

TE TAKUTAI MOANA O AOTEAROA
THE FORESHORE AND SEABED OF NEW ZEALAND

“I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of the foreshore of the colony will be vested 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.”

Chief Judge F D Fenton *Kauwaerenga* judgment (1870) 4 Hauraki MB 236,

“...I am now speaking of the fishing grounds inside Tauranga Harbour. My mana over those 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 Māori customs and are constantly claiming here whenever they like to fish. I ask that our Māori custom shall not be set aside in this manner, and that our authority over these fishing grounds maybe upheld..”

Hori Ngatai 1885,
Appendices to the General of the House of Representatives G-1

I. INTRODUCTION

Since 1963 Māori claims to the foreshore ran aground on the sandbank of “settled” law known as *In re: the Ninety Mile Beach*.¹ In that decision the New Zealand Court of Appeal held that once the Native Land Court had investigated title to Maori customary land, customary title to the adjoining foreshore was automatically extinguished. Any other result the judges noted would be “*startling and inconvenient*”.

Despite that view, Maori maintained a long history of exercising rights to coastal areas, including the foreshore, river mouths and inshore and deep water fishing grounds.² In the context of Maori claims to foreshore, riverbeds and the like, there had previously been an array of somewhat inconsistent court decisions at various levels and ad-hoc local legislative “settlements”. A number of these have been subsequently revisited and reversed.³ On 19 June 2003, in *Ngāti Apa v Attorney General*⁴ the Court of Appeal altered that landscape completely.

1. The Ngāti Apa decision

¹ [1963] NZLR 461

² For examples, see Waitangi Tribunal *Muriwhenua Fishing Report* (1988) Brooker & Friend Ltd, Wellington, *Ngai Tahu Report* (1991) Brooker & Friend Ltd, Wellington. In the 1850s, Turanga (Gisborne) Maori even asked Crown officials for guidance on how much to charge settlers for taking water out of the rivers.

³ See for example *Tamihana Korokai v Solicitor General* (1912) 32 NZLR 321 (CA), Te Arawa Maori Trust Board Act 1922 and Te Arawa Lakes Settlement Act 2006, which were all concerned with the claims by the Arawa tribes to the beds of the lakes at Rotorua.

⁴ [2003] 3 NZLR 643

Four important points emerge from the *Ngāti Apa* judgment:

- (a) the Court's own earlier decision in *re the Ninety Mile Beach* was overruled as having being wrongly decided because it was premised on the incorrect assumption that native title to the foreshore was automatically extinguished once title to the adjoining land had been investigated;
- (b) Māori customary title to the foreshore and seabed, if any, had not been extinguished by any general enactment. Such extinguishment required language that was plain and clear and none of the mentioned statutes satisfied this;
- (c) the Court expressly declined to consider the effects of area specific legislation that may have extinguished customary title to particular defined portions of seabed until "the facts are established;" and
- (d) the argument that "land", as referred to in Te Ture Whenua Māori Act 1993/ Māori Land Act 1993, excluded the foreshore and seabed was rejected. The Maori Land Court did have jurisdiction to investigate Maori claims to the foreshore and seabed.

2. Maori and Crown responses 2003-2004

The euphoria of the Maori claimants was short lived. In response to the decision the Government quickly issued proposals to legislate away the effects of the judgment. That resulted in a massive hikoī to Parliament and an urgent inquiry and report from the Waitangi Tribunal.⁵ The Tribunal found that the Government's proposals were in serious breach of the terms and the principles of the Treaty of Waitangi. Despite these concerns Parliament enacted the Foreshore and Seabed Act 2004.⁶

3. The Foreshore and Seabed Act 2004 (FSA)

The key effects of the FSA are to:

- (a) **vest** public foreshore and seabed in the Crown
- (b) **protect** public rights of access and navigation;
- (c) **abolish** the jurisdiction of the High Court and the Māori Land Court to investigate Māori claims to the foreshore and seabed;
- (d) **enable** the High Court to issue territorial customary rights orders/customary rights orders, and the Maori Land Court to issue customary rights orders
- (e) **establish** a foreshore and seabed register

The FSA is a significant change to the law governing ownership and use of the foreshore and seabed in New Zealand.

⁵ Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (2004) Legislation Direct, Wellington. The Waitangi Tribunal is a permanent commission of inquiry empowered to hear Māori claims on any Crown act or omission alleged to be in breach of the principles of the Treaty of Waitangi. See section 6 Treaty of Waitangi Act 1975.

⁶ The ensuing political controversy also resulted in the birth of the Maori Party, which secured half of the eight Maori Parliamentary seats in the 2005 election.

Despite the passage of the Foreshore and Seabed Act 2004, the issue of Maori customary interests and rights remains live, as Associate Professor Richard Boast notes:⁷

“...The increasing importance and value of the coast, and the emergence of a major legal controversy over ownership of the foreshore and seabed are obviously interconnected...It cannot be stressed enough that the matter of ownership of the foreshore and seabed is not a new issue; it has been troublesome throughout the country’s legal history. It is important for national well-being that this is understood”

This paper outlines the significance of the *Ngāti Apa* decision and the principal findings of Waitangi Tribunal in its *Report on the Crown’s Foreshore and Seabed Policy*. This is followed by a brief summary of the Foreshore and Seabed Act 2004.

Time limitations prevent an exhaustive review of this subject. Consequently, all that is presented here is a brief and cursory summary of key events in the recent legal and political history of Maori claims to the foreshore and seabed. From the outset it must be acknowledged that this paper draws exceedingly extensively - some might say almost exclusively - from the leading text of Associate Professor Boast, *Foreshore and Seabed* and from the report of the Waitangi Tribunal.

⁷ Boast *Foreshore and Seabed* (2005) LexisNexis, Wellington p10. Richard Boast is a leading Treaty of Waitangi, Maori issues and indigenous rights expert and has appeared frequently before the Waitangi Tribunal and other fora as both an expert witness and as counsel for Maori claimants.

II. THE COURT OF APPEAL JUDGMENT – *Ngati Apa v Attorney General* [2003] 3 NZLR 643

1. Maori Land Court

In 1997 eight northern South Island tribes - Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa, Rangitane and Te Atiawa - applied to the Maori Land Court for an investigation into land below high water mark per section 132 of Te Ture Whenua Maori Act 1993. That section provides the court with exclusive jurisdiction to investigate the title to Maori customary land and to determine the relative interest of the owners. The applicants sought an order that if the land was determined to be Crown land, the Crown held it in a fiduciary capacity for the tribes.⁸

The Crown and other parties objected arguing that, as a matter of law, the claim could not succeed because of the Court of Appeal decision *In re: the Ninety Mile Beach*, the Territorial Sea Acts and the Seabed Endowment Revesting Act 1991. The Crown did not claim ownership of the foreshore and seabed by a prerogative right. Instead it claimed Maori title to the foreshore was no longer extant due to a series of extinguishing acts. Regarding the seabed, Crown counsel argued there was no recognised Maori customary title to it and, further, section 7 of the Territorial Sea Act prevented any declaration of Maori customary title. Finally, it was submitted that any Maori spiritual practices or customs exercised in respect of the areas claimed could not give rise to a title under Te Ture Whenua Maori Act 1993. Instead, provision might be made in other legislation for recognition of such practices including the Resource Management Act 1991 and the Fisheries Act 1996.

Judge Hingston issued an interim decision on 22 December 1997 and held that he was not bound by *In re: the Ninety Mile Beach* since that only applied where the court had previously investigated adjoining land *above* high water mark.⁹ In addition, he found that where land had been alienated from Maori by sale, the customary rights to the foreshore that were not included in the sale or not extinguished by any subsequent act still remain. While some examples of such express extinguishment of customary rights to the foreshore might exist, any determination required a factual inquiry.

His Honour also held that the Territorial Sea Act did not prevent the Maori Land Court from conducting an investigation into the title of the seabed. Judge Hingston considered that section 7 of the Territorial Sea Act went no further than to “*statutorily assume the sovereignty, and title similar to the radical title of the common law, that the Crown could not assume in 1840 since the common law did not recognise a title to the land comprising the bed of the sea.*”¹⁰ The purpose of section 7 was to define the parameters of New Zealand’s territorial sea boundaries and fishing zones. Maori customary rights had not been considered by Parliament. The judgment was then

⁸ Pursuant to section 18(1)(i), Te Ture Whenua Maori Act 1993. However, see *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 where the Court of Appeal held that the Maori Land Court’s jurisdiction under this section was limited to making vesting orders and granting other relief consistent with the purposes of the Act. It was not intended to be used in relation to General land or Crown land.

⁹ *In re: Marlborough Sounds* (1997) 22A Nelson MB 1, at p4

¹⁰ *Ibid*, at p9

appealed to the Maori Appellate Court and subsequently referred by way of case stated to the High Court.¹¹

2. High Court

In the judgment *Attorney General v Ngati Apa*¹² Ellis J, bound as he was by *in re: the Ninety Mile Beach*, which he agreed was correctly decided, held that the Maori Land Court had jurisdiction to investigate titles down to the low water mark.¹³ However, once title to the adjacent dry land had been determined, any Maori customary title *below* the high water mark was extinguished. Contrary to Judge Hingston, Ellis J also considered that the seabed is never Maori customary land. Indeed, he took the view that the Government had maintained authority over the foreshore and seabed, so as to ensure the rights of all citizens were recognised:¹⁴

“...At all times the government has from time to time assumed full control over the foreshore, seabed and seas that wash them and dictated their use for the public good. The consequences of agreeing with the arguments adduced by the applicants would be highly detrimental to citizens as a whole, including Maori other than the applicants. All legislative action had proceeded on the basis that there was no significant private ownership of the foreshore, seabed or seas.”

3. Court of Appeal

The decision of Ellis J was reversed on appeal. The judges were unanimous in their view that the Maori Land Court *did* possess the jurisdiction to investigate Maori claims to the foreshore and seabed. The Court held that:

- (a) on the acquisition of sovereignty by the Crown native property rights continued until lawfully extinguished. The onus of proof for any extinguishment lay with the Crown and the purpose had to be clear and plain;
- (b) the property interest of the Crown depended on whether there was any pre-existing interest, the extent of which was discoverable by evidence of custom and usage from the particular community. The burden on the Crown’s title could extend from usufructuary rights to exclusive ownership equivalent to fee simple. This doctrine extended to any customary rights that might have existed in the seabed and foreshore and did not end at the high or low water mark;
- (c) the definition of land in Te Ture Whenua Maori Act 1993 – the Maori Land Act 1993 did not necessarily exclude foreshore and seabed;
- (d) the Harbour Act 1955, Territorial Sea and Fishing Zone Act 1965, Territorial Sea Contiguous Zone and Exclusive Economic Zone Act 1977 did not extinguish any Maori customary property and were largely concerned with sovereignty, not property rights.

¹¹ Supra, fn4 at 647-648. Elias CJ noted, at 648, that the Maori Appellate Court was initially reluctant to state a case as it was concerned that questions that invited abstract answers might risk erroneous assumptions of fact. The Chief Justice agreed that the questions ultimately posed were not helpful since “...it is impossible to resolve many of the legal points raised in them in advance of determination of the facts.”

¹² [2002] 2 NZLR 661

¹³ Ibid at p675.

¹⁴ Supra fn12 at p682-683

- (e) the exercise of any interests in Maori customary property was subject to management of the coastal marine area under the Resource Management Act 1991, but that act did not extinguish any such property;
- (f) investigation by the Maori Land Court of title to customary land bordering the sea and grant of title thereto did not extinguish any property held under Maori custom in lands below high water mark. The terms of any sale or application for vesting order might permit an inference to be made that the customary interest of the seller or grantee was exhausted.

Elias CJ made it plain that the earlier decisions on foreshore, being based as they were in part at least, on *Wi Parata v Bishop of Wellington*¹⁵ were incorrect because the common law recognised that the Crown's sovereignty was subject to native customary title:¹⁶

“The reasoning in Re the Ninety-Mile Beach was based on that accepted in Wi Parata. So too, was the reasoning in Waipapakura v Hempton, a case suggested to be of “dubious authority” by this Court in Te Runanga o Muriwhenua v Attorney General at p654. The approach adopted in the judgment under appeal in starting with the expectations of the settlers based on English common law and expressing a preference for “full and absolute dominion” in the Crown pending Crown grant is also the approach of Wi Parata. Similarly, the reliance by Turner J [in the Ninety Mile Beach Supreme Court judgment] upon English common law presumptions relating to ownership of the foreshore and seabed...is misplaced. The common law as received in New Zealand was modified by Maori customary proprietary interests. If any such custom is shown to give interests in foreshore and seabed, then there is no room for a contrary presumption drawn from English common law. The common law of New Zealand is different.”

On the claims to seabed, the Court considered that even a mere “vesting” in the Crown via section 7 of the Territorial Sea and Exclusive Economic Zone Act 1977 was insufficient to counter the presumption against the extinguishment of native title. Keith and Anderson JJ gave three reasons. Firstly, the vesting was only one of radical title or imperium, not proprietary title, dominium. Secondly, the focus of such legislation was territorial and was concerned with sovereignty, not property.¹⁷ Thirdly, the extinguishment of native title required clear and plain language and this was not evident. Tipping J stated that there was no need to even discuss the territorial sea legislation because it could not possibly have the effect of extinguishing Maori interests.

For many Maori, a key aspect of the judgment was the door now being opened to the *possibility* at least that significant areas of land, previously assumed to be owned by the Crown, might in fact be Maori customary land. If the Maori Land Court had jurisdiction to investigate such claims, it could subject to the necessary elements being present, then award a Maori freehold title in fee simple. At the very least the potential for this outcome was real.

¹⁵ (1877) 3 NZ Jur (NS) SC 72

¹⁶ Supra, fn4 at

¹⁷ Supra, fn4 at pp687-688

4. Crown Proposals: August – December 2003

In response to *Ngati Apa* the Crown declined to appeal the decision to the Privy Council. Instead, it issued a discussion paper in August 2003 and began consultation over a six week period. The heart of the proposals, according to Boast, was the “four principles” which he characterises as “*a statement of policy decisions that had already been taken*”.¹⁸ In summary, those principles provide for:

- **access:** the foreshore and seabed should be public domain with open access and use for all citizens
- **regulation:** the Crown has the responsibility to regulate its use for the present and future generations
- **protection:** customary interests of Maori should be acknowledged, and specific rights identified and protected
- **certainty:** there should be certainty for those who use and administer the foreshore and seabed

5. Summary

The essence of Judge Hingston’s decision was upheld by the Court of Appeal in *Ngati Apa*. The significance of its overruling of *In re: the Ninety Mile Beach* was evident soon after the decision was released in the reaction of both the Crown and Maori parties to the litigation. It must be remembered however that *Ngati Apa* did *not* say that Maori now owned the foreshore and seabed. In fact, its overall conclusion has a narrow compass. It simply confirmed the prevailing legal orthodoxy that, on the Crown acquiring sovereignty, the rights of Maori to their lands and resources remained intact. Crown sovereignty did not automatically mean extinguishment of Maori rights. The effect is that Maori customary rights endure until extinguished by lawful means. The Court did not agree with *In re: the Ninety Mile Beach* that on an investigation of title by the Native Land Court, Maori customary rights in the adjoining land below high water mark were extinguished. That said, the Court noted that while the Maori land Court *did* have the jurisdiction to investigate claims this did not necessarily mean a claim would succeed and that a freehold title would issue. It was simply a question of ascertaining the facts in each case.

But what cannot be denied is that what began as a simple application for title investigation in the Maori Land Court sitting in Nelson soon turned into a major political and constitutional controversy. Maori reaction to the Government’s plans was overwhelmingly negative. For many iwi and hapu the proposals were a modern confiscation of their property rights without compensation and in breach of the Treaty of Waitangi. Worse still, they were to be denied due process with the abolition of the jurisdiction of the courts to consider their claims. Many of those who made submissions on the Foreshore and Seabed Bill and before the Waitangi Tribunal expressed dismay at the Crown’s proposals. These were considered discriminatory because they would expropriate only Maori rights in defiance not only of the Treaty, but of the rule of law as well. Instinctively, many Maori groups then turned to the Waitangi Tribunal for redress by filing claims for urgent inquiry into the Crown’s Foreshore and Seabed policy.

¹⁸

Supra, fn7 at p86

III. WAITANGI TRIBUNAL – Report on the Crown’s Foreshore and Seabed Policy

1. Waitangi Tribunal hearings: January 2004

After the release of the draft Crown proposals on the foreshore and seabed on 18 August 2003 a number of tribes filed claims for urgency with the Waitangi Tribunal. Following a series of preliminary steps, including release of the confirmed Crown policy on 17 December 2003, the Tribunal heard the claims on 20-23 and 28-29 January 2004. Its findings were released in a detailed 181 page report entitled *Report on the Crown’s Foreshore and Seabed Policy* on 4 March 2004.

2. The Tribunal’s Report: March 2004

The Tribunal unanimously rejected the Crown’s case and roundly criticised every aspect of the foreshore and seabed policy. The Tribunal found that the Crown’s policies were in breach of both the three articles of the Treaty of Waitangi as well as its principles.¹⁹

Article 2

The English version of the Treaty guaranteed the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other such 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 Tribunal found that the Crown’s actions were in breach of Article 2 in two respects:²⁰

Historically the Crown:

- (a) **did not protect** Māori authority or even the more limited concept of ownership of the foreshore and seabed;
- (b) **actively assumed** ownership of the foreshore and seabed for itself without the consent of Māori and without compensation;
- (c) **incorrectly assumed** that it was acting according to the common law; and
- (d) **ignored** or made inadequate responses to Māori protests;

1. *The Crown thus acted in breach of the Treaty when it took those rights for itself when it was aware of Māori claims to ownership of the foreshore and seabed.*

According to the Tribunal, the *Ngati Apa* decision left 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 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. The Tribunal found that, 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 and replace it.

¹⁹ Supra, fn5 at pp 127-144
²⁰ Supra, fn5 at pp 127-129

In the wake of *Ngāti Apa* the Crown:

- (a) **does not accept** the outcome of the Court of Appeal's decision and is not prepared to allow those rights to be declared by the courts according to law; and
 - (b) **is removing the right of access** for Māori to go to court to prove the nature and extent of their property rights in the foreshore and seabed despite the wholesale objection of Māori.
2. *In removing the property rights themselves by pursuing a policy that removes the means whereby property rights can be declared the Crown is acting in further breach of Article 2.*

The Tribunal had already found in an earlier report on *Turangi Township*²¹ that where there is an overriding national interest, in such exceptional circumstances, and only as a last resort should the fundamental rights guaranteed to Māori in Article 2 be set aside. Here it found that there is no overriding need for the foreshore and seabed policy that is 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 set out in Article 2.²²

Article 3

Article 3 guaranteed to Māori the rights and privileges of British subjects. That includes the right of all citizens to equal treatment under the law. The Crown's policy fails to honour this guarantee. The Tribunal found that the policy was in breach of Article 3 of the Treaty in two ways:²³

Through its proposals the Crown is:

- (a) **abolishing** the common law rights of Māori in terms of the foreshore and seabed and their right to obtain a fee simple title from the Māori Land Court. The removal of the means whereby property rights can be declared is a removal of the rights themselves. The owners of the property rights do not consent to their removal; the Crown is also
 - (b) **failing** to treat Māori and non-Māori citizens equally by abolishing the private property rights of Māori only.
3. *All other classes of rights are protected by the policy and in treating Maori differently this is a breach of Article 3 of the Treaty.*

Not only are Māori entitled under Article 3 to equal treatment but also the protection of the rule of law. When matters of property arise which involve the definition of property rights all citizens are able to take those matters to the courts for definition and, where appropriate, protection. Māori actively pursued their right to have their property rights determined by a court of law. Having obtained a result from the courts that the Government did not like, the Crown's solution is to cancel the ability of the

²¹ Waitangi Tribunal *Report on Turangi Township* (1995) Brooker & Friend Ltd, Wellington

²² *Supra*, fn5 at p129

²³ *Supra*, fn5 at pp129-130

courts to further define, articulate and award those property rights. This is a violation of the rule of law, the protection of which was guaranteed under article 3.

4. *By enacting a policy contrary to the rule of law and which disadvantageously affects Māori the Crown breaches Article 3.*

In these four ways the Crown proposes to act in serious breach of the terms of the Treaty.

3. Principles of the Treaty of Waitangi

Principle of reciprocity and partnership

The Tribunal reaffirmed the notion that the Crown's exercise of kawangatanga (sovereignty) - or as some Māori acknowledge, "*governership*" which is less than sovereignty - is qualified by respect for tino rangatiratanga - absolute chieftainship and authority. This has been recognised by the Tribunal as the principle of reciprocity, an overarching principle that guides the interpretation of other principles such as partnership. While accepting the Crown had the authority to develop a policy for the foreshore and seabed, the Tribunal emphasised that the principles of reciprocity and partnership require the Crown to develop policies "*in a way that gives meaningful effect to te tino rangatiratanga*" balancing the interests of Māori and Pākehā "*in a fair and reasonable manner.*"²⁴

However, the Tribunal found that the Crown's policy does not meet this test. In the Tribunal's view, the Crown, 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. The Tribunal further stated that in response to *Ngāti Apa*, the Crown proposed 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... the unfairness is of a character that flies in the face of the norms of good government and developed societies. The result is a serious Treaty breach...*" according to the Tribunal.²⁵

Principle of active protection

The courts and the Tribunal have long held that the Crown has an active duty of protection towards Māori, their rights and interests in their property, beliefs and practices. Previously, the Tribunal found that the Crown's responsibilities are "*analogous to fiduciary duties.*"²⁶ The Tribunal found that the Crown's proposals and the limited "*customary title*" device contained therein falls far short of the authority encompassed in tino rangatiratanga. It also fell far short of the fee simple titles potentially available through the Māori Land Court and falls short even of the bundle of rights that the High Court might declare to be owned by Māori. Its offer falls very

²⁴ Supra, fn5 at p131

²⁵ Ibid

²⁶ Waitangi Tribunal, *Muriwhenua Land Report* (1997) Legislation Direct, Wellington p388

short of actively protecting tino rangatiratanga or potential property rights and, of course, it is not a offer that had been accepted.²⁷

The Tribunal found that the Crown’s “*extreme haste*” to deal with consultation coupled with its “*apparent unwillingness*” to make real or significant changes to the policy exacerbated the situation. It also found that this falls short “*even of a minimum interpretation of the principle of active protection.*”²⁸

The principles of equity and options

The Tribunal has previously found that the protections of citizenship apply equally to Māori and Pakeha, sometimes expressed as the principle of equal treatment. This means that the Crown is required to treat Māori and Pākehā fairly and equally and also to treat Māori tribes in the same manner as amongst themselves. In this case the Tribunal found:²⁹

“...a policy that effectively expropriates one class of property (Māori rights under common law and Te Ture Whenua Māori Act 1993), 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 a breach of the principle of equal treatment. Coastal tribes are not being treated equally with other classes of property owners, or with other tribes.”

The principle of options enables Māori to have the freedom to pursue either or any options as the case may be in appropriate circumstances. The Tribunal found in an earlier report that the Crown is obliged to offer reasonable protection to Māori in the exercise of the rights so guaranteed to them.³⁰ In the instant case the Tribunal found that the Crown proposals were a breach of the principle of options in denying Māori the opportunity to test their claims in Court.³¹

“...[A]s citizens Māori are entitled to their options under the law. They are entitled to have their property rights defined by the Court. In the late 1950s they took up this option in the litigation which resulted In Re 90-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 [Ngāti Apa] 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.

²⁷ Supra, fn5 at p133

²⁸ Ibid

²⁹ Ibid, at p134

³⁰ Waitangi Tribunal, *The Ngäi Tahu Sea Fisheries Report* (1992), Brooker and Friend Ltd, Wellington p274

³¹ Supra, fn5 at p134

Depriving one class of citizens of their right to go to Court to have legal rights declared as a serious matter. It is, in our view, a breach of the Treaty principles of equity and options.”

Principle of redress

Where the Crown has acted in breach of the principles of the Treaty and Māori have suffered prejudice as a result, the Crown has a clear duty to set matters right and this is known as the principle of redress. 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 should not create fresh injustices for others.³²

However, in the present case the Tribunal found that the Treaty breaches arising from expropriation of property rights *cannot “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 thus not apposite here. According to the Tribunal, the principle of redress was developed for situations where Māori *had no legal rights*. They had no legal position to rely on in the courts and so their appeal was to the Treaty, which is not enforceable in the courts. That is not the case here:³³

“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 of our recommendations...”

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 that 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. We have observed already, in chapter 4, that the exchange of a legal right to compensation for a legislative 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 relationships.”

³² Supra, fn5 at pp134-135
³³ Ibid, at p135

4. Prejudice and recommendations

The Tribunal identified three categories of prejudice: Māori citizenship was being devalued, a sense of powerlessness was being rendered through uncertainty of political process, and mana and property rights were being lost.³⁴ The Tribunal went on to consider six separate options for recommendation.

Begin again – go back to the drawing board

Firstly, start again, that is that the process ought to commence from the beginning. The Tribunal emphasised that until a conversation between the parties commenced in earnest, then uncertainties would remain.³⁵

“Potential to achieve a settlement the same kind of outcome may exist here. For instance, interests in aqua-culture and minerals could be brought to the negotiating tables. 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 hapu, 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.”

Do nothing – let the courts hear the cases

Secondly, the option of doing nothing. This is covered in chapter four of the Tribunal’s report and will not be traversed here. Suffice to say the Tribunal’s preferred option was for the processes of the rule of law to unfold and only then should the Government consider a range of options which might include a legislative solution.

Protect access and inalienability

Thirdly, provide for access and inalienability. The Tribunal considered that a least intervention policy could be developed co-operatively that would provide a basis for the Court’s 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 rahui. The need for Māori to deny access to urupa is already provided for in the existing policy. Likewise, there is a common view that Māori interests in the foreshore and seabed should be inalienable.³⁶

Give the courts a greater role

Fourthly, improve the court’s toolkit. The Tribunal acknowledged that there may be difficulties with the range of instruments available to the High Court and the Māori Land Court when considering customary titles. One possibility the Tribunal suggested was that the court simply make a declaration about the nature and scope of the customary interest comprised in the title and the declaration itself would come to be

³⁴ Ibid, at pp136-138

³⁵ Ibid, at p140

³⁶ Ibid, at p141

recognised as giving rise to a property interest. However, under the Land Transfer Act 1952, 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.³⁷

Protect the mana of the tribes

Fifthly, to protect mana. Here the Tribunal referred to the example of the Orakei Act 1991 and the various devices included in that settlement. The range of remedies contained therein satisfied the parties. However, the distinction with the present case as the Tribunal acknowledged was that in the Orakei situation, the parties agreed. There is no such agreement with the foreshore and seabed.³⁸

Treat the coastal and lakes tribes consistently

Sixthly, the Tribunal urged the Government to be consistent. The example given was the Government's preparedness to recognise the ownership interests of certain tribes in the beds of their lakes but its refusal to do likewise in foreshore and seabed for coastal tribes. The Tribunal considered that the policy framework for lakebeds could be adapted to foreshore and seabed including:

- Negotiation with claimants on a case by case basis;
- Resolution of claims through special statutory settlements;
- Vesting of title in tangata whenua;
- Preservation of public access;
- Joint management of the resource.

Compensation

Finally, the Tribunal insisted that compensation was essential. The Tribunal did not suggest changes to the detail of the policy as it considered any amendments to the detail "would not redeem it." The Tribunal's stance on compensation was unequivocal.³⁹

"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, in 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 Court's jurisdiction. We therefore recommend as preferable option 2, the do nothing option. Under that option, the Court's would investigate and declare the rights, and then their ambit would be known. If the

³⁷ Ibid

³⁸ Ibid, at p143

³⁹ Ibid

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. Summary

The Tribunal was at its most strident in its criticism of the Crown’s foreshore and seabed policy. The proposals were a clear breach of Articles 2 and 3, and a breach of the principles. The proposals, the Tribunal commented, were being imposed contrary to the rule of law in that any citizen has a right to seek redress against the state through the courts. While it was obviously within the Government’s power to legislate away the effect of the *Ngati Apa* decision, that did not bode well for Treaty compliance according to the Tribunal. Then if rights were to be extinguished there should be compensation payable. The Tribunal found that the prospect of a legal remedy through the courts being exchanged for a less certain political agreement was a poor exchange. The courts should be allowed to hear the claims and then, if it considered the outcomes wrong should the Government consider a legislative solution. Ultimately, the Crown paid little heed to the Tribunal and pressed ahead with the legislation largely unchanged in its key effects.

IV. FORESHORE AND SEABED ACT 2004

“The object of the Act is to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whanau, hapu and iwi with areas of the public foreshore and seabed.”

Section 3, Foreshore and Seabed Act 2004

Purpose of the Act

The FSA has two overarching aims. The first is to eliminate uncertainty that public foreshore and seabed is vested in the Crown with a consequent right of public access. The second general objective is to provide a process by which Maori customary interests in particular over the foreshore and seabed can be accommodated. To achieve these broad aims, the FSA has four core components, as set out in section 4. First, to vest public foreshore and seabed - as defined in the Act - in the Crown. Second, to protect public rights of access and navigation over public foreshore and seabed. Third, to abolish the jurisdiction of the High Court and Maori Land Court to investigate Maori claims to the foreshore and seabed. Fourth, to enable the High Court to issue territorial customary rights orders or customary rights orders and to provide the Maori Land Court with the jurisdiction to make customary rights orders.⁴⁰

1. Vesting of public foreshore and sea bed in the Crown

Section 13 vests the public foreshore in the Crown:

Public foreshore and seabed vested in the Crown.

13(1) On and from the commencement of this section, the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown, so that the public foreshore and seabed is held by the Crown as its absolute property.”

Subsection (2) states that subsection (1) replaces all previous statutory vestings in, and acquisitions of title by the Crown in respect of any area of foreshore and seabed. Subsection (4) then provides that the Crown does not owe any fiduciary obligation, or any obligation of a similar nature to any person in respect of the public foreshore and seabed.

The foreshore and seabed had been subject to distinct definitions and legal regimes but now the FSA fuses the two together. Public foreshore and seabed is defined as “the foreshore and seabed”, which is itself defined as in section 5 of the FSA as follows:

⁴⁰ Generally, see Boast, fn7 at pp103-167

Foreshore and seabed

- a) *means the marine area that is bounded,—*
 - (i) *on the landward side by the line of mean high water springs; and*
 - (ii) *on the seaward side, by the outer limits of the territorial sea; and*
- b) *includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and*
- c) *includes the bed of Te Whaanga Lagoon in the Chatham Islands; and*
- d) *includes the air space and the water space above the areas described in paragraphs (a) to (c); and*
- e) *includes the subsoil, bedrock, and other matters below the areas described in paragraphs (a) to (c)*

This is an area of land from the mean high water springs mark out to 12 nautical miles. However, “public foreshore and seabed” specifically excludes any land subject to a “specified freehold interest”. That is then defined as effectively any freehold title that existed before the commencement of the FSA.

2. Rights of public access and navigation

Section 7 provides a right of public access, to enter, remain in and leave the public foreshore. And to pass, repass, in on over and across the public foreshore and seabed. The public may also engage in recreational activities in or on the public foreshore and seabed. Access is for natural persons rather than any corporate identity. It is also subject to “authorised” limits including restricting access that any other enactment may impose.

However, as Boast notes, section 7 does not provide a right “to” the public foreshore. So coastal owners do not have to let the public have access to the foreshore and seabed through their land. Boast further notes that public access to the foreshore and seabed is not improved at all. The real issue in this context he says is getting owners of adjoining coastal land to agree access across their land to the sea.

Abolition of the High and Maori Land Court jurisdiction

With the passing of the FSA the result for any applications by Maori for investigation on the foreshore and seabed per section 132 of Te Ture Whenua Maori Act 1993 still extant was inevitable. As Boast notes, the enactment of the FSA overtook events before the Maori Land Court and all pending applications were dismissed. He refers to my memorandum of 12 April 2005, recorded at (2005) 150 Aotea MB 208, which stated:⁴¹

“Since the enactment of the Foreshore and Seabed Act 2004, the Maori Land Court is prevented from further hearing any applications lodged before 17 January 2005. Section 12 of the Foreshore and Seabed Act 2004 declares that all applications before the Court prior to that date are “of no effect”. For this reason the Court may no longer consider, make findings or orders in respect of those applications. As required by the Act, all applications filed before 17 January 2005 must be dismissed accordingly.”

⁴¹ Boast *supra*, fn 7 at pp 123-124

In place of the *Ngati Apa* defined common law both the High and Maori Land Court had their powers significantly reduced.

4. New High Court jurisdiction

The High Court can now issue either territorial customary rights orders or customary rights orders as appropriate. While the High Court cannot make a finding that a group *has* native or customary title to the public foreshore and seabed, it can make a territorial customary rights order. Section 32(1) provides:

Meaning of territorial customary rights

- (1) *In this Act territorial customary rights, in relation to a group, means a customary title or an aboriginal title that could be recognised at common law and that-*
- (a) is founded on the exclusive use and occupation of a particular area of the public foreshore and seabed by the group; and*
 - (b) entitled the group, until the commencement of this Part, to exclusive use and occupation of the area.*
- (2) *For the purposes of subsection (1)(a), a group may be regarded as having had exclusive use and occupation of an area of public foreshore and seabed only if-*
- (a) that area was used and occupied, to the exclusion of all persons who did not belong to the group, by members of the group without substantial interruption in the period that commenced in 1840 and ended with the commencement of this Part; and*
 - (b) the group had contiguous title to contiguous land.*
- (3) *In assessing, for the purposes of subsection (1)(b), whether a group had exclusive use and occupation of an area of the public foreshore and seabed, no account may be taken of any spiritual or cultural association with the area, unless that association is manifested in a physical activity or use related to a natural or physical resource...*"

Boast notes that the section is inherently problematic. At a basic level, what is a group? A customary right must be capable of being recognised by the common law or else it fails at this first hurdle. Then it must be founded on exclusive use and occupation and related to a particular area of foreshore and seabed. The area must have been used without “substantial interruption”. Key questions will include – what is meant by “recognised at common law” and “exclusive use and occupation”? Does the latter mean then that if anyone for whatever reason stumbles across an area used by a group – itinerant traveller, irregular surfcaster, or someone just plain lost – then the exclusive use criteria has been irredeemably compromised? There would be few parts of New Zealand that might be even remotely relevant in this context.

At another level it is clear that many inter-tribal disputes concerned access to particular coastal resources where two or more competing iwi might grudgingly recognise each others rights to take mussels from a rock or harvest titi – mutton birds, but whom will then join together is an unbreakable compact to aggressively deny the claims of a third or fourth tribal group to those resources. Similarly, while the rights to lands adjoining a harbour might have been fiercely contested over generations, often with dire results, a general group right of access to the harbour *itself* and attendant resources is not an unheard of situation.⁴²

5. New Maori Land Court jurisdiction

Section 46 provides the Maori Land Court with the jurisdiction to make customary rights orders that relate to a specified area of public foreshore and seabed. The court's ordinary jurisdiction is ousted with the provision – "Te Ture Whenua Maori Act 1993 does not apply to the jurisdiction of the Maori Land Court or the Maori Appellate Court under the [FSA]." But it is then readmitted under clearly defined parameters per section 47(2), which spells out the particular provisions of the 1993 Act that apply.

Detailed procedural provisions on filing have also been included, ie, the requirement that all applications are made by an authorised representative to a specific area with full details of the tikanga Maori governing the activity, the scale, extent and frequency of the activity. The application must also be filed with the Chief Registrar in Wellington rather than the local registry of the Court and no later than 31 December 2015. Public notification and service is also clearly spelled out. Boast records that the important point to note is the limits to the jurisdiction of the Maori Land Court. Section 49 specifies activities that *cannot* form the subject of a CRO include:⁴³

- Commercial Maori fishing rights
- Non-commercial Maori fishing rights
- Any activity regulated under the Fisheries Act 1996
- Protected wildlife
- Marine mammals

The question of what CROs from the Maori Land Court might apply to thus remains a live if limited issue.

⁴² See for example the competing claims of the Ngati Awa, Whakatohea and Tuhoe tribes to the Ohiwa Harbour and surrounding lands in Waitangi Tribunal *The Ngati Awa Raupatu Report* (1999) Legislation Direct, Wellington

⁴³ Supra, fn7 at pp169-170

6. Summary

Boast provides a helpful table that summarises each court's jurisdiction:⁴⁴

Type of order	Who may apply	What must be shown	Effect of order
Territorial customary rights order – High Court	A group or a person authorised by a group	The group has a title that could be recognised at common law, is founded on exclusive use and occupation, entitles the group to continuous use and occupation, and relates to an area which was used and occupied to the exclusion of all persons who did not belong to the group. The group must have contiguous title to contiguous land.	Such redress as the Crown may be prepared to give following a reference to Ministers or a foreshore and seabed reserve. Areas made a foreshore and seabed reserve remain vested in the Crown and the public continues to have rights of access and navigation.
Customary rights order – High Court	The authorised representative of a group of natural persons with a distinctive community of interest. The High Court may not inquire into the matter if it is able to be recognised and protected by the Maori Land Court.	The activity, use or practice is integral to tikanga Maori, has been carried on in a substantially uninterrupted manner, that it continues to be carried on in accordance with tikanga Maori, is not prohibited by law and has not been extinguished.	Entitles whanau, hapu or iwi o carry out a recognised activity in accordance with section 76, ss17A and 17B and Schedule 12 of the Resource Management Act 1991
Customary rights order – Maori Land Court	A whanau, hapu or iwi through its authorised representative.	The activity, use or practice is integral to tikanga Maori, has been carried on in a substantially uninterrupted manner, that it continues to be carried on in accordance with tikanga Maori, is not prohibited by law and has not been extinguished.	Entitles whanau, hapu or iwi o carry out a recognised activity in accordance with section 76, ss17A and 17B and Schedule 12 of the Resource Management Act 1991

⁴⁴Supra fn7 at p118-119

Boast has described the FSA as a resource nationalisation statute enacted to set aside a court decision the Government did not agree with. While this form of action was certainly not unprecedented nor unlawful, against the canvas of legal and political developments for indigenous peoples globally and increasing Maori hostility and assertiveness, the breadth of the taking to a number of iwi seemed surprising. Equally importantly, Boast argues that the FSA is not declarative of existing law since it does not say that title to the foreshore and seabed *continues* to vest in the Crown as its absolute property. On the contrary, Boast contends that until the coming into force of section 13 (24 November 2004) the legal status of the foreshore and seabed must be deemed to exist in accordance with *Ngati Apa* and so Maori interests remained live for subsequent determination.⁴⁵

“The foreshore and seabed was not, therefore, land held in dominium by the Crown at any time until 2004. Whether it was, strictly speaking, “Maori customary land” as defined in [the Maori Land Act 1993] is, however, arguable, but if not, it was something very close to it and can be thought of as being land held under native title at common law-provided that the native title in any given case remained extant.”

Section 13 of the FSA lies at the heart of the legislation’s purpose. The significance of this short section and what it does cannot be underestimated. As Boast notes, it represents perhaps the most significant expropriation of rights since possibly the confiscations of the nineteenth century. It is certainly without modern precedent in the context of its particular effect on Maori:⁴⁶

“Working on the assumption that the pre-existing law was correctly stated by the Court of Appeal in Ngati Apa this provision is by far the biggest property and resource nationalisation of recent times, certainly the most substantial since the nationalisation of developments rights with respect to natural water with the Water and Soil Conservation Act 1967 and is probably the biggest land expropriation since the New Zealand Settlements Act of 1863, or perhaps ever. The scale of this taking is more than a little staggering.”

And while he acknowledges that this “*dramatic statutory taking*” is somewhat ameliorated by the possibility that the actual area Maori might have been able to convert to freehold under the pre-FSA law was probably modest, “*claims by Maori that the Act is another raupatu (dispossession) invoking parallels with the invidious legislation of 1863, are understandable.*”⁴⁷

⁴⁵ Supra, fn7 p139

⁴⁶ Supra, fn 7at p132

⁴⁷ Ibid

CONCLUSION

The *Ngati Apa* decision engendered considerable comment in political and legal circles for most of 2003 and 2004. Its presence was certainly felt at the 2005 election. For some the court's overruling of *In re: the Ninety-Mile Beach* was both overdue and timely given the state of law in other common law jurisdictions on such issues as native title. Some labelled its effect as one of having "unintended consequences". Others considered it the unnecessary unbundling of 40 years of settled law, which even if wrong, should be left to lie and not reawakened by unelected judges.⁴⁸ Whichever opinion has present currency, there can be no doubt that many Maori regarded *Ngati Apa* as a landmark outcome with the promise of due process rendering at least the possibility of the issue of a freehold title over land they had long regarded as being tribal. But their euphoria was short-lived and the Government, acting as it was entitled to under present constitutional arrangements, simply legislated the effect of the decision out of existence. The Tribunal considered that such an approach, however lawful, was not Treaty compliant.

It has been said that Maori claims to the foreshore and seabed are inseparable from the Maori view of the exercise of mana and tino rangatiratanga over everything. Like Maori claims to lakes and rivers, their beds and waters they have challenged governments, courts and the public since the advent of colonisation. Maori assertions of rights to these areas remain fixed in the sense that tribes have always considered that they have had and retain rights over their lands and resources, their customs and culture despite the constraints of laws, statutory or common. Challenging Crown action over the existence and relevance of such rights has been a feature of Maori-Crown relations since 1840. That is unlikely to change in the foreseeable future. For many Maori, the impact of *Ngati Apa* and the subsequent Foreshore and Seabed Act 2004 remains a deeply divisive issue. To them the tide has certainly gone out on Maori claims to the foreshore and seabed and what has been left behind is in their view the shadow, not the substance.

While there is now clarity as to ownership of the public foreshore and seabed it is also a time of uncertainty as to how the FSA will operate in practice. It is interesting to note that the tribes have not flooded the Maori Land Court or the High Court with applications for customary rights and territorial customary rights orders. That may be explained in part by the cautious approach a number of iwi have adopted in simply waiting and watching to see what will happen with the three test cases that are presently before the Maori Land Court. In the end, these applications will be progressed and the devices available to the courts remain to be fully tested in the days yet to come.

Layne Harvey⁴⁹

5 June 2007
Rotorua
New Zealand

⁴⁸ James Allan, National Business Review, 5 September 2003

⁴⁹ LLB, MComLaw (Auckland), Judge of the Maori Land Court, New Zealand

