare, by a status order, the particular status of any parcel of land (s131(1)). As we have seen (sec 3.3), the High Court has a parallel jurisdiction under the common law, to determine whether, and how, land is held by Māori in accordance with the doctrine of aboriginal title.

3.4.2 What is a vesting order?

In the event of the status order being made, application can be made to the Māori Land Court to exercise its exclusive (sole) jurisdiction to investigate the title to the land and determine, according to tikanga Māori, the relative interests of the owners (s132(1), (2)). The court may then define the area dealt with and make an order vesting it in such persons, or trustees, as it thinks fit (s132(4)(a), (b)). On the making of a vesting order, the land becomes subject to the Land Transfer Act and the order must be registered under that Act (ss139, 140). This means that on receipt of a copy of the vesting order, the district land registrar must embody the order in the provisional register, and all the provisions of the Land Transfer Act as to provisional registration then apply, subject to the Act.[127] The effect is that the land is vested as Māori freehold land, for an estate of fee simple,[128] in the owners or trustees named in the vesting order (s141). Thus, the process of vesting brings customary land into the general land tenure system, and allows its owners to exercise the usual rights of ownership.

125. Te Ture Whenua Māori Act 1993, s129. Some concern was expressed by the Court of Appeal in the Marlborough Sounds case (see, for example, Gault P, 672, para 99), and by claimant counsel in our proceedings (doc A55 (Boast), paras 5.4–5.9), that these categories might not be comprehensive, as seems to have been intended by the framers of the Act. For the purposes of a Māori Land Court inquiry into the status of land, however, the categories are sufficient for the court to determine whether land is still Māori customary land.

126. *Marlborough Sounds* 659, para 47

127. *Marlborough Sounds*, 696, para 194, per Tipping J

128. An estate in fee simple is the most extensive form of landholding known to English law. Putting aside some of the legal technicalities, owning a fee simple estate in land (also described as having a fee simple title to the land) is equivalent to owning the land itself. More technically, the fee simple is the most common of the freehold estates, all of which are characterised by their uncertain duration. (The other kind of estate is the leasehold, which is of certain duration.) The fact that the fee simple estate is the most common form of freehold estate means that the terms 'fee simple' and 'freehold' are used almost interchangeably in some contexts: docA55 (Boast), para 3.19.

The Crown's foreshore and seabed policy proposes to abolish the status and vesting order jurisdiction of the Māori Land Court and replace it with jurisdiction to award a new right comprised in what is called a 'customary title' in publicly owned land, on which specific use rights can be recorded.

3.4.3 What do you have to show to convince the court that land is Māori customary land?

The answer to this question is deceptively simple: if land is not any of the other kinds of land identified by Te Ture Whenua Māori Act (Māori freehold land, General land owned by Māori, General land, Crown land, or Crown land reserved for Māori) *and* it is held by Māori in accordance with tikanga Māori, that land 'shall have the status of Māori customary land' (s129(2)(a)).

To determine that land is not any other kind of land, the court will need to satisfy itself that the customary title has not been extinguished. We have already outlined (in section 3.3.2) the law relating to extinguishment of customary rights and our view that, in some cases at least, the inquiry will involve a detailed examination of laws and legal documents and a forensic examination of historical evidence. We cannot predict how straightforward or otherwise the task will prove to be in the majority of cases. But there are bound to be some situations that call for intensive research and time-consuming analysis. As we noted in chapter 2, the Te Whanganui-ā-Orotu (Wai 55) Tribunal had to carry out a detailed historical analysis of the Ahuriri deed. It concluded that the deed did not, despite an appearance to the contrary, cede the Napier Inner Harbour or the claimants' rights in the foreshore and seabed of their taonga. A quick inquiry and a concentration on the English-language version of the deed would not have reached the correct result.

If the customary title has not been extinguished, the Māori Land Court would next ask: Is the subject land held in accordance with tikanga Māori? Much turns on how this phrase will be interpreted, and it is a matter to which we will return. But first we need to explore a critical question that has been raised about the Māori Land Court's jurisdiction: will a customary land status order necessarily give rise to a vesting order?

3.4.4 Will a status order always lead to a vesting order?

In the Court of Appeal in the Marlborough Sounds case, Justice Tipping thought that it did not necessarily follow that once the Māori Land Court makes a status order under section 131, a vesting order under section 132 will also be made. His Honour observed that declining to make a vesting order would, in the words of the heading to section 132, involve declining to change Māori customary land to Māori freehold land. In his view, there may be circumstances, 'such as when the foreshore or the seabed are involved,' when it would not be appropriate to change the status of the land in that way. Thus:

> There is no inevitability that a status order under s131 will convert to a Land Transfer Act title under s139. . . . There may be cases where a status order is the only order that should properly be made under Part 6 of the Te Ture Whenua Maori Act.[129]

The chief justice gave a historical perspective, when she said that, before 1894:

> it was possible for the ownership of land held according to Maori custom to be ascertained on application to the Native Land Court without also obtaining a vesting order changing its status from land held in accordance with custom to land held in fee of the Crown.[130]

However, Her Honour continued, from the time the 1894 Native Land Act was enacted until 1993, when Te Ture Whenua Māori Act came into force:

> investigation of title of customary land automatically resulted in the conversion of customary ownership into Māori freehold land, held in fee of the Crown as though by Crown grant.

Commenting on the effect of Te Ture Whenua Māori Act's provisions for status and vesting orders, the chief justice said:

> Under Te Ture Whenua Maori Act a vesting order obtained under s132 continues to change the status of customary land to Maori freehold land. But the Maori Land Court may now make a declaration of status of customary land under s131 without that consequence. The current legislation is therefore no longer an inexorable mechanism for conversion of customary land into freehold land.[131]

The Court of Appeal judges made no determination on the ultimate significance of the possibility that land could be declared customary land, and remain customary land. That was not the matter they were deciding. The chief justice therefore simply noted that:

> For present purposes . . . any property interests in foreshore and seabed land according to tikanga may not result in vesting orders leading to fee simple title . . .[132]

The Court of Appeal president, Justice Gault, took a different view of the status and vesting order provisions, however. He saw the essential purpose of part VI of Te Ture Whenua Māori Act in which they are contained as being:

> to enable the interests of Maori in Maori customary land to be brought under the Land Transfer system conferring title as near as possible under that system to that previously enjoyed.[133]

129. *Marlborough Sounds*, 696 para 196, per Tipping J
130. Ibid, 658, para 44, per Elias CJ
131. Ibid, 658–9, paras 44–45, per Elias CJ
132. Ibid, 659, para 47, per Elias CJ
133. Ibid, 673, para 104, per Gault P

Observing that a vesting order is made in favour of 'the owners of the land' as determined according to tikanga Māori and that the land transfer system title that is conferred is for a fee simple estate, the president reasoned that part VI of the Act is concerned with:

> land capable of supporting an estate in fee simple and ownership interests capable of conversion to registered estates under the Land Transfer Act.[134]

This meant that interests in land 'in the nature of usufructuary [use] rights or reflecting mana':

> though they may be capable of recognition both in tikanga Maori and in a developed common law informed by tikanga Maori, are not interests with which the provisions of Part VI are concerned.

Therefore, although acknowledging that the issue was for the Māori Land Court to determine, the president noted his 'real reservations' about the ability of the iwi applicants 'to establish that which they claim'.

By those statements, we understand the president to mean that, from his knowledge of tikanga Māori, and of the Māori laws and customs that define customary rights under the common law of aboriginal title, the nature of any Māori interest in the foreshore and seabed is unlike the ownership interest conferred by a fee simple title. Instead, Māori interests in the foreshore and seabed comprise ancestral connections to particular places as well as particular uses that are still being made of those places but they are materially different from the sorts of interests that should be able to be converted to fee simple title. Therefore, they should not be the subject of a status order which declares land to be customary land for the purpose of then vesting it in fee simple title. We note the similarity between the president's view and the views that underlie the Crown's proposed policy.

The approach of the chief justice and Justice Tipping, however, envisages a situation where the property rights held by a particular hapū in relation to a particular area of foreshore and seabed might be sufficient to give rise to a declaration that the land is customary land, but insufficient to justify a fee simple title. In that situation, the customary land would presumably continue as customary land outside the Land Transfer Act system of registration. As will be seen shortly, claimant counsel before us did not necessarily accept this approach.

3.4.5 Benefits of a status order without a vesting order

There is another situation, we think, in which it is possible to imagine a status order being made by the Māori Land Court without a vesting order also being made. It is when the applicants desire that result. The notion that land may be declared to be Māori customary land and remain as such seems to us to be one that would be valued by Māori in some situations. It

134. Ibid, 673, para 106, per Gault P

may, for example, be regarded as an outcome that is most consistent with tikanga Māori and, therefore, most appropriate for a particular area. It may be an outcome that preserves some other feature of the area that will be changed if it becomes Māori freehold land, such as its potential liability to being rated. These would be benefits that a status order, on its own, would confer on the customary owners.

Other possible benefits of a status order, it seems, would depend on the particular circumstances, as was discussed in relation to a High Court declaration (see sec 3.3.1). Of particular note, we think is that the trust provisions of Te Ture Whenua Māori Act (ss 212–217) apply to 'Māori land', which is defined to include customary land. Mr Boast submitted that this was significant because it allows the Māori Land Court, having made a status order, to proceed to make a trust order in respect of the customary land and vest the land's management in trustees.[135] Since the making of a trust order requires the beneficial owners of the land to be first identified, the Māori Land Court could only make such an order in relation to customary land once it had investigated the title to the land and determined its owners. This means that if the court did make trust orders in relation to customary land, it would be doing that as an alternative to making a vesting order – the order that vests the land, as Māori freehold land, in fee simple title. It is possible, therefore, that trust orders in relation to customary land could provide the 'middle ground' that otherwise appears to be lacking between a status order declaring land to be customary land and a vesting order that converts the land to freehold land in fee simple title.

3.4.6 Restrictions on alienation of Māori freehold land

There is one other important element of the Māori Land Court's jurisdiction to vest customary land as Māori freehold land. It is that, unlike general land (whether owned by Māori or others), there are significant restrictions on the alienation of Māori freehold land.[136] This means that even where customary land is vested and a fee simple title is acquired, it would be most unlikely that it could be sold, even in the event of its owners wishing to take that course. Practically speaking, we think that owners of this kind of land are likely to be a wide kin group. By far the most likely course is that the land would be vested in a trust under the Act. The potential for trustees to sell Māori freehold land is virtually nil. Given the circumstances of the acquisition of the freehold title, and the land's significance culturally and spiritually, the deed of trust would almost certainly preclude alienation of the land comprised in the trust.

Having now set out the key aspects of the jurisdiction of the Māori Land Court with respect to customary land, we turn to consider the range of views that we consider plausible about how the Māori Land Court may exercise its jurisdiction.

135. Document A117, paras 4.1–4.5
136. See Te Ture Whenua Māori Act, pt VIII

3.5 The Range of Plausible Approaches

A wide range of views was presented to us. We have grouped them in three categories. In the first category, we put those claimant counsel who predicted that the Māori Land Court's approach would be very permissive, such that most applications would result in a declaration of customary land, and such declarations would always mature into a vesting order conferring freehold title where applicants wanted that result. We call this category 'most permissive'.

In the second category we put those who predicted a middle road, in which the Māori Land Court was likely to develop tests for proving different levels of interest in customary land. This would lead to some customary land comprising only limited rights that would not support its vesting as freehold land. Where the evidence of the applicants of attachment to the land is stronger, vesting could result. We call this category 'the middle ground'.

In the third category is the Crown's view. The Solicitor-General told us that there would only rarely be extant (existing) customary interests that would be so ample as to support a freehold title.[137] The Crown attached considerable significance to the limiting effect of the Crown–Māori fisheries settlement (the Sealord deal) on the ability of Māori to show a continuing customary interest of magnitude.[138] We call this category 'most restrictive'.

We now discuss each category in turn, identifying the circumstances and interpretation of the law relied on to support the views expressed.

3.5.1 Most permissive

At one end of the spectrum is the contention that in *all* cases where the customary title remains unextinguished, the court will declare the land to be customary land, and the vesting of the land as Māori freehold land will result in its owners obtaining a fee simple title under the Land Transfer Act.[139] This view calls in aid the practice of the Native Land Court in the nineteenth century, and the role of the Māori Land Court as a direct successor in that practice.

The investigations of title that went through the Native Land Court in the nineteenth century covered huge tracts of land. The purpose was to establish title so that land could be alienated. The court then was involved in establishing ownership as between hapū and whānau rather than determining whether it was customary land by virtue of custom and usage.

Under Te Ture Whenua Māori Act, the Māori Land Court determines owners of customary land and their relative interests 'according to tikanga Māori' (s132(2)). Although the use of this language is new, Mr Boast told us that its meaning is equivalent to earlier Acts' reliance on the phrase 'according to Native custom'. In practice, in the past, however, custom came

137. Oral submission of Terence Arnold QC, 29 January 2003; doc A24 (Crown), para 112
138. We discuss the effect of the fisheries settlement at section 3.6.
139. Document A46 (Powell), paras 31–32

into play principally in determining who the owners were according to tikanga – that is, having established a tupuna connection with the land, tikanga determined who were those entitled at the time the investigation was undertaken, and what was their rohe. It was in relation to that question that the court developed the standard tests as to 'take' (sources of right).

Under these tests, the court sought factual evidence to ascertain by which of three take (sources of right) the applicant group claimed title. The take were:

- take tupuna (rights derived from ancestral connection);
- take raupatu (rights derived from conquest); and
- take tuku (rights derived from a customary gift exchange).

If applicants could show that they had an underlying right to the land and its resources through ancestral descent, conquest, or customary gift, they had then to show evidence of a fourth take:

- take ahi kā (keeping one's fires alight by means of use and occupation).

Importantly, the court did not typically focus on the 'intensity' or 'strength' of the association that would support a declaration of customary land. This was so even in the one hundred year period between 1894 and 1993 when, under the legislation then in force, the declaration inevitably resulted in a vesting of the land in fee simple title. Rather, vesting the land in fee simple was part and parcel of the investigation, and was subject to no separate and more rigorous test.

Counsel told us that the Māori Land Court's practice would continue in the vein described, because to import a host of more rigorous tests now would be inconsistent and unfair. The argument is encapsulated in this quotation from the submissions of claimant counsel Mr Powell:

> Although much of the evidence tendered in the Native Land Court was usufructuary in nature, often applying to specific areas within a given block, in general terms it provided good evidence for an overall title in fee simple to be issued to the customary owners . . .
> . . . as a matter of consistent policy, successive native land acts have been utilised as statutory translation mechanisms turning a variety of proven customary rights and interests into fee simple titles. The advantage to the colonial government was substantial as by bundling the rights up into a single transferable title it was far easier to orchestrate the alienation of significant areas of land. It is too late now to suggest that different criteria should now be applied.[140]

We asked whether the application of the test comprised in take ahi kā might limit the situations in which customary title would be declared today. If the court were to require proof of keeping one's fires alight by use and occupation, might that not sometimes present an obstacle to groups asserting title to foreshore and seabed today? We were told that take ahi kā as applied by the court in the past would not serve to limit Māori rights in the modern context,

140. Document A46, paras 27, 29

where there is a contest as to rights between Māori and non-Māori. This is because the court's jurisdiction is to apply tikanga Māori, and under tikanga Māori the concept of ahi kā roa only operates to determine questions of right as between Māori, not as between Māori and others.[141]

If Mr Powell and supporting claimant counsel are correct,[142] the Māori Land Court would almost always declare land to be customary land where Māori maintained a connection with it in accordance with tikanga. There would not be a high threshold in terms of the strength of the connection that needed to be shown. The underlying premise would be that if the land does not have one of the other statuses identified in section 129(1) (general land, Crown land etc), then it will be customary land, and there will be an iwi or hapū that has a tikanga connection with that land. The court's job would be to determine to whom the tikanga connection belonged, and over what area the connection could be substantiated by evidence. As in times past, the principal focus of the court's work would be on judging competing claims to territory as between hapū and whānau Māori, rather than assessing whether the nature and quality of the applicants' connection justified a declaration of right in the land at all.

This view also accords no significance to the fact that declaring customary land and vesting it happen in separate steps under separate sections of Te Ture Whenua Māori Act. As we have seen, the court's jurisdiction is, first, under section 131, to consider whether to declare land to be customary land and, secondly, under section 132, to apply tikanga Māori to the investigation of who owns the title and in what shares, and vest it in them. As in the nineteenth century, the two steps would effectively be conflated, and vesting would always follow hard on the heels of the declaration, unless for some reason the applicants wanted it otherwise.

3.5.2 Middle ground

Sitting perhaps at about the middle of the continuum of views was that expressed by Mr Boast. His is the middle ground in the sense that his approach comprehends the possibility that some – perhaps even most – applications for a declaration of customary land may result in rights being declared that do not equate at all to a fee simple title.

Mr Boast identified, rightly we think, the key issue for the Māori Land Court of determining:

> when it would be appropriate to make merely a status declaration that a defined area of foreshore has the status of Māori customary land for the purposes of [the Act] and when to make a vesting order (which leads, as already pointed out, inevitably to a certificate of title under the Land Transfer Act 1952).[143]

141. Counsel for Te Ohu Kai Moana, oral submission, 29 January 2004
142. Other counsel adopted the submissions of Mr Powell (docs A46, A46(a) and A113) and Mr Boast (doc A55(c)).
143. Document A55, para 6.5

This view acknowledges the circumstances of modern times that make the court's task of assessing customary interests in the foreshore and seabed different from what it was in respect of land in the nineteenth century. As we have seen, at that time, the key driver of the policies enshrined in the native land legislation was to render all customary land as alienable titles as soon as possible, in order to meet the settler demand for land. The underlying premise was that all land belonged to 'the natives'; the Native Land Court's job was to determine which natives. If Pākehā considered they had rights in the subject land, they could object to a declaration being made. If the court upheld the objection, the land would not be declared to be customary land. Thus, it was not the approach of the court to factor in the interests that non-Māori may have acquired, and then award a lesser interest in the land to the applicant Māori – although, having said that, it may be possible to characterise the approach in *Kauwaeranga*[144] and the other fishing cases in that way. Certainly, the court did allocate different proportions of interest in the land to different groups of applicant Māori. This usually reflected the varying intensity of uses of the land by the different groups, and the effect was that those with the most use rights got the biggest share.

Mr Boast's support of the middle ground is, we think, in many ways a pragmatic one, reflecting the inclinations discernible in the judgments in *Marlborough Sounds*, and acknowledging the inevitability that any approach devised by the Māori Land Court would certainly be appealed through the court hierarchy. We note that the chief justice in the Marlborough Sounds case foreshadowed the possibility that the Māori Land Court might need scope to recognise lesser interests than those amounting to a fee simple title. After referring to the Native Land Court's 'apparent . . . willingness' before 1894 to recognise 'lesser interests by way of easements or other mechanisms known to English law', Chief Justice Elias commented that such lesser interests 'might better have approximated some customary interests'.[145] She does not develop the point, but notes the possibility (already referred to – see section 3.4.4) that property interests in foreshore and seabed land may not result in vesting orders leading to fee simple title.[146] As has also been noted (sec 3.4.4), the president, Justice Gault, went further in expressing doubt that the Court of Appeal's decision in *Marlborough Sounds* would necessarily lead to any outcome favourable to the Māori parties.

It was further submitted by Mr Boast that, on the basis of the 1840 Rule and the standard take set out above, the Māori Land Court will need to develop tests to determine whether applicants have not merely a customary title, but one which is appropriately translated into a fee simple today:

> The Court would have to embark on a task it has not done before. It would have to rank interests in the foreshore and seabed into what might be called 'Category 1' interests (interests equivalent to a freehold) and 'Category 2' interests (interests not equivalent to a

144. *Kauwaeranga* (1870) 4 Hauraki MB 236 (reprinted in (1984) 14 VUWLR 227, 224)
145. *Marlborough Sounds*, 659, para 46
146. *Marlborough Sounds*, 659, para 46

> freehold, but which nevertheless justify the making of a vesting order) . . . The Court would *have* to evolve a threshold criteria which justify, in the first place, a status order, and secondly, a stricter range of tests as a prerequisite for a vesting order. [Emphasis in original.][147]

This approach does seem to us to be in line with the general understandings of the Court of Appeal judges as to the kind of process that, following their judgments, the Māori Land Court would embark upon.

Nevertheless, Mr Boast is quite clear that, notwithstanding the development of tests establishing a hierarchy of customary interests, the Māori Land Court would be in the business of making vesting orders. While declining to undertake a full review of the kinds of evidence that would persuade the Māori Land Court to make a freehold order, he asserted that 'In practice a wide range of interests would support this.'[148] He respectfully differed from the suggestion by the chief justice that interests in the foreshore and the seabed might be more difficult to prove than 'dry land' cases.[149] He pointed to the approaches of the courts in *Ngakororo*[150] and *In Re Ninety-Mile Beach*[151] as indicative of the court's willingness in the past to investigate areas of the foreshore, specify criteria for the establishment of rights, and find the criteria fulfilled.

In respect of the Ngakororo case, the Māori Appellate Court identified these elements as significant to proof of title:

- a clear definition of the area;
- proof of continuous and exclusive use;
- proof of use which is different from that of the public generally;
- evidence (for example) that 'there were . . . special shellfish beds over which proprietary rights were exercised by any particular section of the people'; and
- evidence that the area 'existed in 1840 in much the same condition as it did today'.[152]

Judge Morison accepted in *In Re Ninety-Mile Beach* that the evidence justified the grant of freehold titles in 1957 on the basis that the applicants could satisfy the court as to the following:

- the area was part of the tribal territory;
- they had kāinga and burial grounds scattered inland from the beach;
- the beach had been occupied 'to the exclusion of other tribes';
- the (foreshore) land itself was a major source of food;
- fish were caught in the sea from the beach;

147. Document A55, p 43
148. Document A55(c), para 8.5
149. *Marlborough Sounds*, 662, para 55
150. Ngakororo case, (1942) 12 Auckland Native Appellate Court minute book 137
151. (1957) 85 Northern MB 126 [MLC]; *In Re an Application for Investigation of Title to the Ninety-Mile Beach* [1960] NZLR 673 (SC); *In Re the Ninety-Mile Beach* [1963] NZLR 461 (CA)
152. Document A55(c) (Boast), para 9.8

- for various reasons, from time to time rāhui were imposed upon various parts of the beach and the sea itself (demonstrating management under Māori customary law); and
- the beach was 'used generally' by Te Rārawa and Te Aupōuri.

If the Māori Land Court were to take the middle ground, as predicted by Mr Boast, criteria of the sort set out above would be likely to be developed. Effectively, these would become a court-developed gloss on what 'held in accordance with tikanga Māori' means for the purposes of the court's jurisdiction over the foreshore and seabed. The differing circumstances of applicants assessed in relation to the criteria would determine, first, whether their interest(s) would justify a status order declaring the land to be customary land and, secondly, whether they would justify translation into the general law of land registration by an order vesting fee simple title to Māori freehold land.

3.5.3 Most restrictive

The Crown took the position that the Māori Land Court should take a restrictive approach to the customary interests before it, because they do not (in most cases) amount to the customary equivalent of a full fee simple title. The Crown's argument focused on three main points:

- its concern that Te Ture Whenua Māori Act 1993 was not intended to apply to the special circumstances of the foreshore and seabed;
- its view that, in the great majority of cases, the Māori customary interests that have survived in the foreshore and seabed are not equivalent to a fee simple title; and
- its concern that the Māori Land Court might nonetheless take an 'expansive' approach and grant fee simple titles, and that this possibility cannot be ruled out.

Taking the Crown's arguments in turn, we look first at the question of whether Te Ture Whenua Māori Act 1993 provides an adequate range of options for the Māori Land Court. Counsel submitted that, in the view of the Court of Appeal, the Act 'did not equip the Māori Land Court to deal with the full range of customary interests in foreshore and seabed'.[153] The chief justice noted that it was not clear whether the Māori Land Court could 'recognise customary interests in land which do not translate into fee simple ownership'.[154] President Gault thought that interests in land which amounted to usufructuary rights or reflected mana, though they might be recognised by tikanga Māori, were nevertheless 'not interests with which the provisions of Part VI [of Te Ture Whenua Māori Act] are concerned'.[155] Crown counsel noted his agreement with the president that the range of customary Māori interests in the foreshore and seabed would not generally justify a grant of fee simple ownership.[156] The Crown's policy, however, recognises the possibility that some Māori interests do make 'a good

153. Document A24 (Crown), paras 23.3.1, also paras 3, 13
154. *Marlborough Sounds*, 649–650, para 8, per Elias CJ
155. Ibid, 673, para 106, per Gault P
156. Document A24, para 19

case for exclusive occupancy', beyond what the court could award if its jurisdiction were changed in accordance with the policy.[157]

The Crown's argument that Māori rights in the foreshore and seabed today are fairly limited ones, is based on three things:

- that in some cases, the rights have been lawfully extinguished;
- that in most cases, the rights have been attenuated by loss of seafront land and many other practical limitations on what Māori can still do, and by the rights acquired in the meantime by others; and
- that in particular, the nature and extent of Māori customary interests in the foreshore and seabed have been diminished by the 1992 Crown–Māori fisheries settlement.[158]

The Crown is concerned, however, that Te Ture Whenua Māori Act 'does not provide the Court with the range of tools necessary to enable it to address the full range of customary interests'.[159] Counsel noted:

> the Maori Land Court has not been concerned with examining the intensity of Maori association with a view to deciding whether some threshold for ownership has been passed. In other words, it has not had to locate Maori rights along the spectrum of common law aboriginal title. Once the Court has determined that the assumed native title has not been extinguished, its task has been merely to establish the identity of the title-holders, who are entitled to a grant or its equivalent.[160]

As a result, isolated rocks in the sea, which it may not even be possible to land on, have been declared to be customary land in recent decisions. The Crown cited the da Silva case, and its findings that the test 'held in accordance with tikanga Māori' could include spiritual associations (without physical ones), and that there are uncertainties about the meaning of customary land.[161]

Counsel noted Mr Boast's submission that the court would evolve tests and thresholds, but remained concerned about the possible outcomes.[162] As the policy notes, the Crown is concerned that 'there is every prospect that concepts appropriate only to ownership of land above the high water mark would be applied to the foreshore and seabed'.[163] A tikanga Māori test 'could lead to an expansive approach' by the Māori Land Court.[164]

Thus the Crown's analysis of the Māori Land Court jurisdiction is an interesting one. Its assessment is that the rights are at the low end, but its fear is that the Māori Land Court's assessment of the rights will be an over-assessment. Moreover, Te Ture Whenua Māori Act is

157. Document A21, para 270
158. Document A24, paras 42.1, 55–67, 86.3
159. Ibid, para 23.3.1
160. Ibid, para 76
161. Ibid, paras 76–101
162. Ibid, para 112
163. Document A21, para 84
164. Ibid, para 140

drafted in a way that augments the potential for the rights to be recognised – mistakenly, the Crown thinks – as giving rise to a status order declaring foreshore and seabed to be customary land, because machinery for recognising lesser rights is not spelled out in the Act. And once there is a declaration of customary land, the Māori Land Court is on the slippery slope to vesting the land in fee simple.

3.5.4 Conclusion

As we said when we embarked upon this section of the report, it is not our role to determine the difficult questions set out here. That would fall to the Māori Land Court, as envisaged by the Court of Appeal in *Marlborough Sounds*.

We think it possible that the Māori Land Court could elect any of the three categories of approach we have described. We think it most likely that various judges of the Māori Land Court, as the various applications came before them over time, would incrementally develop an approach that was in effect a variant, or variants, of the middle ground. However, we do not at all discount the possibility that one of the other two approaches, or elements of them, would be favoured. We note again too the inevitability of the Māori Land Court's judgments being appealed, and the possibility that judges in the higher courts might take a more restrictive approach.

There are, however, factors that militate against an appellate court reading down the ability of the Māori Land Court to recognise customary rights, declare land to be customary land, and vest it in owners where appropriate. The first is the strong emphasis in Te Ture Whenua Māori Act on application of tikanga to the court's determinations in sections 131 and 132. The evidence we heard about the tikanga applying to the foreshore and seabed persuaded us that it would be wrong – and demonstrably wrong – to take a view of the extant interest of Māori in the foreshore and seabed that was too reductive.[165]

There is the impact too of the wider statutory context. Section 2(2) of the Act requires the Māori Land Court to exercise its jurisdiction 'in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants'. Section 2(1) provides that the provisions of the Act are to be interpreted in a manner that best furthers the principles set out in the preamble to the Act. The preamble refers specifically to the protection of rangatiratanga embodied in the Treaty of Waitangi.[166]

We heard reasonably extensive evidence on Māori custom and values as they operate today in the coastal area. The evidence indicates to us that many of the claimants who appeared before us can prove:

165. A very general account of that evidence is provided in chapter 1 of this report.
166. Document A45 (Powell), paras 9–10

- ancestral connection with the foreshore and sea, giving rights and authority and imposing responsibilities and obligations under tikanga;
- spiritual (in all cases) and physical (in some cases) relationship with the foreshore and sea, governed by tikanga;
- the operation of tikanga in today's world, regulating their own activities, and those of manuhiri (guest tribes and, to some extent, Pākehā); and
- exclusive aspects of the relationship and the tikanga.

As a result, we have no difficulty in concluding that land in the foreshore and seabed would be declared customary land, and would at least sometimes be vested as freehold land. This conclusion is supported by the purpose and intent of Te Ture Whenua Māori Act, as expressed in the general provisions referred to above. It is also supported by the Act's deliberate invocation of the Māori view, as is evidenced by the central place that is given to tikanga Māori, including in relation to the status and vesting of customary land.

3.6 The Effect of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

In the Marlborough Sounds case, the chief justice observed that a question of law that could arise for future consideration is whether any interest in the foreshore and seabed (whether recognised by common law or under Te Ture Whenua Māori Act) is affected by the terms of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. That Act gives effect to the Crown–Māori settlement, popularly known as the Sealord deal, which settled all Māori fishing interests, both commercial and non-commercial. Section 9 of the Act extinguishes customary rights in commercial fishing[167] and section 10 'shoehorns' customary rights in non-commercial fishing into a framework which is meant to give them expression through regulation.[168] Section 9 provides that all claims (current and future) by Māori in respect of commercial fishing are 'finally settled' and the obligations of the Crown to Māori in respect of commercial fishing are 'fulfilled, satisfied and discharged'. Further, all claims (current or future) in respect of, 'or directly or indirectly based on, rights and interest of Māori in commercial fishing are hereby fully and finally settled, satisfied, and discharged'. Section 10 provides that claims arising from Māori rights or interests in non-commercial fishing[169] shall continue to give rise to Treaty obligations on the Crown and that regulations will be made to recognise and provide for customary food gathering that is non-commercial. Further, the Māori rights or interests in non-commercial fishing that give rise to claims, whether under the law or the Treaty, 'shall have no legal effect and accordingly are not enforceable in civil proceedings and shall not provide a defence' in criminal proceedings.

167. See, for example, doc A99 (Ferguson), para 31
168. The expression is Dr McHugh's: transcript 4.2, p 11.
169. By section 10, non-commercial fishing relates to the 'species, or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983'.

The Tribunal sought submissions from counsel on the effect of the Act on applications to the High Court or Māori Land Court for declarations that particular areas of foreshore and seabed are customary land. Crown counsel submitted that 'a very significant aspect of the nature of the Māori interests in the foreshore and seabed relates to fishing'. Therefore, the Act, it was said, provides 'substantial and significant recognition of Māori rights with respect to the foreshore and seabed'.[170] This meant that the Act has 'a diminishing effect on the range of residual customary interests in the foreshore and seabed that have not been settled and brought under regulation'.[171] In light of Crown counsel's additional comments on this point at the hearing, we understand this submission to mean that the customary rights that remain in the foreshore and seabed after the fisheries settlement legislation are a thinner 'bundle' than that which existed beforehand. On this view, the fisheries settlement legislation has eroded the foundation of contemporary Māori claims to substantial rights in the foreshore and seabed. Thus, for the Crown, with its view that the Māori Land Court jurisdiction should be analogous to the High Court's common law jurisdiction, the conclusion is that, with fishing rights already recognised by the 1992 Act (and in light of the other 'diminishing' factor of loss of contiguous Māori land), the 'bundle' of customary rights that remains in the foreshore and seabed will be most unlikely to be so extensive as to equate with ownership of the area.

Claimant counsel maintained that, as a matter of statutory interpretation, the Act does not affect the ability of Māori to rely on customary fishing rights as evidence of rights in land, whether in the High Court or the Māori Land Court.[172] Mr Powell submitted that a 'clear and justifiable distinction' needs to be drawn between customary rights in the foreshore and seabed and the evidence that can be relied upon to make out those rights.[173]

The issue, then, is what effect will evidence of customary fishing rights have on the High Court's and Māori Land Court's inquiries into whether particular areas of foreshore and seabed are customary land? There seems to be no disagreement that such evidence could be relied on as evidence of a connection between the people who held (in the case of commercial rights) or still hold (non-commercial) customary fishing rights, and the area to which the rights relate. But are such rights also evidence of the 'intensity' of use of the area?

We think the Crown's argument only has potential force in the High Court. There, if Dr McHugh's analysis is accepted, the aboriginal title to the foreshore and seabed that is potentially available to Māori is 'non-territorial', comprising a bundle of rights, not 'qualified ownership'. The rights in the bundle are predicated on the use to which the land was and is put. The content of the rights is, therefore, quintessentially about the activity that defines it. We think it arguable that the High Court would be precluded from including a fishing right in the bundle as a result of the terms of the fisheries settlement.

170. Document A24(b), para 56.1

171. Document A24, para 42.1. The Crown also submitted that the fact that there is now very little customary land or Māori-owned land adjacent to the foreshore 'must have' a similar 'diminishing effect' (para 42.2).

172. Document A46 (Powell), paras 41–45; doc A99 (Ferguson), paras 21–23

173. Document A46, para 44

In the Māori Land Court, however, the question for the court is whether the land is held in accordance with tikanga Māori. There is therefore a focus on the land itself, on where the people went, and why – all in the context of tikanga. The examples of the courts' analysis in the Ngakororo and Ninety-Mile Beach cases referred to above (sec 3.5.2) show that use of the subject land for fishing was only one of several factors bearing on the courts' consideration. We do not think that the terms of the fisheries settlement would preclude applicants in the Māori Land Court from relying on evidence of the intensity of their use of the land for fishing purposes. However, it may be that the use of the word 'indirectly' in section 9 would be considered to have very broad effect and that such evidence would be excluded. But if that were so, we do not think it would impact at all seriously on the ability of applicants to demonstrate the necessary links through tikanga by other means.

Our conclusion, therefore, is that although the fisheries settlement might be interpreted so as to impact considerably on the ability of applicants to succeed in obtaining a declaration of customary rights in the High Court, we doubt that it would have any appreciable effect on their prospects before the Māori Land Court.

3.7 Summary

3.7.1 The High Court's jurisdiction

Having considered a number of procedural and substantive questions about the High Court's jurisdiction to declare land to be customary land according to the common law doctrine of aboriginal title, in this chapter we concluded:

- The circumstances in which the court would exercise its discretionary jurisdiction are unknown but might be limited by the availability of an alternative remedy in the Māori Land Court.
- A High Court declaration, of itself, is not legally enforceable but it could well provide the declared customary right-holders with leverage for their position in a range of disputes.
- A declaration coupled with a trust of the customary land could be a convenient means of implementing the right-holders' obligations to protect the land.
- It is more likely that the New Zealand High Court, and the courts above it, would adopt the 'bundle of rights' approach of the High Court of Australia in *Yarmirr* than hold that customary rights in the foreshore and seabed can amount to 'qualified ownership', that is, full ownership qualified only by the public rights of navigation and fishing.
- While the New Zealand High Court, when determining the evidence that is needed to prove customary rights, would be influenced by the Treaty of Waitangi, it would not depart from the need for continuity of connection between the applicants and the land to such an extent that the preservationist rationale of the doctrine was compromised.

- How the High Court would deal with competing Māori claims to the same area is not able to be estimated.
- In each case where customary rights are asserted, the High Court would need to consider whether they had been extinguished and this could entail lengthy and complex examinations of historical evidence and legal argument.
- It is possible that the High Court could determine that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 precludes customary fishing rights from being included in the 'bundle' of customary rights that can be owned by Māori in relation to the foreshore and seabed, thereby reducing the strength of the rights that can now be established under the doctrine of aboriginal title.

3.7.2 The Māori Land Court's jurisdiction

We then examined the Māori Land Court's jurisdiction under Te Ture Whenua Māori Act 1993 and concluded:

- A status order, on its own, might be sought by some applicants, where they perceive there to be value in the land remaining customary land rather than being converted to Māori freehold land.
- A status order accompanied by a trust of the customary land might be an effective means, in some situations, of ensuring the right-holders' interests are protected.
- With regard to the foreshore and seabed, whenever the court might make an order vesting customary land in its owners, as Māori freehold land for an estate of fee simple, it would be likely that a trust of the land would also be appropriate, the creation of which would make it most unlikely that the land could be sold.
- Each of the three categories of approach that, collectively, counsel argued were open for the Māori Land Court to take with regard to Māori interests in the foreshore and seabed ('most permissive', 'middle ground' and 'most restrictive') is plausible, and so none can be discounted.
- The most likely approach is a variant of the 'middle ground', where some – perhaps most – applications to the court would result in rights being declared that do not amount to a fee simple title.
- On that approach, there would be situations in which particular areas of foreshore and seabed land would be vested in fee simple title in identified Māori owners.
- Even on the Crown's 'most restrictive' approach, there would be situations where Māori rights in the foreshore and seabed were extensive and, by their nature, exclusive.
- The test to be applied by the Māori Land Court (of the land being 'held according to tikanga Māori') could not be applied in too reductive a manner for this would undermine the purpose of Te Ture Whenua Māori Act and contravene Māori understandings of tikanga.

- The evidence of tikanga with which we were presented indicates that many claimant groups in the Waitangi Tribunal would be able to prove connections (ancestral and spiritual and, in many cases, physical) with the foreshore and sea that are governed by tikanga, as well as the continuing operation of tikanga and exclusive aspects of their relationship with the foreshore and seabed.
- The Māori Land Court's assessment of customary land in terms of tikanga Māori makes it unlikely that the Treaty of Waitangi (Fisheries Claims) Act would be interpreted to preclude applicants relying on customary fishing rights as evidence of the intensity of their use of particular areas of the foreshore and seabed but, even if that interpretation was adopted, it would be unlikely to diminish applicants' ability to demonstrate the necessary links through tikanga by other means.

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CHAPTER 4

THE CROWN'S POLICY

4.1 Introduction

4.1.1 The nature of our task

It is the Tribunal's role to analyse the policy – both the reasons given for requiring it, and its content – in terms of the principles of the Treaty of Waitangi. So we will look first at the reasons the Government has put forward for introducing a comprehensive policy, rather than letting the law take its course in the wake of the Marlborough Sounds case. We will then turn to the policy itself, and see whether it is a good policy, either on its own terms, or in terms of wider norms to which policies must have reference if they are to be seen as good – including domestic and international human rights norms. In our next chapter, we analyse the policy in light of the principles of the Treaty of Waitangi.

As we said when we introduced this report, we are a quasi-judicial body that stands outside the political process. We proceed in the expectation that governments in New Zealand want to be good governments, whose actions although carried by power are mitigated by fairness. Fairness is the value that underlies the various norms to which we referred above – legal norms, international human rights norms, and Treaty norms. We see it as part of our role in the present situation to ensure that the Government has before it all the matters it needs to know in order that its decision-making is fair. In the Waitangi Tribunal, consideration of what is fair is always influenced by the agreements and understandings embodied in the Treaty, but fairness in Treaty terms is not the only relevant norm. There is a fairness that can be distilled independently of the Crown's commitments under the Treaty, and we think that wider fairness has relevance in the present situation. This is a theme to which we will return.

4.1.2 The structure of this chapter

The Government describes its policy in the 65-page document *Foreshore and Seabed: A Framework*.[1] In this chapter:

1. On 11 August, Cabinet agreed to a set of principles that would inform the preparation of a Government paper for public feedback. *Protecting Public Access and Customary Rights: Government Proposals for Consultation* (doc A125) was released on 18 August 2003. Submissions were received up to (and in the days following) 3 October 2003. The full policy (doc A21) was released on 17 December 2003. The *Framework* is an edited version of the Cabinet paper prepared for Ministers' consideration and records Cabinet's decisions.

4.1.2

1. We outline the Crown's rationale for and objectives of the policy as set out in the document and addressed during the hearing. The key elements are that, according to the Crown:
    - the Māori interest in the foreshore and seabed must be less than exclusive ownership because the common law cannot recognise exclusive ownership of the foreshore and seabed;
    - lengthy litigation to determine the Māori interest would be costly and potentially confusing, and waiting for the outcomes would cause uncertainty for all;
    - current Māori land legislation was not designed for ascertaining the Māori interest in the foreshore and seabed, and does not enable the court to recognise and provide for the potential range of interests;
2. We set out Crown counsel's useful summary of the policy.[2]
3. We analyse the Crown's rationale for introducing legislation now to substitute its policy for the results of the Marlborough Sounds decision.
4. We note that the claimants say that the policy:
    - is not necessary;
    - understates the potential outcomes for Māori through the legal process;
    - reflects Crown indifference to its Treaty obligations;
    - is intrinsically unfair to Māori, extinguishing property rights in breach of common law, international law and Treaty norms; and
    - is inadequate even on its own terms, being both incomplete and uncertain in critical ways.
5. We ask whether, under the circumstances, the Crown's foreshore and seabed policy really *is* necessary to achieve the Government's four principles. We say that the rule of law underpins the right of Māori to go to court to have their property rights declared, and that right should not be abrogated except where there are very compelling reasons. We look at the rule of law, its application to the present situation, and the associated ethic of fairness. We identify four key ways in which we think the Crown's approach is unfair. We examine whether the Crown's policy really provides for a regime that is more certain, in terms of what it means and what it will deliver, than the status quo.
6. Having considered whether the policy is really called for at all, we then turn to consider whether the policy is a good policy. The Crown says that the policy delivers enhanced recognition of Māori customary rights. We critically examine the Crown's assessment of Māori foreshore and seabed rights at law, and its arguments based on that assessment. We ask whether the policy delivers on its own objectives. We look at what it provides in terms of enhanced recognition of customary rights, clarity, comprehensiveness and certainty, and conclude that it does not meet its own standards. We conclude that the policy

2. Document A24, para 8; see also doc A21, paras 2–30

has several important areas of deficiency, but note that in view of its enormous scope and the very short time allowed for its preparation, shortcomings were inevitable.

4.2 The Policy Itself

The Government's policy does many things, but probably its cardinal feature is that it proposes to vest the foreshore and seabed (those areas not presently in private title) in the people of New Zealand. Consistently with this, it takes away the current jurisdictions of the High Court and Māori Land Court in relation to Māori customary rights in the foreshore and seabed.

Crown counsel submitted:

> In brief, the Government's policy seeks to establish a comprehensive, clear and integrated framework which provides enhanced recognition of customary interests of whanau, hapu and iwi in foreshore and seabed, while at the same time confirming that foreshore and seabed belongs to, and is in principle accessible by, all New Zealanders. While the development of the policy was prompted by the Court of Appeal's decision in *Ngati Apa v Attorney-General*, the scope of the policy goes well beyond the narrow question addressed in that case.[3]

4.2.1 The Government's rationale for the policy

It was contended for the Crown that there is a pressing need for fast, comprehensive intervention.[4] This is because:

- The possibility that a fee simple title might be conferred 'clashes with the widely held and longstanding assumption (of Māori and Pākehā alike) that these areas are open and communal spaces'.[5] This assumption has driven the present legal and regulatory framework.
- Te Ture Whenua Māori Act 1993 does not recognise the range of Māori rights in that 'special juridical space' of foreshore and seabed nor provide the Māori Land Court with enough guidance with regard to tikanga Māori there.[6]
- 'The High Court would approach the issue of customary rights through the common law. As Dr McHugh's evidence shows, there has been little development of the common law in this context in New Zealand.'[7]

3. Document A24, para 2
4. Ibid, para 23–24
5. Ibid, para 23.2
6. Document 4.2 (McHugh), p 5
7. Document A24, para 23.3.2

- The potential for applications to determine Māori title to be run in both the High Court and Māori Land Court may lead to tensions between different legal approaches – common law possibly influenced by the Treaty in the High Court, and tikanga Māori in the Māori Land Court.
- The process would be 'incremental' and costly, 'with uncertain outcomes particularly where (as the Crown believes would generally be the case) the award of a fee simple title could not be justified'.[8]
- The common law would not allow the award of a fee simple title in the High Court, and it is not clear what either the High Court or the Māori Land Court can do to give practical effect to an interest short of a fee simple.
- If a fee simple title were vested in Māori by the Māori Land Court, this would promote uncertainty within existing legal and other regulatory regimes, and would affect other parties with interests relating to fishing, navigation, and access.

The Crown identified those having interests in the coastal marine area as:

- all citizens, who have an interest in the general question of access to the coastline and marine environment;
- whānau, hapū, and iwi, in relation to their customary interests;
- business sectors, which may have a significant interest in the coastal marine environment and the regulation of activities such as fishing, marine farming, marine transport, mining and tourism; and
- local government, and other public agencies with delegated authority to administer the law that regulates use of the coastal marine area.[9]

The Crown has to balance all these interests, and must act quickly:

> There is a great deal of uncertainty about how the various legal and administrative processes might fit together. Yet the issues are highly relevant to a lot of practical activity, by individuals and communities, by government and by businesses.
>
> The uncertainty has the potential to stall or delay progress in some areas of activity. The government therefore considers that it needs to legislate, to provide clarity and to ensure that some basic principles are put beyond doubt.[10]

The Crown believes that its policy framework responds to its responsibility to protect and regulate a wide range of interests, at the same time securing and enhancing recognition of Māori customary rights.

8. Ibid
9. Ibid, para 23.5
10. Document A125, p 13

4.2.2 The policy's key elements

From the beginning, the Government identified certain imperatives that must underpin the policy. These essential goals were expressed in four principles that featured in the initial proposals, and remained unchanged in the final policy framework:

- the foreshore and seabed should be public domain, with open access and use for all New Zealanders (principle of access);
- the Crown is responsible for regulating the use of the foreshore and seabed, on behalf of all present and future generations of New Zealanders (principle of regulation);
- processes should exist to enable the customary interests of whānau, hapū, and iwi in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected (principle of protection); 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 (principle of certainty).[11]

The key elements of the policy that fleshed out these principles were conveniently summarised by Crown counsel in their submissions to us. We quote from those submissions because in them counsel provided an up-to-date restatement of the policy in a succinct form that conveys the Crown's own emphases:

> 8. The essential elements of the Government's policy are as follows:
>
> 8.1 Full Legal and Beneficial Ownership of the Foreshore and Seabed (not already subject to certificates of title) is to be vested in the people of New Zealand, to be held in perpetuity. Foreshore and seabed will thus be confirmed as part of the 'public domain' (Policy, paras 73–74).
>
> 8.2 It will not be possible for persons or entities to obtain a fee simple title over foreshore or seabed other than under the authority of an Act of Parliament (Policy, para 76c). The position in relation to the relatively few private titles that exist at present will be reviewed, with the general objective that over time these will, if possible, be brought within the public domain (Policy, paras 230–260).
>
> 8.3 There will be statutory recognition of a right to reasonable and appropriate access for all New Zealanders to foreshore and seabed within the public domain. This would be subject to any limitations imposed by law. Limitations on public access are likely to arise, for example, in relation to safety concerns (e.g. ports), as a consequence of affording proper recognition to customary rights (e.g. around an urupa) or to preserve conservation values (Policy, paras 76b and 217–220).
>
> 8.4 The Māori Land Court's jurisdiction to consider whether foreshore and seabed is Māori customary land under the 1993 Act will be removed. So too will the High Court's jurisdiction to hear claims based on the common law doctrine of customary rights in relation to foreshore and seabed (Policy, paras 21, 88, 261–264, 267, 273).

11. Document A24, app C, p 2

8.5 Those jurisdictions will be replaced by a new statutory process. The Māori Land Court will be able to grant a new form of customary title to whānau, hapu or iwi over areas of foreshore and seabed within the public domain (Policy, paras 174–194). This will normally follow an investigation by a newly created Commission (Policy, paras 116–129). Customary titles will identify those who hold mana and have ancestral connections in relation to specific areas, and may record specific customary rights held within the area covered by a title. Customary titles will coexist with the underlying public domain title (Policy, paras 85–87 and 91–93).

8.6 Those who hold customary titles will be entitled to participate in management and decision-making processes in relation to the coastal marine areas over which they hold titles. Sixteen regional working groups, comprising central and local government and whānau, hapū and iwi, will be established. Through these groups, the Government will facilitate discussion between customary titleholders and relevant local authorities to establish how title-holders will participate in such processes, and will ensure that agreements are reached and are made binding. It is proposed that agreements will be promulgated by Orders in Council so as to create the opportunity for judicial review where it is alleged that agreements have not been followed properly (Policy, paras 94–108).

8.7 The Government proposes to begin work immediately on developing guidelines for practical agreements that will ensure real and effective participation by customary title holders in decision-making processes (Policy, paras 112–115).

8.8 Existing legislation (e.g. the Resource Management Act, the Fisheries legislation and the Local Government Act) already provides mechanisms and processes for the recognition and protection of whānau, hapū and iwi customary rights. As the implementation of these mechanisms and processes has not always been satisfactory, they will be considered to identify and remedy impediments to their effective implementation (Policy, paras 203–209).

8.9 To the extent that customary rights are not already provided for in legislation they will be recognised through the Māori Land Court, and the governing legislation (the 1993 Act) will be amended to make this possible. All customary rights recognised, whether through the new Māori Land Court process or through existing mechanisms, will be able to be registered on the relevant customary title (Policy, paras 130–146).

8.10 The holder of a customary right will be entitled to exercise that customary right, subject to sustainability issues. The usual regulatory mechanisms will apply. However, local authorities will not be able to undermine the recognition of customary rights by regulatory decisions. Where for reasons of sustainability there should be some significant restriction or prohibition of the exercise of a customary right, that decision will be made by central, not local, government (Policy, paras 155–161).

8.11 Commercial development of an activity covered by a customary right will be possible, subject to normal regulatory processes (Policy, paras 16 and 148). However, a customary right holder will not have the right to develop commercially a new activity not falling within the scope of the customary right (Policy, para 137).

8.12 Once customary rights are declared, policy-making in the coastal marine area will need to be adjusted to recognise those rights. Further, where a person seeks resource consent for an activity which will have a significant impact on a customary right, the application will be declined unless the holder of the customary right agrees to a limitation or suspension of the customary right (Policy, paras 162–170).

8.13 The policy recognises that there will be instances where the Crown will have to consider whether it should provide redress or some other form of specific recognition for customary rights holders. These may arise where:

8.13.1 The Māori Land Court refers a particular claim to the Crown, on the basis that the customary right which it has found cannot be addressed adequately within the new framework for the recognition and protection of customary rights (Policy, paras 18, 146, 186d, 264 and 268b).

8.13.2 The Government considers that the exercise of a customary right must be significantly restricted or prohibited for reasons of sustainability (Policy, paras 160–161 and 166–167).

8.13.3 Essential public works activities have a significant impact on the exercise of a customary right (Policy, para 170).

8.13.4 A reclamation affects a customary right (Policy, para 173).

8.14 The policy also recognises that effective transitional arrangements will be necessary to protect the position of those claiming customary rights in areas that are the subject of applications for resource consents and such like, which will be determined before the relevant customary rights applications are determined. Statutory decision-makers will be required to take into account applications for customary rights that are pending in the Māori Land Court. (Policy, paras 154 and 171-173).[12]

4.2.3 The Crown's submissions on the policy

The Solicitor-General, Terence Arnold QC, opened the case for the Crown. He submitted that the Crown has long thought that it held the foreshore and seabed. On that premise it has regulated the coastal marine area, using instruments such as the Resource Management Act 1991. It has sought to prevent the issue of individual private titles in this zone. When a case comes along like the Marlborough Sounds case, overturning long-held assumptions, difficult issues arise for government.

12. Document A24, para 8

Mr Arnold stressed that the policy framework was just that: a policy framework, an expression of core ideas and underlying principles. 'Much of the detail has to be developed,' he said. 'I accept this creates difficulties for us all.' It was, however, incumbent upon the Tribunal to ensure that it fully understood the policy, for it had been subject to misrepresentation by claimant counsel during the hearing. The Tribunal should not assume (as it had been invited to assume) that the Crown would not make a good faith effort to implement the policy framework.[13]

In his submissions, the Solicitor-General emphasised that:

- Whānau, hapū, and iwi 'have customary interests in foreshore and seabed which should be recognised and protected'.
- Achieving balance between articles 1 and 2 of the Treaty is not the Government's sole consideration or responsibility. 'From the Crown's perspective, the policy is very much based on the need to reflect that in New Zealand today there is a wide range of interests in foreshore and seabed, while recognising the fundamental importance of customary interests of whanau, hapu and iwi.'
- The process of policy development is ongoing. 'There is much detail to be developed as the policy is implemented through Parliamentary and Executive action.' There will be opportunity for more input, from Māori and other groups.
- 'The Crown acknowledges that there will be variations in customary interests based on tikanga and that there is legal and factual uncertainty about customary rights.' However the new framework:
  - provides clarity and certainty;
  - is sufficiently general to accommodate the great majority of customary interests; and
  - 'does not prescribe the content of customary interests; it simply regulates the way in which customary interests will be recognised.'[14]

In support of the policy framework and the opportunities and avenues it opens up for Māori, the Solicitor-General said:

- The Marlborough Sounds decision was a narrow one: the court said Māori would face many hurdles in attempting to prove title to the foreshore and seabed before the Māori Land Court and High Court.[15]
- Rather than an uncertain, slow and costly litigious route, the policy framework provides a process for recognising Māori customary interests, and enhances the ability of those Māori to be involved in decision-making concerning the coastal marine area.
- The Crown is informed of its Treaty obligations and is upholding them.

13. Mr Arnold, oral interpolation during submissions to the Tribunal, 29 January 2004
14. Document A24(b), paras 1–4; doc A21, para 21, 150–1; doc A24(b), para 2.4
15. Document A24, paras 11–19

- The implementation of regulatory and legal regimes affecting Māori in the coastal marine area (such as resource management legislation, and the regime for customary fisheries) will be improved to produce better outcomes for Māori.
- 'To the extent that the policy gives rise to any abrogating effect in relation to the customary interests of whanau, hapu and iwi protected by the Treaty',[16] Māori may qualify for consideration for redress or recognition in some circumstances.
- Prior to the Marlborough Sounds decision, the Government was working through a number of policy reforms that may affect Māori interests in the foreshore and seabed, particularly aquaculture, marine reserves, and oceans policy.[17] These comprehensive reviews could now take the foreshore and seabed policy framework into account.
- The common law could not recognise exclusive Māori ownership of the foreshore and seabed. 'Customary title at common law is a preservative, not restorative, doctrine.' The common law 'shoehorns' its notion of Māori customary title into its own paradigm; it absorbs it and preserves it but would not expand it.[18]
- Crown counsel said that the Government's package would:

> Give whanau, hapu and iwi better opportunities for real involvement in management processes involving the foreshore and seabed.
> Create a more complete and consistent framework for the practical recognition of the customary interests of whanau, hapu and iwi in foreshore and seabed.
> Provide certainty in relation to public access, and in relation to customary interests generally.[19]

4.3 Analysis of the Crown's Arguments

In this section, we analyse the Crown's contentions that, first, the circumstances following the Marlborough Sounds case compelled it to act; and, secondly that its policy response is that which is required by the circumstances.

The claimants before us do not like the policy that the Government has developed, and do not consider it fair. We heard extensive submissions from a range of claimant counsel. The essential criticisms were that the policy:

- is not necessary;
- understates the potential outcomes for Māori through the legal process;
- reflects Crown indifference to its Treaty obligations;

16. Ibid, para 33.2.8
17. Document A24(b), pp 17–19
18. Document A24(b), para 2.5
19. Document A24, paras 22.1–22.3

- is intrinsically unfair to Māori, extinguishing property rights in breach of common law, international law and Treaty norms; and
- is inadequate even on its own terms, being both incomplete and uncertain in critical ways.

If counsel are correct, these are serious shortcomings.

We turn first to the issue of whether the Government is driven to intervene. Crown counsel told us that the alternatives to intervening were so unpalatable that the Government effectively had no choice. Claimant counsel told us that intervention was unnecessary. We now investigate, and evaluate, these two opposing points of view.

4.3.1 Is the Crown driven to act?

The Government's view on this is apparently unequivocal. According to Crown counsel:

> The Government believes that it must act to reform and clarify the law following the Court of Appeal's decision in the interests of both Māori and non-Māori. A failure to act would leave intolerable long-term uncertainty.[20]

This is because the Marlborough Sounds case left:

> many difficult issues to be resolved on a case-by-case basis by the Māori Land Court and/or the High Court, each potentially applying different standards and having different powers . . .
>
> The Government considered that it could not responsibly leave the Māori Land Court under the 1993 Act or the High Court under the common law to resolve the outstanding issues on a piecemeal basis over many years.[21]

Thus, the main plank of the Crown's argument in support of the contention that intervention could not responsibly be avoided was that, without intervention, the level of uncertainty is intolerable. That proposition requires close attention.

(1) Uncertainty

The Marlborough Sounds decision does give rise to uncertainty. As Mr Boast said, the law is never entirely predictable, and it cannot be expected that the judges of the Court of Appeal turned their minds to all the implications of their decision.[22] However, the rule of law prevails. In our system of government, it is fundamental that people are allowed to go to court to obtain a declaration of their rights. When the court gives an answer that takes one of the parties unawares (apparently the position of the Crown here), that does not mean that the

20. Document A24, para 33.1
21. Ibid, para 3
22. Document A117, para 5.13

court's decision is undone by Parliament. Usually, what happens is that small adjustments are made incrementally as the implications of the court's decision, and those that follow, are worked through.[23]

It is indeed the case that, if matters were left to lie as they are, there would be many years of litigation both in the High Court and the Māori Land Court as applicants gradually worked their way through the system obtaining declarations and, sometimes, having title vested in them. There would be some inconvenience arising from uncertainty, and in some cases regulatory regimes would be in difficulty. The example was offered of the requirement for holders of permits to take sand to pay royalties to the Crown. If the holder of such a permit were a Māori in expectation of having conferred on his hapū a customary title, he may refuse to pay. There would certainly be other such examples, and they would cause hiccups in administrative systems that have been premised on the incorrect view that the Crown owned the foreshore and seabed. But are there any important and serious consequences that demand an instant fix?

The Crown made many assertions about uncertainty, but we did not think that the uncertainties pointed to were at the upper end of the scale, particularly given the countervailing interests. We will return to this.

When asked, Crown counsel could not point us to any dire consequences that really dictated legislative intervention right now. Mr Arnold said that the possibility that Māori might have fee simple titles issued in their favour causes uncertainty not only for those with preexisting rights in the coastal marine area (such as people with marine farms and moorings), but 'for everybody'.[24] But what are the real evils underlying that uncertainty? How will uncertainty adversely affect 'everybody'? Is uncertainty intrinsically so poisonous that our society will be gravely harmed? Will 'everybody' imagine that they are not entitled to go to the beach? Will marine farmers lose their farms? Will those who use moorings lose them? We think the answer to all these questions is 'no'.

The situation of people whose commercial interests are tied up in existing use rights perhaps deserves particular focus. This might be the marine farmer running a pāua farm in the shallows, or a commercial fisherman whose boat has long tied up to a particular mooring. The declaration of Māori property interests will almost certainly not negate existing use rights that are legally sanctioned. We think it much more likely that the status quo would continue until particular changes occur that might then need to be addressed. Perhaps when it

23. Mr Boast submitted (doc A117, para 5.12): 'Of course the future development of the law is never entirely certain and predictable in the wake of a major precedent-setting decision such as *Ngati Apa*. An aspect of the rule of law, in my submission, is that the proper and constitutional rule for the courts is to develop and refine the law in the way that they habitually do under the Common Law doctrine of *stare decisis*. The full implications of, say, the Privy Council decision establishing immediate indefeasibility, *Frazer v Walker* [1967] 1 AC 569, were not clear at the time, and indeed in respect of some issues, such as the registrar's powers under section 81 of the Land Transfer Act, have yet to be clarified. The implications were worked out, and are indeed still being worked out, by the Courts. That is how the Common Law operates.'

24. Mr Arnold, in response to questions from the Tribunal, 29 January 2004

came time to renew permits or licences, the situation might be affected by a Māori property right that the court has declared in the meantime.

Marine farmers and users of moorings may have interests that amount to property rights. They are concerned that those rights may be compromised by competing Māori rights. The Government, in its policy, seeks to protect such people from fear and uncertainty. But why is it more pressing, as a matter of public policy, to allay their fears than to allay the concerns of hapū and iwi that their property rights at law (a) have yet to be defined and declared by the courts; and (b) never will be if the policy takes effect? The permit of the marine farmer, or the licence of the user of the mooring, would only ever confer a right for a fixed period. Customary rights, where they still exist, have existed since time immemorial, and would, if allowed to, carry on forever.

Another reason for the Government stepping in was that there might otherwise be a hiatus in development of or investment in the coastal marine area.[25] It may indeed be the case that investors would be cautious for a period. But sometimes it is necessary to stop and take stock. This is what the Government has chosen to do in relation to marine farming. A moratorium on the processing of new applications has been in place since March 2002, and in December 2003 the moratorium was extended to December 2004. While these measures cause inconvenience and even disgruntlement in some quarters, they do not have disastrous long-term effects. It means only that things slow down for a while.

Crown counsel referred in submission to the negative effects of the lengthy and costly litigation required to ascertain the Māori property rights in foreshore and seabed. We take a different view. We think that although cost is an issue,[26] the inevitably lengthy nature of the proceedings in the High Court and Māori Land Court would of itself import protections. Nothing would change radically or quickly. It is inherent in proceedings for declaration of customary rights (in the High Court), or a status order declaring that land is customary land (in the Māori Land Court), that a detailed forensic examination[27] is required of the circumstances of each group seeking the declaration. The development of the common law simply takes time:

> The essential element in this common law method [determining native title] is time. It takes time for appropriate cases to come before the courts that demonstrate the facts required to broaden the application of the doctrine. It takes time for enough cases to have

25. Document A125, pp 13, 32

26. We note that it is impossible to compare the cost of multiple applications to the High Court and Māori Land Court over a number of years with the establishment and running costs of the many processes implicated in the Crown's policy. At section 4.3.2(3), we expand on our view of the Government's probable underestimation of the difficulties inherent in the processes it proposes to establish. We think that the difficulty of the tasks in prospect will inevitably lead to their taking a long time, and costing a lot. On balance, therefore, we doubt that the processes would prove to be cheaper than going through the courts – even if the Crown funded the court applications.

27. Document 4.3 (McHugh), p 13

been considered by the courts for the doctrine to develop and achieve the theoretical robustness to support the law.[28]

We do not think that the slow and deliberate pace of the development of the law would be problematical here. As it is the path chosen by Māori, they would have to live with its shortcomings – if slowness *is* necessarily a negative characteristic. A slow pace can be better suited to the way Māori prefer to do things.

The results of the applications would differ from group to group and from place to place. Gradually, the characteristics of the jurisdiction would emerge as the courts developed the New Zealand common law in respect of foreshore and seabed rights (in the High Court), and the statutory regime under Te Ture Whenua Māori Act. After some time had elapsed, it would be possible to discern a picture of the kinds of rights that were being declared, and on what criteria. Determinations would be made as to what those declarations mean, at law.

Mr Boast made the point forcefully in submission that in our system of law, there is really no scope for the Māori Land Court to take a radical view of its jurisdiction:

> The point may be an obvious one, but it may be one which politicians have overlooked, which is that the Māori Land Court is a long established part of the country's legal and judicial system, subject to appeal and judicial review like all judicial bodies. The Court of Appeal has already given some suggestions as to how the new jurisdiction over the foreshore and seabed ought to be exercised. If the Māori Land Court started to grant freehold titles to the entire foreshore and seabed those decisions could of course be appealed and reviewed.[29]

As we noted in chapter 3, he said that the Māori Land Court would be obliged to develop threshold criteria on a case by case basis 'which justify, in the first place, a status order that land is customary land, and secondly, a stricter range of tests as a prerequisite for a vesting order'.[30] 'If the Land Court failed to do that', he submitted, 'then other parts of the New Zealand court hierarchy would do it in the Land Court's place.'[31]

Once titles began to be generated by the court, and again on an incremental basis, interactions would begin between Māori groups and the relevant local authorities. Together, they would work out how the newly declared Māori property rights would be accommodated in the management and control structures already in place.

The Crown's policy acknowledges that these regulatory structures were intended to work with greater and more meaningful Māori input.[32] The Resource Management Act regime is a prime example. The Crown's policy intends to enhance Māori participation in

28. L Strelein, 'Conceptualising Native Title', *Sydney Law Review*, vol 23, no 95, pp 95–124, p 96
29. Document A55, para 6.4
30. Ibid, para 6.7
31. Ibid, para 6.6
32. Document A21, paras 205–209

decision-making of that kind.[33] It seems to us likely that the courts' declaration of legal rights owned by Māori might also have such an effect. Local bodies would be obliged to deal with hapū and iwi, and work out how their processes needed to change to accommodate and recognise the property rights that had been, and were being, declared. This would give Māori leverage they have previously lacked to get into situations where they can really play an active role in local government decision-making affecting their tribal areas.

It is hard to see how incremental changes of this kind would really threaten the viability of the status quo, and indeed they may be changes of precisely the kind that the Government, in its policy, sees as beneficial.[34] They might, in practice, be no more than a different route to a similar result.

No doubt there would be some difficult hurdles to overcome. It is hard now to say exactly what they might be, but assuredly there would be some. Could those difficulties not be met as they arise, with legislative amendments if required?

(2) Access

Although the Crown argued before us that the main imperative for the Government stepping in to legislate was the elimination of uncertainty, we are not convinced that this was really the main driver. Certainly, we infer that a particular 'uncertainty' about which the Government has concern is the possibility that the courts might make decisions about Māori property rights that would threaten access by all New Zealanders to the foreshore and seabed as of right. This might arise where the property right declared was exclusive in character, and access by others incompatible with its continued exercise. This possibility cuts across the Government's belief that the foreshore and seabed belongs to all New Zealanders.[35]

It is definitely the case that leaving it to the courts to determine the Māori property interest in the foreshore and seabed leaves open the possibility that in some instances those rights will be inconsistent with access by others. As we have said, it is probable that some applications to the High Court and/or the Māori Land Court would result in Māori property rights being declared to exist that are either exclusive by their nature (as in a fee simple title), or in their effect (because the bundle of rights is so comprehensive that access by others would infringe upon the rights) (see sec 3.5.1). Exclusivity as a characteristic of a Māori property right could, we think, arise in a number of situations. It is not our role to determine conclusively what they might be, and we do not purport to do so. However, by way of indication, we think that such cases could include:

- tauranga waka in important strategic sites;
- specific tauranga ika;
- tapu areas;

33. Ibid, paras 210–211
34. Ibid, paras 97–129
35. Ibid, para 2

- areas which because of their significance in important tribal kōrero need to be specially preserved; and
- areas which because of their environmental sensitivity, or for other cultural reasons, need to be protected from certain kinds of activity.

Most cultural connections to foreshore and seabed would not be such as to require others to be excluded. It was repeatedly emphasised before us that what Māori seek in relation to the coastal marine area is a recognition of their tikanga connections to it rather than the ability to keep others out. Indeed, the tikanga underlying the assertion of power comprised in the term 'mana' requires the holder(s) of the mana to exercise that power in a spirit of generosity (manaaki) towards others. The effect of this is that those with mana in land have a reciprocal duty to manaaki others. In turn, the exercise of manaaki reinforces the mana of the right-holders. There is an endless cycle of entitlement, responsibility, and generosity.

We think that in the great run of cases, access will not be an issue. However, people being what they are, there will inevitably be occasions where differences arise between tangata whenua and others over access to (particularly) the beach, or parts of it. Actually, we were given examples of such situations arising now, where Māori are kaitiaki of certain parts of the coast, and exercise their kaitiakitanga actively. Angeline Greensill of Tainui hapū told us that when she and her whānau take people aside to explain why it is not a good idea to ride motor-bikes over the sandhills at Te Kōpua,[36] where pingao has been planted to retard erosion, often an apology is forthcoming. Only rarely has conflict arisen. We think this would continue to be the case after the declaration of Māori property rights, and good sense would usually prevail. Nevertheless, it would be foolish to deny that there might be incidents of conflict. Only time would tell whether these were manageable or whether they threatened the fabric of our society, and our cultural ethos of free access to the beach.[37] Would it not be possible to put in place a legislative solution to the problem if and when it arises? Would it not then be easier to target the solution to the problem, the nature and scope of which would by then be measurable?

In departing this topic, we note a practical matter that seems often not to have been thought about. In all this talk about foreshore and seabed, it must be remembered that the foreshore and seabed policy does not relate to the beach *above* mean high-water springs, which in layman's language means the high-tide mark. What we are talking about really is the tidal zone. Clearly, there would be practical difficulties in preventing access only to the part of the beach where daily the sand is wet by the tide. That is at least one strong argument against there being any general denial of access. The further point to be made is that, on many beaches – we would go so far as to say, on most beaches – most of the sandy area is *above* the high-tide mark. It is important to remember the area above high tide is unaffected either by the policy or by the Court of Appeal's decision.

36. Near Raglan on the west coast of the North Island.
37. Document A24 (Crown), para 10

(3) Alienability

Of concern to the Government is the possibility that Māori property interests, once declared, might give rise to saleable titles that would then in fact be sold.[38] The spectre of large chunks of New Zealand's foreshore and seabed being alienated to overseas buyers is of course a frightening one, and the Government seeks to prevent its ever occurring.

We have nowhere heard expressed by Māori the desire to sell any titles that may be declared in the foreshore and seabed. On the contrary, we were told that this prospect is culturally repugnant to Māori – equivalent, in tikanga terms, to selling your mother.[39]

Nevertheless, it is the case that Māori land has been sold in the past, and the possibility exists, however small, that foreshore and seabed titles might be sold in the future. This is an unacceptable risk, as far as the Government is concerned.[40]

It appears that the undesirability of titles being created that may be sold is a matter on which Māori and the Government agree. Would it not be possible to introduce by legislation a simple limitation on any title that might be issued to effect this common objective?

4.3.2 The countervailing interest

The Crown has premised the need for this policy very much on the need to avoid uncertainty. In the foregoing passages, we have said that the uncertainty here is not so pernicious that it must be avoided at all costs.

As we see it, the Government's intervention by legislation is really only justified if the uncertainty it responds to is of a very serious kind, with manifest negative effects. This is because Māori have a genuine right, both at law and under the Treaty, to go to court for declaration of their property rights. As we see it, that right is comprised in the rule of law, and should only be displaced if absolutely necessary.

We therefore proceed now to consider the rule of law, and how it bears upon the Government's proposed actions. Under the rubric of the rule of law is an expectation of justice and fairness. Our analysis leads us to look too at whether, under the circumstances, the policy is fair.

The context also demands that, given the emphasis on the need for certainty, the policy justifies itself by delivering certainty.

We now address in turn the rule of law, fairness, and whether the Government's policy delivers more certainty than the status quo.

38. Document A125, p 6
39. Document A97(a) (Sykes), para 52
40. Document A125, p 32

(1) The rule of law

The claimants before us indicated very strongly that what they want now is for the Government to agree to go back to the drawing-board and work something out with Māori that is the subject of consensus. However, another view expressed almost as strongly is that if the 'go back to scratch' option is not available, then the claimants would prefer to live with the legal regime ensuing from *Marlborough Sounds* – notwithstanding:

- its many uncertainties and inadequacies; and
- the (we think correct) view that such a regime offers less than the Treaty guaranteed to Māori in terms of their property rights.

The claimants before us constituted a good proportion of the main coastal iwi.[41] They are all represented by legal counsel. They must be presumed to know the pitfalls of the legal processes before them if they become applicants in the High Court and/or the Māori Land Court. As our discussion in chapter 3 shows, there are no guarantees. The courts might take any of a number of avenues open to them, and the lower courts' decisions would certainly be appealed.

However, in our system of government, the courts are the means by which citizens have their legal rights declared, and this was the path that the Māori parties in the Marlborough Sounds case took. They did not take that path as Māori under the Treaty: they took it as citizens of New Zealand, to ascertain whether the possibility remained open that the land in the Marlborough foreshore and seabed was still customary land. In the simplest terms, they asked the courts whether they had property rights there, and ultimately the highest court in the land answered unanimously, 'Yes, quite possibly. Go to the Māori Land Court and find out.'

It seems to us that there are issues here about the level of fairness to which all citizens are entitled. There is an argument that Māori, as Treaty partners, are entitled to expect even more protection when it comes to a guarantee of property rights. But we do not think it is necessary even to invoke the Treaty. We need look only to the principles underlying the rule of law to be genuinely concerned about the course of action being proposed by the Government.

Obviously, governments have the right to govern. They certainly have the power to govern. But in our system, there is an expectation that the power will be exercised within certain limits.

The relevant concepts are captured in this quotation from the writing of Stanley de Smith, a famous English constitutional lawyer and academic. Speaking of the rule of law, he said:

> The concept is one of open texture: it lends itself to an extremely wide range of interpretations. One can at least say that the concept is usually intended to imply (i) that the powers exercised by politicians and officials must have a legitimate foundation; they must be based

41. A full list of the claimant groups is contained in the record of inquiry in appendix II.

> on authority conferred by law; and (ii) that the law should conform to certain minimum standards of justice, both substantive and procedural. Thus the law affecting individual liberty ought to be reasonably certain or predictable; where the law confers wide discretionary powers there should be adequate safeguards against their abuse; like should be treated alike, and unfair discrimination must not be sanctioned by law; a person ought not to be deprived of his liberty, status or any other substantial interest unless he is given the opportunity of a fair hearing before an impartial tribunal; and so forth.[42]

We have quoted this passage in full because we wanted to give the flavour of the whole concept of the rule of law, rather than concentrating on only one part of it. For present purposes, its elements are an emphasis on due process, protecting the important legal rights of individuals, and the need to ensure that the actions of those with legislative power are just and fair.

The concepts are elucidated further in this passage by Canadian legal historian Hamar Foster:

> at the end of the day law seems to be more than an ideological reflection of a society's power relations, more than just a means of justifying the accumulation and preservation of property. For the rule of law to be effective it must also appear to be just, that is it must limit as well as facilitate the actions of the ruling élites and occasionally be capable of being used against them as well as by them. Thus the eighteenth-century English cottagers that [historian EP] Thompson wrote about did go to court, and even won a case or two. When they could not continue the fight any longer, they 'still felt a sense of legal wrong: the propertied had obtained their power by illegitimate means.' This sense of hoisting the lawmakers on their own petard resonates in the history of the British Columbia Indian Land Question. It is rather like a version of the old children's game: if '*Symonds*[43] says' recognize title, the government should do so. If it does not, and suffers no penalty for its transgression, there is a bitter sense of the rules being broken by the very people who designed the game.[44]

This quotation perfectly captures the situation of Marlborough Sounds iwi who made the application to the Māori Land Court in the first place. In light of the policy response to the Court of Appeal's decision, they too must have the bitter sense of legal wrong described in the passage.

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42. Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, 8th ed (London: Penguin, 1999), p 17

43. The reference here is to the famous New Zealand case on common law aboriginal title, *R v Symonds* (1847) NZPCC 387 (SC).

44. H Foster, 'Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849–1927', in H Foster and John McLaren, eds, *Essays in the History of Canadian Law*. vol 6. *British Columbia and the Yukon*, Toronto: The Osgoode Society for Canadian Legal History, 1995, pp 87–127, p 67. Foster cites EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin, 1977), pp 261, 264, 267.

(2) Fairness

We are concerned that the policy, as presently framed, lacks certain essential characteristics of fairness.

Māori people are the part of our society potentially most disadvantageously affected by this policy, because it is their rights at law that are being removed, and replaced with something else. The Government has indicated its intention to proceed with its policy with or without Māori agreement. As we have said, the Government certainly has the power to do that. But it is critical that, given the nature of the Treaty relationship, and given the principles inherent in the rule of law, a policy implemented in the face of Māori opposition exhibits a level of fairness that is demonstrable.

As we see it, there are four aspects of the Government's approach that are unfair.

(a) The Government's assessment of Maori property rights: The Government has made an assessment of the benefits that Māori would derive from continuing litigation, and has determined that the regime it is proposing delivers benefits that are as good as, or better than, those benefits. We think it is very difficult to be definitive about what the benefits are that Māori might derive through court-declared property rights. We think that the Government's assessment is at the very low end of what is possible. There is no acknowledgement that property rights, even minimal ones, carry with them the right to sue, and the protection of the law generally.

(b) A new form of 'customary title': The policy framework proposes replacement of property rights with an entitlement 'to participate in management and decision-making processes in relation to the coastal marine areas over which they hold titles'.[45] 'Customary title' is a misnomer, because it is clear that the policy intends that ownership (which is the value to which title usually refers in relation to land) will lie with the people of New Zealand, which for practical purposes is probably indistinguishable from Crown ownership. The customary 'title' is clearly a lesser order of right that does not infringe in any major way the incidents of title (as that term is properly understood) that repose in the people of New Zealand.

It is fairly clear (although not expressly stated) that the customary title and use rights created under the policy are not property rights. It is, however, 'intended that customary rights given legal recognition by the Māori Land Court will be strong rights, different in nature to private land titles and to the temporary rights generally issued through a resource consent'.[46] They are, therefore, to be rights that have a legal character, although we do not understand what that character is. The use rights will be given priority in some situations, but in what situations is unclear. It is also unclear how the right of development attaching to customary rights under the common law will be given effect, although 'Customary rights could include

45. Document A24 (Crown), para 8.6
46. Document A21, para 162

a commercial element . . . subject to normal regulatory controls, including the Resource Management Act'.[47] Whether the owner of a use right could use it to 'veto' the application of a competing applicant to use the resource is another important issue that remains at large. The Solicitor-General indicated before us that a customary use right-holder might be able to 'veto' others' applications to use the resource in question, but other reports have denied that interpretation.[48]

The result is that the strength and usefulness of the customary title and use rights to be conferred under the new statutory regime is wholly unclear.

We think the policy is unfair in:

- failing to acknowledge clearly that what is being taken away is the right to have property rights declared, which is tantamount to their removal;
- calling the right being conferred under the policy a customary 'title', because that is not what it is: title in the land in question will belong to the people of New Zealand. Māori will obtain legal recognitions of a lesser order; and
- failing to characterise clearly the character of the legal rights comprised in a customary use right, and state precisely the level of priority such a right will confer on its owners.

(c) Inconsistency of approach: The third aspect of the Government's approach that we see as unfair is its inconsistency with the Crown's approach to the Māori interest in other resources.

Good examples are the Māori interest in fisheries, and in lakebeds:

Fisheries: In the late 1980s and early 1990s, the Government of the day began to appreciate the possible ambit of the phrase 'Māori fishing rights' in section 88(2) of the Fisheries Act. It became clear that if 'Māori fishing rights' were anywhere near as comprehensive as Māori (supported by the Waitangi Tribunal's *Report on the Muriwhenua Fishing Claim* and *Ngai Tahu Sea Fisheries Report 1992*[49]) said they were, the new management system for fisheries based on individual transferable quota might be stopped in its tracks.

The Government did not step in and take steps unilaterally to decide on an alternative regime that dealt with the Māori interest in New Zealand's commercial fishery in a manner convenient to the Government. Instead, talks proceeded over a number of years. Settlement measures were introduced incrementally until finally the Sealord deal was agreed.[50]

47. Ibid, para 148

48. Document A116 (Powell), paras 2–3 (citing a press release from the Honourable Dr Michael Cullen)

49. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed (Wellington: GP Publications, 1996) (doc A4); Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992) (doc A5)

50. The Fisheries Act 1983 was significantly amended in 1989 to take account of Māori interests on a 'down-payment' basis, then the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 enacted the Sealord deal as final settlement.

The point is simply this: with a potentially very adverse court decision hanging over its head, the Government did not move to repeal the problematical legislation, or take any other expropriatory move. Instead, it faced up to the problem, and sat down across the table with Māori until a deal was reached. It is not clear to us that the circumstances of the current case are very different, but a quite different approach has been taken.

Lakebeds: The situation pertaining to lakebeds is directly analogous to that of the foreshore and seabed.

In 1912, it was determined in *Tamihana Korokai v Solicitor-General*[51] that the Native Land Court had jurisdiction to investigate, and grant, titles to lakebeds. As submitted by Mr Boast, the beds of navigable lakes acquired at that time the same status that the foreshore and seabed has following the Marlborough Sounds case: the lakebeds were potentially capable of investigation by the Native Land Court and freehold titles could be issued.[52]

As has occurred in the aftermath of the Marlborough Sounds case, the Crown refused to accept this declaration as to the jurisdiction of the Native Land Court and opposed a subsequent application to the court to investigate the title of Lake Waikaremoana. In 1918, the Native Land Court vested fee simple title to Lake Waikaremoana in Māori. The Crown appealed this decision.[53] The Native Appellate Court affirmed the granting of title in the lakebed to Māori. The court's finding was based on the same understanding of the law relating to common law aboriginal title that we have today. The court held:

> The Natives successfully established their title to Lake Waikaremoana once they satisfy [*sic*] the Court it was held by them in accordance with their customs and usages unless it can be shown that title has been extinguished. This cannot be shown by mere assertion of title by the Crown but satisfactory proof must be adduced to the Court . . . We have already decided that Lake Waikaremoana can be considered as native customary land and that sufficient evidence was adduced to the Native Land Court upon which it could proceed to make freehold orders.[54]

Prior to the Native Appellate Court judgment, the Crown did contemplate enacting special legislation that vested the beds of all navigable lakes in the Crown.[55] However, rather than take this approach the Crown decided to deal with lakebed claims on a case-by-case basis through negotiation. It then became standard practice for the Crown to resolve the legal issues relating to lakebeds through special statutory settlement. This was done with

51. (1912) 15 GLR 95
52. Document A55(a), para 4.24
53. This appeal was not heard until 1944. See (1944) 8 Wellington ACMB 30.
54. Ibid
55. Solicitor-General to Attorney-General and Minister of Native Affairs, 15 February 1935, CL200/15; Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series, 1998, chs 1, 6

Ngāti Tūwharetoa in 1992. Through a deed between the Crown and Ngāti Tūwharetoa, the title to the bed of Lake Taupō and named tributaries was transferred to the Tūwharetoa Māori Trust Board.[56]

A very recent example of this practice is the announcement of the settlement with Te Arawa relating to the beds of 14 Rotorua lakes. Again, this settlement provides for the vesting of the lakebeds in the tribe, but provides for ongoing public access for recreational use and enjoyment of the waters. Since 2001, intensive negotiations between the Crown and Te Arawa have focused on developing a settlement package that ensures fairness and certainty for both Te Arawa and the public. The Government has stated that, 'The offer is made in the spirit of bringing people together to achieve a lasting solution that works for the whole community'.[57]

Why is lakebed so different from foreshore and seabed? The inherent unfairness of the Crown's current policy is captured in the submission of Mr Boast:

> It seems that if you are Te Arawa or Tuwharetoa and live by a lake, albeit a vitally important asset to the whole region, you can have a freehold title to it; if you are a coastal iwi a freehold title to one's equally prized coastal bodies is not possible.[58]

We note the Crown's view that the lakebed example is not a good analogy.[59] The Crown says that the lakebed situation can be distinguished in that:

- Crown ownership of lakebeds is certain[60] (whereas the Crown's ownership of the foreshore and seabed following the Marlborough Sounds case is uncertain);
- redress offered in the lakebed settlement remedied past[61] (and therefore quantifiable) losses and prejudices; and
- only lakes of great significance to claimants are considered for this type of redress[62] (whereas a settlement of foreshore and seabed interests would extend far and wide).

We do not find any of these distinctions compelling. The situation in respect of the foreshore and seabed may not be completely analogous in that the requirement to provide redress in respect of lakebeds arose in a different context (the remedying of historical breaches), but that is scarcely material to the point we are addressing. That point is that the Crown's reluctance to confer a title on Māori in respect of an important resource to which the wider public requires access can clearly be overcome in certain circumstances. We cannot see why the situation in relation to foreshore and seabed is so fundamentally different that the policy in respect of it must exclude this possibility. Nothing that the Crown has said persuades us that it must.

56. White, sec 6.13
57. Te Arawa Lakes Settlement Offer, 31 May 2001
58. Document A55(a), para. 4.29
59. Paper 2.222, Memorandum on behalf of the Crown, 17 February 2004
60. Ibid, para 6
61. Ibid, para 4
62. Ibid, para 5.3

Let us not forget that some of these accommodations were very controversial in their day. The very suggestion that Māori fishing rights might extend beyond a few site-specific fishing spots was initially greeted with incredulity and, in some quarters, horror. Likewise, the connections with Lake Taupō and the Rotorua lakes of the non-Māori populations of those regions is no weaker than the association nationwide with the seaside. Nevertheless, ways were found to accommodate those rights and interests that involve real and ascertainable property rights at law. The arrangements were arrived at after negotiation, and *with the agreement of Māori*. We think that Māori have come to expect, based on experience and on their reasonable anticipation of being treated fairly, that these processes and outcomes would continue. That the approach has abruptly changed in relation to foreshore and seabed interests seems to be unfair.

(d) Government imposes its own assessment of relative benefits: The fourth aspect of unfairness in the Government's approach is that the Government has made its own assessment of the relative benefits of its policy and the path through the courts, and then imposed its judgement of those benefits on Māori.

Even if the Government is right, and the benefits to be derived from its policy are as good as or superior to what would be derived through the courts, we think that Māori should be allowed to make their own assessment. To insist that the regime under the policy will be better for Māori whether they realise it or not is at best patronising to Māori, but at worst is plain wrong. The Crown is really in no better position to predict what the courts will do than Māori.

Moreover, the parties to the Marlborough Sounds litigation chose a legitimate path offered to all citizens. The clear indication given to us, and to the Government representatives at hui around the country, is that Māori want to continue along that path. The status quo – that is, the post-*Marlborough Sounds* situation that is in place until the policy takes effect – does not offer Māori a regime that recognises the full plenitude of their tino rangatiratanga, as the Treaty promised and as we described it in chapter 2. But the opportunity for that order of recognition is not on the political horizon. And, as Professor Margaret Mutu said to us, for Māori the path through the courts is the 'least worst' path. Other citizens continue to have the right to have their property rights declared by the courts. If that right is taken away only from Māori, like are not being treated as like under the law.

(3) Does the Government's policy deliver more certainty?

The question is whether the Government's policy is in reality any more certain than what would ensue from applications going through the courts. We address this important consideration in more detail in the next part of the discussion, where we focus on whether the policy is a good one. Suffice to say here that we consider that there are very many uncertainties inherent in the Crown's policy. The uncertainties are of two kinds.

The first is that there is a lack of certainty in that the regime has not yet been fully developed, and is considerably lacking in detail. At present, for example, it cannot be said:

- whether the rights to be conferred on Māori under the rubric of 'customary title' or 'customary use rights' will be actionable such that they could be characterised as legal rights, or whether they amount to no more than the right to participate in a process with certain levels of priority (as yet undefined);
- how the new regime will treat lagoons; reclaimed land; or land that has been the subject of accretion or erosion;
- whether there will be another policy that determines rights to minerals, or whether and/or how the Māori interest in minerals will form part of this policy;[63]
- why this policy does not address aquaculture, which is integrally related to the question of property rights in the inshore area, and provides no indication as to how aquaculture interests will be dealt with in the aquaculture policy, when it is developed; and
- how the interface with the Resource Management Act will be handled.

These are important areas where decisions have not yet been made, or have not been explained adequately. The result is that affected Māori cannot ascertain their position, and there is a clear potential for unintended consequences.

The second area of uncertainty is that the policy is not always clear, so that it is not always possible to know precisely what it means. In particular, there is a lack of certainty about how the policy will work in practice. In this latter regard, we have two areas of particular concern:

(a) Will the process by which it is intended that Māori will get 'enhanced participation opportunities' really work?

(b) What will happen when the Māori Land Court 'identifies rights that cannot be recognised by the new framework' and refers those to the Government for consideration?

We now deal with each of these in turn:

(a) Will the process by which it is intended that Māori will get 'enhanced participation opportunities' really work? A key aspect of the Government's policy is that those who obtain customary title will have enhanced opportunities to participate in decision-making affecting the foreshore and seabed.[64] The Government intends to legislate to effect this. The participation, through the establishment of regional working groups, will enable the concerns of Māori to be voiced,[65] and make statutory systems such as those under the Resource Management Act work better.[66]

We have real doubts about what is proposed, and the benefits that will be delivered to Māori. Obviously, from the perspective of compliance with the principles of the Treaty, enhanced participation of Māori in these areas is a good thing. But it should not be forgotten

63. Document A55(c) (Boast), pp 25–29; doc A115 (Boast), pp 7–9
64. Document A21, para 94
65. Ibid, app B9
66. Ibid, para 95

that Māori were intended to be active participants in, for example, the resource management regime, from the outset – in the case of the Resource Management Act, since 1991. There are extensive provisions in that Act for recognition of the Māori interest in the management of the environment, including the devolution to them of decision-making powers. It is certainly the case that the Treaty aspirations of that legislation have never come to fruition.[67] The complaints of Māori about the regime have come before us, and have been reported upon to the Government.[68] In our view, the Crown had an obligation to take measures to ensure that the intentions of that Act were realised long ago. To agree to do it now as partial recompense for the removal of legal rights does not seem to us to be a very good deal for Māori.

Secondly, we think that the ability of the Crown to deliver enhanced participation of Māori by the means proposed must be scrutinised.

What are the mechanisms?

- Sixteen regional working groups will be established according to council boundaries. The purpose of the working groups will be to reach agreement as to the ways in which whānau, hapū, and iwi will be participating in the management of the coastal marine area.[69]
- What constitutes an 'enhanced participation opportunity' and how it will be given effect will be determined at a regional level between central government, whānau, hapū, and iwi, and the relevant local authorities.[70]
- Any agreements reached will be legally enforceable. The agreements, following ministerial consideration, will be formally promulgated by an Order in Council.[71]
- The Government also plans to legislate a 'menu of enhanced participation options' that regional working groups could put in place. These options could include devolved management, membership on hearing committees, and establishment of whānau, hapū or iwi committees. This list is indicative only. A fuller set of 'enhanced participation opportunities' was to be reported by the end of January 2004, but has not yet eventuated.

It is immediately apparent that these plans involve Māori in extensive negotiations over a long period. The purpose of the working groups is to reach agreement about a range of complex matters concerning the foreshore and seabed.

How can there be any real confidence that agreement will be possible in this sort of environment? A host of questions immediately spring to mind:

- Who will represent the various Māori groups in each region?
- Will their representative status be accepted by all the Māori groups who need to be involved?

67. Ibid, para 206
68. For example, Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 145; Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 332
69. Document A21, app B5
70. Ibid, app B6
71. Ibid, para 34

- Can all customary title holders participate? What if there are a great many?
- How will the willing and constructive participation in the working groups of all the Māori who need to be represented there be contrived, especially when Māori are so opposed to the policy?
- Given the complexity of this exercise, will Māori have independent advice (as the councils assuredly will)? Who will pay for it?
- Will the meetings be facilitated? Who will choose the facilitator?
- Will a process be put in place for resolving disputes? Who will decide upon it?
- If the process of ascertaining customary title needs to precede the work of the regional working groups (which logically we think it must), when can it reasonably be expected that 'enhanced participation' will get underway?

We note that the policy framework contains a 'frequently asked questions and answers' section. In it, the question is posed 'When will the working groups be established?' The answer given is: 'Discussions will begin early next year. The establishment of the working groups does not have to wait until the legislation giving effect to foreshore and seabed proposals issues [*sic*] is passed.'[72] In our view, this gives rise to even more uncertainty. If the working groups are to get underway before the legislation is even passed, at a point where the work of the proposed new commission and the Māori Land Court to recognise customary interests has not even begun, how can the working groups be providing enhanced participation to Māori based on their customary title or customary rights? If participation in the working group process, and the consequent right to greater participation, is independent of the recognition of customary title or rights, the situation becomes even more confusing. Why (when 'enhanced' participation is accorded via the working group) would people bother to go to the trouble to get recognition of their connection to the foreshore and seabed through the court?

Clearly, the pitfalls are manifold; so too are the uncertainties. The one thing that can be said with certainty is that this process has the potential to tie up the time and energy of many, many Māori over a period of many, many months, and possibly years. The return for that effort is nowhere guaranteed. Mr Boast put it this way:

> In any case an opportunity to participate in decision making processes in my submission could well be a poisoned chalice, involving much obligation and little return, just yet more meetings and obligations for over-stretched Māori communities to have to participate in.
>
> If the government proposed to expropriate my home but in return offered me the opportunity to have an enhanced opportunity to participate in decision making processes I would not think that much of an exchange.[73]

We turn now to the second area of uncertainty that concerns us.

72. Ibid, app B, page 6
73. Document A55, para 12.17

(b) What will happen when the Māori Land Court 'identifies rights that cannot be recognised by the new framework' and refers those to the Government for consideration? The policy says that, when this situation arises, the Government then 'has the ability, in discussion with the relevant groups, to consider what action it might be able to take to recognise the lost right in some way, or to provide redress'.[74] This is the proposal for how the Government will deal with Māori rights that are in effect too ample to be provided for within the new system for recognition of rights. The Government has taken the view that Māori interests will always be less than would be comprised in a fee simple title, but as we have explained above (sec 3.3), that proposition must be controversial in the present state of knowledge. That is because the New Zealand law on the point has yet to be developed, and it cannot be certainly predicted how our judges will approach these issues. It may be that the Māori Land Court will often identify rights that are so ample that they cannot be recognised by the new framework. The policy provides no assistance with the question as to how those applicants will fare when they are referred to the Government.

When questioned at the hearing, the Solicitor-General said he did not think Māori who were referred to the Government should be described as petitioners, but he agreed that they would have no legal sanctions if their negotiations with the Crown did not prove successful. These parties would simply be discussing with the Government what action the Government 'might be able to take'. To us, this sounds precisely like people in the position of petitioners, or supplicants. That is because the power to decide 'yea' or 'nay', 'redress' or 'no redress', is entirely with the Crown. At this point, the right-holders have no come-back; they are effectively in a 'take it or leave it' position. Right now, when their existing rights at law are about to be removed, they have no way of knowing, and we have no way of predicting, what they might get. There is no intention to articulate what they might get in the legislation.

We think there is considerable uncertainty attaching to this aspect of the policy.

(4) The Crown is not driven to act

Accordingly, it is our conclusion that even if the Government's policy *is* a good policy (and we turn to this next), it is not justified in imposing it upon Māori without consent when the alternative of Māori pursuing their applications for customary title through the courts:

(a) is the path that Māori legitimately chose as citizens, and the application of the rule of law protects their right as citizens to pursue that path;
(b) does not threaten the status quo in our country in any really significant way;
(c) could be tinkered with by legislation if necessary to secure public access and inalienability;
(d) is no more uncertain than the Government's policy; and
(e) allows Māori to take on themselves the uncertainties *they* choose, rather than having imposed upon them the uncertainties that the Government prefers.

74. Document A21, paras 264, 268B, 270, 271

Thus, while there are uncertainties in the path through the courts, overall those uncertainties are no greater than those that are implicit in the Crown's policy.

If the exigencies created by the Marlborough Sounds case were indeed very pressing ones – if chaos and disorder would result if there were no intervention, or if we were at war or facing some other crisis – then perhaps the Government's unilateral decision to do away with these Māori property rights and recast them in another form could be justified. Those exigencies are not present here. We do not accept that the reasons given demonstrate that the Government is driven to this course of action.

4.3.3 Is it a good policy?

We think that the policy has several areas of real difficulty. We divide our analysis of them broadly into two parts. First, we consider whether the policy is a good one in terms of its fairness; as we have said, we consider this to be an absolute standard that underlies the various norms with which the policy should conform, including the Treaty standards which we examine in the next chapter. Secondly, we consider whether the policy achieves its own objectives of enhanced recognition of customary rights, certainty and comprehensiveness.

We turn first to the submissions of the claimants on the policy.

(1) Arguments of claimant counsel

The claimants rejected the thrust of the proposals: the policy takes insufficient account of Māori rights and values ever to be accepted by them. Claimant counsel said that the policy redefines Māori rights in and relationships with the land comprised in the foreshore and seabed in a way detrimental to Māori property rights, their rights to legal process and under the Treaty, and to race relations.[75]

Ms Sykes and Mr Pou said that for their clients 'the Crown's proposed foreshore and seabed policy is an attack on the cultural identity of Māori, undermining their connections to their taonga and way of life, relegating them to the status of interested bystander in the management of their dominions and domains'.[76]

In summary, claimant counsel said that the policy:

- Misapprehends or denies the central and enduring nature of Māori connection with the coastal marine area, and the inherent importance of whakapapa to this relationship: 'The vesting of the foreshore and seabed in the Crown amounts to expropriation of taonga.'[77]

75. For example, doc A55(c) (Boast), para 12.19–12.40; doc A63 (Castle), para 45–118; doc A115, para 8; doc A96 (Ertel), paras 14–35, 52–61, 75V; doc A99 (Ferguson) paras 40–103; doc A46 (Powell), paras 59–68; doc A39 (Stone), paras 33V; doc A97(a) (Sykes), para 109; doc A29 (Williams), para 11V

76. Document A110 (Sykes), para. 3; see also, for example, doc A55 (Boast), para. 3.4

77. Document A96 (Ertel), p 30; see also doc A97(a) (Sykes), para 103; doc A39 (Stone), paras 86–90; doc A29 (Williams), para 27V; doc A115 (Castle), para 4.3; doc A77(a) (Feint), paras 7–11; doc A64(a) (Taylor), para 27

- Breaches the principles of the Treaty of Waitangi, including principles of active protection, good faith, and the duty to be informed.[78]
- Constitutes an abrogation by the Crown of its duties as a fiduciary.[79]
- Removes rights without first ascertaining their extent or securing a transparent regime for compensation such as exists in the law under the Public Works Act or Resource Management Act (which would apply to other citizens with private title).
- Provides for the award of a lesser 'customary title' than that available under Te Ture Whenua Māori Act, while the test for use rights is higher than at present and no description of the 'annotation' process is given.[80]
- The mechanism for recognising customary rights restricts the definition and scope of Māori property rights in the first instance, thereby blocking realisation of extant or potential rights.[81]
- Permits limited recognition only of such economic development as can be strictly tied to 1840 practices, thus breaching the Treaty.[82]
- Breaches principles of equity and the law regarding takings, contract law and damages.[83]
- Disregards the imperative of equal rights to due legal process, including those protected under the Bill of Rights Act 1990.[84]
- Contravenes international human rights instruments such as the Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on Civil and Political Rights pertaining to the right to self-determination and cultural life.[85]

Taken as a whole, these arguments appeal to the norms underpinning the good government of developed societies in 2004. We think that none of these arguments is frivolous or without substance. Together, they constitute a real and substantial criticism of the Government's policy with which we basically agree, as we outline below.

(2) The Crown's assessment of Māori foreshore and seabed rights at law

The previous chapter of this report addresses the possible outcomes from the Māori Land Court and High Court jurisdictions to declare customary title if those jurisdictions were to remain intact.

78. For example, doc A29 (Williams), paras 10–24; doc A39 (Stone), paras 39–67; doc A46 (Powell) paras 16–23; doc A63 (Castle), paras 122–127; doc A64 (Taylor); doc A97 (Ertel), paras 14–35; doc A99 (Ferguson), paras 40–100; doc A97 (Sykes), paras 138–139 and associated supplementary replies to the Crown
79. Document A63 (Castle), pp 16–29; doc A115 (Castle), para 8
80. Document A46 (Powell), paras 59–62
81. For example, doc A46 (Powell), paras 63–67; doc A64 (Taylor), paras 40–49; doc A96 (Ertel), paras 86–90
82. See doc A46 (Powell), paras 9–23
83. See for instance, doc A55(c) (Boast), paras 12.19–12.40, n 42, para 17.4.; doc A39 (Stone), pp 22, 23, 27, para 90
84. Document A115 (Castle), para 5.1; doc A39 (Stone), para 15; doc A55(c) (Boast), paras 12.24–12.40, 17.5
85. Document A97 (Sykes), para 85V; doc A43 (Hirschfeld), para 70

The position is that we are without direct New Zealand authority to indicate how the common law would develop in the High Court, and/or cases that really show how the Māori Land Court would interpret its legislation. The only directly relevant case is *Marlborough Sounds*, but the views of the Court of Appeal judges on the development of the customary rights jurisdictions are speculative. The judges specifically noted that the content of the rights will turn on the facts, and the facts were not before them.[86] It is simply the case that the issue of the nature and extent of the subsisting property rights of Māori in the foreshore and seabed was not decided by the Court of Appeal. They decided the case on a narrow ground, and pointed clearly to how little they considered they had decided.[87] If ever the real questions as to the nature and extent at law of Māori property rights came before a court, the circumstances of the case, and the reading of the relevant precedents, might be quite otherwise than can readily be predicted. It is plainly wrong, in our view, to assert any one view as the only one that can legitimately be taken, and Crown counsel accepted this at the hearing.[88]

Dr McHugh's evidence focused on the likely approach that the New Zealand High Court would take under the common law. (The likely approach of the Māori Land Court falls outside Dr McHugh's expertise, and was not addressed by him.) Across a range of views submitted to us Dr McHugh's was the most conservative. In respect of the foreshore and seabed, he could not conceive of a title in the nature of a fee simple title being granted. Yet, even he clearly stated in questioning that the bundle of property rights that might be conferred on groups of Māori by the High Court might on occasion be so comprehensive as to be in effect exclusive.[89] He emphasised throughout his presentation that because the relevant common law in New Zealand is relatively undeveloped, it is difficult to predict what tests the courts here will develop for proof of customary title. In discussion with the Tribunal at the hearing, Dr McHugh said of the New Zealand High Court:

> the court might decide to take an approach which was consistent with the Māori Land Court jurisdiction but it might not, it might take the traditional law and custom with the time of sovereignty test for example of the High Court of Australia . . . the point I'm trying to make is just simply that it will be up to a New Zealand court to decide what is the appropriate test for proof and there are different options ranging from a restrictive and reductive approach

86. *Marlborough Sounds* at 649, para 12; 650, para 8–9, per Elias CJ

87. Ibid, para. 12; 650, para 8–9; 659, para 49; 670, para 90 per Elias CJ at 677, paras 122, 125 per Gault P; at 678, para 129; at 687, para 157; at 693, para 181 per Keith and Anderson JJ; at 694, para 186, per Tipping J

88. The Crown submission states (doc A24(b), p18, para 33.2.7): 'The common law would not recognise the customary interests of whānau, hapū and iwi in the foreshore or seabed of a kind that would equate to ownership in the fee simple sense.' Crown counsel conceded during questioning from the Tribunal that this paragraph 'probably shouldn't be expressed in such a categorical way. It is meant to reflect what is essentially Dr McHugh's informed opinion on the direction of the common law development. I accept that the way it's expressed there presumes the outcome that hasn't happened'. Mr Doogan, in response to questions from the Tribunal, 29 January 2004.

89. Transcript 4.2, p13

to one which might be more dynamic and flexible. How that will play out in particular circumstances of course would remain to be seen.[90]

He agreed that the removal of the High Court jurisdiction to determine whether a particular hapū had property rights at common law is tantamount to removing the rights themselves. Because the High Court is the only forum where common law rights can be ascertained, the loss of that forum effectively means the extinguishment of the rights.[91]

We turn now to the Crown's view of the likely development of the Māori Land Court's jurisdiction. The arguments are interesting, and by no means simple. In fact, we think that the Crown's own reasoning, and its desire to escape the inevitable consequence of that reasoning, leads it into something of a bind.

We understand it to run like this. The Crown considers that the ambit of the Māori rights in the foreshore and seabed *should* be no larger than would be recognised on a conservative reading of the common law. The Māori Land Court jurisdiction, however, based as it is on tikanga Māori, lacks some of the internal limitations of the common law jurisdiction. The policy itself recognises that the Māori Land Court *could* take 'an expansionist approach' to the meaning of 'held by Māori in accordance with tikanga Māori'.[92] A broad interpretation would render it more likely that applicants to the Māori Land Court for a status order that land is customary land, and a vesting order for freehold title, would succeed.

The Crown is strongly of the view that Māori *should not obtain* such an outcome. Its thinking – not really fully disclosed in the way the submissions are expressed, but nevertheless clearly discernible on close analysis – is as follows:

- Subsisting Māori rights in the foreshore and seabed are properly to be regarded as no greater in number and scope than would be conferred under a conservative interpretation of the common law doctrine of aboriginal title.
- Te Ture Whenua Māori Act was not drafted with the intention that it would apply to foreshore and seabed land. The jurisdiction to declare land to be customary land was thought to be vestigial only, because only odd pockets of 'dry land' without some other status (such as Crown land, General land or Māori freehold land) now remain.
- Accordingly, the Crown did not factor in the risk of that jurisdiction being applied to foreshore and seabed land at the time when the Te Ture Whenua Māori legislation was before Parliament: that risk has arisen only post-Marlborough Sounds.
- Benefits derived from the Māori Land Court's jurisdiction to declare foreshore and seabed land to be customary land are in the nature of a windfall gain, because the Crown never imagined that the legislation would be able to be used in that way.
- Taking away something that no one ever imagined that Māori would be able to get – and which, given the Crown's assessment of the rights involved, they are not really entitled

90. Transcript 4.3, p 16
91. Ibid, pp 10–11
92. Section 129(2)(a)

to – is not an expropriation. Rather, it is sorting out an unforeseen problem with the statutory machinery.

Obviously, from the point of view of persuading the Waitangi Tribunal, the Crown is in some difficulty here.

If it is so that the Māori Land Court could, on a proper reading of its Act, take an 'expansionist' view of tikanga that would lead to customary land often being declared, and fee simple titles vested, then the property right that now exists at law and would be legislated away by the policy is potentially a very significant one. The way we see it, the bigger the right that is being effectively expropriated, the stronger the argument that compensation should be provided for its removal.

It seems, however, that the Government seeks to avoid acknowledging the possibility that compensation is payable when legal rights are removed. This led to the Crown advancing arguments which, on close analysis, we decided were illogical. The Crown must accept the consequences of its own arguments. If:

- there is a significant risk that the Māori Land Court might interpret Te Ture Whenua Māori Act so as to justify the frequent declaration of land as customary land; and
- that interpretation is not a radical interpretation, but is one that is properly supported by legal principle; and
- there is therefore a real prospect that the Māori Land Court's interpretation would survive the inevitable appeals;

then there is a real prospect that the Māori property right in the foreshore and seabed is a significant one. It really goes without saying that when a significant property right is taken away, its owners ought to be compensated for its loss.

If, on the other hand, on a proper view of the law the Māori property rights are no greater than would be recognised under a conservative reading of the common law, such that they are:

- relatively narrow in ambit and small in number;
- not exclusive in their nature or effect;
- subject to significant evidential limitation because of the terms of the fisheries settlement; and
- this analysis would be endorsed by the superior courts;

then the property right may not be worth very much and no significant obligation to compensate arises. But the corollary is that there is no exigency that dictates the enactment of a replacement regime.

The Crown cannot have it all ways: if the rights are, or may be declared to be, of significant ambit, then a policy may be required, but compensation (not merely the possibility of redress) must comprise part of that policy. If the rights on the other hand are small in compass, and constrained by the inherent limitations of the common law, then legislation is not

required because the Crown's view of the proper ambit of the rights will be endorsed in the courts.

Our analysis leads us to the conclusion that the Government's policy *is* expropriatory. The legislation will remove the ability of Māori to prove in the High Court and the Māori Land Court that they own property rights in the foreshore and seabed. We do not know for certain how extensive the courts would determine those rights to be. But *no one* suggests that there would be *no* property rights ascertained as a result of those court processes. The Crown does fear that, through the Māori Land Court, the rights might be extensive. But even if we accept as most convincing the views of the Crown's own witness, Dr McHugh, whose stance was the most conservative put to us, the property rights that may be established cannot be dismissed as being only minimal.[93]

(3) 'Special treatment' for Māori

It is puzzling how the debate over the foreshore and seabed has come to be cast as 'special treatment' for Māori, implying that Māori are being unfairly advantaged by the preparedness of government, in the policy, to recognise their customary interests at all.

In fact, the 'special treatment' is of an entirely different character. In a society where property rights are usually sacrosanct, property rights of Māori are to be legislated out of existence before there is an opportunity for the owners of the rights to have them properly assessed and described in law by the courts whose job it is to do that. The property rights of everyone else, though, continue to be protected. Other owners of private rights in the foreshore and seabed retain them, even though the Government's policy preference is that foreshore and seabed should not be in private title. Where, over time, the Crown moves to acquire such rights, there is every indication that the rights will be bought, or their owners compensated for their forcible removal.[94] Where is the fairness in that? On what legitimate basis can it be postulated that the strong presumption at law that there is no expropriation without compensation does not apply when the property rights belong to Māori? If anything, the terms of the Treaty, with the guarantee of property rights in article 2, should operate to protect Māori property rights. This makes more egregious the expropriatory element of the Government's foreshore and seabed policy.

Thus, we consider that this proposed extinguishment of Māori property rights is no small matter. It is especially worrying because:

93. In evidence, Dr McHugh said (transcript 4.2, p 10): 'When I say there's a bundle of rights I do not exclude the possibility that some of those rights might be exclusive. I differ there from the Australian case law. It may well be that particular rights are identified as exclusive, particularly because of retention of ownership of frontage land. That is something the New Zealand may well need to answer. So that will have a commercial impact of course for those [Māori] owners in that position of holding extensive frontage land.'

94. Other private property interests in the foreshore and seabed will remain unaffected (doc A21, para 230): 'Under the proposed new framework, neither the public domain title nor customary titles will affect areas covered by private titles.'

- it is not the subject of consent by Māori;
- compensation is not being offered;[95] and
- other owners of private property rights are not being treated in the same way.

(4) Human rights law

This is where, in the Tribunal's view, legal norms – not only Treaty norms – come into play. For example, the New Zealand Bill of Rights Act 1990 requires that the rights and freedoms it affirms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The Bill of Rights Act affirms the International Covenant on Civil and Political Rights, ratified by New Zealand in 1976. Among the rights and freedoms that are affirmed is freedom from discrimination on the grounds of race (s19(1)) and the right to natural justice (s27(1)). By section 7, the Attorney-General must report to Parliament when any Bill (draft legislation) appears to be inconsistent with any of the Bill of Rights' rights and freedoms. In light of the three features of the Crown's policy listed above, it seems certain that any Bill that seeks to implement it will be the subject of a report under section 7.

(5) Does the policy succeed on its own terms?

Crown counsel stated that the Government's objective in the policy was:

> to establish a comprehensive, clear and integrated framework which provides enhanced recognition of customary interests of whānau, hapū and iwi in foreshore and seabed, while at the same time confirming that foreshore and seabed belongs to, and is in principle accessible by, all New Zealanders.[96]

These are ambitious goals, and quite simply we think the policy fails to achieve them. We examine the various objectives below.

(a) Does the policy provide enhanced recognition of customary interests? We have already adverted to the question of whether the Government's provision for Māori customary interests is an enhancement of the recognition that the courts would, or might, provide. As the foregoing section indicates, we do not think that it is. We consider that property rights at law,

95. We note that although 'redress' may be available, it is entirely unclear how often, or in what circumstances. We also understand 'redress' as connoting a different legal concept from compensation. It is compensation rather than redress to which property owners are entitled when their land is compulsorily acquired for a public work. 'Redress', to us involves less of an emphasis on a monetary payment. It implies that there will be an attempt to make things right, to make up for the wrong, but not necessarily to pay for what has been taken away. We are confident that those who drafted the policy understood this difference in meaning, and that the word 'redress' was intentionally used in preference to 'compensation.' This issue is addressed at section 5.1.7.

96. Document A24, para 2

however imperfectly framed, are a stronger platform for participation in decision-making than what the policy offers (see secs 3.3.1, 3.4.5).

What the Crown is doing, in our view, is requiring Māori to move from a courts-based regime that has the potential to give rise to legally enforceable rights to an administrative regime underpinned by expectation, but with no certainty of outcome. It is a regime in which all that Māori are guaranteed initially is the opportunity to participate. In it, the Government delimits the ambit of the rights (they cannot be exclusive, or amount in any instance to 'ownership'), and the rules for determining their existence.[97] Those limits may be more restrictive than those the courts – particularly the Māori Land Court – would apply.

It is as yet uncertain what the rules will be. The policy says that 'the criteria would build on the current tikanga Māori test augmented by factors consistent with common law principles'. However, the policy notes previously that:

> Existing jurisprudence from the Māori Land Court has not required it to determine the meaning of 'holding in accordance with tikanga Māori' so there is no guidance or precedent available for future Courts. A tikanga Māori test is therefore less certain in its application to the foreshore and seabed and could lead to an expansive approach being used in the Māori Land Court.[98]

The implication is that the framework will not use criteria of that expansive sort, but the criteria are still being developed by officials who were to report back to the Ad Hoc Ministerial Group on the details of the statutory criteria in January 2004.[99] At the time of the hearing, that report had not been made.[100]

The policy then sets up a process for negotiating the effect(s) the rights might have at a local level, in terms of participation in decision-making. These negotiations are a process Māori will have to enter into in order to obtain value from the customary interests to be recognised through the commission and Māori Land Court processes, and noted on the customary title register kept by the Māori Land Court.[101] We have already expressed our serious reservations about the working party process, the length of time it will take to deliver any results, and its costs to Māori (and not only to Māori) for very uncertain outcome (sec 4.3.2).

Māori have had previous experience of legislative intervention that converts legal rights into a right to participate in a process. One example is Māori customary fishing rights. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 extinguished all existing and future claims of Māori to commercial fishing rights. Customary fishing rights not captured

97. Document A21 (app A), p 1
98. Document A21, para 140
99. Document A21 (Policy), paras 141, 142
100. Dr Mark Prebble in response to questions from the Tribunal, 22 January 2004
101. In submission, Ms Ertel observed (doc A96, para 100): 'Māori are not forced to participate in this process but given the removal/substitution of their current rights non-participation would bring no benefit and may even disadvantage groups who stood aside.'

by section 10(d) of the Act continued to exist and the Government undertook to develop policies and regulations to protect these rights and recognise the special relationship between tangata whenua and places of customary food gathering importance. These rights, however, did not survive as an unrestricted legal right. Instead, the fisheries regulations and legislation put in place after the settlement limit the operation of the rights and control their management through two main mechanisms: taiāpure and mātaitai.[102]

Taiāpure are local fisheries established in areas that have customarily been of special significance to an iwi or hapū either as a source of food or for spiritual or cultural reasons. To date, only seven taiāpure have been established since they were provided for in the Māori Fisheries Act 1989. The purpose of a taiāpure, as stated in section 174 of the Fisheries Act 1996, is to make better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by article 2 of the Treaty of Waitangi.

The 'better provision' is dependent on Māori conforming with and satisfying a lengthy and onerous statutory process. This process includes extensive community consultation and a public inquiry by the Māori Land Court into any objections to the application.[103] These processes are time- and resource-intensive. Even if the Minister of Fisheries approves the establishment of the taiāpure, Māori do not have rangatiratanga over the fishery. They are but one group represented on a committee of community interests who manage the taiāpure collectively.

Mātaitai are customary fishing areas established by regulation, and are managed by tangata whenua or tāngata tiaki.[104] In contrast to the taiāpure application process, the process of establishing a mātaitai is relatively short due to tight statutory time frames.[105] However, the effectiveness of mātaitai as a mechanism for affirming Māori customary rights appears to be compromised by provisions relating to the appointment of tāngata tiaki. Questions of mandate often complicate the process, and only two mātaitai have so far been established since the regulations were enacted in 1998.[106]

There is not much official information about how these processes for customary fisheries are working or not working as the case may be. There is a lot of complaint about them in Māori quarters, however.[107] Arguably, the very low level of take-up by hapū Māori speaks

102. For statistical information about taiāpure and mātaitai we have referred a Government fact sheet (www.beehive.govt.nz/foreshore/docs/facts-customary-fishing.pdf, 13 February 2003).

103. See the Fisheries Act 1996, pt 9

104. Fisheries (Kaimoana Customary Fishing) Regulations 1998; Fisheries (South Island Customary Fishing) Regulations 1999

105. On notice of a mātaitai application, the community and affected fishers have 20 days to respond: see Fisheries (Kaimoana Customary Fishing) Regulations 1998, reg 19.

106. Te Ohu Kai Moana, *Treaty of Waitangi Fisheries Commission's Draft Submission on Tapui Taimoana: Reviewing the Marine Reserves Act 1971*, 2001, para 25

107. 'The Crown has existing legal and Treaty obligations to ensure that the use and management practices of Māori in the exercise of non-commercial fishing rights are preserved.' And 'ample evidence exists of destruction of the sources of those non-commercial rights.' Document 2.156 (Ertel), p 2. Refer also to the Wai 785 material in document A83.

for itself. The Government's proposal to improve the processes for providing recognition of customary fishing as part of the present policy really concedes that the regime is not working as intended.[108]

If Māori had retained legal rights to their customary fisheries instead of exchanging those for a process over which they have little control and no funding for their participation, we wonder whether 'better provision' for their rights would have been secured.

Based on this kind of experience, we think Māori are justified in feeling dubious about forgoing legal rights for the right to participate in a process. Even if it all looks very promising at the outset, the reality can be quite otherwise.

We are mindful of the Solicitor-General's injunction to us to impute good faith to the Government when evaluating this foreshore and seabed policy and what it offers.[109] But at the same time, we cannot be blinkered to the indifferent implementation of this kind of policy in the past.[110] To the extent that a finding that this policy enhances customary interests depends on having confidence that the processes planned will produce only the best outcomes, we have not been offered a basis for that confidence.

(b) Is the policy comprehensive and clear? The policy is currently incomplete in key areas. We have referred already to the most important ones (sec 4.3.2(3)). A few others merit noting:

- How the 'roving commission' will work. There is no detail on appointment criteria, reporting lines, status of its recommendations; review or appeal rights or their scope; the matter of overlapping boundaries; or whether the two-year term (which many may regard as extremely optimistic for what we apprehend to be their task) can be extended.[111]
- The scope of what is to be transferred to the people of New Zealand in terms of 'the foreshore and seabed (including airspace, waterspace and subsoil, etc)'.[112]
- The extent to which Māori are willing and able to form themselves into groups with legal personality.[113]
- The implications of the foreshore and seabed framework for the Marine Reserves Bill (to be considered in early 2004), and the oceans policy project (to be reconsidered in 2004).[114]

108. Document A21, paras 210–212.
109. Mr Arnold, oral interpolation, 29 January 2004
110. The Resource Management Act is another example of a process-based recognition of Māori interests that has not worked well for Māori, as the Policy Framework itself acknowledges. (doc A21, para 206). See also Janet Davidson, *Wāhi Tapu and portable taonga of Ngāti Hinewaka: Desecration and loss; protection and management*. A report prepared for the Ngāti Hinewaka Claims Committee, February 2003 (Wai 863 R01, doc A67).
111. Document A21, para 116v
112. Ibid, para 76(a)
113. Ibid, para 192
114. See, for example, doc A99 (Ferguson), paras 98–101; see doc A21, para 28

Thus, it is difficult to see how the claim that the policy is comprehensive can be substantiated. This policy is incomplete in critical areas.

In the sense that a policy is clear when it states unequivocally what it delivers, we do not think this policy can be described as clear. This policy leaves unanswered many questions about the means of implementation, and what they will deliver. Even though it claims to be a framework only, in order to be adequate in the current situation, the policy must be sufficiently comprehensive and clear to give hapū and iwi some certainty as to what they will get under it. It fails to do that.

(c) Shortcomings inevitable: We are not surprised that the policy falls short even of its own objectives and expectations. Its compass is really very significant, and it has been pulled together in a remarkably short time.

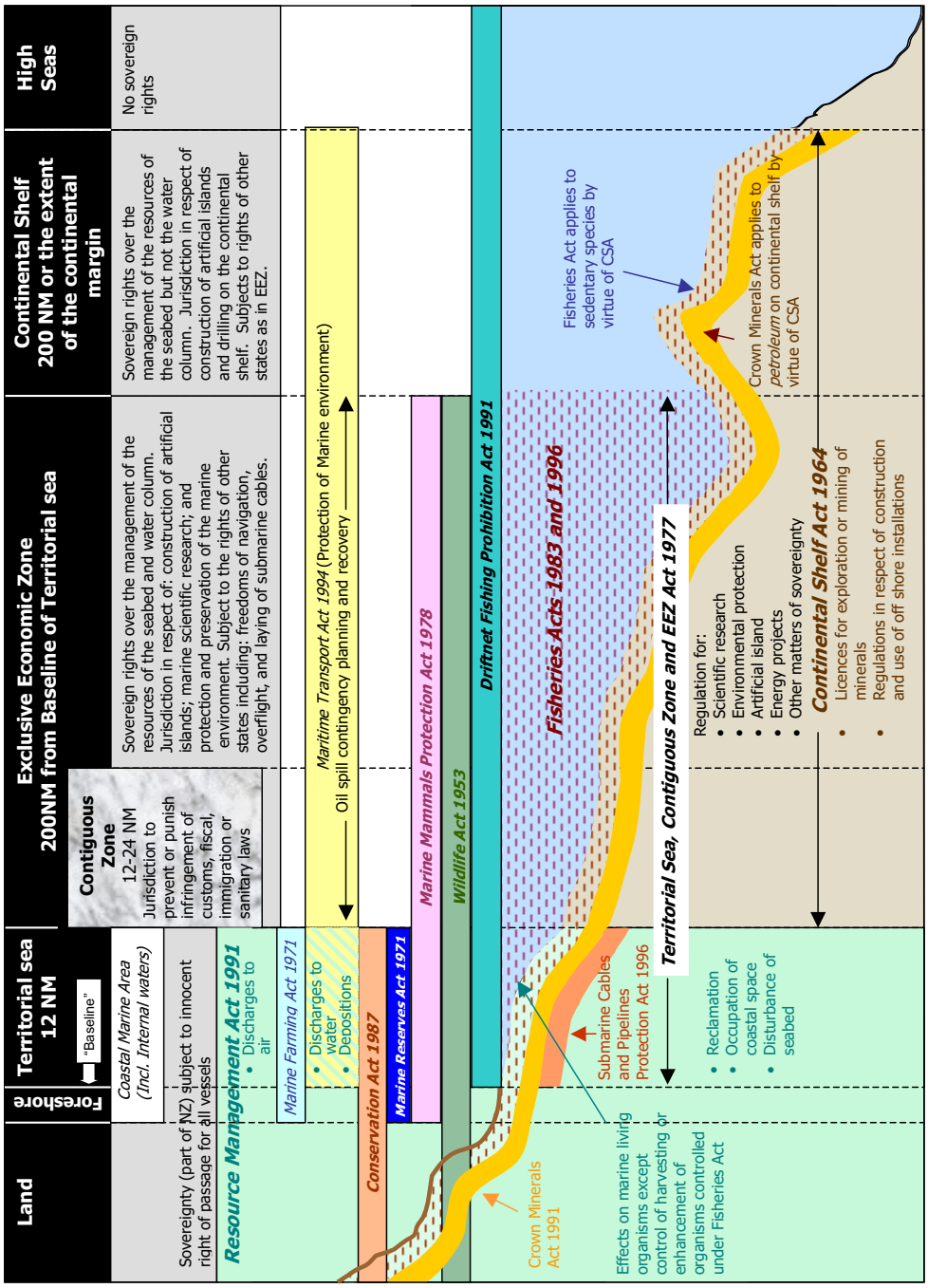
When we questioned Dr Mark Prebble, chief executive of the Department for Prime Minister and Cabinet (the department charged with driving the policy), the size and significance of the policy was clear. We asked him about other aspects of Government policy affecting the marine environment – the oceans policy and the aquaculture policy, for instance. He made it quite plain that development of these policies has effectively been halted while the foreshore and seabed regime is sorted out. The intersections with those other policy areas are so many and various, that they must await the shape of things on the foreshore and seabed front before they can be taken further.[115]

So this policy is a huge undertaking. It will enact a replacement regime for an area of complex common law (the doctrine of aboriginal title) and statute law (Te Ture Whenua Māori Act) upon which there is little New Zealand authority. But it goes beyond being a response to the Marlborough Sounds case.[116] It now comprehends seabed, waterspace and airspace.[117] It intersects with at least 10 other substantial statutes: the Resource Management Act 1991, the Marine Farming Act 1971, the Maritime Transport Act 1994, The Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977, the Continental Shelf Act 1964, the Crown Minerals Act 1991, the Conservation Act 1987, the Marine Reserves Act 1971, the Fisheries Act 1983, and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The diagram opposite helpfully depicts the complexity of the plethora of overlapping of legislative regimes all bearing on the coastal marine area. Then there are the common law, Treaty and international human rights norms to which we have referred. The policy must consider and reflect these norms. It must be consistent with the international law of the sea.

115. Dr Prebble, in response to questions from the Tribunal, 22 January 2004

116. Document A24 (Crown), para 3

117. 'The inclusion of airspace, waterspace and subsoil adds a further dimension to the Crown's Proposal, and opens up issues which have not, in the context of the foreshore and seabed claims, been discussed with Māori. Neither the rationale nor the practical effect of this expanded definition of foreshore and seabed is addressed in the Crown's Proposal.' (Document A99 (Ferguson), para 62.)



Schematic representation of jurisdictional boundaries of key statutes.

(The legislative landscape of the oceans is highly complex and, of necessity, has been simplified to present an overview of jurisdictional boundaries.)

The time allowed for development of the policy, and for response to the policy by Māori and other interested members of the public, has been extremely short. We determined early in the interlocutory stages of this urgent inquiry that we would not include in it an investigation into the process by which the policy had been formulated. This decision was predicated on our feeling that the shortcomings in the process of consultation (particularly from the point of view of Māori, but not only Māori), and government's obvious determination to complete it as speedily as possible irrespective of the consequences, were so obvious that the Tribunal's involvement would really be of no effect. We felt that the Government must know that the process was inadequate for the purpose, but had determined to do it that way anyway. Suffice to say that from everything we know about the consultation, we are strongly of the view that it would not satisfy the requirements for consultation set out in the leading case *Wellington International Airport Ltd v Air New Zealand*.[118] Nor would the Crown be likely to succeed in an argument that its conduct fulfilled the requirements of the duty to consult inherent in the Treaty principles.[119]

Thus, it is apparent that from the outset the Government has been determined upon a path of utmost speed, and we think it is inevitable that the policy is a casualty of that expedition. We note that officials have not met their deadlines for reporting back to Ministers, and it is hardly surprising that this is so. Much of the work was scheduled to be done over the December to January holiday period, and the time allowed for the quantity and difficulty of the tasks prescribed for completion was clearly insufficient.

We think it absolutely unavoidable that if the process continues at this rate, mistakes – and possibly serious mistakes – will be made. What the Government is seeking to accomplish here is very big, very complex, and quite novel. At the moment, much remains at large – including (unsurprisingly) the most complex elements.[120] There is just too much for anyone – be they the Government and Crown officials, Māori, or the general public – to comprehend in the time available. We will all be ill-served by a policy whose main imperative is haste.

The biggest casualty will be Māori, and the property rights they will lose notwithstanding their sustained protest. Their grievance is exacerbated by the fact that they are not even fully informed of their position on the eve of the extinguishment of their rights.[121]

118. *Wellington International Airport Ltd v Air New Zealand*. (CA) [1993] p 676, per Cooke P

119. See, for example, Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002) (doc A9), pp 67–71

120. We include in this category matters pertaining to compensation, the statutory tests for proof and nature of rights or title, mineral ownership, and the regime for lagoons, reclaimed land, and land subject to erosion and accretion.

121. Document A99 (Ferguson), paras 98V, 103; doc A46 (Powell), paras 50–52, 63–67; doc A63(a) (Castle), paras 8.10–8.12; doc A115 (Castle), paras 2.1–2.4; doc A29 (Williams), para 37

4.4 Conclusion

We therefore conclude that:

1. The policy is expropriatory. It takes away the power of the courts to declare Māori property rights in the foreshore and seabed, which is effectively an expropriation of the rights themselves, and replaces them with enhanced participation in decision-making processes. The proposed customary title, with use-rights recorded on it, is not a property right.
2. When the Crown expropriates property rights, especially from its Treaty partner, it must have compelling reasons for doing so. In this case, it does not.
   (a) The uncertainty arising from *Marlborough Sounds* is not so dire as to require immediate legislative intervention. The process of court hearings, appeals, and final decisions on the extent of rights would be a slow one, as the Crown argued. The inevitability of appeals from decisions made by the lower courts limits the scope for a radical and expansionist approach to the definition of customary rights. In the meantime, private property rights would not be affected in any significant way. Anyway, change would be gradual. There would be time for the Crown to correct any problems as they arise. There may be some slowing of investment and development, but it will not be excessive or permanent. Incremental court decisions will allow regulatory regimes and private right-holders time to reach accommodations with Māori.
   (b) We do not think it is necessary to legislate to secure public access. Although there would probably be some Māori property rights that involve excluding others, (for example, tauranga waka, specific tauranga ika, tapu areas, and sites which need to be protected for environmental or cultural reasons), most Māori connections to the foreshore and seabed would not require the exclusion of the public. Tikanga Māori involves the application of the important ethic of hospitality and generosity (manaakitanga) to the foreshore and seabed situation. Conflict might arise where public access is causing harm, but the better approach would be to tailor a solution to the problem as and when it arises. Legislation might be necessary at that point. In any case, the policy, and the Marlborough Sounds case, relate only to the beach *below* high-water mark effectively the tidal zone. Access to the rest of the beach is unaffected.
   (c) The small risk that Māori might sell their property rights in the foreshore and seabed can easily be managed. Crown and claimants before us agreed that rights should be inalienable. A simple legislative limitation on sales could be introduced.
3. The policy does not deliver greater certainty for Māori than if the law were left to run its course.

(a) The policy lacks detail and clarity, and therefore certainty, on:
- whether the rights to be conferred on Māori under the rubric of 'customary title' or 'customary use rights' will be actionable such that they could be characterised as legal rights, or whether they amount to no more than the right to participate in a process with certain levels of priority (as yet undefined);
- how the new regime will treat lagoons; reclaimed land; or land that has been the subject of accretion or erosion;
- whether there will be another policy that determines rights to minerals, or whether and/or how the Māori interest in minerals will form part of this policy;
- why this policy does not address aquaculture, which is integrally related to the question of property rights in the inshore, and provides no indication as to how aquaculture interests will be dealt with in the aquaculture policy, when it is developed; and
- how the interface with the Resource Management Act 1991 will be handled.

These are extremely important areas where decisions have not been made or have not been explained adequately, so that it is not possible for Māori, the Tribunal, or anyone else to ascertain how Māori interests will be affected.

(b) There is uncertainty as to how parts of the policy will work in practice. In particular, the Tribunal doubts that the enhanced role in decision-making will necessarily or easily be achieved. The Resource Management Act and the customary fishing regulations are examples of analogous regimes that promised much but delivered little. We think that there is a potential for this policy to do the same, with the added sting that Māori are being promised enhanced participation that they should already have had under these earlier regimes, as a new pay-off for loss of their property rights.

(c) The mechanisms of the regional working groups and the commission appear likely to involve Māori in extensive and expensive negotiations and processes over a long period, with less guarantee of an effective outcome than if the present law were left to run its course. In particular, there are many process flaws in the operation of the regional working groups. Māori will be hostile (given their opposition to the policy), the process of representation is unclear, there is no provision for Māori access to independent advice, and there is no dispute-resolution mechanism. Moreover, it is not clear how the working groups could give effect to customary titles when (as is apparently the case) they are intended to commence in operation before the customary titles are declared. We think that the risks of failure are great.

(d) The policy acknowledges that there may be instances where Māori rights in the foreshore and seabed are such that the proposed customary title and use-rights are insufficient to give effect to them. The solution is for the Māori Land Court to refer

these right-holders to the Government. The Government 'may' or may not decide to do something (undefined) to recognise greater rights. There is no due process or right of appeal. We think that this is far too uncertain, and makes inadequate provision for the loss of legal rights.

4. The policy violates the rule of law.
   (a) Following *Marlborough Sounds*, Māori have the right to go to the High Court and Māori Land Court for declaration of their property right in the foreshore and seabed. The right to have their property rights defined and protected at law is a right that Māori have in common with all other citizens.
   (b) Under the policy, Māori would lose this right. In taking it away from Māori and not from other citizens, the Government is failing to uphold the requirement under the rule of law that like are treated as like.
   (c) For the rule of law to be effective, governments must exercise power fairly. Laws that are passed must conform to minimum standards of justice, both substantive and procedural. If, as Canadian legal historian Hamar Foster puts it, the courts say 'recognize title, the government should do so'. If it does not, then litigants are left in a situation where the rule-makers break the rules with impunity, and they are powerless to defend their just rights.
5. The policy is unfair to Māori.
   (a) The Government has assessed the Māori property rights that would be declared by the courts as being minimal. We think this assessment is at the very low end of what is possible. Even so, there are still property rights. To replace them with something less than a property right, and to do so without consent or the guarantee of compensation, is unfair. The Crown's conduct is particularly problematical in this respect. Its policy is predicated on the conception that although Māori property rights should properly be judged at the low end of the scale, the Māori Land Court may nonetheless take an expansive approach. If that reading of the situation is correct, then there is the real prospect that Māori property rights in the foreshore and seabed are significant, and their loss should be compensated. If, on the other hand, Māori rights are narrow, non-exclusive, limited by the loss of seafront land and fishing rights, and likely to be so judged by the courts, then the policy is not necessary. Either Māori are entitled to compensation, or it is 'safe' to let the law run its course. For the Crown to seek have it both ways is unfair to Māori.
   (b) The policy is unfair because it is inconsistent in its treatment of Māori groups. We see no reason why Māori with interests in lakebeds and commercial fishing, which have been the subject of rights-recognition and negotiated settlements, often after landmark court cases, should be treated better than Māori who have interests in the foreshore and seabed. We think that Māori have come to expect that negotiated settlements of such legal rights would continue to be available. That the approach

has abruptly changed in relation to the foreshore and seabed seems to us to be unfair.

(c) The policy is unfair because it treats Māori customary property rights in the foreshore and seabed differently from all other rights. It is *only* Māori customary rights that are expropriated by the policy. All other existing private and public rights are protected. Where other classes of private rights amount to ownership, there is every indication that the rights will be bought following negotiation, or their owners compensated for their forcible removal.

(d) The policy is unfair because it is being imposed upon Māori without consent or compensation. The process of consultation did not satisfy legal or Treaty standards. The Government proceeded with the policy in the face of total opposition, and in such haste that many of the details are missing and the policy and its effects are unclear.

(e) The policy is unfair because it denies Māori the opportunity to manage their own affairs and exercise their current legal rights. Under the law, they have the opportunity to have their rights (however large or small) defined and (where appropriate) vested by the courts. This, of itself, would give them independent clout in coastal management regimes.

4.5 Summary

The policy is:

- expropriatory of legal property rights;
- not strictly required to meet the exigencies of uncertainty, risk to public access, and risk that Māori will sell the foreshore and seabed;
- no less uncertain for Māori than if the law were left to run its course;
- lacking in necessary detail and clarity on how it affects key things like aquaculture, minerals, reclaimed land, and regulatory regimes;
- lacking in adequate safeguards and processes for its proposed regional working bodies and commission;
- lacking in certainty, protection, and due process for rights judged greater by the Māori Land Court than those allowed for in the policy;
- in violation of the rule of law, because it takes away the right of only one class of citizens to have their property rights defined by the courts, without consent or a guarantee of compensation;
- doubly unfair to Māori because it:

    - takes a reductive view of what property rights the current law might recognise, but is justified on the basis that the courts might wrongly take an 'expansive' approach; but
    - if the Crown is right then the policy is either unnecessary, or the rights are sufficient to require compensation, yet this logic is not recognised;
- unfair to Māori because it is inconsistent with how other Māori have been treated in the recent past with regard to analogous rights, such as to lakebeds and commercial fishing;
- unfair to Māori because it expropriates their customary property rights but leaves all other classes of rights intact, with the proviso that private rights amounting to ownership will be either purchased or taken with compensation in the future;
- unfair to Māori because it is imposed after inadequate consultation, and in the face of their vociferous opposition;
- unfair to Māori because the process has been carried out in such haste that many details are missing and many of its effects are uncertain;
- unfair to Māori because it denies them the right to choose their own path, and make their own assessment of its advantages and disadvantages.

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CHAPTER 5

FINDINGS AND RECOMMENDATIONS

5.1 Treaty Findings

We now consider the Crown's policy in terms of the plain words and meaning of the articles of the Treaty of Waitangi, and also in light of the principles that arise from the overall meaning and context of the Treaty. The Treaty of Waitangi Act requires us to determine whether actions or proposed actions of the Crown are contrary to the principles of the Treaty. This does not mean that the plain terms of the Treaty can be 'negated or reduced'.[1] The Court of Appeal has noted that 'a breach of a Treaty provision . . . must be a breach of the principles of the Treaty'.[2] We begin our analysis, therefore, by considering whether the policy is consistent with the individual terms of the Treaty.

Under article 1 of the Treaty, the Crown acquired kawanatanga (the right to govern). It is clear that kawanatanga gives the Crown the authority to make the present policy and enact it as legislation. Kawanatanga, however, must be exercised in light of the guarantees in article 2 and article 3 of the Treaty.

5.1.1 The policy is in breach of article 2 of the Treaty

As noted in our discussion in chapter 2, article 2 of the Treaty guaranteed:

- 'te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa' (Māori version); and
- 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and such other Properties as they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession' (English version).

The Treaty also introduced the Crown's right of pre-emption (hokonga), as the means for Māori to voluntarily cede as much of their property as they wished in order for settlement, development, and mutual prosperity to take place.

The Crown's actions breach article 2 in two respects:

(a) Historically, the Crown did not protect Māori tino rangatiratanga, or even the more limited English concept of ownership, of the foreshore and seabed. Instead, the

1. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 386
2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 693

Crown actively assumed ownership of the foreshore and seabed for itself, without the consent of the Māori right-holders, and without compensation. Occasional and specific extinguishment of Māori rights through purchase (such as parts of the Thames foreshore) were the exception that proves the rule. Because it was aware of Māori claims to own the foreshore and seabed and to exercise authority over it, the Crown acted in breach of the Treaty when it took those rights for itself. The Crown assumed (incorrectly) that it was acting according to the common law. It ignored or made inadequate responses to many Māori protests over its actions.

(b) Today, the Crown is faced with a situation where, as we outlined in chapter 2, the Court of Appeal's judgment leaves at large the question as to whether the Crown owns the foreshore and seabed as a matter of law. The High Court and the Māori Land Court have jurisdiction (respectively) to declare the common law rights of Māori, or to declare the foreshore and seabed to be customary land and award it in fee simple. Where customary rights of Māori are found to subsist, those rights will burden the Crown's title or, where the rights are sufficiently ample, override or replace it. The Government is not prepared to accept the outcome of the Court of Appeal's decision: it is not prepared to allow these rights to be declared by the courts according to law.

Instead, the Government plans to enact a policy that will take away those courts' jurisdiction in respect of foreshore and seabed. The High Court's jurisdiction is to be abolished altogether. The Māori Land Court's is to be changed substantially so that the judges there will operate under constraints that (among other things) preclude the vesting of land in fee simple title. The new regime for recognising customary interests will, we think, confer both fewer and lesser rights, and the rights will not have the status of property rights at law. However, no one (including the Crown) can undertake a really informed analysis of the quality and quantity of rights that would be conferred by the courts as compared with the regime under the policy. This is because the Government is not prepared to run the risk of letting the courts exercise their respective jurisdictions. The right for Māori to go to court to prove the nature and extent of their property rights in the foreshore and seabed is thus being removed, notwithstanding wholesale objection from Māori. We think that a policy that removes the means whereby property rights can be declared is a policy that in effect removes the rights themselves.

5.1.2 Is there a Treaty justification for overriding article 2?

The standard to be met has been described by the Turangi Township Tribunal: 'if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Māori in article 2 it should be only in exceptional circumstances and as a last resort in the national interest'.[3] We concluded in

3. Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 285

chapter 4 of our report that there is no overriding need for the foreshore and seabed policy in the national interest. The Crown is not driven to act, and so it lacks the necessary moral and legal grounds for overriding the guarantees made to Māori in article 2 of the Treaty.

5.1.3 The policy is in breach of article 3 of the Treaty

Article 3 of the Treaty provided: 'Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the rights and privileges of British Subjects'. We will consider the principle of options below, but we note here that article 3 of the Treaty guaranteed to Māori the rights of all citizens to equal treatment under the law. As our discussion in chapter 4 has demonstrated, the Crown's policy fails to honour this guarantee.

(a) First, the common law rights of Māori in terms of the foreshore and seabed are to be abolished, and their rights to obtain a status order or fee simple title from the Māori Land Court are also to be abolished. The removal of the means whereby property rights can be declared is in effect a removal of the property rights themselves. The owners of the property rights do not consent to their removal. In pursuing its proposed course under these circumstances, the Crown is failing to treat Māori and non-Māori citizens equally. The *only* private property rights abolished by the policy are those of Māori. All other classes of rights are protected by the policy. This breaches article 3 of the Treaty of Waitangi.

(b) Secondly, Māori are entitled under article 3 not just to equal treatment but also to the protection of the rule of law. When matters of property arise which involve the definition of rights, all citizens are able to take those matters to the courts for definition and, as appropriate, protection. As we observed in chapter 4, Māori actively pursued their right to have their property rights determined by a court of law. Having obtained a result from the courts which the Government did not like, the Crown's solution is a policy to cancel the ability of the courts to further define, articulate, and award those property rights. This violates the rule of law, the protection of which was guaranteed to Māori in article 3. By enacting a policy that is contrary to the rule of law, and which disadvantageously affects Māori, the Crown breaches article 3.

In the four ways described above, the Crown has acted and proposes to act in serious breach of the plain terms of the Treaty of Waitangi. We now go on to consider the principles of the Treaty, as they arise from its broader meaning and context. As the Muriwhenua Tribunal has noted, 'a focus on the terms alone would negate the Treaty's spirit and lead to a narrow and technical approach'.[4] We consider next whether the Crown's past and proposed actions in connection with the foreshore and seabed are contrary to the principles of the Treaty of Waitangi. In doing so, we rely on the very extensive explanation and analysis of Treaty

4. Waitangi Tribunal, *Muriwhenua Land Report*, p 386

principles that has taken place in the courts and in the Waitangi Tribunal, and apply them to the claims before us.

5.1.4 The principles of reciprocity and partnership

Māori ceded sovereignty (English version) or kawanatanga (Māori version) to the Crown in article 1 of the Treaty, in exchange for the Crown's protection of Māori tino rangatiratanga. In our discussion of the Treaty in chapter 2 above, we defined the Crown's duty in this respect as one actively to protect and give effect to property rights, management rights, Māori self-regulation, tikanga Māori, and the claimants' relationship with their taonga.

We also defined those aspects of tino rangatiratanga which relate to authority over the foreshore and seabed, as including:

- a spiritual dimension and a relationship based on ritual and whakapapa;
- a physical dimension, with the ability to enforce rāhui, grant access, and control distribution of resources;
- a dimension of reciprocal guardianship (kaitiakitanga);
- a dimension of use, which is sometimes rendered as an equivalent to use-rights under English law;
- manaakitanga, where, as Sir Hugh Kawharu put it, 'sharing (through manaaki) and authority (mana) are applied concurrently';[5] and
- manuhiri from across the seas, who were granted certain use-rights, as part of the relationship established between the peoples before 1840.

The Crown's exercise of kawanatanga has to be qualified by respect for tino rangatiratanga, as defined above. The Tribunal has called this the principle of reciprocity, which is an 'overarching principle' that guides the interpretation and application of other principles, such as partnership.[6] The nature of the relationship between the Treaty partners is a reciprocal one, with obligations and mutual benefits flowing from it. For example, in its *Report on the Mangonui Sewerage Claim*, the Tribunal said that:

> The basic concept was that a place could be made for two peoples of vastly different cultures, of mutual advantage, and where the rights, values and needs of neither would necessarily be subsumed . . . It is obvious however that to achieve the objective, compromises on both sides are required and a balance of interests must be maintained.[7]

The notion of a balance of interests is reflected in the description of the Treaty relationship as akin to a 'partnership' between the Crown and Māori. As expressed by the president of the

5. Document A35 (Kawharu), p 17
6. Waitangi Tribunal, *Maori Development Corporation Report* (Wellington: Brooker's Ltd, 1993), p 113; Waitangi Tribunal, *The Turangi Township Report*, pp 284–285
7. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (Wellington: Department of Justice, Waitangi Tribunal, 1988), p 4

Court of Appeal in the Lands case, 'the Treaty signified a partnership between the races' and each partner had to act towards the other 'with the utmost good faith which is the characteristic obligation of partnership'.[8] He also added that 'the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Māori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible ministers, and reasonable cooperation.' Other judges made similar comments.[9] Since then, the principle of partnership has been constantly referred to in Tribunal reports.

In practical terms, the application of the principles of reciprocity and partnership to the foreshore and seabed policy is clear. The Treaty envisaged a future for both peoples, sharing resources and developing them, as we noted in chapter 2. In the balancing of interests required for a successful partnership, we think that there is a place for both peoples and their interests in the foreshore and seabed. As claimant witnesses explained it to us, the obligations of manaakitanga would ensure public access, properly regulated, even if there were no other safeguards.

Even so, we accept that the Crown has the authority to develop a policy in respect of the foreshore and seabed. However, the principles of reciprocity and partnership require it to do so in a way that gives meaningful effect to te tino rangatiratanga, and balances the interests of both peoples in a fair and reasonable manner. We do not think that the Crown's policy meets this test. In expropriating property rights:

- before they are defined;
- without consent; and
- in the absence of an exigency like war or impending chaos;

the Crown seriously breaches these principles of the Treaty.

At the very least, the principle of partnership requires the Crown to make informed decisions on matters affecting Māori.[10] The Crown itself states that there are uncertainties arising from *Marlborough Sounds*. Its response to this is to abolish potential property rights before they can be awarded, and without being certain what they are. This is not how partners act in good faith towards one another. Instead, it is, as we concluded in chapter 4, quite unfair to Māori. The unfairness is of a character that flies in the face of the norms of good government in developed societies. The result is a serious Treaty breach.

We explained in chapter 2 how the Crown failed to uphold te tino rangatiratanga of Māori in the 163 years between 1840 and 2003, when the Marlborough Sounds case was decided. The many and various actions that depleted Māori landholdings in breach of the principles of the Treaty are too well known to require repetition here. But suffice to say that these historical breaches compound the present-day breaches involved in the policy and add to their gravity.

8. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 665 (Lands case)
9. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 207
10. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 26

5.1.5

If the Crown were now simply to accept the legal position post-*Marlborough Sounds*, it would go some way towards allowing the development of a regime for the foreshore and seabed that is more Treaty compliant than the pre-*Marlborough Sounds* position. Moreover, such a course has to recommend it one cardinal feature that the Government's policy conspicuously and fatally lacks: Māori agreement. As we said in chapter 4, the post-*Marlborough Sounds* situation is far from ideal for Māori, and, in Treaty terms, does not sufficiently protect Māori rights in the foreshore and seabed. But it is a course that Māori chose. It was the one way open to them to have legal rights declared, and they wish to pursue it.

The Crown, however, has chosen to take unilateral action to extinguish the Māori rights even before they have been properly articulated at law.

5.1.5 The principle of active protection

As the president of the Court of Appeal stated in the Lands case, both parties to the partnership have obligations. The Crown's obligation, he continued, is 'not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable'. Referring to passages in the Waitangi Tribunal's *Te Atiawa*, *Report on the Manukau Claim*, and *Report on the Te Reo Maori Claim* that supported that proposition, he described them as 'undoubtedly well founded'.[11] He also described the Crown's responsibilities as being 'analogous to fiduciary duties'.[12] The Muriwhenua Tribunal described the principle of active protection as embracing three other key elements of the Treaty relationship – honourable conduct, fair process, and recognition by the Crown and Māori of one another's authority.[13]

The Crown's foreshore and seabed policy expropriates the current legal property rights of Māori, which may amount to a fee simple in some cases, and vests them in the people of New Zealand. The people of New Zealand – which, for practical purposes really means the Crown – will be the 'owners' of the foreshore and seabed, and Māori people will not, and never can, own any part of it. As we discussed in chapter 3 of our report, Māori might, under the opportunities provided by the clarification of the law in *Marlborough Sounds*, have obtained fee simple ownership or a set of rights, including some that were exclusive in nature. Those possibilities will be foreclosed forever.

Instead, the Crown offers a more limited 'customary title' and the chance to prove particular use-rights. The benefit of these recognitions of the customary interests of Māori in the foreshore and seabed is that they would provide a basis for increased participation in coastal decision-making. This falls far short of the authority encompassed in tino rangatiratanga,

11. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 665 (Lands case). See also the similar statements of the other four judges at pages 682, 693, 703, and 716.
12. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 664
13. Waitangi Tribunal, *Muriwhenua Land Report*, p 388

and far short too of the fee simple titles potentially available through the Māori Land Court. It falls short even of the 'bundle of rights' that the High Court might declare to be owned by Māori. Any of these would, we think, inevitably lead to Māori having a bigger say in coastal management, but with other benefits as well. Certainly, the Crown is not offering *nothing* in return for what it is taking away. But we think its offer falls very short of actively protecting the tino rangatiratanga or potential property rights of the claimants before us – and of course, it is not an offer that has been accepted by Māori.

This final observation leads us to consider a second dimension of the principle of active protection. In developing its policy, the Crown consulted with Māori and received written submissions. Māori rejected the policy in an overwhelming fashion. We think that the standards of honourable conduct, fair process, and recognition of each other's authority, noted above, require the Crown and Māori to try to reach a negotiated agreement. This will not always be possible, but the attempt should be a meaningful one. It seems clear to us that the extreme haste of the Crown's consultation, and its apparent unwillingness to make real or significant changes to its policy in response to Māori concerns, falls short even of a minimum interpretation of the principle of active protection. The Crown is not required to take action that is unreasonable in the prevailing circumstances, but (as we noted in chapter 4) we do not see any compelling reason for the Crown to act in the way that it has done. We find, therefore, that the Crown is in breach of the Treaty principle of active protection.

5.1.6 The principles of equity and options

As the Tarawera Forest Tribunal noted, article 3 is normally considered 'the source, or one source, of the Treaty principles of equity and options'.[14] The principle of equity is that the protections of citizenship apply equally to Māori and non-Māori. Sometimes expressed as the principle of equal treatment, it requires the Crown to treat Māori and non-Māori fairly and equally, and to treat Māori tribes fairly vis-à-vis each other.[15] It has been applied to the question of social services in the *Napier Hospital and Health Services Report*.[16]

The principle of options draws more widely on the Treaty as a whole and its context. The Ngāi Tahu sea fisheries Tribunal summarised it as follows:

> In essence [this principle] is concerned with the choice open to Maori under the Treaty. Article 2 contemplates the protection of tribal authority and self-management of tribal resources according to Maori culture and customs. Article 3 in turn conferred on individual Maori the rights and privileges of British subjects. The Treaty envisages that Maori should

14. Waitangi Tribunal, *Tarawera Forest Report*, p 28
15. Waitangi Tribunal, *Maori Development Corporation Report*, pp 31–32
16. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), pp 61–64

be free to pursue either or both options in appropriate circumstances. The Crown is obliged to offer reasonable protection to Maori in the exercise of the rights so guaranteed them.[17]

As we noted above in our discussion of breaches of the plain terms of the Treaty, we think that Māori are entitled to equal protection under the law, in terms of their rights as citizens. A policy that effectively expropriates one class of property (Māori rights under common law and Te Ture Whenua Māori Act), but leaves all other classes of private property intact, is in breach of the principle of equity. Furthermore, a government that denies coastal tribes the ability to own fee simple of the foreshore and seabed, but at the same time enters into arrangements that recognise equivalent rights in other tribes (such as the right to own a lakebed in fee simple) is in breach of the principle of equal treatment. Coastal tribes are not being treated equally with other classes of property owners, or with other tribes.

In addition, as citizens Māori are entitled to their options under the law. They are entitled to have their property rights defined by the courts. In the late 1950s, they took up this option in the litigation which resulted in *In Re Ninety-Mile Beach*. In that case, the Crown was content with the result, for it favoured the Crown. A similar exercise of their option in *Marlborough Sounds*, however, resulted in a decision in favour of the Māori parties, and the Crown has responded quite differently.

Post-*Marlborough Sounds*, Māori can choose whether to rely on common law principles and take their foreshore and seabed property rights to the High Court for definition and declaration. Alternatively, they can rely on the test of 'held according to tikanga Māori' and seek a status order and fee simple title from the Māori Land Court. Making the choice, and pursuing one or other course, is the exercise of both a Treaty right and a legal right. The Crown's policy proposes to remove these rights. Depriving one class of citizens of their right to go to court to have legal rights declared is a serious matter. It is, in our view, a breach of the Treaty principles of equity and options.

5.1.7 The principle of redress

Where the Crown has acted in breach of the principles of the Treaty, and Māori have suffered prejudice as a result, we consider that the Crown has a clear duty to set matters right. This is the principle of redress, where the Crown is required to act so as to 'restore the honour and integrity of the Crown and the mana and status of Māori'.[18] Generally, the principle of redress has been considered in connection with historical claims. It is not an 'eye for an eye' approach, but one in which the Crown needs to restore a tribal base and tribal mana, and provide sufficient remedy to resolve the grievance. It will involve compromise on both sides, and, as the

17. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 274
18. Waitangi Tribunal, *Tarawera Forest Report*, p 29

Tarawera Forest Tribunal noted, it should not create fresh injustices for others.[19] We think it applies to our inquiry only indirectly. It applies in respect of the historical breaches of the Treaty described in chapter 2 – namely, the alienation from Māori ownership and control of most Māori land and resources in the years from 1840 to 2003 (when the Marlborough Sounds case was decided). More specifically, we have identified that the Crown has not protected te tino rangatiratanga over the foreshore and seabed since 1840. Instead, it has assumed ownership and control for itself. This action of the Crown was in breach of the Treaty, as we have found above. These breaches will typically be dealt with in the context of the Tribunal's district inquiries, when the Tribunal investigates all the claims of Māori affected by Treaty breaches in a particular part of the country. Claims in respect of foreshore and seabed will be considered in each area, and where Treaty breach and prejudice are found, they will require redress.

The breaches of the Treaty arising from the effective expropriation of property rights under the Government's current policy *cannot* however be put right simply by the kind of settlement foreshadowed in the principle of redress. This principle was developed by the Tribunal for settlement of historical breaches, and is not apposite here.

It was developed for situations where Māori *had no legal rights*. They had no legal position to rely on in the courts. Their appeal was to the Treaty, which is not enforceable in the courts. Their only recourse was therefore to this Tribunal.

The claimants before us are in a different situation. Their legal position is otherwise. The Court of Appeal has said that they may be able to prove, before the High Court or the Māori Land Court, that they have property rights in the foreshore and seabed. We have found, in this inquiry, that it is likely that Māori property rights in the foreshore and seabed would be declared by the High Court and/or the Māori Land Court. Our finding is of course without legal status: it simply forms the basis for our recommendations. However, at this point ours is the best estimation that can be made of the likelihood of property rights being declared, because we have heard argument and evidence on that point. The Government has decided that the courts will not be allowed to do that.

The effect of the Government's policy in property terms can be expressed a number of ways, and we have used a number of expressions in this report. We have said that the removal of the routes whereby property rights will be articulated at law is tantamount to an expropriation. We have called it 'effectively expropriation', and characterised it as having 'an expropriatory effect'.

It is certainly the case that, post-*Marlborough Sounds*, Māori do not yet have an articulated or declared property right in the foreshore and seabed. What they have is a right to prove that they have such a property right. Mr Boast characterised it in this way:

19. Ibid

5.2

> What Maori have at present, following *Ngati Apa*, is clearly a property right. It is inchoate in the sense that the rights will need to be clarified by bringing an action in the Courts . . . it is almost certain that at least in *some* instances this inchoate right will translate into a freehold title . . . At the present time Maori have the right and ability to do this: there is a right which exists at the present time, a valuable right.[20]

It may be more technically correct to characterise the property of Māori in the right to prove they have property rights as a chose in action – a right that needs an action in the courts to be enforced.[21] A chose in action is in itself property, and taking it away without compensation is illegal.

When legal rights are taken away, what is called for is compensation, not redress. We want to be absolutely clear, therefore, that although the Crown's policy breaches the Treaty, that breach cannot be discharged here by redress alone.

In fact, the Crown's policy itself raises the possibility that redress will be available to applicants. The Māori Land Court will have the power to refer applicants to the Government, in cases where their property rights are of greater ambit than can be recognised under the new regime.[22] We have observed already, in chapter 4, that the exchange of a legal right to compensation for a legislated possibility of redress is a poor exchange. We have explained the distinction between compensation and redress, and the stronger legal basis for compensation when legal rights are removed. Redress occupies a vaguer territory, where the language of right gives way to the language of hope. The result is that if the Crown wishes to remove the legal property rights of Māori, redress only will not be an adequate remedy, and will not restore the Treaty relationship.

5.2 Prejudice

The categories of prejudice are threefold.

5.2.1 Māori citizenship devalued

We have said that the Crown's proposed policy violates the rule of law. The rule of law is a fundamental tenet of the citizenship guaranteed by article 3. Removing its protection from Māori only, cutting off their access to the courts and effectively expropriating their property rights, puts them in a class different from and inferior to all other citizens. This discrimination provides the basis for an enduring and justi fied sense of being wronged, and

20. Document A55(a) (Boast), para 12.25(a)
21. Ibid
22. Document A21 (Policy), paras 264, 268, 270–271

marginalises Māori in a way that we fear will threaten the harmony of race relations. The prejudice to Māori – and indeed to our society as a whole – can hardly be overstated.

5.2.2 Powerlessness through uncertainty

Post-*Marlborough Sounds*, Māori are on track to having their rights in the foreshore and seabed defined by the courts. The path through the courts is well understood and clear: all that is required to achieve definition of the rights through the courts is time. Everyone knows that there will be a day, once all the appeals are concluded, on which the Māori property right (if proven) will be known and declared. It will then be slotted into the known system of property rights. There may be a significant lapse of time until that day arrives, but everyone knows where the path is leading: there is certainty about the process and what it produces. The outcome is not known in each case, but predictions can be made based on the factual circumstances of the applicant, in light of the law discussed in chapter 3.

If the path through the courts were to continue uninterrupted, so that the Māori rights were ultimately defined and declared, Māori would arrive at a point where each group has a clear bargaining position based on the number and quality of the rights they own. Simply, those people would know what they had. This is a position of strength. It would provide leverage whether in relation to local government (to effect their greater participation in decision-making in the coastal marine area), or central government (in the event that government wished to take away some or all of the rights).

However, through the policy, the Crown proposes wholly to change the position for Māori, in ways that are new, untried, and only loosely described. As a result, a whole raft of new uncertainties is created. We have described them at length in chapter 4. The uncertainties will all be loaded on to Māori. The Crown, by contrast, has sheltered itself from risk.

The prejudice to Māori is clear. If the Crown proceeds with the policy as currently framed, Māori will be delivered for an unknown period to a position of complete uncertainty about where they stand. This is a very weak position to be in, and the Government has ensured that Māori will have nowhere to turn for a remedy.

5.2.3 Mana and property rights lost

The Crown proposes to cut off the path for Māori to obtain property rights in the foreshore and seabed. All the opportunities that might have flowed to them as owners of rights or title – affirmation of ancestral mana, the ability to exercise kaitiakitanga and manaakitanga, the ability to develop traditional uses and derive commercial benefits as resource-holders – will be lost. The number and quality of rights that the courts might uphold remain a matter for speculation, but it is our view that ample rights would at least sometimes be declared. There is no undertaking to pay compensation for the loss of rights. What is offered for their loss is a

policy that we found gives lesser and fewer rights in respect of foreshore and seabed, and a process to enhance Māori participation in decision-making affecting the coastal marine area. That process promises much, but we fear will deliver little.

These are the categories of prejudice we have identified. We have not sought to be exhaustive in noting every single item of prejudice under each of the three categories. However, we think that the categories cover the range. The prejudice we have identified is very serious indeed.

5.3 Recommendations

The Treaty of Waitangi Act 1975 requires us to make recommendations arising from the practical application of Treaty principles.[23] If the Tribunal finds a claim to be well-founded:

> it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or prevent other persons from being similarly affected in the future.[24]

Earlier in this chapter, we outlined the ways in which the Crown's policy breaches the Treaty, and the prejudice that we think Māori will suffer as a result. We now make recommendations that we hope will assist the Crown to act in a manner more compliant with the Treaty, and to avoid the substantial prejudice we foresee if the policy is enacted in its present form.

It follows from chapter 2 of our report that a government whose intention was to give full expression to Māori rights under the Treaty in 2004 would recognise that where Māori did not give up ownership of the foreshore and seabed, they should now be confirmed as its owners. Pragmatically, however, we recognise that giving effect to te tino rangatiratanga is not currently on the political agenda. Rather, the focus now is on the exigencies of *Marlborough Sounds*, and that focus is what made this an urgent inquiry. What is on the political agenda is the Government's policy, and that has been the principal subject of our inquiry.

We think that the policy reveals three areas where the Government may have misunderstood, or may not have been fully advised upon, the implications of its approach in that:

- overriding the rule of law, by denying Māori access to the courts to ascertain their property rights, and abrogating the rights themselves without promising compensation, is a very unusual and significant step in 2004;
- the extent of the property rights that are to be overridden must be assessed in the light of what the High Court and Māori Land Court might realistically find them to be, rather than in terms of the Crown's view of what they *should* be;

23. Treaty of Waitangi Act 1975, preamble
24. Ibid, s 6(3)

- the processes for securing enhanced Māori participation in decision-making concerning the coastal marine area are ill-conceived. They do not engage realistically with the profound difficulties of securing Māori representation that works, the numbers of people who would need to be involved for any agreements to be useful, and the consequences of the level of Māori disaffection with the Government's plans.

In light of these considerations, we recommend that the Government revisits the question of whether its policy is the only or best means of ensuring that the values underlying their four principles are upheld.

We invite Ministers to consider whether, singly or in combination, any of the options set out below might achieve the essentials of what they want to achieve, and in a way that would be more compliant with the Treaty, and with the other norms we have mentioned. We note that the preference of claimant counsel was for us to recommend only the course proposed in option 1 below – namely, that the Government should now agree to abandon its policy and engage with Māori in negotiating on the appropriate way forward. We do strongly recommend that course, but we have chosen as well to put forward a range of suggestions, so that whatever course the Government chooses, it is aware that there are opportunities to enhance its performance in Treaty terms.

In putting forward the options, we note up front that full compliance with the Treaty would require the Crown to negotiate with Māori and obtain their agreement to a settlement, as happened with respect to commercial fishing and Rotorua lakes. All the other options involve a compromise between Treaty principles, claimant preferences, and what the Government might regard as practicable. They are, to borrow Professor Mutu's phrase, 'least worst' options. We have in mind our statutory obligation to be practical and to have regard to all circumstances of the case.

As we have said, we think Māori are entitled to tread the path they chose – that is, recognition of rights through the courts – without interference by the State. Accordingly, our suggestions proceed generally on the basis that the least intervention is the best intervention.

They also proceed on the premise that any action that the Crown takes unilaterally, short of full restoration of te tino rangatiratanga over the foreshore and seabed, will breach the principles of the Treaty. As we see it, it is critical that the path forward is consensual.

5.3.1 Recommended options

(1) Option 1: The longer conversation

We must begin with the option that was urged on us by all claimant counsel. Māori really want the process to begin again. They want the opportunity to sit down with government and properly explore the options that are genuinely available. As we have said, they consider that they have not had that opportunity. A number of claimant counsel expressed optimism that the Crown's four principles could be accommodated in a negotiation:

> It is quite wrong for the Crown . . . to assume that the four principles around which the Crown seeks to develop its policy are not achievable within a Maori and Treaty compliant regime.[25]

It may be that the conversations would be long ones, and would take place over an extended period. We think that is appropriate. The issues are complex. The rights being interfered with are important ones. Although Māori clearly prefer the path through the courts to the one proposed by the Government, the subtleties of each are almost certainly imperfectly understood. It is also very doubtful that the Government really understands where Māori are coming from. The adversarial way in which the issue has developed has led to people taking positions rather than really communicating. In our hearing, we heard from some outstanding people about their perspectives of where the Māori interests lie in terms of tikanga and identity. We think that the government needs to hear those kōrero. They make it clear that the issues here are not simply legal or political. They are about people, and their conception of themselves as beings connected to the environment through whakapapa, tikanga and emotion. We became very aware that the costs of pushing this policy through in the face of such opposition, and such principled and spiritually based opposition, will be very high indeed.

Legislative change is not imperative immediately. If any really pressing matters arise, a holding pattern could be legislated while the bigger picture is sorted out.

We think that this longer conversation would also provide the Government with the opportunity of exploring options for settling the Māori interest in the foreshore and seabed, where they do not wish to give effect to it. The effect of the Sealord deal was to quantify the Māori interest in the fisheries, and slot it within a Pākehā management framework by expressing it in terms of individual transferable quota. While this settlement has obviously had its problems (and they are not all sorted out yet), this was an example of the Crown recognising Māori property interests, and giving effect to them. Such an approach is certainly preferable to a unilateral approach that has proceeded at speed in the face of overwhelming Māori opposition, and is (in our opinion) inherently flawed in important ways.

Potential to achieve a settlement the same kind of outcome may exist here. For instance, interests in aquaculture and minerals could be brought to the negotiating table. The extent to which Māori are prepared to exchange foreshore and seabed rights for money or other compensation remains an entirely open question, and is one for iwi and hapū Māori alone to answer. However, as far as we can discern, such conversations have yet to begin, and until they do it will not be at all clear what might or might not be able to be achieved.

(2) Option 2: Do nothing

We have discussed at length the possible consequences of no intervention. As we see it, the risks of letting the courts' jurisdictions take their course are not unacceptable, given the

25. Document 96(a) (Ertel), para 27. See also, for example, doc A99 (Ferguson), paras 87–91, 126; doc A46 (Powell), paras 89–103; doc A115 (Castle), para 2.4.

strong and legitimate Māori interest in preserving the status quo. We think that if real problems emerge from court decisions, such that others' interests may be jeopardised in a way that is not regarded as tenable, those issues can be addressed when and if they arise. Solutions could then be tailored to real and known situations, whereas now many of the evils that the poicy theoretically remedies are hypothetical. Chapter 4 covers in detail the implications of the 'do nothing' response.

(3) Option 3: Provide for access and inalienability

Māori do understand the anxiety non-Māori people have about the availability of access to the beach. Māori people are realistic. They do not believe that any system will deliver to them exclusive possession of the beaches. Most do not even want it. There is room to manoeuvre around that whole issue.

We think that a least-intervention policy could be developed cooperatively that provided a basis for the courts' jurisdiction to continue, but with the options for remedies being limited such that public access was a given except in a few limited situations. These would include wāhi tapu, and rāhui. The need for Māori to deny access to urupā is already provided for in the existing policy.[26]

Likewise, there is a common view that Māori interests in the foreshore and seabed should be inalienable. This could also be legislated for.

(4) Option 4: Improve the courts' tool kit

It was submitted to us that there may be difficulties with the range of instruments available to the High Court and the Māori Land Court when they come to consider customary title.

Awkward issues include the following:

- In the High Court, it is not clear what remedy is available once a customary title or customary right is found and declared. There is no obvious mechanism for issuing any kind of title;
- In the Māori Land Court, the court may vest customary land in an entitled group, giving rise to a certificate of title. But there is no power to vest any interest that comprises fewer than the full range of interests comprised in a full fee simple estate, and the rights may often fall short of that.

It could be left on the basis that the court (High Court or Māori Land Court) simply makes a declaration about the nature and scope of the customary interests comprised in the title, and the declaration itself would come to be recognised as giving rise to a property interest. However, under the Land Transfer Act, all interests in land must be registered on the title, and for the sake of consistency, provision should arguably be made for a registration system to be established for customary interests.

26. Document A21, paras 25, 218

The current proposal is that the Māori Land Court will be required to establish a register.[27] This could be established by legislation to record any declarations of customary interests in land made by either the High Court or the Māori Land Court.

(5) Option 5: Protect the mana

Another approach suggested to the Tribunal was that found in the example of the Orakei Reserve. This was described in the evidence of Sir Hugh Kawharu, and advanced as an option for consideration in the submissions of claimant counsel Mr Williams. The example was described as 'an existing legal mechanism whereby land under hapu title is subject to a regime of management involving the Crown and the hapu'.[28]

The mechanism arose as a result of the recommendations in the Tribunal's 1987 *Report on the Orakei Claim*, and was implemented by way of the Orakei Act 1991. Mr Williams argued that the Tribunal's recommendations and the consequential enactment apply to the foreshore and seabed, in that:

- Firstly, the provisions of the Act affirm Maori ownership of the land and in this case in favour of the Ngati Whatua o Orakei Maori Trust Board;
- Secondly, mechanisms have been put in place to deal with the control and management of the land. That control and management is exercised by both Maori and the Crown (even if it is by way of delegated authority to local government) by virtue of representation on the administering body;
- Thirdly, there is a statutory (and therefore legal) right of public access;
- Fourthly, there is protection for both Maori and the Crown in that the land cannot be alienated and recognises tino rangatiratanga.

Therefore, the Act and its provisions provide certainty of ownership, certainty of management and certainty of access.[29]

These provisions, Mr Williams submitted, appear to satisfy, in a general sense, the Government's principles of access, regulation, protection and certainty, without the need to vest legal ownership in either the Crown or the 'people of New Zealand'.[30]

Sir Hugh Kawharu confirmed that 'public access to the foreshore at Okahu Bay has been unrestricted from the day title returned to Ngati Whatua', while 'here at least the mana of Ngati Whatua stands tall, intact, and protected'. The 'key', he concluded, 'is the retention of mana'.[31]

27. Ibid, paras 190, 191
28. Document A29 (Williams), para 126
29. Ibid, para 142
30. Ibid, para 143
31. Document A35 (Kawharu), paras 60, 65

Sir Hugh was careful to point out that although this approach had worked well for Ngāti Whātua, and deserved consideration in the present context as a potential solution, he was not advancing it as a 'one size fits all' solution to situations where the desire of the public for access and the desire of Māori for mana come into play. Moreover, it must be emphasised that this was a solution to which Ngāti Whātua agreed. As a solution to the foreshore and seabed problem, it would likewise require agreement.

(6) Option 6: Be consistent

We have talked about the apparent inconsistency in the Government's preparedness to recognise the ownership interests of Ngāti Tūwharetoa and Te Arawa peoples in the bed of their lakes, and its unpreparedness to vest any kind of title in foreshore and seabed in coastal peoples.

The model that apparently works in policy terms for lakebeds could, we think, be adapted to foreshore and seabed.

Its essential elements (very similar to the Ōkahu Bay model described above) are:

- negotiation with claimants on a case-by-case basis;
- resolution of claims through special statutory settlement;
- vesting of title in tangata whenua;
- preservation of public access; and
- joint management of the resource.

5.3.2 Compensation essential

We have not sought to suggest changes to the detail of the policy, as we think changes as to detail would not redeem it. However, we make an exception in relation to compensation. If, after considering our report, the Government nevertheless wishes to proceed with its policy unchanged, we think that the Treaty requires it to acknowledge a responsibility to compensate Māori for the removal of their property rights. This is the bare minimum of what the Treaty, and any standard of fair and good government, demands.

We acknowledge immediately the extreme difficulty of identifying an appropriate and fair level of compensation for property rights that have not been investigated and declared. But this conundrum is created by the Crown itself, if it removes the means at law for determining the nature and extent of those rights. As we have said, we do not think it is necessary to remove the courts' jurisdiction. We therefore recommend as preferable option 2, the 'do nothing' option. Under that option, the courts would investigate and declare the rights, and then their ambit would be known. If the Government then considers, as a matter of public policy, that they need to be taken away, there would be a basis for assessing compensation.

5.3.3 Final word

It seems to us that claimants and the Crown agree on some fundamental points. Although the cultural imperatives are different, they agree that the public should generally have access to the foreshore and seabed (except where this would cause harm), and they agree that the foreshore and seabed should not be sold. Claimants and the Crown also agree that customary rights exist in the foreshore and seabed, are fundamentally important, and need to be recognised and protected. Further, kawanatanga carries with it a power to regulate the coastal marine area for the benefit of everyone. Claimants and the Crown agree that current tools for regulation (such as the Resource Management Act and the regime for customary fisheries) are not working well for Māori, and this needs to be improved.

These are important bases for agreement. We think that they serve as starting points for the dialogue that we say needs to happen next. We do not attempt to prescribe the nature or outcomes of that dialogue. That is for Māori and the Crown, if they agree to negotiate. Whatever happens, we hope for an outcome that is faithful to the vision of the Treaty: two peoples living together in one nation, sharing authority and resources, with fundamental respect for each other.

Dated at Wellington this 4th day of March 2004

CM Wainwright, presiding officer

J Clarke, member

JR Morris, member

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APPENDIX I

BACKGROUND TO THE URGENT HEARING

Applications for Urgency

Following the release on 19 June 2003 of the Court of Appeal's Marlborough Sounds decision, the Government announced its intention to legislate to secure Crown ownership of the foreshore and seabed. The Waitangi Tribunal received three applications for urgency concerning the Crown policies or proposed policies. On 3 July 2003, Chief Judge Williams declined the applications on the basis that the Government announcements made at that stage could not be viewed as representing a policy or proposed policy on behalf of the Crown. Parties were encouraged to renew their applications if and when the Crown adopted a firm proposal on the matter.[1]

On 18 August 2003, the Government released a policy and consultation document, *The Foreshore and Seabed of New Zealand. Protecting Public Access and Customary Rights: Government Proposals for Consultation*, and embarked upon a process of consultation, with public submissions on the proposals closing on 3 October 2003.[2] The Tribunal received a renewed application for urgency, and on 27 August 2003, Chief Judge Williams appointed Judge Carrie Wainwright to determine the application.[3] On 5 September, Chief Judge Williams appointed Joanne Morris and John Clarke, Tribunal members, to assist Judge Wainwright.[4]

This Tribunal convened a judicial conference in Wellington on 10 September 2003 to hear parties on the question of whether, and if so, when, an urgent inquiry should commence.[5] Claimant counsel, representing a significant number of claimants, reaffirmed their application for urgency.[6] Crown counsel indicated at this time that the Crown 'did not oppose the granting of an urgent hearing of this claim', and considered that the hearing 'might provide a useful forum for further exploration by Crown and claimants of the issues relevant to the Crown's proposals'. Crown counsel advised that 'the Crown considers a hearing should be held as soon as possible to enable the Crown to be informed of the Tribunal's views before the Crown proceeds to take any final decision', and asked that a hearing be scheduled before the end of October 2003.[7] The Tribunal

1. Paper 2.8
2. Document A125
3. Paper 2.1
4. Paper 2.79
5. Paper 2.2
6. Papers 2.23–2.99
7. Paper 2.93

delivered an oral decision granting an urgent hearing on the Treaty compliance of the Crown's proposed policy. The Tribunal noted that 'the level of animosity among Māori to the substance of this policy is such that no process of interaction that did not involve a major reworking of the policy would meet Māori demands'. In light of this, the Tribunal decided not to schedule an urgent inquiry to focus on the consultation process. The Tribunal also noted, at this stage, that the focus was on 'the system that recognises, or may recognise, Māori customary rights, rather than on the rights themselves'.[8]

Interlocutory Matters

At the 10 September judicial conference, the Tribunal indicated that the urgent hearing would proceed on 5–7 November 2003, predicated on the Crown's undertaking to notify claimants and the Tribunal of the Government's formulated policy by 17 October 2003. In the meantime, the Tribunal encouraged the Crown to take the opportunity to engage more fruitfully with Māori on the foreshore and seabed issues.[9] On 17 October 2003, Crown counsel informed the Tribunal that the Crown wished to defer filing the statement of its position until it had considered all public submissions received on its proposals and further developed its proposals 'to balance the various interests raised'.[10] Following a second judicial conference on 20 October 2003, at which the various options available to parties was discussed, Crown counsel further elaborated the Crown's position, advising that the Crown's policy would be finalised by December 2003, with likely introduction of legislation in late February or March 2004.[11] The Tribunal requested that Crown counsel seek further instructions so as to be able to fully inform the claimants and the Tribunal of the Crown's position prior to a third judicial conference on 7 November 2003.[12]

At the third judicial conference, the week of 20 to 23 January 2004 was set aside for the hearing. The Tribunal noted that the hearing would proceed unless, following discussions with the Crown and the release of the Government's confirmed foreshore and seabed policy in mid-December, the claimants wished to withdraw. The Tribunal therefore convened a fourth judicial conference on 22 December 2003 in order to hear parties on their intentions following the release of the confirmed policy (on 17 December 2003).[13] Having agreed that the urgent inquiry would proceed, the date and venue for the hearing were confirmed, along with other procedural matters.[14]

8. Paper 2.101
9. Ibid
10. Paper 2.133
11. Paper 2.136
12. Paper 2.144
13. Paper 2.157
14. Paper 2.173

Issues

Following the initial judicial conference, the Tribunal drafted a statement of issues for the urgent inquiry.[15] The issue questions, developed over the course of the interlocutory period, were designed to assist the Tribunal in answering the overriding question before it: Is the Crown's proposed policy consistent with the principles of the Treaty of Waitangi?

The confirmed issues:

(a) Generally, and not in relation to any particular group, what are the Māori interests in the foreshore and seabed?

(b) How might those interests be recognised in a Māori customary title to the foreshore and seabed? Consider:

- In what circumstances might the Māori customary title equate to a freehold title?
- What kinds of evidence would be required to support recognition of customary title?
- What title, short of freehold title, might be recognised, and how would such recognition be effected?
- Does the Sealord deal (and implementing legislation) preclude reliance on use of the fisheries resources as a basis for demonstrating customary title?

(c) Do the Crown's proposed policies comprise an abrogation of or other interference with Māori customary title or other interests in the foreshore and seabed, and/or the means for investigating that title/interest and giving it legal recognition and protection?

(d) If the answer to (3) is 'yes', on what basis (at law or under the Treaty) is the Crown justified in that abrogation or interference without:

- making a thorough assessment of the nature and extent of that title or interest; and/or
- providing a regime for compensation?

(e) How are Māori prejudiced, or likely to be prejudiced, by the Crown's proposed policy?

(f) What options are available for mitigating and/or averting that prejudice?[16]

In addition to these issue questions, the Tribunal invited counsel, and particularly Mr Boast, to provide:

(a) a description of the current state of the law in New Zealand pertaining to the recognition at law of Māori interest(s) in the foreshore and seabed, following the Court of Appeal's decision;

(b) the options available to the Māori Land Court in considering the question of how those interests can be given legal recognition, given both:

15. Ibid
16. Paper 2.157

- the different lines of legal authority on the matter; and
- the terms of Te Ture Whenua Māori Act 1993;

and

(c) an informed prediction as to how a judicious Māori Land Court might be expected to proceed under these circumstances.[17]

17. Paper 2.131

APPENDIX II

RECORD OF INQUIRY

RECORD OF HEARINGS

The Tribunal

The Tribunal constituted to hear Wai 1071, concerning the foreshore and seabed claims, comprised Judge Carrie Wainwright (presiding), John Clarke, and Joanne Morris.

The Hearing

The hearing was held over six days on 20 to 23 and 28 and 29 January 2004 at the Westpac Stadium, Wellington.

The first two days were reserved for traditional witnesses who presented evidence relating primarily to tikanga associated with the foreshore and seabed. On 20 January, the Tribunal heard evidence from Rima Edwards (Nga Puhi Nui Tonu); Hector Busby (Ngā Puhi Nui Tonu); Tame McCausland (Te Arawa); Derek Te Ariki Morehu (Ngāti Makino); Kihi Ngatai (Ngāi Te Rangi, Ngāti Ranginui); Peter Cross (Te Ao Tāwirirangi – Tokomaru Bay); Lou Tangaere (Ngāti Hei); and Dr Manuka Henare (Ngāti Hāua–Te Aupouri, Te Rarawa, Ngāti Kurī). On 21 January, the Tribunal heard evidence from: Haami Piripi (Te Rarawa); Professor Margaret Mutu (Ngāti Kahu); Sir Hugh Kawharu (Ngāti Whātua); Roimata Minhinnick (Ngāti Te Ata); Angeline Greensill (Tainui o Tainui Hapū); Piko Davis (Ngāti Maniapoto); Tohepakanga Ngatai (Taranaki); and Ron Hudson (Taranaki). In addition, the Tribunal received a large number of written briefs of evidence, as listed in the record of documents.

On 22 January, the Tribunal heard evidence from Dr John Yeabsley (Senior Fellow, New Zealand Institute of Economic Research); Dr Paul McHugh (Faculty of Law, University of Cambridge); and Dr Mark Prebble (chief executive, Department of the Prime Minister and Cabinet). Over the following three hearing days, the Tribunal heard oral submissions from the following claimant counsel: Annette Sykes and Jason Pou; Martin Taylor; Kathy Ertel; Grant Powell; Richard Boast; Tim Castle; Te Kani Williams; Karen Feint; and Damian Stone. We also heard submissions from Jamie Ferguson on behalf of Te Ohu Kai Moana. Written submissions from other counsel are listed in the record of documents. On the sixth day of hearing, the Crown's submissions were presented by the Solicitor-General, Terence Arnold QC, and Michael Doogan.

RECORD OF PROCEEDINGS

1. Claims

1.1 Wai 38

A claim by Te Roroa concerning land in the Hokianga area, 22 April 1987 (last amended , 17 September 1990)

1.2 Wai 39

A claim by Herewini Te Moananui-A-Kiwa Kaa and another concerning lands, fisheries and the State-Owned Enterprises Act 1986 , 30 March 1987 (last amended received 21 January 2004)

1.3 Wai 45

A claim by the Honourable Matiu Rata and others concerning Muriwhenua lands, 1 December 1987

1.4 Wai 54

A claim by Makere Rangiatea Ralph Love and another concerning Nga Iwi o Taranaki, 23 December 1987 (last amended 26 June 1995)

1.5 Wai 55

A claim by Te Otane Reti and others concerning Te Whanganui-ā-Orotu, 17 February 1988 (last amendment received 20 January 2004)

1.6 Wai 65

A claim by James Pohio and others concerning cultural wellbeing and the Foreshore Local Bodies Act 1974, 8 April 1988 (last amendment received 21 January 2004)

1.7 Wai 72

A claim by Hariata Wiremu Gordon and others concerning Ngāti Paoa confiscation, 21 October 1987 (last amended 15 October 1993)

1.8 Wai 87

A claim by Claude Augin Edwards and others concerning Whakatohea lands, 22 May 1989 (last amended 6 January 1999)

1.9 Wai 96

A claim by Ngeungeu Te Irirangi Zister and others concerning Wairoa and Otau blocks, 25 September 1989

1.10 Wai 97

A claim by Hinepatokaariki Paewai and others concerning Kahungunu me Rangitāne o Wairarapa lands and fisheries, 28 October 1988 (last amended 7 March 2003)

1.11 Wai 98

A claim by Te Rimu Trust concerning rivers, lakes, coastal waters and Māori customary use, 28 October 1988

1.12 Wai 99

A claim by Piki O Te Rauamoa Parker and others concerning Te Pakakohi lands and fisheries, 10 October 1989 (last amended 2 August 1995)

1.13 Wai 100

A claim by H Tukukino and others concerning land in the Hauraki area, 5 May 1987 (last amended 29 August 2002)

1.14 Wai 106

A claim by Te Kahu Iti Morehu and others concerning Kaipara fisheries, 05 April 1988

1.15 Wai 110

A claim by Rebecca Fleet concerning land near Matapaua Bay, undated (last amended received 21 January 2004)

1.16 Wai 112

A claim by Puni Makene and others concerning Kaitaia lands, 10 November 1989 (last amended 7 November 1989)

1.17 Wai 118

A claim by Haami Piripi and others concerning Mapere 2 block in the Te Rārawa area, 23 May 1989

1.18 Wai 119

A claim by Ariel Whai Aranui and others concerning Mohaka lands, 24 January 1990 (last amended 9 April 1997)

1.19 Wai 125

A claim by Haami Whakataari Kereopa concerning Raglan Harbour, 26 March 1990 (last amendment received 20 January 2004)

1.20 Wai 126

A claim by John Hanita Paki and others concerning Motunui Plant and Petrocorp, 28 May 1990 (last amended 21 June 1990)

1.21 Wai 128

A claim by Dame Whina Cooper concerning Hokianga lands and fisheries, 15 May 1990 (last amended 10 May 1996)

1.22 Wai 129

A claim by Sue Te Huinga Nikora and others concerning East Coast lands and waters, undated (last amendment received 21 January 2004)

1.23 Wai 131

A claim by Hamiora Raumati and others concerning Taranaki land wars and raupatu, 31 March 1987 (last amendment undated)

1.24 Wai 137

A claim by Gary Neilson concerning Ngā Rauru lands, 18 December 1987 (last amended 22 June 1990)

1.25 Wai 139

A claim by Ted Tamati concerning Taranaki land confiscations, 19 June 1990

1.26 Wai 143

A claim by all Taranaki claimants concerning claims in the Taranaki inquiry district, undated

1.27 Wai 148

A claim by Ngaruna Ronald Mikaere concerning Manaia 1C, 28 April 1990 (last amendment received 15 September 1999)

1.28 Wai 151

A claim by Ropata Gray and others concerning Waiouru and other lands, undated, received 6 July 1990 (last amended 6 April 2002)

1.29 Wai 166

A claim by Manahi Paewai concerning Rangitāne o Tāmaki Nui a Rua lands and fisheries, 21 September 1990 (last amended 5 March 2003)

1.30 Wai 168

A claim by Anikanara Te Haipo Hadfield concerning Waiohiki lands, Hastings–Napier, 21 August 1990 (last amendment received 21 January 2004)

1.31 Wai 174

A claim by Ata Patricia Bailey concerning Kuaoturu blocks and others, 18 October 1990 (last amended 30 November 1999)

1.32 Wai 175

A claim by Piri Te Tau and others concerning Hutt Valley and Cape Palliser lands, 29 October 1990 (last amended 5 March 2003)

1.33 Wai 177

A claim by Selwyn Tukumana Gregory and others concerning Hauraki gold mining lands, 23 February 1991 (last amendment received 21 January 2004)

1.34 Wai 192

A claim by Walter Wilson and others concerning Hereheretau Station, 11 April 1991 (last amended 19 June 2003)

1.35 Wai 203

A claim by Tuiringa Mokomoko and others concerning Mokomoko, 14 May 1991 (last amended January 2003)

1.36 Wai 211

A claim by M Ellis concerning Whareroa blocks, 24 June 1988 (last amended 31 July 1998)

1.37 Wai 243

A claim by G Herbert concerning Warawara forest, 10 February 1987

1.38 Wai 249

A claim by James Christopher Eruera concerning Hokianga lands and fisheries, 4 September 1987 (last amendment received 21 January 2004)

1.39 Wai 250

A claim by B Wikaira concerning Hokianga), 6 November 1987

1.40 Wai 262

A claim by Haana Murray and others concerning indigenous flora and fauna, 9 October 1991 (last amendment received 24 October 2001)

1.41 Wai 272

A claim by Apirana Mahuika concerning Ngāti Porou lands and fisheries, 13 February 1992 (last amendment received 21 January 2004)

1.42 Wai 273

A claim by Paul White concerning Tapuwae 1B and 4 Incorporation, 21 February 1991

1.43 Wai 274

A claim by Eric Ruru concerning Mangatu block, 21 February 1992 (last amendment received 16 January 2004)

1.44 Wai 275

A claim by Kawana Te Kirikau concerning Tahunaroa and Waitahanui blocks, 13 February 1992 (last amendment received 20 January 2004)

1.45 Wai 279

A claim by Eriapa Uruamo concerning Te Taou Reweti Charitable Trust, 3 April 1992 (last amended 15 August 2001)

1.46 Wai 283

A claim by Eric Ruru and others concerning East Coast raupatu, 13 March 1992 (last amendment received 16 January 2004)

1.47 Wai 285

A claim by Shane Ashby and others concerning Manaia blocks, 9 September 1991 (last amendment received 15 September 1999)

1.48 Wai 291

A claim by D Barrett concerning Maungakaramea block, 24 April 1992

1.49 Wai 298

A claim by Lawrence Tukaki-Millanta concerning Whangaokena Island, 10 July 1992 (last amendment received 21 January 2004)

1.50 Wai 304
A claim by Tamehana Tamehana concerning Ngawha geothermal resources, 8 September 1992 (last amendment received 20 January 2004)

1.51 Wai 312
A claim by Takutaimoana Wikiriwhi and others concerning West Auckland lands, 8 September 1992 (last amended 3 August 2001)

1.52 Wai 339
A claim by Tuiringa Mokomoko and others concerning Hiwarau block, 17 December 1992 (last amended January 2003)

1.53 Wai 341
A claim by Cyril Chapman concerning Te Karae block, 10 December 1992

1.54 Wai 373
A claim by Toko Renata Te Taniwha and others concerning Maramarua State Forest, 19 August 1993 (last amended 22 September 1995)

1.55 Wai 400
A claim by Hoani Hohepa concerning Ahuriri block, 2 November 1993 (last amended 26 September 1997)

1.56 Wai 403
A claim by Andrew Kendall concerning Mitimiti lands, 13 September 1993

1.57 Wai 418
A claim by Rikiriki Rakena and others concerning Waikawau purchase, 26 September 1993 (last amended 30 November 1999)

1.58 Wai 420
A claim by Warren Edward Chase concerning Mataikona A2 block, 22 November 1993 (last amendment received 21 January 2004)

1.59 Wai 423
A claim by Te Warena Taua and another concerning Ngai Tai ki Tamaki Rohe, 16 December 1993 (last amended 17 April 2002)

1.60 Wai 429

A claim by Ryshell Griggs concerning MacLean purchases, 17 March 1994 (last amended 10 March 2003)

1.61 Wai 450

A claim by Eunice Pomare concerning Waireia, Hokianga Harbour, 29 April 1994

1.62 Wai 452

A claim by Paul Irven White and another concerning Tapuwae and other blocks, Hokianga, 18 October 1994

1.63 Wai 464

A claim by Gavin Caird and others concerning Pakirarahi 1C block, undated (last amended 21 October 1999)

1.64 Wai 470

A claim by Hariata Ewe and another concerning land within Kawerau-a-Maki tribal territory, 1 July 1994 (last amended 15 August 2001)

1.65 Wai 475

A claim by Remehio Te Maunga Mangakahia and others concerning Whangapoua Forest, 4 October 1994 (last amendment received 21 January 2004)

1.66 Wai 504

A claim by Tamihana Akitai Paki and another concerning Te Mata, Ruakaka, Takahiwai, Maungakaramea, Poupouwhenua, Moutere Island, Te Mahe and Waipu land blocks, 8 March 1995 (last amended 3 November 1999)

1.67 Wai 505

A claim by Te Aroha Ruru Waitai concerning Whanganui, Waitotara, Kai Iwi Sale Claim (Moutoa Gardens), 10 April 1995 (last amended 2 February 1999)

1.68 Wai 521

A claim by Kathleen Hemi concerning Ngāti Apa Iwi lands and fisheries, 9 June 1995 (last amended 14 February 2003)

1.69 Wai 524

A claim by Leith Comer concerning Rotomahana Parekarangi Ruawahia and Rerewhakaaitu blocks, 30 June 1995 (last amended 6 September 1996)

1.70 Wai 533
A claim by Te Au Nikora and others concerning Whakarewarewa geothermal valley and Whakarewarewa State Forest, 26 July 1995

1.71 Wai 534
A claim by Georgina Martin and others concerning Telecom Depot, Kaitaia, 5 July 1995

1.72 Wai 546
A claim by Tureiti Stockman and others concerning Ngāti Tapu tribal lands, 12 September 1995 (last amended 15 May 2000)

1.73 Wai 548
A claim by Sydney Murray concerning Takahue 1 block, 25 May 1995

1.74 Wai 552
A claim by Lewis Turahui and another concerning Ahitahi–Araukuku claim, 4 October 1994 (last amended 4 June 1997)

1.75 Wai 553
A claim by Andrew Erueti concerning Araukuku hapū, 21 November 1995 (last amended 16 January 2004)

1.76 Wai 566
A claim by James Hemi Elkington and others concerning Ngāti Koata rohe, 22 December 1995 (last amended 10 November 2000)

1.77 Wai 591
A claim by Tamihana Rewi concerning Te Rewarewa block, 15 February 1996

1.78 Wai 594
A claim by Barry Mason concerning Ngāti Rarua, 13 May 1996 (last amended 7 March 2003)

1.79 Wai 619
A claim by Hare Pepene and others concerning Far North, 18 August 1996 (last amendment received 21 January 2004)

1.80 Wai 620
A claim by Mitai Kawiti and others concerning Te Waiariki, Ngāti Korora Hapū land and resources, 26 August 1996 (last amended 30 July 2000)

1.81 Wai 626

A claim by Awhina Andrews concerning Te Kohanga 1 block, 3 September 1996

1.82 Wai 632

A claim by Garry Hooker and another concerning Te Kopuru and Aratapu blocks, 8 August 1996 (last amended 11 September 2000)

1.83 Wai 642

A claim by Elizabeth Mataroria-Legg and others concerning Motatau 5A2 block, 5 October 1996

1.84 Wai 655

A claim by Ngahina Matthews concerning Whanganui–Rangitikei blocks, 9 December 1996

1.85 Wai 659

A claim by Desmond Tata and others concerning Ngai Tamarawaho tribal estate, 22 January 1997 (last amended 6 January 2000)

1.86 Wai 661

A claim by Shane Ashby and others concerning Wharekawa East 2 block, 19 November 1996 (last amendment received 15 September 1999)

1.87 Wai 663

A claim by Tanengapuia Te Rangiawhina Mokena concerning Te Aroha lands, 14 January 1997 (last amended 18 February 2000)

1.88 Wai 664

A claim by Thomas McCausland and others concerning Waitaha Tribal estate, 14 February 1997 (last amended 2 November 2001)

1.89 Wai 687

A claim by Te Okoro Joe Runga and others concerning Kahungunu–Rongomaiwahine, 16 May 1997 (last amended 18 February 1998)

1.90 Wai 696

A claim by Glass Murray and others concerning Ngāti Haua land and resources, 19 September 1997

1.91 Wai 724
A claim by Roland Mason concerning Murupara land and the Rating Powers Act 1998, 29 May 1998 (last amendment received 20 January 2004)

1.92 Wai 725
A claim by Hiraina Hona concerning Te Pahou blocks, Te Whaiti, 27 February 1998 (last amendment received 20 January 2004)

1.93 Wai 728
A claim by Toko Renata Te Taniwha and others concerning Tikapa Moana (Hauraki Gulf) National Marine Park, 19 June 1998 (last amended 1 February 2001)

1.94 Wai 730
A claim by Rima Edwards concerning Te Rārawa ki Muriwhenua, 8 July 1998

1.95 Wai 741
A claim by Murray Hemi concerning local government and resource management issues in Wairarapa, 21 August 1998 (last amended 5 March 2003)

1.96 Wai 744
A claim by Bernard Manaena concerning Wairarapa lands and Crown's 5 per cents policy, 29 April 1998 (last amended 7 March 2003)

1.97 Wai 745
A claim by Luana Pirihi and others concerning Patuharakeke hapu lands and resources, 22 May 1998

1.98 Wai 753
A claim by Puti Paparaahi and others concerning Ngāti Kinohaku lands, forests and fisheries, 29 May 1998 (last amendment received 21 January 2004)

1.99 Wai 772
A claim by Gary Neilson concerning Nga Ariki mandating process, lands and fisheries, 13 January 1999

1.100 Wai 788
A claim by Atiria Takiari and others concerning Mokau–Mohakatino and other blocks, 14 July 1999 (last amendment received 21 January 2004)

1.101 Wai 792

A claim by Parekura White concerning Harataunga blocks, 14 October 1999 (last amendment undated)

1.102 Wai 794

A claim by Tame Iti concerning Opouriao land and resources, 25 March 1999 (last amendment received 16 January 2004)

1.103 Wai 795

A claim by Hirini Paine and others concerning Waikaremoana catchment area, Te Pou o Tumatawhero Pa site, 5 May 1999 (last amendment received 20 January 2004)

1.104 Wai 805

A claim by Brian Herepete concerning Rawhitiroa and Owhata lands, 23 December 1999

1.105 Wai 808

A claim by Hoe o Tainui ki Mahurangi concerning Tupuna whaea lands of Ngāti Horowhenua within Hauraki rohe, 18 January 2000 (last amended 1 May 2002)

1.106 Wai 809

A claim by Toko Renata Te Taniwha concerning Ngāti Whanaunga, Hauraki district, 18 January 2000

1.107 Wai 810

A claim by Moana Te Aria Te Uri Karaka Te Waero concerning Waiheke Island and Hauraki Gulf land, 20 January 2000 (last amendment received 21 January 2004)

1.108 Wai 852

A claim by William Blake and others concerning Kahungunu petroleum, 13 June 2000 (last amended 21 August 2000)

1.109 Wai 861

A claim by Peter George and others concerning Tai Tokerau District Māori Council, 23 June 2000 (last amendment received 20 January 2004)

1.110 Wai 866

A claim by Pakariki Harrison concerning rights of members of Ngāti Porou ki Harataunga ki Mataora, 8 August 2000 (last amended 28 September 2001)

1.111 Wai 868
A claim by James Taitoko and others concerning land in Maniapoto rohe, 26 June 2000 (last amendment received 21 January 2004)

1.112 Wai 937
A claim by Trainor Tait and another concerning Noa Tiwai lakes, lands and other resources, 2 July 2001 (last amendment received 20 January 2004)

1.113 Wai 939
A claim by Takare Leach concerning Castlepoint block, reserves, forestry and wahi tapu, 31 July 2001 (last amended 7 March 2003)

1.114 Wai 944
A claim by Frances Smith concerning ancestral lands, forests, lake, traditional inland and coastal fishing places, their urupā, mahinga kai and areas of waahi tapu, 23 August 2001 (last amended 28 February 2003)

1.115 Wai 953
A claim by Ngahiwi Tomoana concerning marine farming, 11 December 2001 (last amended 19 July 2002)

1.116 Wai 964
A claim by Paora Whaanga concerning land in the Wairoa district, 15 March 2002 (last amendment received 21 January 2004)

1.117 Wai 966
A claim by Gray Theodore concerning Te Tii land and resources, 12 April 2002 (last amendment received 16 January 2004)

1.118 Wai 968
A claim by Korohere Ngapo and others concerning Moehau 2A2 block, 7 February 2002 (last amended 14 August 2002)

1.119 Wai 971
A claim by Horimatua (George) Evans concerning East Coast lands and resources, 7 May 2002

1.120 Wai 983
A claim by Mini Westrupp concerning Waikokopu Harbour and Mahia block, undated (last amendment received 21 January 2004)

1.121 Wai 991

A claim by Punaruku (Mona) Karena concerning loss of land through legislation, native land policies, and the Native Land Court, 21 September 2001 (last amendment received 21 January 2004)

1.122 Wai 997

A claim by Daniel Hitchcock concerning Papaaroha 1 block, 23 May 2002 (last amendment received 21 January 2004)

1.123 Wai 1004

A claim by Mike Taitoko and others concerning various blocks in the Maniapoto rohe, 24 August 2001 (last amendment received 21 January 2004)

1.124 Wai 1009

A claim by Te Weeti Tihi concerning Te Hurepo, a maunga known as Titi Tangi-ao a wāhi tapu urupā Opiki-Whanaunga-Kore, 19 September 2002 (last amendment received 20 January 2004)

1.125 Wai 1010

A claim by Rose May Lackner and another concerning rates, 13 August 2002 (last amendment received 16 January 2004)

1.126 Wai 1011

A claim by Kirituia Alice Tumarae concerning land taken for roading and rail purposes, 14 August 2002 (last amendment received 20 January 2004)

1.127 Wai 1012

A claim by Hohepa Kereopa and others concerning Māori land tenure, rates and survey costs, alienation of land, management of sea and forestry resources, 19 September 2002 (last amendment received 20 January 2004)

1.128 Wai 1013

A claim by Dr Rangimarie Pere and another concerning section 7 of the Resource Management Act 1991 relating to kaitiakitanga, 13 August 2002 (last amendment received 20 January 2004)

1.129 Wai 1022

A claim by Jim Hemi and others concerning acquisitions of lands and forests for public works, 28 June 2002 (last amended 7 March 2003)

1.130 Wai 1026
A claim by Robert Takao and others concerning ancestral land in the northern Urewera, 29 October 2002 (last amendment received 20 January 2004)

1.131 Wai 1035
A claim by Matthew Te Pou and others concerning economic and political policies in the late 19th century, 27 January 2003 (last amendment received 16 January 2004)

1.132 Wai 1036
A claim by Claude Tihi concerning Native Land Court and economic and political policies in the late nineteenth century, 27 January 2003 (last amendment received 20 January 2004)

1.133 Wai 1037
A claim by Jennifer Takuta-Moses and another concerning Native Land Court and economic and political policies in the late nineteenth century, 27 January 2003 (last amendment received 20 January 2004)

1.134 Wai 1039
A claim by Tamati Kruger and others concerning status of the Treaty of Waitangi by the way it has been imported into domestic legislation, 24 January 2003 (last amendment received 20 January 2004)

1.135 Wai 1042
A claim by Billy McLean and others concerning confiscation of land and acts of violence against peaceful tipuna without due process of law, 16 January 2003 (last amendment received 20 January 2004)

1.136 Wai 1051
A claim by Kenneth Clarke and another concerning loss of lands through the Native Land Court, 28 August 2002 (last amendment received 21 January 2004)

1.137 Wai 1057
A claim by Manu Te Whata and another concerning fragmentation and alienation of the Akura block, 23 May 2003

1.138 Wai 1063
A claim byEriapa Uruamo concerning alienation of the Orakei block, 12 September 2002 (last amendment received 21 January 2004)

1.139 Wai 1066

A claim by Hekenukumai Puhipi and others concerning foreshore and seabed policy proposals, 3 July 2003

1.140 Wai 1074

A claim by Rangi Walker and Pa Walker concerning loss of lands and guarantee of tino rangātiratanga over the foreshore, 14 May 2003

1.141 Wai 1081

A claim by Piki o te Rauamoa Parker concerning foreshore and seabed policy proposals, 30 September 2003 (last amendment received 21 January 2004)

1.142 Wai 1088

A claim by Huia Whangapirita and another concerning customary title to the Waiapu River and foreshore, seabed, fisheries, and related taonga o Tangaroa, 26 August 2003 (last amendment received 21 January 2004)

1.143 Wai 1089

A claim by Peter Cross concerning ancestral lands, waterways, seabed and other resources in the Rohe of Te Whānau a Te Aotawarirangi, 28 October 2003 (last amendment received 21 January 2004)

1.144 Wai 1091

A claim by Jason Koia concerning foreshore and seabed policy proposals, 27 November 2003 (last amendment received 21 January 2004)

1.145 Wai 1101

A claim by Henry McRae, Te Uira Reg Naera, and another concerning lands along the Maketu Peninsula, 07 November 2003

1.146 Wai 1106

A claim by Inuwai McKinnon concerning Ngāti Tahinga foreshore and seabed, 5 December 2003 (last amendment received 21 January 2004)

1.147 Wai 1109

A claim by Patrick Park and others concerning foreshore and seabed policy proposals, 5 January 2004

1.148 Wai 1110

A claim by Nganeko Minhinnick and another concerning foreshore and seabed policy proposals, 5 January 2004

1.149 Wai 1122

A claim by Margaret Paeone Korau concerning foreshore and seabed policy proposals, 13 November 2003 (last amendment received 28 January 2004)

2. Papers in Proceedings

Owing to the length of the record, the papers in proceedings have not been reproduced here. If required, a full version of the record may be obtained from the Tribunal's offices.

3. Research Commissions

Owing to the length of the record, the research commissions have not been reproduced here. If required, a full version of the record may be obtained from the Tribunal's offices.

4. Transcripts and Translations

4.1 Questioning of H Kawharu, 21 January 2004

4.2 Presentation of evidence of P McHugh, 22 January 2004

4.3 Questioning of P McHugh, 22 January 2004

RECORD OF DOCUMENTS

* Document held in the Waitangi Tribunal library, Waitangi Tribunal offices, third floor, 110 Featherston Street, Wellington

A To End of First Hearing

A1 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiau Pa Power Station Claim*, 2nd ed (Wellington: Government Printing Office, 1989)

A2 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989)

A3 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Department of Justice: Waitangi Tribunal, 1989)

A4 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed (Wellington: GP Publications, 1996)

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A30 Affidavit of M Mutu (Wai 17, 117, 388), 16 January 2004

(a) Attachment A

(b) Extract from 'Te Waka Māori'

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A54 Statement of evidence of A Kira (Ngā Rauru O Nga Pōtiki), 9 January 2004
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GLOSSARY OF MĀORI TERMS

ahi kā	burning fire; continuous occupation; rights to land by occupation
ahi kā	roa long burning fires; rights to land by occupation
ao mārama	world of light, material world
ariki	high chief
atua	god, deity, spirit, supernatural being
hapū	tribe, descent group, wider kin group than whānau
hau	spirit, vitality of human life, vital essence of land
hui	meeting, gathering, assembly
iwi	tribe, collection of hapu, people
kai	food, to eat
kaimoana	seafood
kāinga	home, village, settlement, possibly also country around settlement
kaitiaki	guardian, trustee, protector, steward, controller; spirit guardians
kaitiakitanga	ethic of guardianship, protection
karakia	incantation, chant, prayer, ritual
kōrero	discussion, speech, to speak
mahinga mātaitai	traditional fishing grounds
mana	authority, control, influence, prestige, power, reputation
mana kaitiaki	authority of the guardian
mana moana	customary rights and authority over the sea
mana whenua	customary rights and authority over land and other taonga within the rohe
manaaki	hospitality, generosity, compassion, respect, kindness
manaakitanga	ethic of hospitality, generosity, care-giving
manuhiri	guests, visitors
marae	enclosed space in front of house, courtyard, community meeting place
mātaitai	seafood, fishing area
mauri	life force, life principle
mimiha	bitumen
moana	lake, sea
noa	ordinary, free from tapu or restrictions, safe, touchable
nohoanga	place of occupation, breeding grounds
pā	fortified village, or more recently, any village
Pākehā	European, non-Māori

papa	ground, earth
papamoana	seabed
pou	upright post, support, pole, sustenance
rāhui	restriction on access or prohibition on use of land or resources; reserve, preserve
rangatira	chief
rangatiratanga	chieftainship, leadership, self determination, self-management; qualities of leadership and chieftainship
rangi	sky, weather
Raukawa Moana	Cook Strait
ringa kaha	literally 'strong hand', but connoting the power to exercise physical force; conquest
rohe	boundary, territory, district, area, region
rongoā	medicine, remedy, solution to problem, take care of
taiāpure	local fisheries established under 174 of the Fisheries Act 1996 in areas that have customarily been of special significance to an iwi or hapū
take	issue, grievance, cause, reason
take raupatu	rights derived from conquest
take tupuna	rights derived from ancestral connection
take tuku	rights derived from customary gift exchanges
take ahi kā	rights derived by keeping one's fires alight, connoting use and occupation
takutai moana	foreshore and seabed, but possibly connoting the inshore rather than the outer waters
tangata tiaki	caretaker
tangata whenua	people of the land, people of a given place
taniwha	supernatural guardian of water of waterway; protector
taonga	treasured possession, property
tapu	religious or spiritual restriction, sacred, consecrated, prohibited
tauiwi	foreigner
tauranga ika	traditional fishing ground
tauranga waka	traditional waka landing site
tika	correct, proper, fair, just, according to traditional ways
tikanga	custom, habit, rule, plan, method, rights, law
tino rangatiratanga	full (chiefly) authority
tohunga	specialist, expert
tupuna, tūpuna	ancestor, ancestors
urupā	burial site, cemetery
utu	reciprocation, recompense, revenge, response, price

wāhi tapu	sacred place, repository of sacred objects
wai	water
wairua	spirit, spiritual aspects
waka	canoe
whakapapa	ancestry, lineage, family connections, genealogy; to layer
whānau	family, extended family
whanaunga	relative, blood relationship
whanaungatanga	ethic of connectedness by blood; relationships, kinship
whare	house, building
whenua	land, ground, placenta, afterbirth

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