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NGATI APA AND THE ENVIRONMENTAL MANAGEMENT OF NEW ZEALAND'S COASTAL MARINE AREA

Andrew Erueti*

I INTRODUCTION

The Court of Appeal decision in *Ngati Apa v Attorney-General*,[1] decided in June 2003, is one of the most controversial decisions ever handed down by a New Zealand court on Maori rights. In *Ngati Apa*, the Court recognised the possibility of tribal customary interests in the foreshore and seabed (the foreshore), including private freehold titles granted by the Maori Land Court. In many respects, the decision is akin to the modern native title judgments of *Calder v Attorney-General*[2] in Canada and *Mabo v Queensland (No 2)*[3] in Australia. What these decisions have in common is acceptance of the principle that following the assertion of British sovereignty over new territories the property rights of the indigenous inhabitants continued to exist, until the rights were lawfully extinguished. What they also share is the fact that judicial recognition of these rights has come many years after the assertion of sovereignty (sovereignty was asserted in New Zealand in 1840 under the Treaty of Waitangi (the Treaty), New Zealand's

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* Lecturer, Faculty of Law, Victoria University of Wellington.

1 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

2 *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3rd) 145 (SCC).

3 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

founding constitutional document) and, in that time, the legal systems of these countries have allocated property rights in areas subject to native title and largely ignored indigenous interests. With the modern recognition of native title rights, then, the courts are required to accommodate these new rights within the existing non-indigenous property system. In particular, courts must consider whether these newly recognised indigenous rights may co-exist with, or are extinguished by, non-indigenous interests. Usually, in a case of clear conflict between an indigenous interest and a non-indigenous interest, the former is trumped by the latter. With the *Ngati Apa* decision, the core issue has been the potential conflict between tribal interests and non-indigenous rights and interests in the coastal marine area, including rights granted under the Resource Management Act 1991 (RMA), the "public interest" in access over the coast in particular and rights of navigation and public fishing.

The prospect of Maori acquiring exclusive freehold titles in the foreshore has created a great controversy and inspired the most passionate criticism of the *Ngati Apa* decision. There was strong public opposition to the idea that Maori coastal tribes might possess the right to control access over New Zealand's beaches and foreshore. In fact, the *Ngati Apa* decision did not concern the beach at all but rather the foreshore, being that area between the high and low water mark and the seabed, the area from the low water mark out to 12 nautical miles. Moreover, very few Maori have ever expressed the desire to deny public access over the foreshore.

Nevertheless, the New Zealand media, politicians and many members of the public have focused on public access. This, in turn, has resulted in strong public criticism of the modern Treaty settlement process, references to the Treaty in New Zealand statutes and the "preferential treatment" of Maori in health and education policies.

The main opposition party, the National Party, sought to profit from this climate of unease. Early in 2004, the National Party enjoyed a dramatic resurgence in the voting polls on the back of high profile

speeches from its leader which are highly critical of Maori and the *Ngati Apa* decision.[4] The National Party's rise in popularity with the voters was met with a corresponding drop in support for the incumbent Labour-led government. The government responded by quickly adopting a tougher line on the foreshore decision and other issues relating to Maori rights.[5] What emerged from this volatile political climate is the Foreshore and Seabed Act 2004 (FSA).[6]

Against the backdrop of the *Ngati Apa* decision, this paper focuses on the rights that could be recognised in the foreshore following that decision, its implications for the environmental management of the New Zealand coast and the government's statutory response, the FSA. The first part of this paper reviews the environmental management of New Zealand's natural resources under the RMA, with a focus on coastal management, and outlines how the RMA seeks to incorporate the interests of Maori in resource management decisions. The RMA has always sought to involve Maori in the resource management planning and decision-making process but there have been mixed results. The general view amongst Maori is that the RMA fails to give

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4 Dr Don Brash, Leader of the National Party "Nationhood" (Speech to Orewa Rotary Club, Auckland, 27 January 2004). Dr Brash described endeavours to provide redress to Maori for historical breaches of the Treaty of Waitangi (the Treaty) as an entrenched "treaty grievance industry". He stated that Maori partly lost their land historically because of deficient Maori leadership and criticised special measures for Maori in the health sector despite serious disparities in health statistics between Maori and non-Maori.

5 See Hon Trevor Mallard, Coordinating Minister, Race Relations "Terms of Reference: Ministerial Review Unit to Oversee Review of Targeted Policy and Programmes" (25 March 2004) Press Release; The Official Website of the New Zealand Government <http://www.beehive.govt.nz> (last accessed 11 December 2004). The Labour government appointed the Hon Trevor Mallard to a new ministerial position, Co-ordinating Minister, Race Relations. The Minister's task is to undertake a "review of statutory references to the Treaty of Waitangi" and a "review of targeted policy and programmes … to give ministers and the public assurance that policy is being developed on the basis of need, not on the basis of race."

6 The Bill was introduced before Parliament on 6 May 2004 and the Foreshore and Seabed Act 2004 (FSA) was enacted on 24 November 2004.

them an effective voice in the management of resources within their ancestral territories. The *Ngati Apa* decision seemed to provide the impetus for these matters to be addressed, but Maori will be disappointed with the government's response. The second part of this paper looks at the range of Maori proprietary and customary interests that could have resulted following the *Ngati Apa* decision and how they would have affected, and been affected by, the RMA consent and planning process. The paper finally considers the FSA and how it seeks to recognise customary interests and integrate those interests within the RMA's environmental management of the foreshore.

II THE RMA AND PROTECTION OF MAORI INTERESTS

The RMA, enacted in 1991, is the principal code for regulating the use of New Zealand's physical environment – land and buildings, water, air, plants, animals and the coast.[7] The purpose of the RMA is to promote the sustainable management of natural and physical resources. Much of the responsibility for maintaining sustainable management in particular areas is delegated to local governments (called "consent authorities" under the RMA) who must prepare, publicize and monitor compliance with resource planning documents. The planning documents set out whether local government consent is required for a proposed resource use or development in their area. The RMA is particularly vigilant in the vetting of consent applications in relation to the New Zealand coastline. Broadly speaking, under the RMA, all activities in the coastal marine area (whether, for example, marine aquaculture, discharges into the environment or the building of structures) cannot proceed unless the activity has been approved in a plan, or by a resource consent granted, by the local government. Resource users and developers who receive such approval are

7 For a general overview of the Resource Management Act 1991 (RMA), see Richard Boast and Yves-Louis Sage "Le New Zealand Resource Management Act 1991: fondamentaux et problématique" in Stephen Levine and Yves-Louis Sage (eds) *Contemporary Challenges in the Pacific: Towards a New Consensus* (RJP Numéro Hors Série II, 2002) 257.

responsible for "avoiding, remedying or mitigating" the environmental effects of their activities.

The consent and planning processes established by the RMA recognise the interests Maori may have in any resource development given the special relationship tribes have with their traditional lands and waters.[8] That Maori are *kaitiaki*, or guardians of their environment, is noted in the RMA.[9] Tribes are required to be consulted in the preparation of national and regional planning documents and are encouraged to prepare "iwi management plans" so local governments may easily identify their special interests (for example, a traditional relationship with specific rivers, lakes, mountains and *waahi tapu* (sites of special spiritual significance) or *urupa* (burial grounds)).

In addition, local governments are required to take certain Maori interests into consideration when deciding whether to grant resource consents. Local governments are required "to recognise and provide for", as a matter of national importance, "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga."[10] This Maori interest, however, is one of several matters that must be considered; others include the efficient use and development of natural and physical resources; the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers; and, the preservation of the natural character of the environment.[11] The RMA also contains a specific provision that requires "all persons exercising functions and powers" under the Act to "take into account the principles of the

8 In terms of dry-land in New Zealand, there is little that remains subject to a tribal customary title – virtually all of that title was extinguished many years ago. Nevertheless, the RMA recognises a "tribal interest" in developments that occur within a tribe's traditional territory.

9 See RMA, s 8.

10 See RMA, s 6(e).

11 See RMA, ss 6 and 7.

Treaty of Waitangi."[12] These provisions, known as Treaty clauses, have been inserted in many New Zealand statutes;[13] they vary in their language with some clauses imposing more rigorous obligations than others. The Treaty clause in the RMA requires decision-makers to merely "take into account" the Treaty – that is, turn their mind to the Treaty when making a decision after which point it may be disregarded. The RMA Treaty clause is not as strong as the requirement in other statutes, such as the Conservation Act 1987, to "give effect" to the principles of the Treaty.[14]

Tribes have used these provisions to raise objections, on cultural grounds, to consent applications for resource use and developments over their traditional lands (for example, roading that may cross *waahi tapu* or *urupa*, or the discharge of pollutants in the environment). Some have managed to prevent developments from proceeding or have negotiated compromises. Often, however, the Maori interests find themselves trumped by the other factors listed in the RMA. Courts may also find that the Maori objections are grounded in spiritual or religious values that cannot be given due recognition under the RMA.[15] The general view amongst Maori, then, is that the RMA does not give Maori an effective voice in the management of resources within their traditional lands.[16]

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12 The new statutory drafting technique is to avoid the Treaty clauses altogether and specify in detail the Treaty obligations that arise under the relevant Act. See for example the New Zealand Public Health and Disability Act 2000. See also the article by Matthew Palmer advocating this approach: "The Treaty of Waitangi in Legislation" [2001] NZLJ 207.

13 See for example the Hazardous Substances and New Organisms Act 1996, s 8; the Education Act 1989, s 181; the Conservation Act 1987, s 4; and, the Crown Minerals Act 1991, s 4.

14 See Conservation Act 1987, s 4.

15 *Friends and Community of Ngawha Inc v Minister of Corrections* [2003] NZRMA 272 (CA).

16 Waitangi Tribunal *Ngawha Geothermal Resource Report*: *Wai 304* (Waitangi Tribunal, Wellington, 1993) 145; Waitangi Tribunal <http://www.waitangi-tribunal.govt.nz> (last accessed 17 December 2004).

What the RMA has always promised to deliver, yet so far failed to realise, is the possibility of tribes acquiring some of the powers exercised by local governments under the RMA. Under the RMA, local governments may delegate powers, including the right to grant resource consents, to tribal representative bodies.[17] That power has not been used to date principally because it requires local governments to initiate the process and the process is subject to broad public consultation. This remains a possibility under the FSA but is unlikely to happen in the current political environment.

The perception that the RMA process fails to address Maori concerns is exemplified by the *Ngati Apa* case itself. The *Ngati Apa* decision arose from tribal frustrations with the allocation of marine farming resource consents under the RMA in the Marlborough Sounds in the north of the South Island. Ngati Apa, one of the tribes that initiated the claim, and other tribes in the area had failed under the RMA to obtain consents to establish farms and failed to stop further developments.[18] The Ngati Tama tribe, for example, one of the applicants in the *Ngati Apa* case, had applied unsuccessfully on 35 occasions for marine farming consents in the Marlborough Sounds. No consents were granted or reasons provided as to why the applications had failed. Yet, applications lodged by other parties were accepted. The final straw for the tribes was the proposal by the government to impose a moratorium on marine farming applications in the Marlborough Sounds due to the shortage of suitable space for marine farming and the need to develop a coherent aquaculture regime before further developments took place.[19] The result was an

17 See RMA, s 33.

18 Report of the Fisheries and Other Sea-related Legislation Committee *Foreshore and Seabed Bill (129-1)* (4 November 2004); The Official Website of the New Zealand Government <http://www.beehive.govt.nz> (last accessed 20 December 2004).

19 See Hon Pete Hodgson, Minister of Fisheries "Aquaculture Law To Get Much-Needed Overhaul" (28 November 2001) Press Release; The Official Website of the New Zealand Government <http://www.beehive.govt.nz> (last accessed 20 December 2004).

application to the Maori Land Court for a court order that the tribes had customary ownership of areas of the Marlborough Sounds' foreshore and seabed land, which eventually resulted in the Court of Appeal's *Ngati Apa* decision.

III PROPRIETARY AND CUSTOMARY INTERESTS IN THE FORESHORE AND SEABED OF NEW ZEALAND

There has been much speculation about the rights that could have been recognised by the courts following the *Ngati Apa* decision.[20] The reason for this is simple: in enacting the FSA, the government, while extinguishing extant customary interests, has established new judicial powers for recognising customary interests. The government has insisted that this statutory replacement regime essentially tracks what would have been available to Maori following the *Ngati Apa* decision. Given that Maori tribes were never able to exercise their rights following *Ngati Apa*, it becomes necessary to determine what may have been, or what rights could have been recognised, to see if in fact the FSA does simply replicate the rights that were available to Maori. In New Zealand, the focus has been on the rights that Maori could have acquired from the general courts exercising their inherent native title jurisdiction.

It is important to note that after the *Ngati Apa* decision, there were in fact two legal avenues available to Maori seeking recognition of customary rights in the foreshore: the Maori Land Court (exercising its statutory jurisdiction under the Maori Land Act 1993) and the High Court (exercising its inherent "native title" jurisdiction). The *Ngati Apa* decision concerned the jurisdiction of the Maori Land Court. The Court of Appeal, having found that customary title survived

20 See Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy: Wai 1071* (Legislation Direct, Wellington, 2004) 121. See also the Report of the Fisheries and Other Sea-related Legislation Committee *Foreshore and Seabed Bill (129-1)*, above n 18.

sovereignty and had not been extinguished by general legislation,[21] ruled that the Maori Land Court had authority to inquire into claims of customary title in the foreshore.[22] But the Court's finding that customary title survived sovereignty and was not extinguished also meant tribes could seek to invoke the High Court's inherent native title jurisdiction.

Turning first to the Maori Land Court's jurisdiction, this Court was first established in 1865 by the Native Lands Act to convert what remained of tribal customary title – much of it having been extinguished by Crown purchases from tribes and confiscation following Crown-Maori warfare over those purchases – into a Maori freehold title. The express policy of the statute was to "encourage the extinction of such proprietary customs and provide for the conversion of such modes of ownership into titles derived from the Crown."[23]

A Maori freehold title is essentially a common law freehold title and as such gives the title-holder the right to exclude access to the land and the right to sell the land to third parties. The Maori Land Court was very successful. Almost all that remained of the tribal estate at the Court's inception in 1865 had been converted into freehold titles by the year 1900. Most of these freehold titles were then sold to settlers and the Crown, often in dubious circumstances.

Following *Ngati Apa*, it seemed the Maori Land Court could exercise that very same jurisdiction in relation to New Zealand's foreshore. Ironically, the Maori Land Court, once a principal means by which Maori lost their traditional lands in the 19th century, could be used by tribes in the 21st century to acquire a freehold title, the strongest private property right known to the common law.

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21 The effect of area-specific statutes was left for consideration by the Maori Land Court when exercising its jurisdiction. See the judgment of Elias CJ in *Ngati Apa v Attorney-General,* above n 1, para 58.

22 See the judgment of Elias CJ in *Ngati Apa v Attorney-General,* above n 1.

23 See the preamble to the Native Lands Act 1865.

That conversion process involved two distinct steps.[24] First, Maori tribes could seek a determination before the Maori Land Court that specific areas of the foreshore adjacent to their traditional lands had the status of "Maori customary land" (defined in the Maori Land Act 1993 as land held by Maori in accordance with Maori customary values and practices).[25] Having obtained such a determination, Maori tribes could then apply under the Maori Land Act 1993 for the land to be converted from "Maori customary land" into "Maori freehold land".[26]

There has been some debate over whether, and in what circumstances, the Maori Land Court could have exercised that conversion jurisdiction following the *Ngati Apa* decision. When this jurisdiction was originally invoked, in the late 19th century, the Maori Land Court did not have to consider whether there were any competing non-indigenous interests over the land claimed or whether customary rights had expired. However, the Waitangi Tribunal considered this issue when Maori tribes brought an urgent claim to it that the government's proposal to enact the FSA breached the principles of the Treaty.[27] The Tribunal considered that the Maori Land Court would have had little difficulty in establishing appropriate threshold tests for determining whether a conversion was

24 See the Maori Land Act 1993, ss 131 and 132.

25 See the Maori Land Act 1993, s 129(2)(a) and the definition of "tikanga Maori" in s 4.

26 See the Maori Land Act 1993, ss 131 and 132.

27 The Waitangi Tribunal is a commission of inquiry established by statute, the Treaty of Waitangi Act 1975, to inquire into whether any Crown action or inaction, dating from 1840, breaches the principles of the Treaty. In contrast with this "quasi-judicial" process, Treaty grievances are often settled between the Crown and Maori claimants in the political arena through direct settlement: Mason Durie *Te Mana, te Kawanatanga: The Politics of Maori Self-determination* (OUP, Auckland, 1998) 188. Nowadays recognised as the "primary mode of settlement", direct settlement is the method favoured by the current Labour government: see Malcolm Birdling "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process" (2004) 2 NZJPIL 259, 260.

appropriate.[28] And in the Tribunal's view, after considering evidence from Maori tribes and the Crown, it was clear that land declared to be Maori customary land would "at least sometimes" be converted to a Maori freehold title.[29]

Whether tribes would have acquired exclusive titles in the foreshore from the general courts under native title law is less certain. Under this jurisdiction it is not possible for the courts to grant the precise equivalent to a freehold title. But with respect to dry-land, courts have recognised a right to exclusive occupation of land.[30] Given that New Zealand does not possess a developed modern jurisprudence on native title – almost all customary interests in dry-land were extinguished in the 19th century – speculation on how the courts would have developed such a jurisprudence for the foreshore has been guided by the large body of case law generated by the Canadian courts, following *Calder*,[31] and Australian courts, after *Mabo (No 2)*.[32]

But it is only in Australia that the courts have considered native title claims to exclusively occupy the sea and seabed. In *Commonwealth of Australia v Yarmirr*,[33] the claimants sought from the High Court of Australia native title rights to exclusive "possession, occupation, use and enjoyment of the sea and seabed" in an area of the Northern Territory of Australia. The claim did not include the foreshore as that land was already vested in the claimants.

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28 See Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy*: *Wai 1071*, above n 20, 74.

29 See Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy: Wai 1071*, above n 20, 75.

30 See the judicial declarations made in *Mabo v Queensland (No 2)*, above n 3, and in *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

31 See *Calder v Attorney-General of British Columbia*, above n 2; *R v Van der Peet* [1996] 2 SCR 507; *Delgamuukw v British Columbia*, above n 30.

32 See *Mabo v Queensland (No 2)*, above n 3.

33 *The Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1.

The High Court majority, in a very brief passage, rejected the claim to exclusive native title interests. In their view, such interests would be inconsistent with successive assertions of sovereign authority in Australia's sea and seabed area which gave rights of fishing and navigation to the public and conceded the right of innocent passage of vessels under international law. According to the majority, the assertion of sovereignty on those terms left no room for common law recognition of a native title right to control access to the sea and seabed.[34] If the Sovereign did not possess the right to control access because of the aforementioned public and international rights, then it was not within the scope of the common law to grant such exclusive rights. The High Court went on to determine that the native title claimants possessed a bundle of non-exclusive rights in the area (for instance, the right to hunt, fish and gather in the native title area).[35]

Whether the New Zealand courts would have adopted this approach is unclear. Dr Paul McHugh, when giving evidence to the Waitangi tribunal, considered New Zealand courts would be likely to follow the majority judgment in *Yarmirr* and take a "bundle of rights" approach to foreshore claims. In his view, the reasoning of the majority, while short, was consistent with English concepts of sovereign rights in the foreshore. The Waitangi Tribunal agreed with Dr McHugh's evidence.[36]

However, in comparing jurisdictions, it is important to note that courts can take very different approaches towards native title

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34 *The Commonwealth of Australia v Yarmirr*, above n 33, para 99 Glesson CJ, Gaudron, Gummow and Hayne JJ.

35 *The Commonwealth of Australia v Yarmirr*, above n 33, paras 50-60 Glesson CJ, Gaudron, Gummow and Hayne JJ.

36 See the Waitangi Tribunal's summary of Dr McHugh's evidence, in its *Report on the Crown's Foreshore and Seabed Policy*: *Wai 1071*, above n 20, 52. See also Submissions by Dr McHugh in the Report of the Fisheries and Other Sea-related Legislation Committee *Foreshore and Seabed Bill (129-1)*, above n 18, 54. See generally Paul G McHugh "Aboriginal Title in New Zealand: A Retrospect and Prospect" (2004) 2 NZJPIL 139.

recognition. Canada has adopted a "factual-basis" approach by focusing on the practice of specific activities prior to European contact – to establish "aboriginal rights" to engage in particular activities, like hunting and fishing[37] – and exclusive physical occupation of areas of land at sovereignty – to establish an "aboriginal title" to occupy land exclusively in the modern age.[38] The Australian native title jurisprudence, on the other hand, adopts a "normative-basis" approach for proving native title in that native title claimants must show that their native title rights and interests have their origin in custom law practiced in pre-sovereignty times and adhered to in the modern age.[39] The focus in Australia, it follows, is proving the content of traditional law, a very difficult test given the effects of colonization on aboriginal communities.

In addition, the Canadian courts see "aboriginal title" as a robust property right – a "right to land" that supports a range of "aboriginal rights".[40] Australia, on the other hand, has adopted a "bundle of rights" approach to native title, which treats native title as a bundle of separate rights that are not linked to any underlying title.[41] These divergent approaches cannot be explained simply on the basis of historical and constitutional differences. Rather, they show the broad discretion accorded to judges when called upon to resolve native title issues. Compared with Australia, the Canadian courts have adopted a far more benevolent approach to native title recognition. The *Yarmirr* decision typifies the uniquely narrow approach of the Australian High Court.

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37 See *R v Van der Peet*, above n 31.

38 See *Delgamuukw v British Columbia*, above n 30, para 114 Lamer CJ.

39 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 77 ALJR 356, para 43 (HCA) Gleeson CJ, Gummow and Hayne JJ.

40 See *Delgamuukw v British Columbia*, above n 30, para 140 Lamer CJ.

41 See the judgment of Glesson CJ, Gaudron, Gummow and Hayne JJ in *Western Australia v Ward* (2002) 191 ALR 1 (HCA).

Canada has not, to date, made a decision on indigenous interests in the foreshore, but there is no guarantee that it would automatically adopt the approach of the majority in *Yarmirr*. Given New Zealand's tradition of recognition of Maori rights, as exemplified in the Treaty and judicial decisions,[42] the New Zealand courts could have taken a very different approach to *Yarmirr*. In any event, even if the New Zealand courts had adopted the majority decision in *Yarmirr*, the alternative Maori Land Court statutory jurisdiction provided tribes with the means to circumvent *Yarmirr* and claim freehold titles in the foreshore.

IV EFFECT OF NGATI APA *ON ENVIRONMENTAL MANAGEMENT OF NEW ZEALAND'S COASTAL MARINE AREA*

The government's primary justification for enacting the FSA is the uncertainty created by the *Ngati Apa* decision, which clearly stated that the Crown could not assume to have any property rights in the foreshore. The only way in which the existence and nature and extent of Maori customary and proprietary interests in the foreshore could be settled was by judicial investigation on a case-by-case basis,[43] with two fora – the High Court and Maori Land Court – capable of hearing that issue. In the meantime, the rights of the general public to access the beach and foreshore and the interests granted under the RMA are left uncertain.

There is no doubt the *Ngati Apa* decision created a climate of legal uncertainty. But it is important not to overstate the problem. With respect to the environmental management of the foreshore, for many years, it was simply assumed by successive governments that New Zealand's coastal marine area was in Crown ownership and, as a result, local governments regulating coastal activities through the RMA would determine the type of activities that could be undertaken there. That assumption proved to be very wrong.

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42 *R v Symonds* (1847) [1840-1932] NZPCC 387.

43 See *Ngati Apa v Attorney-General,* above n 1, para 8.

Without doubt, new applications for resource consents under the RMA were likely to be affected by the *Ngati Apa* decision. It seems that after *Ngati Apa*, Maori tribes could have sought interim relief to stop the granting of new RMA consents in relation to areas of the foreshore until the courts had inquired into the existence of tribal rights. The actual judicial recognition of tribal rights could also have prevented the granting of RMA consents in the same area. Whether new RMA-granted activities could co-exist with recognised tribal interests would turn on the extent of those tribal interests, with Maori freehold titles leaving little scope for co-existence but lesser customary interests leaving some room. For example, if a tribe acquired a Maori freehold title to an area of the foreshore, it would not be possible for a third party to be granted a resource consent under the RMA to mine sands in the same area. Under the common law principle of *cujus est solum ejus est usque ad coelum et ad inferos* (that is, all minerals belong to the land owner from the heavens to the centre of the earth), all subsurface minerals, excepting those precious minerals vested in the Crown,[44] would belong to the tribal freehold owner. Also, third parties would not be able to erect structures over the freehold title, including marine farming structures, without the tribal freehold owner's consent.

But the RMA itself would have imposed limitations on the use of judicially recognised Maori rights and claims to such rights. It is clear that all activities carried out on Maori freehold titles (for instance, mining and building of structures) would have been subject to the RMA planning and consent process. That is the case for all owners of land in the foreshore (currently there are over 12,000 freehold parcels in the foreshore, most of which have been created by erosion of dry-land). The exercise of customary activities (for instance, the taking of sand and minerals), it seems, would also have been regulated by the RMA and subject to its policy of sustainable management. Moreover, the judicial recognition of Maori customary and proprietary rights

44 Crown Minerals Act 1991, s 10 provides that "all petroleum, gold, silver, and uranium … shall be the property of the Crown."

could have been hampered by consents already granted in the same area. The RMA of itself would not have prevented the possibility of judicial recognition of Maori freehold titles or customary interests in the foreshore, but resource consents already granted under the RMA may have had the legal effect of extinguishing tribal customary interests. Native title jurisprudence generally holds that when there is a clear conflict between non-indigenous legal rights and native title rights, the former prevail and the latter are extinguished.[45] In areas of New Zealand subject to intensive marine farming, like the Marlborough Sounds, there may have been little scope for extensive or indeed any Maori proprietary or customary interests.[46]

All of these issues are matters that could have been addressed by the courts on a case-by-case basis. They are matters well within the expertise of the common law courts. Other common law jurisdictions faced with modern native title claims have not reacted with legislation akin to the FSA. It is clear that almost all of British Columbia is subject to subsisting aboriginal rights, some quite substantial in light of the finding of the Supreme Court of Canada in *Delgamuukw* that aboriginal title gives the right to exclusive use and occupation of the land held pursuant to that title.[47] Governments in Canada have responded by allowing the tribal communities to either claim aboriginal rights in court or enter into negotiations to create a treaty to settle their aboriginal title claims by consent with compensation. Both the treaty-making process and aboriginal title litigation have progressed slowly and that has created some uncertainty for commercial interests and the general public. None the less, Canadian

45 See *Yanner v Eaton* (1999) 201 CLR 351, para 109 Gummow J.

46 The New Zealand courts may, however, have decided that any conflict between a customary activity and non-indigenous interests of a finite duration, like RMA-approved activities, would have resulted in the former's suspension, not extinguishment. In *Western Australia v Ward*, above n 41, the Australian High Court rejected this idea of finite interests, like short-term leases, suspending rather than extinguishing inconsistent native title interests: see the judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ, para 82.

47 See *Delgamuukw v British Columbia*, above n 30, para 117 Lamer CJ.

governments (both federal and provincial) have resolved to address the issue on a case-by-case basis.[48] A similar approach applies in Australia. Following the *Mabo (No 2)* native title decision, the federal government decided to allow claimants to litigate their claims in the courts subject to certain private titles being validated.[49] The Native Title Act 1993 (Cth), enacted to provide a framework for hearing these claims, has in part influenced the nature of native title litigation – the Act directs the courts to adopt the normative-basis approach towards recognising native title – but that statute is nowhere near as prescriptive as the FSA in terms of the types of customary rights that may be recognised by the courts and the circumstances in which extinguishment of customary interests will occur. New Zealand's response to modern customary rights is quite unique. The FSA creates a climate of immediate certainty for the general public concerned about access to the foreshore and those wishing to invest in activities in the coastal marine area. However, this is achieved by limiting the range of property rights Maori may claim in the foreshore.

V THE FORESHORE AND SEABED ACT 2004

The Government's response to *Ngati Apa* has been to introduce legislation, the FSA, that vests ownership of the foreshore and seabed in the Crown and thereby extinguishes all customary interests extant at the date of the FSA.[50] All prior means for judicial recognition of customary interests in the foreshore (via the Maori Land Court and general courts) have been removed and replaced with a new

48 To date, only one treaty has been finalized with the Nisga'a Nation in northern British Columbia. But progress is being made. There are now 55 First Nations participating in the British Columbia treaty process, representing about two-thirds of all aboriginal people in British Columbia. Five First Nations are at the "Stage 5" negotiation step of finalizing a treaty. For online access to information on the British Columbia settlement process, see BC Treaty Commission <http://www.bctreaty.net> (last accessed 31 December 2004).

49 See Native Title Act 1993 (Cth).

50 FSA, s 13, vests full legal and beneficial ownership of the foreshore and seabed (including adjacent air space, waters and the subsoil, bedrock and other matters) in the Crown.

jurisdiction. Now, the Maori Land Court may recognise customary rights to engage in traditional activities and the High Court may recognise territorial customary rights to exclusively occupy areas of foreshore, though such orders do not confer a right to exclusive occupation, but rather the right to negotiate with the government for redress.

The major shortcoming with the FSA is its highly prescriptive nature. The New Zealand courts have not been permitted to develop their own standards of proof and determine the nature and extent of customary interests in the foreshore. Rather, the FSA tightly prescribes the rights that may or may not be recognised, the standards of proof for recognition of such rights and circumstances in which they will have been extinguished.

A Customary Rights Orders: The Right to Gather Sand and Stones

These rights are modeled on the Canadian "aboriginal rights" first formulated in *R v Van der Peet*. The *Van der Peet* decision requires aboriginal rights claimants to adduce evidence that the right claimed – whether a right to undertake commercial fishery,[51] to conduct gaming on First Nations land[52] or to transport goods across the United States-Canada border[53] – has a reasonable degree of continuity with a practice, tradition or custom that was integral to the distinctive culture of the aboriginal people prior to contact with the Europeans.[54] It has been criticised widely for its effect of confining the legal recognition of aboriginal rights to traditional activities practised in the distant past.[55] In Canada, this test is ameliorated significantly by the ability of

51 *R v Van der Peet*, above n 31.

52 *R v Pamajewon* [1996] 2 SCR 821.

53 *Mitchell v Minister of National Revenue* [2001] 1 SCR 911 affirming and applying *R v Van der Peet*, above n 31.

54 *R v Van der Peet*, above n 31.

55 See Leonard I Rotman "Creating a Still-life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997) 36 Alberta L Rev 1; Russel

tribes to receive an "aboriginal title" declaration to their lands, a much more robust property right that entitles tribes to occupy their traditional lands exclusively. Such a title was first recognised by the Canadian Supreme Court in *Delgamuukw v British Columbia*.[56] As a result, in Canada, there is little enthusiasm for the *Van der Peet* type aboriginal rights; not when there is the possibility of aboriginal title.

The customary rights in the FSA are more difficult to prove than Canadian aboriginal rights. To claim a "customary right" to engage in an activity, claimants must not only show that the right claimed was integral to their *tikanga* (customary laws) in 1840, but that the right remains so today.[57] In addition, the right claimed must have been substantially uninterrupted during that time[58] – a more onerous requirement than the Canadian "reasonable degree of continuity" test.

In confining Maori tribal property rights to these pre-sovereignty traditional activities, the FSA permits tribes to engage in only a very limited range of activities. This is because any customary interest in in-shore and deep-sea fisheries has been extinguished and settled, with compensation, by the 1992 fisheries settlement.[59] Once the customary right to fish is removed from the equation, in terms of traditional rights, Maori are confined to claiming the right to gather rocks, sand and seaweed, the right to launch *waka* (canoe) from the foreshore and perhaps the right to protect access to *waahi tapu* (sites of spiritual significance). Apart from access to *waahi tapu*, it is not clear how "integral" these rights were to Maori tribal life at sovereignty.

Lawrence Barsh and James Youngblood Henderson "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993.

56 *Delgamuukw v British Columbia*, above n 30, para 114 Lamer CJ.

57 See FSA, s 50(1).

58 See FSA, s 50(1).

59 The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

Further, on the current standards of proof set for establishing customary rights, there are likely to be few customary rights orders made throughout the country. The "integral to culture" test sets too high an evidential threshold for tribes. In any event, it is possible that these customary rights have expired (that is, not been substantially maintained without interruption) or been extinguished at law. The FSA provides that a range of non-indigenous interests may extinguish customary rights. These include interests already granted in the foreshore by the RMA, in particular marine farming resource consents. Drafters of the FSA rejected an earlier proposal that any consent merely suspends the exercise of a customary right for the duration of the conflict. Maori will also be disappointed that the FSA does not affect the many current pending resource consent applications for marine farms awaiting approval from local governments.

B Protection of Customary Rights Orders under the RMA

Obtaining recognition of a customary right will not be an easy task. However, there are several mechanisms that seek to protect and enhance the right under the RMA if tribes do manage to meet the forensic requirements. Once recognised by the courts, customary rights holders will be exempt from ordinary requirements to obtain resource consents under the RMA.[60] In fact, the government or regional councils will not be able to interfere with Maori exercising these rights, unless the exercise of these rights would cause "significant harm" to the environment. This is a significant departure from the RMA's precautionary approach.

In addition, the RMA now provides that "the protection of recognised customary activities" is a new matter to be recognised and provided for as a matter of national importance.[61] Moreover, if a third party seeks a resource consent under the RMA for an activity that will, or is likely to have, a "significant adverse effect" on a recognised

60 See RMA, s 17A.

61 See RMA, s 6(f).

customary activity, the consent must be declined, unless written approval is given by the customary rights' holder.[62] Many commentators see this as providing Maori with a "right to veto" resource consent applications in an area subject to customary rights.[63] It is said also that this will lead to the practice of negotiation and payment by developers for tribal approval of consent applications. However, this "right of veto" depends upon there being a "significant" conflict between the exercise of any new activity and any customary rights. The potential for meaningful conflict is limited given the tightly prescribed nature of customary rights – they are confined to non-intrusive traditional activities and are subject to limits of scale, extent and frequency. Any real potential for conflict has been removed by not allowing for the recognition of exclusive interests in the foreshore.

C Territorial Customary Rights Orders

Finally, the FSA will allow Maori tribes to claim territorial customary rights to the foreshore through the High Court. The territorial customary right is said by the government to be included in the FSA in recognition of the right that Maori had, following *Ngati Apa*, to seek a customary title declaration from the general courts. Territorial customary rights are described by the FSA as a customary title or aboriginal title that could be recognised at common law and that is based on exclusive use and occupation of the area, entitling the holder to such exclusive use and occupation.[64]

The FSA, therefore, recognises the possibility of exclusive titles in the foreshore and seabed despite the *Yarmirr* majority decision. However, if the High Court finds that, but for the FSA, claimants would have such territorial customary rights, there is no legal

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62 See RMA, s 107A.

63 See the New Zealand National Party views in the Report of the Fisheries and Other Sea-related Legislation Committee *Foreshore and Seabed Bill (129-1)*, above n 18, 10.

64 The standards of proof are set out in FSA, s 32.

recognition of such a right. Instead, claimants may either take steps to establish a "foreshore and seabed reserve"[65] or enter into discussions with the government of the day to discuss the possibility of redress for lack of legal recognition.[66]

As the "territorial customary rights" provision refers to common law rights of exclusive use and occupation, it appears to reflect the Canadian aboriginal title decision in *Delgamuukw*. In fact, the provision has little to do with Canadian law. In *Delgamuukw*, the Supreme Court ruled that the claimants had a robust property right entitling the holders to occupy their traditional lands exclusively for a variety of activities, both traditional and non-traditional.[67] The *Delgamuukw* decision is pretty much as good as it gets for customary title declarations. The title-holders may alienate their lands to the Crown only and cannot use their lands in a way that would undermine their traditional link with the land. None the less, they possess the power to control access to their lands. This title, then, is very close to a freehold title.

The difficulty with the FSA, however, is that the standard of proof prescribed for territorial customary rights is different from and more rigorous than the standard used to establish a *Delgamuukw*-style "aboriginal title". "Aboriginal title" claimants in Canada are required to show that they physically occupied the land exclusively (from both an aboriginal and common law perspective) at sovereignty and have maintained a connection with the land. The *Delgamuukw* requirement of exclusivity is concerned solely with the question of whether, at sovereignty, one aboriginal group occupied the land to the exclusion of other aboriginal groups.

Acknowledging that evidence of exclusive occupation at sovereignty would be hard to come by, the Supreme Court said

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65 See FSA, s 36.

66 See FSA, s 37.

67 See *Delgamuukw v British Columbia*, above n 30, para 117 Lamer CJ.

aboriginal title claimants could rely on present occupation as evidence of occupation at sovereignty and there was no need to establish an unbroken line of occupation from the present day to the date of sovereignty so much as a "substantial maintenance of the connection between the land and the people."[68] "Aboriginal title" claimants, then, need not establish continuity of exclusive occupation or even continuity of occupation. Instead occupation in the present day and substantial maintenance of a connection with the land since sovereignty would result in an aboriginal title declaration.

On this later point of a continual connection, the Canadian Supreme Court has not yet established whether there is a need to prove any continuous connection with the land if there is in fact evidence of exclusive occupation at sovereignty. The recent Nova Scotia Court of Appeal decision in *R v Marshall*[69] noted that in all the aboriginal title cases till then proof of exclusive occupation at the date of Crown sovereignty had been shown through proof of present-day presence and substantial maintenance of a connection with the land since sovereignty. As noted, this test worked backwards to the time sovereignty. The Nova Scotia Court of Appeal held, however, that if evidence of pre-sovereignty exclusive occupation was available, then there was no need to prove subsequent occupation as aboriginal title crystallizes at sovereignty.[70]

It remains to be seen how the Supreme Court will address this question of sovereignty, but the idea of aboriginal title rights crystallizing at sovereignty is consistent with *Delgamuukw* and has support from Dr Kent McNeil, a respected international scholar in aboriginal title.[71] This approach also addresses the unfairness that can

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68 *Delgamuukw v British Columbia*, above n 30, para 153 Lamer CJ.

69 *R v Marshall* [2003] NSCA 105.

70 *R v Marshall*, above n 69, para 181.

71 Kent McNeil "Continuity of Aboriginal Rights" in Kerry Wilkins (ed) *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Purich Publishing Ltd, Saskatoon, 2004) 127-150.

result from post-sovereignty indifference to aboriginal rights. That is significant in the New Zealand context given the large amounts of tribal lands that were confiscated by settler governments.

The FSA rejects that approach by imposing strict requirements of continuity and exclusivity. To obtain a territorial customary rights order, tribes will need to establish that they have from 1840 to the date of the FSA occupied areas of the foreshore, without substantial interruption, to the exclusion of all others, including other tribes and non-Maori. If any other group had ever used the same area of foreshore (other than rights to navigation), then exclusive use and occupation is deemed to have been terminated unless those other persons were expressly or impliedly permitted to use the area and recognised the authority of the claimant group. In addition, the FSA imports a requirement that claimants establish in evidence that they have maintained ownership of dry-land adjacent to the foreshore claimed from 1840 to the date of the FSA.

As with customary rights orders, that sets a very high evidential threshold. It is difficult to see how tribes can establish such continuous exclusive use and occupation of the foreshore after over 150 years of settlement. Tribes that have retained ownership of much of their coastal lands – such as Ngati Porou and Te Whanau-A-Apanui in the east coast of the North Island – will stand the greatest chance of meeting the evidential requirements, but even they will struggle with this test. However, tribes that have lost their coastal tribal lands due to Crown confiscation – such as Taranaki tribes on the west coast of the North Island – will simply be unable to claim territorial customary rights. And there is a bitter irony in this given the Crown's acknowledgement in several Taranaki Treaty settlements that these confiscations breached the principles of the Treaty.[72]

72 See, for example, Deed of Settlement of the Historical Claims of Ruanui Office of Treaty Settlements <http://www.ots.govt.nz> (last accessed 12 December 2004).

D The FSA's Redress Provisions

Tribes that will obtain territorial customary rights orders have two options for redress. First, there is the right to establish a "foreshore and seabed reserve" over the area subject to the court order. This reserve mechanism does not confer any property right. The reserve remains subject to Crown ownership, it is held for "the common use and benefit of the people of New Zealand" and public access and navigation rights over the reserve are guaranteed. The reserve is to be managed by a board comprised of the territorial customary rights holder, the local government and members of the central government. The board's key function is to prepare a "management plan" akin to the "iwi management plans" prepared by tribes under the RMA so local government may identify the tribe's special interests for the purpose of preparing planning documents, consultation and granting resource consents. Given that tribes are already able to prepare "iwi management plans" under the RMA, there seems to be no real advantage in seeking this remedy.

The FSA does provide that these boards may be delegated certain powers under the RMA. As noted, that power has been available but never used since the RMA's enactment in 1991. It requires a local government to initiate the process, is subject to broad public consultation and can be revoked at any time by the local government. In this political environment, it would take a bold local government to agree to the transfer of any of its RMA powers to a reserve board.

The alternative remedy available to the holders of territorial customary rights is to enter into redress negotiations with the Crown. The term "redress" suggests that compensation will not be paid; in fact there is no guarantee that any redress will be provided and there is no independent mechanism for determining the nature of any redress to be provided. The Attorney-General has said there is no reason for Maori to believe that the Crown will not act in good faith in these

discussions for redress.[73] However, this has not been the experience of Maori with the current Treaty settlement process.[74] Moreover, the "foreshore and seabed reserve" seems to set a benchmark for these negotiations. If negotiations fail, the reserve remedy is deemed to be the only available alternative. It is difficult to see, then, these negotiations providing any remedy substantially more fruitful than that offered by the "foreshore and seabed reserve".

VI CONCLUSION

The *Ngati Apa* decision raised the potential for the judicial recognition of customary interests of an extensive nature in the foreshore. To achieve legal certainty and to assuage the concerns of commercial developers and the general public about Maori control of access to areas of the foreshore, the FSA allows tribes to claim only non-exclusive customary interests in the foreshore. These customary rights will result in tribes receiving some benefits under the RMA. However, neither the RMA nor the FSA allows Maori to participate in a meaningful way in the environmental management of New Zealand's coastal marine area. The major shortcoming with the RMA is that it has never provided tribes with an effective voice in the management of natural resources within their traditional territories. Nor did it devolve decision-making powers to tribes. The *Ngati Apa* decision seemed to provide tribes with leverage for increasing their participation in the environmental management of the coastal marine

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73 Attorney-General Report on the Consistency of the Foreshore and Seabed Bill with the New Zealand Bill of Rights Act 1990 (6 May 2004); Ministry of Justice <http://www.justice.govt.nz> (last accessed 31 December 2004).

74 A recent publication, Crown Forestry Rental Trust *Maori Experiences of the Direct Negotiation Process* <http://www.cfrt.org.nz> (last accessed 31 December 2004), notes that many Maori negotiators consider that these are not in fact negotiations. The Crown negotiators (all members of the Office of Treaty Settlements) set the parameters of the negotiations from the outset. Certain matters are not on the table for negotiation, including rights to self-government (akin to the rights conferred on indigenous peoples in the British Columbia treaty settlement process) and rights to precious minerals like oil and gas. In addition, the compensation paid in these settlements is a tiny fraction of the true economic loss suffered by tribes.

area at least. Strong public opposition towards the decision and the government's statutory response has put an end to that idea. There remains the possibility of tribes acquiring territorial customary rights to obtain some powers under the RMA, but there is no guarantee that this will occur in the present political and social environment. The prevailing view amongst New Zealanders seems to be that Maori should not acquire extensive interests in the foreshore or have a greater say in the coast's environmental use and management.