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VICTORIA UNIVERSITY OF WELLINGTON  
*Te Whare Wānanga o te Ūpoko o te Ika a Māui*



FACULTY OF LAW  
*Te Kauhanganui Tatai Ture*

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# ABORIGINAL TITLE IN NEW ZEALAND: A RETROSPECT AND PROSPECT

P G McHugh\*

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*This article considers the aftermath of the Court of Appeal's judgment in the Marlborough Sounds case. It looks at the potential scope of the common law aboriginal title recognised by the Court as possibly subsisting over the foreshore and seabed. The author discusses how a prospective jurisprudence might construct the aboriginal title under the present law unaffected by any legislative intervention. He also looks at the Foreshore and Seabed Bill 2004 (as introduced and – inconclusively – reported back) and considers how a statutory regime of the type proposed meshes (and messes) with that prospective jurisprudence.*

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## I INTRODUCTION

In June 2003 the Court of Appeal held in *Ngati Apa v Attorney-General*<sup>1</sup> that the Maori Land Court had jurisdiction to investigate title to land below the high tide mark. The jurisdiction was a statutory one located in Te Ture Whenua Maori Act 1993 (the Maori Land Act 1993). Through most of the 20th century there had been uncertainty over the Court's jurisdiction to investigate title over the foreshore and seabed.<sup>2</sup> The judgments in *Re the Ninety Mile Beach* (1963)<sup>3</sup> were popularly, though inaccurately, regarded as authority against the jurisdiction. That earlier case did not directly exclude the Maori Land Court

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

2 Richard Boast "In re Ninety Mile Beach Revisited: The Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 VUWLR 145.

3 *Re the Ninety Mile Beach* [1963] NZLR 461 (CA) ["*Ninety Mile Beach*"].

jurisdiction so much as swerve around it, holding that the transmutation of customary land bordering the sea extinguished any seaward customary title. Nonetheless *Ninety Mile Beach* became widely regarded as authority for the jurisdictional point that it had not directly answered. This was the more sweeping proposition that there was no Maori customary title over the foreshore and seabed. Forty years later in *Ngati Apa* that rather casual understanding unravelled in a most spectacular fashion.

In looking at the Maori Land Court's jurisdiction, the Court of Appeal had to address directly the legacy of *Ninety Mile Beach*. The Court held that under the 1993 statute the Maori Land Court had jurisdiction, but indicated that Maori property rights over the foreshore and seabed derived not from the statute itself, as had been previously supposed, but from the common law. The statutory jurisdiction was interpreted as a particular means for the better recognition of the common law aboriginal title that sprang up with Crown sovereignty. The Court of Appeal was clear that the statutory jurisdiction was not the legal source of Maori property rights but simply a mechanism (though in many aspects, it noted, an awkward and incomplete one) for their recognition. This meant that there were two mechanisms of legal accommodation: the statutory remit of the Maori Land Court under the Te Ture Whenua Maori Act 1993, and the inherent jurisdiction of the High Court.

The reasoning in *Ninety Mile Beach* was that the transmutation into Maori freehold land of customary land bordering the sea extinguished any customary aboriginal interest over the foreshore or seabed. That rationale was applied analogously, and for the most part tacitly, to other land fronting the sea where the aboriginal title had been extinguished by means other than through the agency of the Native Land Court, as by purchase, cession, or confiscation. There was, in short, a general supposition that once the landward aboriginal title went, so did that below the high tide mark. This was bolstered by the belief in many quarters that the title to the foreshore and seabed vested unqualifiedly in the Crown under its prerogative and as confirmed by declaratory legislation.

The legal position associated with *Ninety Mile Beach* did not necessarily square with Maori practice and *tikanga*. As most New Zealanders with any experience of beachside holidays and life away from urban centres know well, that *tikanga* continued to operate in all its regional and historical variations along the coastline, particularly in remote rural regions. The case seemed to pronounce the Maori proprietary interest in the foreshore gone as a matter of law (the seabed was not there at issue), but actual Maori practice carried on heedless to that legality except to the extent it was enforced against Maori, as under the fisheries legislation.

Although some comments were made along the way (as, importantly, on the question of extinguishment), the Court of Appeal did not venture into any sustained elaboration of the common law aboriginal title because its scope was not at issue. References in *Ngati Apa* to the High Court's inherent jurisdiction were mostly by way of aside, as the issue for

determination concerned the extent of the statutory jurisdiction. Until the doctrine of aboriginal title was articulated in common law jurisdictions in the last quarter of the 20th century, the received position was that the statutory jurisdiction of the Maori Land Court combined the two steps of (1) legal recognition and (2) transmutation of customary property rights. In separating the two and acknowledging that the first lay in the common law itself, the Court of Appeal was plugging in to a jurisprudence that had grown in fraternal jurisdictions during the last quarter of the 20th century. However, the acceptance of common law aboriginal title by the Court of Appeal was not a surprising step, for the principles had already circulated around the New Zealand legal system for some while.

In December 2003 the Government proposed a "Framework" removing the inherent High Court jurisdiction and giving the Maori Land Court a new and exclusive jurisdiction to make "customary rights" orders for the foreshore and seabed. The threatened removal of the High Court jurisdiction roused massive protest, particularly because it prejudged the possibility that (subject to then unquantified public rights) Maori might have exclusive ownership of stretches of the foreshore and seabed. The Government withdrew its original proposals and in March 2004 returned with a Foreshore and Seabed Bill.<sup>4</sup> The Bill proposed the reconstitution of the High Court jurisdiction into a statutory form modelled on lines synthesised from the considerably more sophisticated aboriginal title jurisprudence of Australia and Canada. After the Select Committee reported back inconclusively fragmented on a party basis,<sup>5</sup> the Government signalled its intention to proceed on the model of the Bill in order to "codify" the common law.

The fate of the inherent jurisdiction—the spectre of removal followed by statutory reconstitution—raised the question of what it potentially entailed in its own right. Lacking any sustained engagement with common law aboriginal title, New Zealand courts have not developed a jurisprudence approaching that of the North American and Australian jurisdictions. Apart from the question of extinguishment, the Court of Appeal declined elaborating the common law principles beyond the initial and core presumption of "modified continuity". However after *Ngati Apa* it became clear that the Government was not prepared to let the inherent jurisdiction stand by itself. With the decision to replace the common law jurisdiction with a statutory version, it became necessary to form some idea, however speculative, of what was being replaced. By that measure the Government's proposals could be gauged. Political circumstance made inevitable the speculative exercise

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4 This article refers to the Bill as introduced, referred to the Select Committee, and reported back (without recommendation of amendment), which was the state of play at the time of writing.

5 Foreshore and Seabed Bill (129-1); *Report of the Fisheries and other Sea-related Committee* (4 November 2004) 2, declining to recommend amendment and noting the division of the report into six parts for the Government's and other parties' positions.

that the Court of Appeal had properly seen as unnecessary. In January 2004 I presented independent evidence to the Waitangi Tribunal's hearing of the Government's foreshore and seabed policy. This evidence explained the modern doctrine of aboriginal title and, using the other common law jurisdictions as a measuring rod, attempted to describe the form a New Zealand jurisprudence might take. Essentially I was envisaging a prospective jurisprudence, a future one based on the experience of the other common law jurisdictions but allowing room for a local flavour. This article repeats that exercise in the light of the Tribunal's Report<sup>6</sup> and the Foreshore and Seabed Bill 2004. During winter this year (2004) I travelled the country for the Law Society explaining the common law background to the Bill (which, it will be seen below, rendered obsolete aspects of my Tribunal submissions). This culminated in a two-and-a-half-hour presentation to the Select Committee, the major thrust of which is reproduced in this article.

## II COMMON LAW ABORIGINAL TITLE – THE PRESUMPTION OF "MODIFIED CONTINUITY"

Common law aboriginal title is concerned with the effect of Crown sovereignty upon the pre-existing property rights of the tribal inhabitants. The Crown declares itself sovereign over territory: it raises the flag, makes a formal proclamation of sovereignty (annexation), establishes institutions of governance including courts that apply English law. English law in that sense of reception means the common law, the statute law of England then in force, all Imperial statutes that thereafter named the colony expressly, plus subsequent local legislation (in matters of which the local legislative institutions possessed competence). Since the Crown's courts now applied the introduced law of their common law system—we think here of the common law also as a way of thinking about and articulating legal thought as well as a body of judge-made rules—to what extent did that system of thought and doctrine allow the aboriginal inhabitants to have their customary property rights recognised and enforced in the courts?

Here there could be either of two results: *legal discontinuity*, entailing the suspension of all tribal property—a legal vacuum as it were; or *continuity*—some form of cognisability in the courts of the *arriviste* legal system. The answer that common law aboriginal title gives is to state that the proclamation of Crown sovereignty, sometimes called *imperium* (the self-claimed right to govern), did not simultaneously exclude pre-existing property rights or *dominium*. At its most basic formulation, common law aboriginal title is founded upon this presumption of legal continuity. It allows the tribal owners to have their communal land rights recognised by the introduced common law legal system.

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<sup>6</sup> Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy: Wai 1071* (Legislation Direct, Wellington, 2004).

This presumption of legal continuity needs closer examination, for it is not an unqualified one. It lies at the heart of the common law doctrine used by the Court of Appeal in *Ngati Apa*. The principle of non-discrimination is pivotal. The common law today treats the property rights of tribal peoples as holding the same legal entitlement as, say, the French landowners in Quebec or Dutch settlers in Cape Colony, whose property rights were similarly regarded as continuing at law after Crown sovereignty. However, the non-European quality of the tribal title meant that the principle of continuity was modified by the rule that the tribal property could be alienated to no one other than the Crown. The reason for this rule was to protect the tribal owners from unscrupulous land jobbers and also to ensure the transition into an orderly Crown grant-based system for the settlers. This rule of *modified continuity* was included in the Treaty of Waitangi as the so-called "pre-emptive right": the exclusive facility of the Crown to purchase Maori land. Putting the Treaty of Waitangi alongside those principles one notes its recognition of customary Maori property rights and provision for the Crown's pre-emptive right. Those are features anyway of the modern-day common law doctrine of aboriginal title and they render the Treaty declaratory of rules that applied in any event.<sup>7</sup> In short, that is what the common law doctrine, put at its simplest, entails: the principle of modified continuity that is also found in the Treaty itself.

Nonetheless, this does not reduce the Treaty to irrelevance. In constructing a common law jurisprudence—so much as that task will ever fall onto them—it is likely that New Zealand courts will consciously strive to build one consistent with the Treaty. The Waitangi Tribunal has acknowledged that common law aboriginal title and the Treaty inhabit their own "aura",<sup>8</sup> but it is long settled that courts will develop the common law in a manner consistent with the international treaty obligations of the Crown. Here treaties are not being used as a source of common law right in themselves—an outcome that would mean the Executive could make and change law without Parliament under its prerogative power to conduct foreign relations.<sup>9</sup> Rather, they are guiding the ongoing development of the common law. There are a number of choices New Zealand judges would face in exercising the inherent jurisdiction. It seems inescapable that the Treaty would influence their route.

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7 *R v Symonds* (1847) NZPCC 387, 390 (SC) Chapman J.

8 Waitangi Tribunal *Muriwhenua Fisheries Report: Wai 22* (Waitangi Tribunal, Wellington, 1988) 208–209.

9 *Hoani Te Heu Heu Tukino v Aotea Maori District Board* [1941] AC 308 (PC). The Court of Appeal confirmed that the Treaty could not be a source of legal right in itself absent enacting legislation in *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA).



The principle of continuity underpinning the common law doctrine is part of the wider set of common law principles defining and articulating the nature of Crown sovereignty in its colonies. This, it should be understood at the outset, is a legal rather than an historical explanation. Common law explanations of such principles, by the very (inductive) nature of common law reasoning, operate retrospectively as the haphazard character of litigation throws these questions into relief. Common law aboriginal title comprises a set of legal principles explaining aspects of the nature of the sovereignty that the Crown has acquired and exercises over its territory. Over time, as litigation tests the character of that sovereignty, so is it explained and clarified by the common law. As the *Ngati Apa* judgments show graphically, that sovereignty can still be examined and explained many years after its actual acquisition. To repeat, this is a consequence of the reasoning processes of the common law through which the nature of Crown sovereignty is defined. The Crown's courts will not challenge its sovereignty, but when litigation occurs they must explain its nature and consequences in such matters as the status of indigenous property rights, including those over the foreshore and seabed.

Common law aboriginal title is concerned, therefore, with the nature of Crown sovereignty. It is not concerned with what might be called questions of "reception", meaning the extent of the importation of common law doctrine affecting matters of private right. The character of Crown sovereignty and the reception of English law represent juridically distinct enquiries. They are closely related, yet each is concerned with different matters. The Court of Appeal judgments in *Ngati Apa*—notably those of Elias CJ and Keith and Anderson JJ—tended to combine the two. This is the first time that any major Commonwealth judgment on common law aboriginal title has tied aboriginal title so strongly to reception analysis. It was, I think, an unwitting conflation of two different legal enquiries.<sup>10</sup> Common law aboriginal title is bound in with the character of Crown sovereignty. It articulates a set of principles that although finding latter-day articulation are regarded as having operated *ab initio*, from the moment of that sovereignty. Reception analysis asks the essentially different question of whether particular common law or statutory principles (matters of English law as at the date of sovereignty) have been received subsequent to foundation. It requires judicial exploration of colonial practice and usage—or "local circumstances"—which reveal whether the rule has arrived or not. So it is, for example, that the English law of usury or solemnisation of marriage may not have been "received" because post-foundation circumstances have gravitated otherwise. Aboriginal title is not such a rule of English law prone to reception analysis, for it does not arise from inside English law (as will become plain below). Aboriginal title relates to legal principles

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<sup>10</sup> See also *R v Côté* (1996) 138 DLR (4th) 385, para 49 (SCC), citing B Slattery "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727, 737–738.

the courts will regard as being operative from the time of and within the terms of the Crown's proclaimed sovereignty. The rules of sovereignty cannot be modified or adapted in such a manner by post-foundation "local circumstances". They explain the character of Crown sovereignty from the beginning.

Common law aboriginal title therefore operates within an ever-refining set of principles defining the character and nature of Crown sovereignty. The Court of Appeal turned to those principles in *Ngati Apa* when (collectively) it held that the Crown's sovereignty over the foreshore and seabed gave it an *imperium* (governance) that in principle did not preclude the continuance of the property interest (*dominium*) of Maori. That continuity could be recognised by the High Court applying those common law rules of aboriginal title, or through the Maori Land Court applying its statutory jurisdiction to declare the status of land. It had not been extinguished by general or specific legislation declaring the Crown's sovereign title over the seabed and providing for its management. The Court warned that any such continuity was also subject to Maori establishing the appropriate factual basis to sustain a property interest. Since the case involved the claim to customary title under the statutory regime of Te Ture Whenua Maori Act 1993, the establishment of that factual basis was a matter for the Maori Land Court.

### III A SHORT HISTORY OF THE COMMON LAW DOCTRINE OF ABORIGINAL TITLE

The doctrine of common law aboriginal title emerged in the late 1960s in Canada and Australia as tribal communities in northern Quebec, central British Columbia, and Gove Peninsula sought to prevent intrusive development on their ancestral land. Until then—throughout the 19th century and most of the 20th—the legal position had been that technically their land was vested in the Crown as sovereign, and that any aboriginal interest was protected by and through the Crown. This was an expression of the feudal doctrine of tenures according to which all enforceable legal title to land derived from a Crown grant. Crown sovereignty was regarded in that feudal sense blending *imperium* and *dominium*: the Crown's right to govern also gave ownership of all land until granted away. The reasoning ran that since tribal occupation did not rest upon a Crown-derived basis and remained un-granted land, the tribe had no land rights of which a common law court might take cognisance.

That inability to enforce the tribal title was compounded by the long-standing refusal of the common law to recognise the tribal polity in itself. The tribes were not seen by the common law as distinct polities inside the Crown sovereignty—political beings organised by their own laws—but as a collection of Crown subjects unable to claim any right through this legally non-existent entity: the tribe. This inability to claim rights that were *aboriginal* in character went back to the paternalistic legalism of a highly deferential and hierarchical age when married women and children were also legally disabled and when the view of

the enfranchised male freeholder dominated the Anglo-settler constitutional imagination. It rendered inconceivable articulation by the common law of any notion of aboriginal rights: that is to say, rights vested in tribal peoples as a result of their customary political and cultural form of organisation and lifestyle.

By taking that position throughout the 19th and most of the 20th centuries, the Crown's obligations to its aboriginal peoples were thus depicted as a "political trust" that was morally obliging but legally unenforceable.<sup>11</sup> This made aboriginal groups dependent upon the Crown to commence actions in trespass and maintain other protection of their land. In colonial times this protection was mediated through so-called Protectors and (in North America) Superintendents or "Indian Agents" who nominally discharged the Crown's protective role over the tribes' land. There were two major difficulties with this non-justiciable Crown trust. First, the Crown often did not intervene to remove the acquisitive white squatters, trespassers, and roving stock that were disrupting tribal life. Secondly, it was frequently the Crown itself that was causing or licensing the disruption without any regard for its impact upon the aboriginal inhabitants.

In the late 1960s aboriginal peoples in Canada and Australia looked over to America where tribes, newly endowed with general legal standing,<sup>12</sup> were commencing actions successfully in the federal courts on their aboriginal title. At that time the major American example involved the aboriginal title over Alaska, where large-scale oil development in Prudhoe Bay was being affected by such claims. The Alaska settlement in 1970 was the outcome and sent signals to aboriginal nations in the other common law jurisdictions. They literally followed suit. At that time hydro-electricity projects in northern Quebec, logging in British Columbia, and bauxite extraction in Gove Peninsula had been licensed by the national governments without any consideration of the adverse effect on the aboriginal inhabitants.

The breakthrough case was *Calder v Attorney-General for British Columbia* in the Supreme Court of Canada.<sup>13</sup> The Prime Minister at the time, Pierre Trudeau, had derided aboriginal

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11 This was certainly the case in Canada and New Zealand, where historically the Crown constantly avowed its guardianship duties; in Australia the fiction of *terra nullius* operated and there was less public announcement by the Crown of its trusteeship. Both approaches—non-justiciable trusteeship and *terra nullius*—operated to the same end, preventing enforcement in the courts of the tribal property rights.

12 See now 28 USC § 1331, which until 1980 limited district courts' jurisdiction through the "amount in controversy" requirement: *Yoder v Assiniboine and Sioux Tribes of Fort Peck Indian Reservation* (1964) 339 F 2nd 360 (9th Cir), which was eventually removed from "general federal question" jurisdiction in 1980: Pub L 96-486, § 2(a), 94 Stat 2369 (codified at 28 USC § 1331(a) (1988)).

13 *Calder v Attorney-General for British Columbia* (1973) 34 DLR (3rd) 145 (SCC) ["*Calder*"].

title as a "historic might-have-been", but this case forced him into a famous climb-down. *Calder* effectively required the Canadian Government to enter into comprehensive claims settlements: a process that did not really gain momentum until the 1990s. This pattern subsequently recurred in Australia after *Mabo v Queensland (No 2)* (1992)<sup>14</sup> and appears imminent in New Zealand after *Ngati Apa*. It is one in which court judgment provides tribes with an undefined set of property rights, the existence of which is either dealt with through litigation or by negotiation and settlement (or, in Australia, Indigenous Land Use Agreements) with the tribal owners. New Zealand's Foreshore and Seabed Bill contemplates that same pattern.

Around the same time as *Calder*, a first instance Australian case *Milirrpum v Nabalco Proprietary Ltd*<sup>15</sup> took the opposite line and refused to recognise any common law basis for aboriginal title. That effectively remained the Australian position until *Mabo* dramatically overruled it. The *Mabo* judgment produced a result not unlike the New Zealand one, in that the Commonwealth Government, unwilling to leave doctrinal development to the vagaries of the adversarial system and worried about the cloud of legal uncertainty over Crown land in the meanwhile, shoehorned the common law aboriginal title into a statutory form: the Native Title Act 1993.

From the late 1970s the Canadian courts, like the American, developed a jurisprudence of common law aboriginal title of increasing sophistication. The Canadian jurisprudence was accentuated by the constitutional recognition of "existing" aboriginal and treaty rights in 1981: a step protecting those rights from unjustified executive or legislative abridgement. Australia surged into this cross-jurisdictional momentum in the 1990s and very quickly acquired a legalism as intense as the Canadian. With those break-through cases it became clear that aboriginal title could be enforced through the courts and that the Crown was regarded as holding its paramount title subject to the "aboriginal burden" and a fiduciary obligation in its treatment of those occupation rights. The old notion of a moral, non-justiciable trust had gone.

The impact of *Calder* and *Mabo* within the political systems of Canada and Australia respectively was immense. Indeed, the similarities with the New Zealand reaction to *Ngati Apa* are very close: disbelief, accusations of judicial manipulation and politicisation, underpinned by a prevalent reluctance to accept that aboriginal practices over or use of land could have any legal consequence. Some property rights, it seemed, were more equal than others.

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14 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ["*Mabo*"].

15 *Milirrpum v Nabalco Proprietary Ltd* (1971) 17 FLR 141 (NTSC).

Yet, as already intimated, the precepts of aboriginal title had been accepted in the New Zealand legal system long before *Ngati Apa* gave them such prominence. The applicability of the doctrine in New Zealand had been mooted during the 1980s and after, but apart from the fisheries settlement the actual impact of common law aboriginal title was slight. Papers written by me circulated in 1983 on this matter, mainly through the agency of my father, Deputy Chief Judge A G McHugh of the Maori Land Court. They were published in legal journals in 1984,<sup>16</sup> after presentation to the Waitangi Tribunal hearing of the Kaituna River claim.<sup>17</sup> In *Te Weehi v Regional Fisheries Officer* (1986),<sup>18</sup> Williamson J recognised the common law basis of Maori fishing rights. This, potentially, was the New Zealand breakthrough case, but the Crown did not appeal, and the publicity it attracted, though sizeable, was soon superseded by the intense politics of the fisheries negotiations. The Government's fear of an authoritative Court of Appeal judgment led by Sir Robin Cooke,<sup>19</sup> then regarded as an activist judge, undoubtedly propelled fisheries negotiations during the late 1980s. At that time there was much talk in New Zealand—not least before the Waitangi Tribunal—of the so-called "Boldt Judgments" (1974 and 1979) in which the "treaty tribes" of the American Pacific Northwest had been given a 50 per cent share of the allowable catch.<sup>20</sup> Indeed while Prime Minister Geoffrey Palmer was out of the country during the winter of 1989, the Acting Prime Minister, Richard Prebble, introduced a Bill proposing the blanket extinguishment of all Maori rights of fishery. Fortunately this

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16 "Aboriginal Title in New Zealand Courts" (1984) 2 Cant LR 235; "The Legal Status of Maori Fishing Rights in Tidal Waters" (1984) 14 VUWLR 247.

17 Waitangi Tribunal *Kaituna River Claim: Wai 4* (Waitangi Tribunal, Wellington, 1984) para 5.6. On a personal note, it is worth noting that the solicitor for the Ngati Pikiao claimants was Ken Hingston, who, as judge of the Maori Land Court, later applied the common law principles in the first instance hearing of the Marlborough Sounds application. My father had given Chief Judge Durie and Ken copies of my (then unpublished) papers. Ken and I spent a considerable amount of time going through the Ngati Pikiao submissions on this area—coaching he gleefully told me had paid off when he visited me in Cambridge soon after retiring. Indeed, he was thrilled that virtually his last judicial act had been to deliver the Marlborough Sounds judgment.

18 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682 (HC) ["*Te Weehi*"].

19 Sir Robin Cooke (as he then was) was tremendously supportive of my work, particularly during the late 1980s and early 1990s when these issues were before the courts, although he was never called upon to adjudicate directly on common law aboriginal title. He requested and kept a personal copy of my Cambridge dissertation (*The Aboriginal Rights of the New Zealand Maori at Common Law* (PhD Thesis, University of Cambridge, 1987)).

20 *United States v Washington* (1974) 384 F Supp 312 (WD Wash), affirmed (1975) 520 F 2d 676 (9th Cir). See more recently *United States v State of Washington* (1998) 157 F 3d 630 (9th Cir) [shellfish]. In a highly controversial series of judgments, it was held that the right to fish held by tribes of the Pacific North-West of the United States under treaty with the Federal Government entitled them to 50 per cent of the allowable catch.

attempt to put Maori rights back on the old footing of a non-justiciable "moral" imperative did not prevail over the belief that the Maori claim had a footing in law.<sup>21</sup> Although ostensibly presented as a Treaty-based settlement, common law aboriginal title was undoubtedly a strong imperative behind the 1992 fisheries legislation.<sup>22</sup>

The sea fisheries settlement was the biggest moment for common law aboriginal title until *Ngati Apa*. However, during the 1990s its continuing possibilities were acknowledged by the Law Commission,<sup>23</sup> and in a report I prepared for the Ministry of Justice in 1998,<sup>24</sup> as well as in occasional dicta from the courts, including the Court of Appeal.<sup>25</sup>

Why then, one might ask, did the common law doctrine sit in the background?

Through the mid-1980s and into the 1990s the New Zealand jurisprudence of Maori claims largely revolved around the network of statutes recognising the "principles of the Treaty of Waitangi". A raft of legislation was passed by the Fourth Labour Government and during the first of the Bolger ones incorporating "Treaty principles" into the statutory scheme. The notable statutes included the extension of the Tribunal's jurisdiction to historical claims under the Treaty of Waitangi Amendment Act 1985, the State-Owned

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- 21 Relations between the Court of Appeal and the executive had been strained as a result of the *Maori Council* cases (1987–1990), when the President indicated that the courts would have the final say on the "Treaty principles" section of the State-Owned Enterprises Act 1986 (s 9). Prime Minister Geoffrey Palmer was reportedly extremely angry upon learning of the contents of the Bill. In the late 1980s the prevailing mood was such that to many lawyers the Treaty seemed poised to acquire a deep-reaching constitutional status. The more earth-bound pronouncements of courts in the 1990s dashed those heady and slightly naïve expectations. Nonetheless, I was in New Zealand when the Bill was introduced and well recall the outcry. I have strong memories of sitting with counsel for Maori one drizzly evening overlooking Oriental Bay in Wellington, talking about attacking the Bill through the courts.
  - 22 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. See also Pete Southen "*Te Weehi*: The Key that Opened the Door to the Establishment of Maori Fishing Rights" (unpublished paper). Southen interviewed all the living participants in the fisheries negotiations, including Sir Geoffrey Palmer, Sir Tipene O'Regan, Henare Riki Tau, and senior policy analysts at the Ministry of Fisheries.
  - 23 Notably throughout New Zealand Law Commission *The Treaty of Waitangi and Maori Fisheries – Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi* (NZLC PP9, Wellington, 1989).
  - 24 The paper had been commissioned by the Department of Justice while Sir Douglas Graham was Attorney-General and Minister for Treaty Negotiations. Sir Douglas spent several months in Cambridge after he retired from politics. We met regularly to discuss legal matters—primarily the question of customary rights, which he believed was bound to crop up in New Zealand courts in the next few years. *Ngati Apa* proved him right.
  - 25 *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641 (CA); *Te Runanga o te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 24 (CA); *Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 363 (HC).

Enterprises Act 1986, the Resource Management Act 1991, and Te Ture Whenua Maori Act 1993. This Treaty-driven platform was a far more commodious one than common law aboriginal title, as it straddled historical as well as contemporary claims and used a vastly more flexible and deeper-reaching legalism.<sup>26</sup> That did not make common law aboriginal title irrelevant, so much as reduce its profile in the face of Treaty jurisprudence.

Here more careful thought must be given to the role of the common law in the public sphere during the last quarter of the 20th century. There is a risk of putting common law aboriginal title into an intellectual compartment apart from the modern history of public law. In this light the formation of the common law doctrine does not seem "activist" or "politicised" so much as consistent with what judges were doing in other spheres of public law. In 1971 Lord Denning famously said:<sup>27</sup>

[T]here have been important developments in the last 22 years which have transformed [judicial review]. It may truly now be said that we have a developed system of administrative law.

In 1971 that statement may have been a little premature and self-congratulatory, but by the end of that decade it undoubtedly held good for all common law jurisdictions in Canada and Australasia. During the 1970s judges shed their historical deference to the executive and took a more active and interventionist profile in their approach towards judicial review of executive action. Key principles of legality, rationality, and natural justice were refined and amplified as officials found they no longer had an unfettered and unreviewable discretion. This account of the post-war rise of administrative law is commonplace.

The core predicates of common law aboriginal title are consistent with the general trend in public law during the past quarter-century increasingly becoming known as "judicialisation". These public law values reflect the courts' refusal to countenance unbridled executive discretion, their respect for practices and suppositions that individuals have been exercising continuously with Crown licence and that now face disruption by executive fiat,<sup>28</sup> the principle of non-discrimination, and the rights-based approach at large. In that light, common law aboriginal title is simply the accommodation of tribal peoples within the ordinary scope of administrative law in the last quarter of the 20th century. What would have been more surprising and vastly less defensible would have been the judicial failure to extend those principles to tribal peoples. Put that way and

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26 R Boast "Treaty Rights or Aboriginal Rights?" [1990] NZLJ 32.

27 *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, 189.

28 The doctrine of legitimate expectation is based upon such a principle.

against the background circulation of the doctrine in the New Zealand legal system for a good 20 years, the *Ngati Apa* judgments' recognition of aboriginal title was to be expected.

In many ways the legal history of the common law doctrine has reflected the wider historical path of Anglo-Commonwealth public law in the last quarter of the 20th century. Yet it is important to reiterate that common law aboriginal title did not emerge as historical truth. Courts did not pretend that officials in the 19th century were operating other than to the widely held and rarely controverted principle of non-justiciability. Rather, aboriginal title emerged as legal doctrine concerned with the identification and articulation of extant rights, the protection of which courts were once but no longer content to leave to executive discretion. Aboriginal title did not invent the recognition of tribal property rights for the Crown, and governments had purported to do that throughout the history of Anglo-American colonialism. It simply removed the shield of non-justiciability.

The foundational cases were essentially concerned with protecting extant tribal rights over land. In its early stages, common law aboriginal title was largely preservationist in terms of the goals it sought and the situations in which it was pleaded. That is, aboriginal nations, like the Nisga'a of British Columbia or Meriam of the Torres Strait, were largely concerned with preventing disruptive encroachment onto their land and into their traditional lifestyle. The aims sought in the early landmark cases essentially related to the halting of inroads into their territory by logging, bauxite extraction, and the like; the thrust of common law aboriginal title in its earliest guise was essentially towards preserving the integrity of aboriginal culture as practised on and from an ancestral land base. The extant rights that litigation sought to protect had a clear connection with the traditional lifestyle.

As these judgments produced an institutional acceptance through government and the private sector of aboriginal title, tribal nations began to probe the scope of the doctrine being formed by the national common law. The early judgments themselves left much unsaid and unexplained about the nature of the aboriginal title. Tribal nations insisted, not unreasonably, that their property rights were not bounded by some moribund, museum-like notion of traditionalism, but that their aboriginal ownership held as much potency as non-indigenous ownership of land. Aboriginal title was, in other words, full ownership or the equal of fee simple (freehold) title qualified only by the rule of inalienability. This was a logical extension of the notion of aboriginal title as ownership, but one that had difficulty taking full root in the jurisprudence of all jurisdictions. Since the early cases and initial notion of aboriginal title had been preservationist and protective in character, courts were unwilling to disconnect it from its early defensive goal.

The hallmark of the aboriginal title was its inalienability other than to the Crown, which meant that any economic development through arrangements with third parties (that is, the settler community) had to be brokered through the Crown transmuting the title into tradeable form. Tribal nations sought increasingly to extend their aboriginal title into



more dynamic and modern forms within the compass of the common law doctrine, but that ambition was restrained by the doctrine's juridical foundation. Apart from the inflexible rule of inalienability, the restraints largely emanated from the preservationist origin. Litigation has brought the limitations of judicially generated doctrine into increasingly sharper relief. Ultimately these come down to the consequences of the adjective "aboriginal". There has been considerable aboriginal title case law in Canada and Australia in the past decade, much of it springing from the hope of tribal nations to exploit those rights in a more proactive manner. In true common law style, this case law has resulted in an accretive corpus of doctrine of increasing sophistication and technical detail.

However, for tribal nations the outcome has been decidedly mixed. On the one hand, common law aboriginal title has prodded governments into major settlements; yet, on the other, the doctrine has been fastened to its original preservationist aim (although, again, the extent of that varies across and within the jurisdictions). That mooring—some consider it a shackling—has stifled tribal nations' attempts to realise much of their aboriginal title's commercial potential. It has been further licensed by division within these polities as to the appropriate means of pursuing economic development—an objective in respect of which all political societies naturally harbour a range of diverse viewpoints. In that respect the limitations of common law aboriginal title have suited the more conservative and frustrated the more ambitious. Predictably the judicial disposition in the articulation of those principles has tended more towards the former rather than the latter, especially in the political landscape of the 1990s and the new century where settlements have become regular.

The aboriginal title jurisprudence of the 1990s captures this dialectic between a conserving traditionalism, on the one hand, and the dynamic, more proactive on the other. It has been caught in a mixed world where the new juridical theme of reconciliation (negotiated outcomes and non-adversarial relations with the Crown based on dialogue) tangles with the old, ingrained hostilities. Increasingly and in this environment of deal-making, courts have been reluctant to enlarge and modernise the scope of common law aboriginal title. The doctrine has put aboriginal peoples at the negotiating table—and the courts are constantly framing their judgments to encourage such dialogue—but their judgments have become more tactical and reluctant in terms of increasing the doctrine's leverage for the tribal ownership. In short, the cautious aboriginal title jurisprudence of the past decade is like the guarded tenor of the recent New Zealand jurisprudence of Treaty review. It has occurred in a broader context of negotiations and settlements, the likelihood of which has plainly tended judges towards a guarded arms-length approach.

It is instructive, then, to envisage the prospective jurisprudence that Parliament is replacing. Even though it will never occur, this will give a critical perspective on the

legislation that has supplanted it as contemplated by the Foreshore and Seabed Bill (as introduced).

#### IV THE FOUR STEPS TOWARDS ESTABLISHING COMMON LAW ABORIGINAL TITLE

The common law doctrine of aboriginal title comprises a number of progressive steps or areas of inquiry. These legal building blocks concern:

- (a) recognition (the consistency test);
- (b) proof;
- (c) nature and extent; and
- (d) extinguishment.

These steps must be applied forensically to each block of land, and this involves an extended, highly particularised interplay between law and fact. Virtually all the aboriginal title cases to date have concerned huge blocks of land covering hundreds if not thousands of square miles. However there is no reason why principles applied to such vast reaches cannot apply to much smaller areas such as a few acres or square miles of outback, or even a few hundred yards of coastline. One sees this more minute form of inquiry in patches of the Australian judgments, as for example in *Ward* where the Argyle mining lease is considered,<sup>29</sup> and in those parts of *Ngati Apa* assessing the specific legislation for the Marlborough Sounds. Aboriginal title has been mostly addressed in large geographical contexts, but the densities of the New Zealand setting will lead inevitably to myriad microscopic inquiries. Necessarily this type of exercise will also occur inside any replacement statutory regime.

##### A Common Law Recognition

The basis of common law aboriginal title is the legal recognition of the continuity of aboriginal property rights upon the Crown's acquisition of sovereignty. Canadian courts took an early lead in elaborating the doctrine, until the flourish of Australian jurisprudence after *Mabo* (1992).<sup>30</sup> The early approach was to base the title upon the factual use and occupation of ancestral land.<sup>31</sup> This remains the Canadian approach.<sup>32</sup> However, the

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29 *Western Australia v Ward* (2002) 191 ALR 1 (HCA) ["*Ward*"], paras 322–335 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

30 *Mabo*, above n 14.

31 *Baker Lake v Minister of Indian Affairs and Northern Development* [1980] 12 FC 518 (FC TD).

32 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 ["*Delgamuukw*"], para 114 Lamer CJC.

Australian courts and legislature have followed Brennan J in *Mabo*<sup>33</sup> and based the aboriginal title upon the continuity of property rights under traditional law and custom. Although much of the Australian case law is based upon the native title legislation, the key definition section of the Native Title Act 1993 (Cth) (section 223) adopts the Brennan approach and expressly calls for the courts to apply the principles recognised by the common law of Australia. The Australian position is summarised in this oft-cited passage from *Fejo v Northern Territory* (1998):<sup>34</sup>

Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law.

The common law of Australia therefore recognises aboriginal title as a form of property right derived from another legal system. It takes a "normative-basis" approach.

The Australian courts have taken this image of intersection both to stress the basis of aboriginal title in the traditional laws and customs regarding land and to highlight that customary system's engagement with another normative system: the common law. It is "critically important to identify what exactly it is that intersects with the common law",<sup>35</sup> and to put this alongside the common law which will "recognise" the continuity of that pre-existing normative order. That co-existence has been characteristically depicted as placing aboriginal title as a burden upon the Crown's radical title, although the High Court has stressed that this notion is not indispensable to such co-existence.<sup>36</sup> Since the sovereignty of the Crown is indisputable in its own courts, the accommodation of the pre-existing normative order of property rights cannot be inconsistent with "fundamental tenets of the common law",<sup>37</sup> especially (though not exclusively) those which go to defining the nature of Crown sovereignty. In other words, the preliminary step of recognition requires verification of whether the traditional property rights claimed are of an order that the common law can recognise. If there is an inconsistency, or if co-existence of the two normative systems is not possible, recognition will not be made. This test of

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33 *Mabo*, above n 14, 58 Brennan J.

34 *Fejo v Northern Territory* (1998) 195 CLR 96 ["Fejo"] para 46 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, and Callinan JJ.

35 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 77 ALJR 356 ["Yorta Yorta"], para 31 (HCA) Gleeson CJ, Gummow and Hayne JJ.

36 *Commonwealth of Australia v Yarmirr* (2001) 184 ALR 113 ["Yarmirr"], paras 42–49 (HCA) Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

37 *Yarmirr*, above n 36, para 77 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

consistency and co-existence is sometimes put in the slightly over-dramatising terminology of Brennan J in *Mabo* warning against "fractur[ing] a skeletal principle of our legal system".<sup>38</sup>

Only one Canadian judge, Justice Binnie in *Mitchell* (2001), has suggested an equivalent test. He stated that "British colonial law presumed that the Crown intended to respect aboriginal rights that were neither unconscionable nor incompatible with the Crown's sovereignty". He held that the international trading/mobility right claimed by the Mohawk community straddling the American-Canadian border was "incompatible with the historical attributes of Canadian sovereignty". It "did not survive the transition to non-Mohawk sovereignty".<sup>39</sup>

For an Australian example, in *Bulun Bulun v R and T Textiles Pty Ltd* (1998) it was suggested that incorporation of cultural knowledge into native title would fracture a skeletal principle of Australian law by upsetting the "inseparable nature of ownership in land and ownership in artistic works".<sup>40</sup> Justice Kirby later explored that suggestion in *Ward* (2001), indicating he had difficulty accepting it. At one end of the spectrum cultural knowledge could plainly be protected through an aboriginal title right to control access, he said, but at the other end lay representations, images, and oral accounts relating to land or waters embodying information highly precious to aboriginal peoples.<sup>41</sup> This too must be part of an aboriginal title, Kirby J said: "If this cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land" as part of a native title.<sup>42</sup> If this is inconsistent with the common law approach, then, he said, "skeletal principles" should not be regarded as immutable, especially when they offend present-day notions of justice and human rights.<sup>43</sup> It will become clear that this conclusion flowed from Kirby's "ownership" approach to native title. The other members of the High Court rejected Kirby's reasoning. In their

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38 *Mabo*, above n 14, 43 Brennan J.

39 *Mitchell v Minister of National Revenue* [2001] 1 SCR 911 ["*Mitchell*"] para 163 Binnie J (concurring with McLachlin CJC, who did not discuss this question of sovereign incompatibility which will probably be canvassed by the Supreme Court if the aboriginal title claims to parts of the Great Lakes, presently going to trial (*Walpole Island First Nation v Canada* [2004] 3 CNLR 351), are taken on appeal).

40 *Bulun Bulun v R and T Textiles Pty Ltd* (1998) 86 FCR 244 ["*Bulun Bulun*"], 256 von Doussa J.

41 *Ward*, above n 29, para 579 Kirby J.

42 *Ward*, above n 29, para 580 Kirby J.

43 *Ward*, above n 29, para 585 Kirby J.

judgment native title comprised a "bundle of rights" that did not include intellectual property rights, because to do so would fracture skeletal principles of the common law.<sup>44</sup>

The foreshore and seabed is one important area where the consistency or "sovereign compatibility" test for common law recognition has had particular application. In *Yarmirr* (2001) the High Court of Australia considered the possibility of a native title determination for the sea and seabed surrounding Croker Island. The Court had to consider at the outset the possibility of the common law's recognising ownership rights over the sea and seabed.

For one judge, the Queenslander Justice Callinan, there could be no native title at all in the sea and seabed as that was inconsistent with the sovereignty of the Crown under Australian common law.<sup>45</sup> The sea represented a region wherever the jurisdictional competence of the Crown could not be affected by any private ownership rights except those it had expressly conferred. Not only could there be no exclusive native ownership over the sea, he said, there could be no stand-alone native title rights at all. Callinan would have struck out the order of the trial judge recognising a set of native title rights in the seas around Croker Island.<sup>46</sup> In taking that approach he was buoyed by the American cases

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44 *Ward*, above n 29, para 59 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

45 *Yarmirr*, above n 36, para 382 Callinan J, rejecting native title over the seabed on grounds of its inconsistency with the nature of sovereign authority recognised by international and municipal law as arising over the sea:

[A] recognition of the reality of the difference between the land mass and the seas; the over-arching importance, for a multiplicity of reasons, such as national defence, foreign relations, strategy, diplomacy and related treaty, trade and commercial considerations, of unrestricted control by the national sovereign of the territorial sea; and, an acknowledgment of the relevance and influence of international law and the history of international relations on the development of the concept of sovereignty over the territorial sea as part of the municipal law.

Callinan J held (para 364) that:

[U]nless and until, by an exercise of sovereignty, dominion is actually asserted, and rights, titles and interests are expressly conferred by the sovereign authority, the common law does not recognise any other rights, titles or interests claimed in or in respect of territorial waters and what lies above and below them.

Kirby J was not altogether consistent on this matter, mixing recognition (consistency) with extinguishment (consider paras 235 (consistency), 281 (extinguishment), 290 (consistency), and 291 (extinguishment)). He also collapses recognition into extinguishment in *Yorta Yorta*, above n 35, para 110 Gaudron and Kirby JJ.

46 The order (*Yarmirr*, above n 36, para 2 Gleeson CJ, Gaudron, Gummow, and Hayne JJ):

5. The native title rights and interests that the Court considers to be of importance are the rights and interests of the common law holders, in accordance with and subject to their traditional laws and customs to:

where, he said, an aboriginal title over the sea and seabed was rejected as inconsistent with federal paramountcy.<sup>47</sup> However, contrary to that depiction and as will be seen later, those American cases did not totally rule out all aboriginal rights over the sea and seabed but simply excluded exclusive ownership or rights.

Justice Kirby (as so often in the present-day High Court) was at the other end of the spectrum. He held that the common law could recognise a native title of "qualified exclusivity", with full and exclusive aboriginal ownership being qualified only by a narrow band of public rights. These were the common law public right of navigation, the related international law right of innocent passage, and statutory fishing licence rights. Thus he thought the order made by the trial judge was not wide enough.

Taking the middle ground and endorsing the order made at trial, the majority stressed that application of the recognition test prevented claims to exclusive ownership or exclusive rights over the sea being recognised by the common law as part of a native title. The inquiry began with an examination of "the sovereign rights and interests which were and are asserted over the territorial sea".<sup>48</sup> It was not necessary to define the powers of Australia under its sovereignty over the territorial sea. Public rights of fishing and navigation inherently "limited" in the sense they defined the nature of the Crown sovereignty acquired and held under its common law prerogative powers.<sup>49</sup> The majority felt it was not so much a question of an exclusive Aboriginal ownership being extinguished as not being capable of any recognition at the outset. That did not prevent the

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(a) fish, hunt and gather within the claimed area for the purpose of satisfying their personal, domestic or non-commercial communal needs including for the purpose of observing traditional, cultural, ritual and spiritual laws and customs;

(b) have access to the sea and sea-bed within the claimed area for all or any of the following purposes:

(i) to exercise all or any of the rights and interests referred to in subparagraph 5(a);

(ii) to travel through or within the claimed area;

(iii) to visit and protect places within the claimed area which are of cultural or spiritual importance;

(iv) to safeguard the cultural and spiritual knowledge of the common law holders.

47 *Inupiat Community of the Arctic Slope v United States* (1982) 548 F Supp 182 (Dist Alaska) and *Native Village of Eyak v Trawler Diane Marie Inc* (1998) 154 F 3rd 1090 (9th Cir). These cases, like Justice Callinan in *Yarmirr*, above n 36, collapse questions of *imperium* (jurisdiction) into those of *dominium* (ownership).

48 *Yarmirr*, above n 36, para 50 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

49 *Yarmirr*, above n 36, para 60 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

existence of non-exclusive aboriginal title rights in the sea, and none of the past or present Australian law was inconsistent with the existence of such rights.

The Court of Appeal judgments in *Ngati Apa* accepted that some common law aboriginal title *might* subsist over the foreshore and seabed, and that such title would not be regarded as incapable of recognition per se by the common law. The judgments indicated that a Callinan-like position was untenable in New Zealand law: that is, there could be no outright rejection of any aboriginal title for Maori over the seabed whatsoever. That meant, effectively, that this initial test of recognition would be regarded as met by a New Zealand court. However, the choice then came between the two remaining approaches in *Yarmirr* between admitting possible ownership equivalent of freehold title (Kirby's "qualified exclusivity") or lesser specific rights to perform a particular activity comprised in a bundle. In making submissions to the Waitangi Tribunal I argued that a version of the majority approach would be taken in New Zealand. After a lengthy analysis of this submission and the contrary view of counsel for Maori, the Waitangi Tribunal came to a similar conclusion, commenting that it would require a "bold" court to take the Kirby approach.<sup>50</sup> Callinan's line made too absolute the common law notion of the sea as a special jurisdictional space with no room for private rights other than those expressly created. Under English law certain private rights have been recognised in these regions (though very rarely ownership in the exclusive fee simple sense).<sup>51</sup> If non-aboriginal rights over such parts can be recognised by the English common law, one wonders why not the Australian or New Zealand? In any event, *Te Weehi* and *Ngati Apa* indicated the Callinan line would have no purchase in New Zealand.

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50 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy*, above n 6, para 3.3.4.

51 Joseph Chitty Jr *A Treatise on the Law of the Prerogatives of the Crown* (Joseph Butterworth and Son, London, 1820) 142:

[The soil or *fundum maris*] may be claimed either by charter or prescription ... yet it is to be observed that the soil can only be appropriated *sub modo*; for ... though the dominion either of franchise propriety be lodged by prescription or charter in a subject, yet it is charged or effected with that *jus publicum* that belongs to all men.

The few cases recognising a fee simple right over the foreshore arise from the interpretation of the Crown's grant where the sea is identified as the boundary (*Attorney-General v Burridge* (1822) 10 Price 350), but these are acknowledged as rare. Prescription can only give rise to use rights (easement) and not fee simple title (compare *Ngati Apa*, above n 1, para 133 Keith and Anderson JJ, where English cases are cited without any distinction being made between proprietary title to sea-covered land and lesser proprietary interests of the character of an incorporeal hereditament). In my view it is overloading this meagre authority, with its very cautious recognition of proprietary rights over sea-covered land, to extend it to allow a presumptive territorial aboriginal title over the entire coastline of a colony. Of course, any such private rights are always subject to the recognised public rights (see below n 55).

The Kirby approach, at the other end of the spectrum, gave strong priority to the indigenous law notion of land and sea as a continuous entity. It started from the premise that the sea was to be regarded in the same light as dry land, as that was the holistic approach of the aboriginal normative system. This key supposition was oiled strongly by the terms of the Native Title Act itself, as the Waitangi Tribunal noted.<sup>52</sup> It meant that there was also a *prima facie* right to exclude, but one qualified, Kirby emphasised, by the narrow range of defined (and limited) public rights. This approach started from the premise that there was an initial right to exclude, or, in other words, that there might be exclusive private ownership of the sea and seabed. That, however, took an initial position that the common law could not recognise at the outset. The very nature of Crown sovereignty under the common law characterises the foreshore and seabed as a special juridical space and prevents it being treated presumptively as dry land. Kirby was, in other words, operating from a postulate outside the common law ken. Whereas applying the recognition test to native title in the sea Callinan erected a wall beyond which he could not proceed, Kirby ignored or downplayed it altogether, implicitly treating the Native Title Act as resolving the question.

The majority approach absorbed elements of both the Callinan and Kirby approaches. It put both normative systems at a true intersection where the tenets of neither legal system were accorded primacy but an accommodation was reached. Unfortunately their reasoning on the recognition test was terse, but its thrust can be teased out more fully. This aspect of their judgment—the failure to explain how the right to exclude cannot be accommodated by the common law—is, it will be seen, a feature of the majority's reasoning applied to dry land (where it is vastly less sustainable). Unlike Callinan, the majority agreed that some native title rights over the sea were capable of recognition, but the manner in which that occurred needed also to acknowledge the common law's historical treatment of the sea as a special juridical space subject to much wider overarching notions of public interest than dry land. They accepted that the trial judge's order validly identified the range of aboriginal title interests that might be recognised, but equally they accepted that alongside those rights there was a public element broader (though unelaborated) than that identified by Kirby.

This approach can be seen as a balancing one that allows both an aboriginal and public band of interest in the sea and seabed. It is also consistent with the High Court's avowed approach since *Wik* where it emphasised the possibility of the co-existence of aboriginal title and other property rights (private or, in the case of the sea, public).<sup>53</sup> Here the aboriginal title rights in the seabed co-existed with the public interest and the rights (such

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52 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy*, above n 6, para 3.3.2.

53 *Wik Peoples v Queensland* (1996) 187 CLR 1 ["Wik"].



as fishery licences) carved out from it. In that sense the majority's approach to recognition of aboriginal title over the seabed in *Yarmirr* gave a principled compromise between Callinan and Kirby. It was the "bundle of rights" approach towards which the Waitangi Tribunal and I believed a New Zealand court would tend in exercise of the inherent jurisdiction.

From that it followed, I submitted to the Waitangi Tribunal, that any (prospective) New Zealand statute declaring that Maori could not hold exclusive ownership of the foreshore and seabed would not extinguish any rights they might hold under common law. Since the common law could not recognise exclusive ownership of the foreshore and seabed (or "territorial aboriginal title"), any statutory declaration to that effect would not be removing a vested legal right. Of itself, the inherent jurisdiction could not deliver exclusive ownership of the foreshore and seabed, although that was not to say that the statutory jurisdiction of the Maori Land Court was similarly incapable. Yet the inability of the common law to render exclusive ownership or territorial title to those parts did not prevent there being non-territorial rights—and those, I submitted, could in some cases be a very substantial bundle.

Clause 29 of the Foreshore and Seabed Bill would allow the High Court to make an order that a group "but for the vesting of the full legal and beneficial ownership of the public foreshore and seabed in the Crown ... [would] have held territorial customary rights to a particular area of the public foreshore and seabed at common law." This provision for territorial customary rights (TCRs) effectively answers the recognition question in the affirmative. A New Zealand court would reason that in enacting clause 29 Parliament was recognising the legal possibility of exclusive Maori ownership, and in that regard has provided for more than the common law by itself would have allowed. This would seem to be a response not to any requirements of the common law so much as the history of the statutory jurisdiction since the 1860s. Long before courts articulated common law aboriginal title as a burden on the Crown's sovereign ownership, Maori had brought claims to the foreshore before the Maori Land Court based on the native land legislation. Even *Ninety Mile Beach* did not reject the viability of such claims so much as explain how they had disappeared. The TCR jurisdiction to be given to the High Court refers to the common law as the source, yet analysing *Ngati Apa* in the light of *Yarmirr* shows that it was the statutory rather than the inherent jurisdiction that carried the possibility—and a remote one all judges intimated—of exclusive Maori ownership rights (territorial title) over the foreshore and seabed.

In interpreting clause 29 it would be most unlikely that a New Zealand court would cleave to the position that legislative provisions anticipating exclusive Maori ownership rights were ineffectual because, to paraphrase a well-known (indeed, notorious) saying, a

statute cannot call what is non-existent into being.<sup>54</sup> Given the choice, a court would always take the interpretive option giving statutory provisions operative scope—for otherwise, Parliament would not have put them there. As a result of this clause, the conclusion offered by my submissions and endorsed by the Tribunal would no longer hold. Potentially there could then be the full range of aboriginal title rights over the foreshore and seabed: full territorial title (the TCR regime) outside the common law's gift, plus the bundled or stand-alone customary rights already inside it.

Given the coexistence at common law of public and aboriginal bands of right over the foreshore and seabed, the question became one of specifying the nature of each. The aboriginal one will be considered more fully in a moment, but at this stage the public band might be considered briefly. Defining the extent of this is a task that the courts in all jurisdictions have tended to sidestep where possible. *Yarmirr* is a good example in that while all judges agreed there was a public band, only one—Justice Kirby, ever the loner—attempted to define its content. The other judges simply said that it was there: one thinking it too wide for any aboriginal one to run alongside; the majority thinking co-existence of public and aboriginal bands was feasible. Certainly rights of navigation, landing, and sea-fishing have been included in the range of public rights at law, but the question of recreational user has been more problematic.<sup>55</sup> The folksy belief of the Anglo-settler communities in Australasia that they have a "right" of recreational user is far from clear in or confirmed by the case-law. Enumerating those public rights is a task that the Foreshore and Seabed Bill attempts. For the first time New Zealand law will specify what rights the public have in and over the beach and sea. It also establishes a mechanism for the ascertainment of the Maori band of interest, which brings one back to the question already asked: the extent to which that statutory mechanism diminishes or trims the common law rights that the Court of Appeal acknowledged may be there. This raises the second question of proof of aboriginal title.

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54 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 79 Prendergast CJ. The phrase was used so that a statutory reference to native title was not interpreted as giving it legal cognisability.

55 The recognised public rights are those of navigation and landing. There are no other general public rights over the foreshore. Thus, there is no right at common law to bathe in the sea, and no public right of access over a private foreshore for that purpose (*Blundell v Catterall* (1821) 106 ER 1190; *Brinckman v Matley* [1904] 2 Ch 313). The foreshore is not a public highway (*Llandudno UDC v Woods* [1899] 2 Ch 705); nor is there a public right to shoot wildfowl there (*Fitzhardinge (Lord) v Purcell* [1908] 2 Ch 139). There is no public right to collect sea coal washed ashore (*Beckett (Alfred F) Ltd v Lyons* [1967] Ch 449). See arguing in favour of a common law right of recreational user Edward Hale's rather polemical pamphlet of 1865, reprinted as an appendix in S A Moore *A History of the Foreshore and the Law Relating Thereto* (3 ed, Stevens and Haynes, London, 1888).

### B Proof of Aboriginal Title

Canadian law has made a distinction between aboriginal "title" (exclusive use of land) and aboriginal "rights" (which involve lesser, stand-alone rights dissociated from a claim to exclusive ownership). In New Zealand that distinction between full ownership and lesser rights over land has been carried by the expressions "territorial" and "non-territorial" aboriginal title. Australia, it will be explained in the next section (and Justice Kirby excepted), recognises only non-territorial native title. The importance of the distinction in Canadian law is that different standards of proof apply to the different types.

In Canada an aboriginal *title* is proven by factual material disclosing the claimants' exclusive use of and presence on land.<sup>56</sup> The Canadian test for an aboriginal *right* focuses on the integral, defining features of the relevant aboriginal society before European contact. A *right* claimant must prove that a modern practice, custom, or tradition has a reasonable degree of continuity with a practice, tradition, or custom that was in existence prior to contact with the Europeans. The practice, tradition, or custom must have been integral to the distinctive culture of the aboriginal people, in the sense that it distinguished or characterised their traditional culture and lay at the core of the aboriginal people's identity.<sup>57</sup> Hence Canadian courts have held that there is no aboriginal right to transport goods across the United States–Canada border,<sup>58</sup> nor an aboriginal right to conduct gaming on First Nations land,<sup>59</sup> nor a right of commercial fishery.<sup>60</sup>

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56 *Delgamuukw*, above n 32, para 114 Lamer CJC:

However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, *Common Law Aboriginal Title* (1989), at p. 7. Thus, in *Guerin*, *supra*, Dickson J. described aboriginal title, at p. 376, as a "legal right derived from the Indians' historic occupation and possession of their tribal lands". What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward: see Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (1997), 135, at p. 144. This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that "aboriginal title pre-dated colonization by the British and survived British claims of sovereignty" (also see *Guerin*, at p. 378). What this suggests is a second source for aboriginal title -- the relationship between common law and pre-existing systems of aboriginal law.

57 *Mitchell*, above n 39, affirming and applying *R v Van der Peet* [1996] 2 SCR 507 ["*Van der Peet*"]. This test has been controversial as a "frozen in time" approach.

58 *Mitchell*, above n 39.

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

The Canadian case law has opened and widened that unhelpful gap in the standards of proof for an aboriginal title, on the one hand, and an aboriginal right, on the other.<sup>61</sup> The pre-contact approach towards identification of an aboriginal right was heavily criticised as ossifying the property right (such as a fishing or hunting right) as a museum-piece frozen in pre-contact form. Consequently the Supreme Court soon took a more expansive approach to definition of an aboriginal title, indicating that it could hold a contemporary economic dimension (unlike a right).<sup>62</sup> The consequence of this restrictive approach has been to render almost entirely empty the category of non-territorial aboriginal title. Where "rights" have any presence in Canadian law nowadays it tends to be the result of their basis in treaty,<sup>63</sup> rather than emanation from the common law.

The Canadian test for title requires proof of exclusive use and occupation at the time of Crown sovereignty. This test has received surprisingly little analysis by the Supreme Court, although that will change in the next year as a result of the pending appeals in the *Bernard*<sup>64</sup> and *Marshall*<sup>65</sup> cases. In *Delgamuukw*, Lamer CJC noted that there were degrees of occupation, and there must be proof of occupation "sufficient" to establish title. Anything less would result in (and must be proven to the test set for lesser non-territorial) rights. The proof needed for title would come from evidence of activities on the land, including the construction of dwellings, cultivation of fields, and regular use of definite tracts of land for hunting, fishing, or otherwise exploiting its resources. In assessing the sufficiency of the occupation, the group's size, manner of life, material resources, technological abilities, and the character of the lands claimed could be considered.<sup>66</sup> Lamer stressed that this proof must take account of both the common law and the aboriginal perspectives.

The "common law perspective" has received an authoritative analysis by Professor Kent McNeil in his 1989 book *Common Law Aboriginal Title*. Professor McNeil distinguishes

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60 *Van der Peet*, above n 57.

61 For a recent indication of the absurdities flowing from the pre-contact element of an aboriginal right, see *Treaty Eight Grand Chief Halcrow v Attorney-General of Canada* [2003] FCT 782 ["*Treaty Eight Grand Chief Halcrow*"], in which it was held that the duty to consult in relation to an aboriginal right had to arise out of a practice of cultural significance in continuity with pre-contact practices, customs, or traditions.

62 *Delgamuukw*, above n 32, para 169 Lamer CJC.

63 See Thomas Isaac *Aboriginal and Treaty Rights in the Maritime: The Marshall Case and Beyond* (Purich, Saskatoon, 2004).

64 *Bernard v The Queen* [2003] NBCA 55. This case illustrates the tendency in Canadian law for First Nations to argue either treaty *rights* or aboriginal *title*.

65 *R v Marshall* [2003] NSCA 105 ["*Marshall*"].

66 *Delgamuukw*, above n 32, para 149 Lamer CJC.

between the two ends of the "occupation" scale (that is, the necessities of fact) set by the common law as sufficient to amount to "possession" (a legal condition) to bring proceedings.<sup>67</sup> At one end there is the minimal occupation that would permit a person to sue a wrong-doer in trespass, and at the other there is the onerous standard required by the common law to ground title in adverse possession such that the statutory limitations period would be regarded as running. The standard of occupation for an aboriginal title falls into the middle ground between those extremes, argues Professor McNeil, distinguishing between "occupation" and "occupancy". He says:<sup>68</sup>

[O]ccupation must be distinguished from occupancy. The latter occurs when a person either enters into occupation of an unowned thing, or is in occupation when a thing becomes unowned. This person, who is known as an occupant, is accorded not only possession, but a "title by occupancy" as well ...

McNeil is clear that occupancy might be a rare thing for land in England, but argues that the "general occupant" approach is the most appropriate standard for aboriginal title. The "general occupant" is someone asserting possession over land where no one else has a present interest or with respect to which title is uncertain. He then examines this category of title by occupancy and the nature of occupation required:<sup>69</sup>

What, then, did one have to do to acquire a title by occupancy? ... It appears ... that ... a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts "being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider." There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred. Significantly, the acts and intention had to relate only to the occupation—it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the vacant estate, for the law cast it upon him by virtue of his occupation alone. ...

Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. Generally, any acts on or in relation to land that indicate an intention to hold or use it for one's own purposes are evidence of occupation. Apart from the obvious, such an enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used.

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67 Kent McNeil *Common Law Aboriginal Title* (Oxford University Press, Oxford, 1989) 197–198.

68 McNeil, above n 67, 73.

69 McNeil, above n 67, 198–200.

This test, giving weight to the nature of the land and the purposes for which it can be reasonably used, was applied by the majority of the Nova Scotia Court of Appeal in *Marshall* (2003):<sup>70</sup>

Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they would be if dealing with enclosed, cultivated land. Perhaps most significantly, and to use words quoted by *Pollock and Wright*, it is impossible to confine the evidence to the very precise spot on which the cutting was done: *Pollock and Wright* at p. 32. Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant.

In *Marshall* the Mi'kmaq appellants claimed an unextinguished aboriginal title over Nova Scotia, including the right to cut timber on Crown land as an incident of that title. Described at trial as a "moderately nomadic" people, the Mi'kmaq insisted that the term was a misnomer since there was a pattern to their subsistence quest:<sup>71</sup>

They knew the land and the resources that it had to offer. Even though they might not return to the same spot each year their knowledge of the resource base would mean if a particular resource was not available in one area in a given year they knew where else to look.

Adopting the Mi'kmaq perspective of territoriality and ownership, the majority applied Professor McNeil's standard and held that there was "sufficient" occupation. They were clear that a "more stringent standard would not be consistent with the culture of a people whose 'subsistence quest' through hunting, fishing and gathering led them to frequent movement within the territory they considered theirs."<sup>72</sup>

The *Marshall* case is, however, likely to be regarded more cautiously by the Supreme Court of Canada on the question of continuity. The Nova Scotia Court of Appeal noted that in all the aboriginal title cases till then the proof of exclusive occupation at the date of Crown sovereignty had been shown through proof of present-day presence. This proof worked backwards to the pre-sovereignty era by establishment of continuous, uninterrupted occupation. Indeed, the Supreme Court had discussed the question of proof through contemporary presence and how the requirement of continuity did not need an unbroken line of exclusive occupation so much as a "substantial maintenance of the connection' between the people and the land".<sup>73</sup> The Supreme Court explained this test of

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70 *Marshall*, above n 65, para 138 Cromwell and Oland JJA.

71 *Marshall*, above n 65, para 152.

72 *Marshall*, above n 65, para 156.

73 *Delgamuukw*, above n 32, para 153 Lamer CJC.

present-day occupation working backwards on grounds that "evidence of pre-sovereignty occupation may be difficult to come by".<sup>74</sup> The Nova Scotia Court of Appeal held, however, that if evidence of pre-sovereignty exclusive occupation was available, then there was no requirement of continuity. Such a requirement only operated where evidence of pre-sovereignty occupation was lacking and the proof on offer operated from the present day backwards. The majority thus distinguished the case at bar from those earlier applying the continuity requirement and concluded:<sup>75</sup>

To return to the place of continuity in Canadian aboriginal title cases, I would conclude that continuity of occupation from sovereignty to the present is not part of the test for aboriginal title if exclusive occupation at sovereignty is established by direct evidence of occupation before and at the time of sovereignty. This view is consistent with the basic principle underpinning *Delgamuukw* that title crystallizes [sic] at that time. It also responds to the concern that requiring continuity of occupation after sovereignty would undermine the purpose of s. 35 by giving effect to displacement of aboriginals by Europeans as a result of post-sovereignty indifference to aboriginal rights. This approach is also mandated by the clear statement by the Court that the central significance requirement in title cases is "subsumed" by the requirement of occupancy. Subject of course to arguments relating to abandonment, cession and extinguishment, aboriginal title crystallizes at sovereignty and is made out by proof of exclusive occupation as of that date.

The approach of the Nova Scotia Court of Appeal cuts against the grain of the case law in the Supreme Court of Canada and the High Court of Australia, where aboriginal title has been treated as a mechanism for protecting present-day use and occupation so necessitating proof of continuous association (factual or normative). In *Delgamuukw* the Supreme Court of Canada accepted that this association need not be completely continuous (so long as it is substantially uninterrupted), and that it can be extended from one area into another even after Crown sovereignty. It did stress, however, that aboriginal title is the consequence of an enduring association with and presence upon ancestral territory (such as that of the Gitksan or Wet'suwet'en in *Delgamuukw*). While the Supreme Court was prepared in that case to accept occasional weak or even missing links in that continuous association, it seems unlikely to dispense with the continuity requirement altogether as per *Marshall* where evidence of occupation at sovereignty can be led. The rider at the end of the above paragraph concerning arguments of "abandonment, cession, and extinguishment" suggests that a requirement of "non-abandonment" might in any event be a version of the continuity test.

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74 *Delgamuukw*, above n 32, para 152 Lamer CJC.

75 *Marshall*, above n 65, para 181.

I believe that in exercising the inherent jurisdiction to set a standard for proof of aboriginal title in both its territorial and non-territorial forms, New Zealand courts would want to avoid the bifurcated Canadian one. Differing standards for proof of territorial and non-territorial aboriginal titles are hard to justify. Further, any legal definition of Maori aboriginal title by reference to pre-contact culture would be incompatible with the Treaty of Waitangi and its principles, which, at a minimal interpretation, protected Maori property at the time of Crown sovereignty. The "pre-contact" test is, therefore, an option that would not run in New Zealand. In any event, as I will explain later, it is unlikely New Zealand courts will regard their position as being one of necessary choice between either the Canadian or the Australian approach. Rather the design of the Foreshore and Seabed Bill is such that the test devised will synthesise both.

The Australian cases have formulated—and continue to articulate—principles governing the proof of aboriginal title. Having met the preliminary test of recognition, the next step involves proof of the particular title. The native title is proven by evidence of a connection to, rather than evidence of, physical presence on land. However, the fact of occupation or actual exercise of rights over that land will signal the likely presence of aboriginal title, though it will not prove it: the "exercise of native title rights or interests may constitute powerful evidence of both the existence of those rights and their content."<sup>76</sup> Proof of connection does not require "some recent use of the land or waters",<sup>77</sup> because this is established not from occupation "but from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country."<sup>78</sup> That is, the connection is established through the traditional law and custom that authorises the presence. In that regard a distinction, one usual in property law, is made between possession (the position of entitlement under the traditional law and custom) and the actual exercise of those rights by occupation and presence (a matter of fact).<sup>79</sup>

This requirement of a connection with the land and waters has not been explored at length in native title judgments. As Kirby J noted in *Ward*, native title rights have generally related physically to land and waters in a manner analogous to common law property concepts.<sup>80</sup> In this case the majority of the Court refused to decide when or whether a spiritual connection unaccompanied by more tangible physical forms would suffice.<sup>81</sup> The

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76 *Yorta Yorta*, above n 35, para 84 Gleeson CJ, Gummow and Hayne JJ.

77 *Ward*, above n 29, para 64 Gleeson CJ, Gummow, Gaudron, and Hayne JJ.

78 *Ward*, above n 29, para 93 Gleeson CJ, Gummow, Gaudron, and Hayne JJ.

79 *Yorta Yorta*, above n 35, para 84 Gleeson CJ, Gummow and Hayne JJ.

80 *Ward*, above n 29, para 590 Kirby J.

81 *Ward*, above n 29, para 64 Gleeson CJ, Gummow, Gaudron, and Hayne JJ.



Australian jurisprudence of native title suggests that spiritual association alone under customary law may suffice,<sup>82</sup> but the High Court has yet to address the issue directly. The Supreme Court of Canada will address this issue shortly,<sup>83</sup> although its fact-based test already suggests an answer in the negative. This issue has remained outstanding mainly because the cases have involved both spiritual association and physical manifestation: customary law has been reflected in actual presence. However this is a question that New Zealand courts might have to answer: Can an aboriginal title be proven by reference to a spiritual association only, or must there also be demonstrated in proof some physical manifestation of the association?

It is clear that there must be a *present* possession and *present* connection. That is, there must be a present-day entitlement under the traditional law and custom related to the particular land and/or waters presently holding the historical association. Flowing from the notion of intersecting normative systems, "traditional" is defined as being "the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty."<sup>84</sup> These traditional laws and custom can have a modern form,<sup>85</sup> as where modern technology is used to exercise ancient rights, but they must have been "substantially uninterrupted".<sup>86</sup> They must have a foundation in pre-sovereignty aboriginal custom.

A recent Australian case gives an example of how aboriginal title must run from a starting date (Crown sovereignty). In *The Lardil Peoples v State of Queensland*<sup>87</sup> an agreement had been made post-sovereignty by the four claimant groups to treat the determination area as a single communal area held by them jointly, with four internal areas that they each held separately. This was an agreement that could not be recognised as affecting the common law title, because no traditional law was acknowledged or custom observed over the land and waters in the claim area by the four claimant groups as a whole at the time of Crown sovereignty. Hence the agreement was not the outcome of "traditional" law and custom.

This proof of continuity of connection under traditional law and custom is not an insignificant one, especially where oral traditions are involved. The Australian courts acknowledge that much depends upon the evidence and inferences that can be drawn. For

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82 See most recently *Daniel v Western Australia* [2003] FCA 666.

83 *Marshall*, above n 65, leave granted May 2004.

84 *Yorta Yorta*, above n 35, para 86 Gleeson CJ, Gummow and Hayne JJ.

85 *Yanner v Eaton* (1999) 201 CLR 351 ["Yanner"].

86 *Yorta Yorta*, above n 35, para 87 Gleeson CJ, Gummow and Hayne JJ.

87 *The Lardil Peoples v State of Queensland* [2004] FCA 298 ["Lardil"].

a start, there will be difficulties establishing the character of the traditional law and custom at the time of sovereignty.<sup>88</sup> Even once that has been established there may have been changes to the tradition in patterns of observance and acknowledgement. In that regard there is no "single bright line test" for determining what inferences a court may draw from the changes in customary law and practices in the time since sovereignty.<sup>89</sup> The High Court of Australia has given this not particularly helpful explanation, saying one must inquire into:<sup>90</sup>

the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws.

That is, two points in time are identified; a line of "tradition" connects the date of Crown sovereignty and the present. It follows that the law and custom must not have lost its "traditional" character, in that it must remain if not demonstrably then at least recognisably the same as that obtaining at the time of sovereignty. Here one cannot help but feel that the judicial notion of tradition has a limiting and straitening effect, supposing as it does a clear link between what existed at the time of sovereignty and that which is practised today. Indeed, that restrictive role will become clearer when the High Court's approach to the nature of native title is explained below (and contrasted with that of Kirby J).

There must not only be continuity in the acknowledgement and observance of the traditional law and custom, but also in the community exercising them. Continuity has a "who?" as well as a "what?" dimension. In *Yorta Yorta*, a majority of the High Court was not prepared to disturb the trial judge's finding that there had been insufficient continuity of identity for the claimant group to be regarded as a traditional one holding native title rights. Issues of historical identity are less likely to affect Maori groups in New Zealand asserting aboriginal title along the coastline. Most, if not all, will have little trouble proving the requisite continuity of group identity since 1840.

In this as in so many other dimensions of aboriginal title, the approach of Kirby J has been towards a freer accommodation of the organic elements in post-sovereignty

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88 *Lardil*, above n 87, para 80.

89 *Lardil*, above n 87, para 82.

90 *Lardil*, above n 87, para 56.

aboriginal culture. His approach to both the "who?" and "what?" elements stresses the ongoing continuity rather than the vestigial presence of pre-sovereignty features:<sup>91</sup>

What is necessary for laws and customs to be identified as traditional is that they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledged and observe those laws and customs.

Whereas the majority approach requires a direct correlation between "then" (pre-sovereignty) and "now", the Kirby approach simply requires "now" to be an organic outcome of "then".

The requirement of continuity set by the Australian courts highlights the concern of common law aboriginal title with extant rights acknowledged by and observed according to traditional law and custom. The common law will not protect rights that are not current or no longer evidenced. It is unclear whether spiritual association alone, unaccompanied by more physicalised manifestations or expression of right, will suffice. In that regard, inasmuch as traditional law and custom has ceased to apply over particular land or places, the common law aboriginal title is said to have "expired".<sup>92</sup> Expiry is therefore a factual condition (as opposed to extinguishment, which is a legal result) whereby the factual basis or matrix for a common law aboriginal title is absent. If the aboriginal title has expired in point of fact—if the customary law no longer says anything of a place—then no question of extinguishment arises.

In building the prospective jurisprudence a New Zealand court would require evidence of continuity in a claimant group's association with a stretch of foreshore and sea. The differences in the High Court of Australia indicate the range of options. The majority approach is a narrower and more rigid one than that of Justice Kirby. It demands the strong residual presence of pre-sovereignty elements, a "substantially uninterrupted" continuity of connection that has been largely undiluted by the experience of colonialism. The Kirby approach gives the requirement of continuity more dynamism and flexibility and would allow the custom to develop in a manner that flowed from but was not constrained by the nature of things at the time of Crown sovereignty. The majority approach would allow no greater set of rights than those there at sovereignty and which the present continuity under traditional law gives. To give an important example of that approach, an aboriginal right to trade a tribal resource (as opposed to alienate the right itself, which the common law absolutely prohibits) would have to be established at the

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<sup>91</sup> *Lardil*, above n 87, para 114.

<sup>92</sup> *Lardil*, above n 87, para 91.

time of sovereignty and shown to have been continuously present in the traditional laws since then. This is a difficult test for Australian Aboriginal clan nations to meet, although it is one that particular Maori claimants with a history of robust exchange with other groups (including "old settlers") might have a better chance of satisfying. These hoops do not appear in the Kirby approach, whereby the post-sovereignty appearance of a commercial element in the traditional law is unproblematic so long as it is a continuation of the aboriginal group's historical and customary association with the resource.

The majority approach puts the notion of continuity inside a narrow band. Once the traditional connection has diminished under the traditional law it cannot be regained. The continuity can only work to maintain the aboriginal right mostly as it was at sovereignty. It cannot enlarge it and it cannot regain it. This means that those aboriginal groups who have maintained a stronger customary association with their coastline will have a fuller common law entitlement than those whose traditional laws by force of circumstance have suffered a diminishment. To repeat, aboriginal title is concerned with protection of extant rights and is not a mechanism of historical redress. In the New Zealand setting those iwi that have maintained uninterrupted ownership of frontage land (like Ngati Porou), would be in a better position under common law than those who have not maintained similar control. For example, suppose that an iwi can establish a commercial element under their traditional laws at the time of sovereignty that has continued to the present day. That aspect of the right would be lost in relation to a particular stretch of the shoreline—either because it has been discontinued and expired (factually gone) or extinguished (legally removed)—when Maori sold the freehold land with sea frontage because the right to exclude under *tikanga* was thereby implicitly abridged.

The Foreshore and Seabed Bill, as introduced, substitutes the common law with a comprehensive statutory regime in one area: that of non-territorial aboriginal title. On the question of connection it provides statutory criteria for the Maori Land Court and High Court to consider in issuing a customary rights order (CRO) (that is, in relation to non-territorial aboriginal title). However it does not substitute and fix statutory criteria for territorial customary rights (TCR) (territorial aboriginal title). The reference is simply to the common law and, presumably, whatever standards for connection the High Court might eventually set.

The statutory criteria for CRO connection set out in clauses 42 and 61 are drawn directly from the common law. The claimant group seeking the CRO must establish that the particular right:

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

The prescribed test blends the Australian and Canadian approaches in that the particular right claimed must have a basis both in *tikanga* (a normative basis) and must be actually exercised (the factual basis). The "substantially uninterrupted" dimension of both tests is included.

It is notable that the common law has tended to frame the continuity of aboriginal connection in the singular, a feature carried over into the Bill. However it is probable that there will be overlapping aboriginal claims to particular stretches of coastline, each of which meets the common law requirement of connection under traditional law. How will such questions of inter-group contestation and layered rights be handled? How is a plurality of connections, some of which may be antagonistic, to be treated?

There has been little doctrinal development in the common law so far as this aspect is concerned. The existence of sustainable overlapping claims will render impossible any territorial title over disputed coastline reaches without acceptance of the common law principle of "shared exclusivity" referred to by the Supreme Court of Canada in *Delgamuukw*.<sup>93</sup> It is very likely that there are stretches of New Zealand coastline where

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93 *Delgamuukw*, above n 32, para 158 Lamer CJC:

The possibility of joint title has been recognized by American courts: *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941). I would suggest that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity. The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's. However, since no claim to joint title has been asserted here, I leave it to another day to work out all the complexities and implications of joint title, as well as any limits that another band's title may have on the way in which one band uses its title lands.

tribes have contested *mana*, or even where their *mana* is seasonal.<sup>94</sup> To accommodate those situations New Zealand courts would have to accept the possibility of shared exclusivity in the manner of the Supreme Court of Canada. Without such a step, territorial rights will only occur where the claimant group has maintained ownership since 1840 of contiguous land where other groups' *mana* does not run. Failing such an acknowledgement, overlapping rights would produce at most a CRO bundle for each group subject to the appropriate proof before the Maori Land Court.<sup>95</sup> In that regard the Court will need to develop mechanisms for the management of overlapping claims. The Australian approach has been to use mediation and internal rather than judicial processes,<sup>96</sup> although the Federal Court has authority under the Native Title Act to manage and co-ordinate overlapping claims.<sup>97</sup> Overlapping claims have also arisen in British Columbia where

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94 Evidence of Nanaia Mahuta, Foreshore and Seabed Bill Submission (July 2004) 2, concerning a coastal reservation named Waharau at Kaiaua on the Firth of Thames, where custodial rights are normally vested in Ngati Paoa but for several weeks each summer by Maori custom (*tuku* or gift) Ngati Mahuta assume guardianship.

95 Under the Bill, the High Court has jurisdiction to make a customary rights order but only if it is satisfied that the Maori Land Court lacks jurisdiction (cl 60)—a requirement that probably renders most of this jurisdiction redundant. The High Court's important jurisdiction lies in the TCR rather than the (mostly illusory) CRO jurisdiction.

96 Native Title Tribunal *Native Title Report January – June 1994 – Resolving Disagreements*. The Burrup Peninsula Agreement (Western Australia, 16 January 2003) is an example of mediation amongst (three) overlapping claimant groups.

97 The 1998 Amendment Act addressed overlapping claims by strengthening the requirement of an identifiable claimant party (National Native Title Tribunal "Spurious Claim on Withdrawn Native Title Applications Could Undermine Rationalisation Efforts" (19 January 1999) Press Release):

Tribunal Member Fred Chaney said the Federal Government's new native title laws aimed to encourage indigenous people to act as an identifiable group in asserting their native title rights and they were responding to the laws by amalgamating and withdrawing claims.

"Previously, many native title applications were lodged by individuals or small family sub groups according to the law which prevailed at the time and this resulted in many rival or overlapping native title applications," he said.

Under s 190B(3) of the Native Title Act as amended in 1998, stringent requirements of claimant group description were made replacing the "low-scale screening test" that had previously applied and allowed the submission of overlapping and conflicting claims by disparate members of the group. Jocelyn Grace "Aboriginal Group Descriptions—Beyond the Strictures of the Registration Test" (Native Title Research Unit, AIATSIS Issues Paper no 2, September 1999) argues that the statutory revision has not resolved the enduring problems of inter-group conflicts and disagreements. It has simply made them more explicit, "better defined and articulated".

again the approach has mostly been to avoid courtroom conflict.<sup>98</sup> However the Gitanyow and the Gitskan Nations who brought the *Delgamuukw* litigation have argued that the Nisga'a settlement incorporates part of their territories,<sup>99</sup> and it may be that eventually this matter will come before a Canadian court.

For the most part, the overseas aboriginal title jurisprudence has not had to grapple with conflicting and overlapping claims. The New Zealand jurisprudence might not be able to avoid that. It is certain that litigation surrounding the foreshore and seabed will become another site for the highly contestative politics of Maori as the inevitable legalism (whether inside a statutory framework such as the Bill proposes or remaining as of *Ngati Apa*) moves from rights-recognition to rights-integration and -management. It may be expected that Maori groups will seek to appropriate the *mana* of the High Court jurisdiction against rival groups. This would maintain a historical pattern witnessed in the late 19th century in the Native Land Court and, more recently, in the tide of judicial review applications in the fisheries allocation and Treaty settlement processes. How that will play out in a legalism that fuses common law and statutory sources remains to be seen. One thing is sure, however. This intense legalism will arise within Maoridom inside or outside any statutory framework.

### C The Nature and Extent of Common Law Aboriginal Title

One of the most crucial tasks facing a prospective New Zealand jurisprudence will be definition of the underlying nature and extent of the common law aboriginal title. Supposing a particular claim has met the test for recognition and satisfied the appropriate evidentiary elements, the courts will then need to explain the nature of that title. One

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98 Brian Thom "Territory, Boundaries and Overlapping Claims on the Northwest Coast" (Paper presented at the 99th Annual Meetings of the American Anthropological Association, San Francisco, November 2000):

First Nations leaders are meeting with each other outside the Treaty process to establish protocols on 'overlapping' territories. They want to reach agreements that will be equitable to all parties once the bounds of Aboriginal Title become more well defined. Nanoose Chief Wilson Bob described this at a meeting with Hul'qumi'num Treaty Group Chiefs and Elders:

"... there is no way we want to use the overlapping type of language that the governments use. We feel that it could create problems when you start to lay solid boundaries, we feel that it would only create hardship. And knowing that our families are inter-related in all these communities, we don't see any reason to have the overlapping terminology that governments use. We have shared territories, it is to our own advantage to deal with it in our own way, rather than try to satisfy the governments. (Chief Wilson Bob, June 9, 1997)."

99 Neil J Sterritt, Susan Marsden, Robert Galois, Peter R Grant, and Richard Overstall *Tribal Boundaries in the Nass Watershed* (UBC Press, Vancouver, 1998).

hallmark of that title has been noted already: its inalienability other than to the Crown. In *Delgamuukw* Chief Justice Lamer described aboriginal title as falling along a sliding scale or spectrum. At one end there was the full "title" carrying exclusive use and occupation of land, and at the other, stand-alone and site-specific "rights" detached from the full "title".

In recent years the nature of aboriginal title has been explored thoroughly by the High Court of Australia. The Court has divided on the approach to be taken to such claims. The majority has adopted the so-called "bundle of rights" line whereas one judge, Kirby J, has become associated with the "ownership" approach. These approaches are not simply based upon the idiosyncrasies of the Australian native title system. Rather, they raise important questions – and choices – concerning the theoretical basis of property rights in the common law normative system.

The "relevant task" the court faces "is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms".<sup>100</sup> In putting the Aboriginal custom that way the High Court majority has said:<sup>101</sup>

The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer.

The above passage carries something of an expression of regret, although its sincerity is compromised (it will be seen) by the "bundle of rights" approach that compounds severely the fragmentation through law of the Aboriginal worldview and relation with land. Under Aboriginal customary law the fullest relationship a clan nation may have with ancestral land is the right "to speak for country". Consequently the fullest customary relationship is expressed in common law terms as ownership: that is, an exclusive right to possess, or the right to be asked for permission to come onto their land.<sup>102</sup>

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100 *Ward*, above n 29, para 89 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

101 *Ward*, above n 29, para 14 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

102 *Ward*, above n 29, para 88 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.



The majority in *Ward* held that the right under Aboriginal custom to control access over their land, one they acknowledged as a "core concept", had disappeared.<sup>103</sup>

The assertion of sovereignty marked the imposition of a new source of authority over the land. Upon the authority being exercised, by the creation or assertion of rights to control access to land, the right to be asked for permission to use or have access to the land was inevitably confined, if not excluded.

There is a problem with this crucial passage where it is held that the Aboriginal right to control access (to dry land) has been "confined, if not excluded". The majority state that the right to exclude can be extinguished and construct the native title as a bundle within which that right is the most prone, if not absent altogether as a result of Crown action (legislative and executive) since settlement.

This loss of the right to exclude is an intellectually crucial (though glossed over) step because its disappearance allows the High Court majority to reconstruct the native title not as a form of "ownership" analogous to freehold title but as a narrower "bundle of rights" proven item by item, particular right by particular right. It consists of a bundle of discrete rights, each of which is proved by the test of continuity (and that being the majority's rather rigid approach). The majority try to cushion the outcome. The (lost) right to exclude, they say,<sup>104</sup>

is not an exhaustive description of the rights and interests in relation to land that exist under that [traditional] law and custom. It is wrong to see Aboriginal connection with land as reflected only in concepts of control of access to it. To speak of Aboriginal connection with "country" in only those terms is to reduce a very complex relationship to a single dimension. It is to impose common law concepts of property on peoples and systems which saw the relationship between the community and the land very differently from the common lawyer.

There is something disingenuous about that passage because it is that judicial act of rendering the right to exclude so frail and easily lost that compromises the prime common law device for maintaining and ensuring that "very complex relationship" of which they speak. It is because an owner of dry land has the right to exclude that the integrity of their relationship with the land, complex or otherwise, can be legally assured and protected. Instead, the Court holds that the aboriginal title comprises a "bundle of rights" minus, in almost all situations nowadays, the right to exclude. As a result, the fullest form of title recognised in Canada on the spectrum described by Lamer – what New Zealand has called

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<sup>103</sup> *Ward*, above n 29, para 91 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

<sup>104</sup> *Ward*, above n 29, para 90 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

territorial aboriginal title—is virtually impossible in Australia.<sup>105</sup> The majority explained it this way:<sup>106</sup>

[R]ecognising that the rights and interests in relation to land which an Aboriginal community may hold under traditional law and custom are not to be understood as confined to the common lawyer's one-dimensional view of property as control over access reveals that steps taken under the sovereign authority asserted at settlement may not affect every aspect of those rights and interests. The metaphor of "bundle of rights" which is so often employed in this area is useful in two respects. It draws attention first to the fact that there may be more than one right or interest and secondly to the fact that there may be several *kinds* of rights and interests in relation to land that exist under traditional law and custom. Not all of those rights and interests may be capable of full or accurate expression as rights to control what others may do on or with the land.

Thus the majority insist that it is preferable to enumerate the particular rights (the non-territorial collection) rather than to speak in terms of controlling access (territorial title).<sup>107</sup>

Rather than being a form of "ownership" carrying the inherent right to exclude (except to the extent that right has been specifically extinguished) and so allowing the custom to continue within its own uninterrupted sphere, the majority's approach requires the compilation of a list of activities that cumulatively comprise the native title. The list is drawn by each incident being referred to the probative requirement of connection under traditional law and custom (according to their rather restrictive test). The contrast here is with the approach of Kirby J, who takes more of an "ownership" route in which the right to exclude is far less vulnerable and more prominent and integrated into native title. He emphasises the title or "ownership" given by Aboriginal custom (the right to speak for country) and disapproves of the legalistic winnowing that produces a list of activities permitted on or in relation to land.<sup>108</sup> Kirby sees the right to speak for country as the virtual equivalent of freehold ownership.

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105 Subject to its terms, a native title determination will normally result in the holders' acquisition of rights to exclude. This outcome, one whereby they acquire through the determination itself a right their native title previously lacked under Australian common law, underlines the meanness of the majority's approach (to dry land native title). Instead of tending towards an approach standardising the character of native title before and after determination, the post-determination position, by including a right to exclude, is more extensive than the pre-. I acknowledge that in distinguishing between the absence of the right to exclude in pre-determination native title and its presence in the post-determination one I differ from Sean Brennan.

106 *Ward*, above n 29, para 95 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

107 *Ward*, above n 29, para 52 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

108 *Ward*, above n 29, paras 569–571 Kirby J.

The question of minerals and petroleum illustrates the difference between a "bundle of rights" and "ownership" approach to aboriginal title. In *Ward* the native title determination order made by Lee J at trial stipulated that in the determination area the native title holders had the right to use and enjoy the resources of the area, and the right to control the use and enjoyment of others of resources in the area. They had, in short, ownership. The order did not define what he meant by "resources" but was taken in the higher courts to include minerals of all kinds. Lee held that the right was concurrent with various other interests granted by the Crown, as these amounted to a "regulation" of the aboriginal right rather than an extinguishment. The Full Federal Court overturned this aspect of Lee's determination. It held that the Mining Act 1904 and Petroleum Act 1936 vesting those resources in the Crown extinguished any aboriginal title in relation to them. The High Court majority, like that of the Full Court, was not convinced that any native title reached those resources in the first place. The right to exclude, they reiterated, was not an initial part of the native title (and hence there could be no ownership). Instead they applied the "bundle of rights" approach requiring identification of the particular native title right(s) at issue.<sup>109</sup> In relation to minerals and petroleum there was no evidence of any traditional law, custom, or use relating to those resources except the use of ochre, which was, anyway, not a mineral for statutory purposes. Extinguishment was not at issue, the majority said, since there was no aboriginal title right in the first place. The right to these resources was not part of the aboriginal "bundle".

In the *Lardil* determination Cooper J referred to the bundle of rights approach as it affected native title claims over the sea:<sup>110</sup>

[W]hen the unity of the relationship between Indigenous people and the land and waters is fragmented, and the rights to control access to, and use of and activities in the land and waters are excluded, little may remain which is capable of being translated into rights and interests in relation to that land and waters capable of recognition and protection under the NTA. What is left may amount to little more than non-exclusive rights to engage in specified activities in relation to the land and waters. Because the content of those rights or interests was fixed at sovereignty, no subsequent enlargement of these rights will be recognised under the Act.

Counsel for the applicant, realising the necessity of operating within the authority of *Yarmirr*, invited Cooper J to render an alternative form of determination to the non-exclusive composite claim. An order was suggested, recognising an interest in maintaining the land and waters free from "intrusion, interference and affectation [sic] inconsistent with the spiritual connection and responsibility for the land and waters". In other words, the

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109 *Ward*, above n 29, para 382 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

110 *Lardil*, above n 87, 173, 175, citing *Yorta Yorta*, above n 35.

suggestion was that the right to exclude was a particular right inside the "bundle". Cooper J recognised this as an unsubtle attempt to rehabilitate the right to exclude. He found that this was "an emotional, as opposed to a practical, interest to exclude from the claim area anyone or anything which was inconsistent with the spiritual connection and responsibility for the land and waters". There was no other interest separate or apart from the right to control access, use, or activities.<sup>111</sup> The majority approach in *Yarmirr* and *Ward* still held.

Kirby J's dissenting voice in *Ward* joined that of North J in the Full Court.<sup>112</sup> Kirby believed native title represented a form of "ownership" so that the rights arising from it apprehended not only those that existed at the time of sovereignty but those subsequently adopted as a result of change. The connection was to land and its resources as owners, not particular aspects of its use and exploitation taken from an artificial starting point in time.<sup>113</sup>

In relation to the capacity of the common law to recognise change and development in traditional laws and customs, I prefer North J's approach. It supports the recognition of historical uses of resources, such as ochre. It also includes other minerals. It envisages the extension of such recognition to modern conditions, developed over time, so as to incorporate the use of other minerals and resources of modern relevance. Such an approach is generally consistent with the authority of this court and decisions in Canada. When evaluating native title rights and interests, a court should start by accepting the pressures that existed in relation to Aboriginal laws and customs to adjust and change after British sovereignty was asserted over Australia. In my opinion, it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement.

The "ownership" approach was justified also by the principle of equality, said Kirby J. Because of "the principle of equality of the rights of all Australians before the law, where a native title claim is otherwise established as conferring possession, occupation, use and enjoyment of the land and waters to the exclusion of others, there is, in my view, a presumption that such right carries with it the use and enjoyment of the minerals and like resources of the land and waters". Full Aboriginal ownership, proven under customary law, was not to be treated as any less in scope than the common law equivalent. Although in this case the relevant legislation did have an extinguishing effect, Kirby held that where "ownership" under traditional law and custom was otherwise established, there was no

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<sup>111</sup> *Lardil*, above n 87, paras 178, 179.

<sup>112</sup> *Western Australia v Ward* (2000) 99 FCR 316, 528 paras 829–831.

<sup>113</sup> *Ward*, above n 29, para 574 Kirby J.

need to engage in a separate inquiry into particular resources. For Kirby the right to minerals, whenever discovered or sought for exploitation (before or after Crown sovereignty), was part of Aboriginal ownership (as with an aboriginal *title* in Canada).<sup>114</sup> It was not a particular right requiring its own proof by an anyway difficult test of connection.

The unsatisfactory aspect of the "bundle of rights" approach, at least as applied to dry land, lies in the fragility it gives the right to exclude, which has effectively disappeared from all native titles in Australia as a result of legislative and executive acts by the Crown. Where native title to dry land is concerned, it seems to disappear as a result of the mere exercise of "sovereign authority" by the Crown, giving its loss an air of judicial *Realpolitik*. The majority approach is, however, much clearer and their reasoning more sustainable on this point where marine areas are concerned. The loss of the right to exclude from sea country stemmed from application of the test of recognition: exclusive native ownership or rights over the sea and seabed could not be recognised by the common law at the outset.

In that respect—in accommodating aboriginal and public rights over a space physically and juridically unlike dry land (the foreshore and sea)—the "bundle of rights" approach has an intellectual consistency it lacks when applied onshore. The United States courts have also taken a "bundle of rights" approach towards aboriginal title in the sea and seabed. In *Village of Gambell v Hodel* (1989),<sup>115</sup> Alaskan natives challenged Outer Continental Shelf (OCS) oil and gas development, claiming it would adversely affect their aboriginal right to subsistence hunting and fishing. It was held that the Federal Government's paramount interest in oil and gas leasing on the OCS subordinated but did not extinguish aboriginal subsistence hunting and fishing rights. In *Native Village of Eyak v Trawler Diane Marie Inc* (1998),<sup>116</sup> Alaskan Native Villages claimed an aboriginal title to exclusive hunting and fishing rights to portions of the OCS in Prince William Sound, the Gulf of Alaska, and the lower Cook Inlet regions of Alaska. The claim to exclusive rights of occupancy and use was based on use over a 7,000 year period and the fact that a majority of their members still relied upon hunting and fishing on the OCS to maintain their subsistence lifestyle. While acknowledging that aboriginal rights could coexist with federal interests, the Court concluded that a claim of *exclusive* ownership and *exclusive* hunting and fishing rights in offshore waters conflicted with the Federal Government's interests and could not be recognised.<sup>117</sup> The earlier case was distinguished on the basis that the aboriginal rights argued and acknowledged in that case were not exclusive. These cases

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114 See *Delgamuukw*, above n 32, para 122 Lamer CJC.

115 *Village of Gambell v Hodel* (1989) 869 F 2nd 1273 (9th Cir).

116 *Native Village of Eyak v Trawler Diane Marie Inc* (1998) 154 F 3rd 1090 (9th Cir).

117 The Supreme Court denied an application for certiorari: (1999) 527 US 1003.

disclose a narrow "bundle of rights" approach forming in the American case law: exclusivity has been ruled out by the recognition test (federal paramountcy and the national interest) but a bundle of subsistence non-exclusive hunting and fishing rights can arise. The bundle seems to be constrained by the notion of "subsistence" and a very limited view of "tradition" not unlike that of the majority of the High Court of Australia.

However, it is important also to consider the dissent of Justice Kirby in *Yarmirr* as well as *Ward*. His judgment in the former case is the only one to have considered how the normative-basis test applies to aboriginal "ownership" of maritime land. The majority asserted rather blithely and tersely that the right to exclude had gone, whereas he held that the native title over the sea amounted to "qualified exclusivity". The qualification came from the common law and international rights of navigation and innocent passage and the grant of statutory licences to fish in the Croker Island seas. Since the native title arose from traditional law and custom, the right to exclusive possession stemmed in the first place from that law. In *Yarmirr* there was evidence that the applicant community had consistently asserted as a matter of Aboriginal law the right to be consulted and to make decisions about their sea country.<sup>118</sup> Although the public rights of navigation and statutory fishing licence regime diminished that right, it did so only to that narrow extent. They did not operate (as the majority held) to remove the right to exclude altogether. Otherwise there remained a core of ownership under the traditional law according to which the right to control access remained.<sup>119</sup>

[N]ative title accords recognition to rights and interests based on the claimants' connection with land and waters, as recognised by their traditional laws and customs. Such connection must have survived the acquisition of sovereignty. It is the traditional connection arising from the acknowledgment of laws and customs by the indigenous community, and not recognition or acceptance by *others* of the connection, which is the source of native title.

In *Mabo* the High Court had indicated the right to exclude must be "assert[ed] effectively",<sup>120</sup> although (it has been seen) by *Ward* the majority had whittled that down to absence altogether from native title. Kirby revisited that requirement of effective assertion in *Yarmirr* when he stressed the need to view it in terms of the limitations upon Aboriginal claimants. Although there had been encroachment into the Aboriginal sea country by visiting fishermen from Sulawesi, described as the Macassans, and later, after European

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118 *Yarmirr*, above n 36, para 312 Kirby J.

119 *Yarmirr*, above n 36, para 307 Kirby J.

120 *Mabo*, above n 14, 51 Brennan J.

contact, the *balanda* or "white man", the important fact was the continued assertion of the customary law right to exclude.<sup>121</sup>

Limitations on how a right to exclude may be "asserted effectively" by Aboriginal claimants must also be appreciated. Thus, for example, continual assertion of rights to be consulted in decisions concerning access to, and use of, the claimants' country may be the highest feasible level of assertion of control by a fishing-based society against Europeans where the latter were possessed of superior arms and legal power. In such circumstances, I agree ... that it would not be reasonable for a court to place undue weight on methods of *enforcement* of Aboriginal rights against non-Aboriginal persons. How, it might be asked, were the forebears of the claimants expected to assert and uphold their rights to their sea country when the *balanda* enjoyed indisputable superiority of weapons and, until *Mabo (No 2)*, incontestable superiority of legal rights? A proper approach is rather to ask whether native title rights and interests survived in fact, what their relationship was with other rights and interests and how such rights were "asserted" in that context.

He continued:<sup>122</sup>

To posit an obligation of the poorly armed forebears of the claimants to assert against the *balanda* (and for that matter the Macassans) a right of physical expulsion, in order to uphold their native title over their sea country, otherwise surviving in fact, which the Act would enforce, is to define the problem in terms of a desired outcome that would always be unfavourable to the rights of persons such as the claimants.

The Kirby ownership approach therefore emphasised the continuance of the right to exclude in customary law, and its assertion inside that paradigm (and, also, as by protest, petition, or other forms of public avowal) rather than actual manifestation. Whereas the majority implicitly took its non-recognition (and, for good measure, non-exercise *de facto*) as removing it from the "bundle of rights" in the native title, Kirby insisted that importance lay in the continuance of the right inside the customary system regardless of the (im)practicalities of actual assertion. He concluded:<sup>123</sup>

In the remote and sparsely inhabited north of Australia is a group of Aboriginal Australians living according to their own traditions. Within that group, as the primary judge accepted, they observe their traditional laws and customs as their forebears have done for untold centuries before Australia's modern legal system arrived. They have a "sea country" and claim to possess it exclusively for the group. They rely on, and extract, resources from the sea and

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<sup>121</sup> *Yarmirr*, above n 36, para 309 Kirby J.

<sup>122</sup> *Yarmirr*, above n 36, para 316 Kirby J.

<sup>123</sup> *Yarmirr*, above n 36, para 320 Kirby J (emphasis added).

accord particular areas spiritual respect. The sea is essential to their survival as a group. In earlier times, they could not fight off the "white man" with his superior arms; but now the "white man's" laws have changed to give them, under certain conditions, the superior arms of legal protection. They yield their rights in their "sea country" to rights to navigation, in and through the area, allowed under international and Australian law, and to licensed fishing, allowed under statute. But, otherwise, *they assert a present right under their own laws and customs, now protected by the "white man's" law, to insist on effective consultation and a power of veto over other fishing, tourism, resource exploration and like activities within their sea country because it is theirs and is now protected by Australian law.* If that right is upheld, it will have obvious economic consequences for them to determine—just as the rights of other Australians, in their title holdings, afford them entitlements that they may exercise and exploit or withhold as they decide. The situation of this group of indigenous Australians appears to be precisely that for which *Mabo (No 2)* was decided.

The Kirby ownership (or qualified exclusivity) approach to aboriginal title over the seabed has been a lone voice (admittedly in waters not very crowded with case law). In *Yarmirr* he justified his extension of the "ownership" approach to sea country not only through the common law principle of continuity. It was also warranted, he said, by the explicit terms of the Native Title Act 1993 which applied to land and "waters".<sup>124</sup>

The Foreshore and Seabed Bill will legislate the whole "Lamer spectrum"; in other words it houses the full range of aboriginal title possibilities from territorial (TCR) through bundled to stand-alone, site-specific discrete rights. In effect and Kirby-like, it extends the principles applicable to aboriginal title land to the foreshore and seabed (subject always to the statutorily defined band of public rights). It then puts the aboriginal title into two distinct categories where common law and statute will interplay: TCR and the non-territorial "bundle of rights" ("customary rights orders" — CROs). Indeed the Bill ventures beyond the common law spectrum to incorporate circumstances where *mana* remains but ownership rights (that is, a subsisting territorial or non-territorial title) cannot be shown. The Bill allows for *mana* through what are termed "ancestral connection orders" (clauses 39 and 40). CROs can be constructed through the Maori Land Court, but a TCR "finding"<sup>125</sup> can be given only by the High Court.

The Bill thus replaces the inherent jurisdiction with a new statutory one drawing upon and referring to the common law. The extent to which the common law is codified or left

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124 *Yarmirr*, above n 36, para 250 Kirby J.

125 The use of this term is strange since a "finding" refers to issues of fact. The identification of an aboriginal title is a question of law, not fact (although proof of customary law, an ingredient of the title, is a question of fact), and should be described as a "determination" (as in Australia) or even "holding".



its own scope differs between TCRs and CROs. After the controversy of its December 2003 "framework", the Government committed itself to leaving open the possibility that the High Court might award territorial title under its inherent jurisdiction. That, recall, was a point on which the judgments were silent as the intimations of possible territorial ownership were directed towards the statutory rather than inherent common law jurisdiction. Indeed, it has been seen that this was a result that the common law alone would probably not have countenanced but which the Bill now renders possible. In keeping with that commitment the Bill does not predetermine the shape of the common law enquiry but leaves that for the courts: under clause 29 the High Court can issue a TCR to a group who would "have held territorial customary rights to a particular area ... at common law." It was seen already that CROs are subject to a regime that melds the common law elements of the Canadian and Australian jurisprudence into statutory criteria.

How, in the light of the overseas jurisprudence of aboriginal title will the High Court inject the common law (as required by clause 29) into the exercise of its statutory TCR jurisdiction? In that regard the key element in a TCR finding will be that of exclusivity and the basis upon which it rests at law.

In exploring the notion of exclusivity, one might begin by positing a choice for the courts in developing the common law test necessitated by clause 29. The first option involves the normative basis (possession under customary law) taken by the High Court of Australia and applied by Kirby J in *Yarmirr*. The alternative is the fact-based approach of the Canadian Supreme Court (factual use and occupation) soon to be addressed more fully in the *Marshall* appeal. On this the Bill is unclear as the term used in clauses 28 and 31(1)(c) ("exclusive occupation and possession") straddles both approaches. The term "exclusive occupation" is suggestive of the Canadian factual basis. The last word "possession" means an entitlement under law and can be interpreted as "possession under customary law". Here, as I suggested earlier, it is likely that a New Zealand court operating under the inherent jurisdiction unaffected by statute would prefer the normative basis since this is consistent with the Treaty.<sup>126</sup>

Notionally, then, it will be necessary to establish the requisite exclusivity (always qualified, of course, by the public rights) either according to *tikanga Maori* or in point of

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<sup>126</sup> This would apply to non-territorial claims only in the light of my belief that the common law of New Zealand of itself cannot at present recognise exclusive territorial title rights. However, under present law the (new) Supreme Court eventually might have to determine the circumstances in law when a vesting order can issue from the Maori Land Court through the statutory jurisdiction of Te Ture Whenua Maori Act 1993, pt VI. In that regard it is likely the Court would apply a test of "exclusivity" looking across at Australian law, since its normative basis squares with the *tikanga* jurisdiction of the Maori Land Court.

fact. The situation where exclusivity will be most straightforward and provable under both tests will be where Maori have retained ownership of coastal land either collectively or as members of the group. Under the fact-based (Canadian) approach, it would be impossible to contemplate situations other than this giving rise to a TCR, since proof of *de facto* exclusivity and control of access will be too difficult to establish without ownership of contiguous land. On the other hand, it is possible that Maori groups have continued to assert the right to exclude in *tikanga Maori* even though they have lost ownership of the frontage land and have not exercised the right to exclude or control access in point of fact. The basis of this reasoning would follow Kirby in *Yarmirr* where he spoke of the right to exclude being asserted not actually so much as within the customary normative system itself. The argument would then run that as Maori have always claimed exclusive ownership of the foreshore and seabed according to *tikanga*, proof of that would satisfy the requirements of clause 29 to allow a TCR order to issue.

That argument based on *tikanga* can certainly run under the Bill in its introduced form, but it is likely to avail only those claimants for a TCR order who have maintained ownership of land adjoining the sea. This is for a number of interrelated reasons. Kirby's formulation of the continuity of the right to exclude inside the customary system was framed with reference to what he termed the "remote and sparsely inhabited north of Australia". The customary right has to be put into a geographical context. To repeat his words from a passage quoted earlier, the "proper approach is rather to ask whether native title rights and interests survived in fact, what their relationship was with other rights and interests and how such rights were "asserted" in that context".<sup>127</sup> The test is not only that of continued viability within the customary law but its relation to "other rights and interests". A court would strain to hold that at law a territorial aboriginal title could subsist over waters in respect of which the exclusivity claimed by the normative system was no longer objectively feasible because the group had lost control of the shoreline. In *Yarmirr*, that control of the shoreline was self-evidently present and not at issue. But what of coastline that has attracted a significant non-aboriginal use and is freely used by the population at large? Merely because the normative system asserts its own exclusivity over that area cannot be enough if the facts demonstrate that exclusivity has substantially gone. This is not to require the exclusivity to have been actually asserted (the Canadian test), so much as requiring the facts of aboriginal presence to be consistent with it. The factual setting should not contradict but should be consistent with the assertion of exclusivity, otherwise the requirement of continuity cannot be sustained.<sup>128</sup> Ownership of contiguous land would

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<sup>127</sup> *Yarmirr*, above n 36, para 309 Kirby J.

<sup>128</sup> See *The Case of Tanistry* (1608) Davies 28 (KB), one of the very first English cases dealing with the legal continuity of customary law. One of the reasons for the non-application of *brehon* (Irish

supply that consistency. A final reason for the High Court's requiring ownership of contiguous land lies in the format of the Bill itself. If exclusivity according to *tikanga Maori* alone were the unqualified standard for a TCR (that is, Kirby unqualified) it would leave the CROs with only limited scope to operate in those (likely few) situations where *tikanga* does not assert its own exclusivity. One situation might be that of overlapping claims. Where the *tikanga* of groups overlap, it will be difficult for either to maintain exclusivity under the normative system of each unless, as suggested earlier, clause 29 is interpreted to include "shared exclusivity".

I have spoken of there being a choice between the Canadian and Australian approaches to proof and nature of aboriginal title, and applying each test separately I have suggested that both come out with contiguous ownership as a necessary (but not sufficient) condition for a TCR. I have spoken in terms of an "either/or" approach to the formulation of a New Zealand common law test. However, it is more likely that a New Zealand court will construct one that blends both fact-based and normative-based tests. It was seen that the CRO test spelt out by the Bill does that. The criteria for a CRO incorporate factual occupation and normative association under *tikanga Maori*. The High Court applying its TCR jurisdiction will doubtless want to ensure that uniform standards are applied to both types of title, the territorial as well as the non-territorial. There will be no inclination towards opening a gap between the two such as that found indefensibly in Canadian jurisprudence.

In my opinion, therefore, the threshold requirement set by the High Court for a TCR order will be ownership of contiguous land. This will be required whatever standard of proof is adopted. It will set the threshold but will not of itself establish exclusivity. In that regard, an early judgment would be desirable to ensure that a uniform standard is maintained between clause 112 (direct negotiation) and clause 29 (court determination). Not only would this judgment identify the threshold, but it would also set out the other requirements and standards for proof of a TCR. Otherwise there is a risk that negotiation and litigation would operate to uneven criteria so destabilising both processes.

#### ***D The Extinguishment of an Aboriginal Title and Remedies***

Having established the juridical basis for a common law title, the final inquiry concerns extinguishment. This is a requirement that the Foreshore and Seabed Bill explicitly identifies in relation to CROs but not TCRs. That difference underlines the policy commitment of the Government to leave the shape of TCRs to the courts but to specify the jurisdiction of the new CRO jurisdiction of the Maori Land Court. Nonetheless, the same

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customary) law to the land in this case was that the facts and history of its management were inconsistent with the undisrupted, continuous application of that law.

principles of extinguishment will apply to both the territorial and non-territorial aboriginal titles. The Bill's identification of the requirement of non-extinguishment for CROs demonstrates its concern with managing and statutorily structuring extant rights. The Bill and the common law are not concerned with rehabilitating rights that have been lost. Where legal processes inconsistent with Treaty principles have previously extinguished foreshore and seabed rights of Maori, those will be a matter for redress under the historical claims resolution mechanisms. Those concerns lie outside the ambit of the Bill and the common law.

Extinguishment is a question of law not fact. It is "the term ... most often used to describe the consequences in law of acts attributed to the legislative or executive branches of government."<sup>129</sup> An aboriginal title might be extinguished even though on the facts it would otherwise subsist.<sup>130</sup> Any extinguishment will be permanent, preventing a "springing back" of the aboriginal title.<sup>131</sup> An extinguishment, however, must be distinguished from the regulation of aboriginal title, which puts the title inside a regulatory regime. Where this happens the title's scope is necessarily read through the statute and modified by it, as in a general context when planning laws routinely regulate land ownership. But the aboriginal title exists apart from the regulatory code and springs back once the code has gone.

Extinguishment is accomplished by either statute or an executive act under statute or (though this aspect still remains unclear in the case-law) prerogative such as the issue of a Crown grant in fee simple.<sup>132</sup> Extinguishment in New Zealand has largely been under processes derived from statutes. Crown grants in New Zealand have been under statutory authority from the first land claims Ordinances of the colonial Governor.<sup>133</sup>

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129 *Ward*, above n 29, para 26 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

130 *Yanner*, above n 85, para 107 Gummow J; *Ward*, above n 29, para 21 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

131 *Yanner*, above n 85, para 107 Gummow J.

132 *Fejo*, above n 34, paras 42–44 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, and Callinan JJ.

133 The 1840 constituent instruments for the Governor included the power to make Crown grants, provided that the power was not to be construed to affect the rights of "any aboriginal natives" to their land: see *Ngati Apa*, above n 1, para 35 Elias CJ. From colonial times the actual exercise of that power rested on a legislative basis (see *Ngati Apa*, above n 1, paras 38, 39 Elias CJ). In New Zealand, for example, see *Faulkner v Tauranga District Council*, above n 25, 363, holding that the bringing of land into the land transfer system will extinguish the native title.

These actions must demonstrate the "clear and plain intention".<sup>134</sup> The High Court of Australia has warned against misunderstanding the "clear and plain" intention approach, which it applies to direct legislative rather than indirect executive steps under statutory processes. It is not an inquiry into the subjective state of mind of the legislators or Crown requiring these bodies to have directed their minds consciously and deliberately against native title. The High Court has adopted an "inconsistency of incidents" test for executive actions requiring the rights conferred by law—the ostensible extinguishment—to be inconsistent with the alleged native title rights or interests. The test is one related to the character of the legal rights over land, rather than actual use or manifestation of those rights (the rejected "operational inconsistency" test). The mere conferral of statutory authority to deal with land in a manner that may be inconsistent with any native title will not extinguish of itself.<sup>135</sup> However the taking of full title or *plenum dominium* will suffice.<sup>136</sup> In that regard it is important to note clause 11 of the Foreshore and Seabed Bill, vesting in the Crown the "full legal and beneficial ownership of the public foreshore and seabed ... as its absolute property". Along with clauses 9 and 10, limiting the jurisdictions of the High Court and Maori Land Court, the Bill is an extinguishing or at least straitening one in the sense that the common law has no scope other than that allowed through the Act.

In determining extinguishment, the "ultimate question is whether, by the steps that were taken, the Crown created in others, or asserted, rights in relation to the land that were inconsistent with native title rights and interests over the land".<sup>137</sup> Where the rights given through statute or lawful Crown action entail exclusive possession, then native title will be extinguished to the extent of the inconsistency. In that respect it is accepted that there can be a partial extinguishment of aboriginal title to the extent of the statutory right diminishment.

The High Court of Australia has described its approach towards extinguishment this way:<sup>138</sup>

Factual findings are necessary to establish the ambit of the native title right as defined by the traditional laws and customs of the indigenous community. The ambit of the native title right

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134 This terminology is American in origin: *Lipan Apache Tribe v United States* (1967) 180 Ct Cl 487, 492. See *Ngati Apa*, above n 1, para 63 Elias CJ (requiring a "direct" indication) and para 162 Keith and Anderson JJ, para 185 Tipping J.

135 *Ward*, above n 29, para 151 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

136 *Ward*, above n 29, para 151 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

137 *Ward*, above n 29, para 214 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

138 *Yanner*, above n 85, para 109 Gummow J.

is a finding of law. This must then be placed against the statutory rights which are said to abrogate it. The question to be asked in each case is whether the statutory right necessarily curtails the exercise of the native title right such that the conclusion of abrogation is compelled, or whether to some extent the title survives, or whether there is no inconsistency at all. Indeed, statute may regulate the exercise of the native title right without in any degree abrogating it.

There may be no inconsistency between the statutory right and the native title, in which case they are said to co-exist.<sup>139</sup>

Under the Bill, it will be necessary for the High Court to apply the "common law" in determining extinguishment, while clause 42 gives the Maori Land Court a highly detailed test for CROs (especially in subsection (2)). The High Court's test will relate solely to the right to exclude. If that has been lawfully extinguished by legislation or valid executive act—the latter possibility a question the Court will need to address—then the application falls into the CRO category and lands in the Maori Land Court. In that regard it is relevant that the Bill's list of measures for extinguishing the non-territorial title includes not only prerogative Crown grants, there resolved a matter still murky in the overseas case-law, but reclamation and "administrative action". The latter category is an innovation that the Maori Land Court, and possibly the upper courts on an appeal on a question of law, will need to decipher. It is possible—indeed probable in the light of judicial comments in *Ngati Apa* on extinguishment—that the High Court will not match that very low threshold for extinguishment. In all probability there will emerge a divergence between the higher-threshold common law test for extinguishment of the territorial title and the lower one statutorily prescribed for the non-territorial. The statutory criteria are so disagreeably stacked towards ruling in favour of extinguishment that (I suspect strongly) the High Court would not want to associate itself with them.

An aboriginal title is not extinguished merely because it has been put inside a regulatory regime.<sup>140</sup> Hence in *Yanner* it was held that the legislative regulation of that control, by requiring an indigenous person to obtain a permit under the Fauna Act, did not abrogate the native title right to hunt. Rather, the regulation was consistent with the continued existence of that right.<sup>141</sup> In this case legislation had vested fauna in the Crown, but this was seen as no more than a management technique in relation to animals not normally the subject of property rather than assertion of a *plenum dominium*. The Maori sea fisheries settlement illustrates the point: despite the terminology of "substitution", the

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<sup>139</sup> *Wik*, above n 53, 171 Gummow J.

<sup>140</sup> See for example *Ngati Apa*, above n 1, para 76 Elias CJ.

<sup>141</sup> *Yanner*, above n 85, para 115 Gummow J.

settlement legislation undoubtedly extinguishes any commercial right at common law, replacing it with a statutory one, but puts the non-commercial customary fishery (*taiapure*) inside a regulatory regime. *Taiapure* fisheries have their legal foundation in common law aboriginal title (and "Treaty principles"), but the statutory regime regulates the manner of their exercise.

In recent years Canadian courts have identified an important consequence of situations where an aboriginal title is set inside a regulatory regime or there is proposed a lawful "infringement"<sup>142</sup> of the title rights. In *Delgamuukw* the Supreme Court said that there was "always a duty of consultation".<sup>143</sup> This duty flowed from the fiduciary aspect of the common law aboriginal title identified in the *Guerin* case.<sup>144</sup> The Court was speaking of a thoroughgoing duty that applied (as a result of section 35 of the Constitution Act 1982) to legislative as well as administrative activity. The Chief Justice indicated that there were different levels or intensity of consultation.<sup>145</sup>

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation.

Since then the Supreme Court has noted that the fiduciary duty had become invoked "as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship".<sup>146</sup> The Court wished to stem that indiscriminate invocation of the concept. Not all obligations between parties to a fiduciary relationship were themselves fiduciary in character, the Court stressed. It was necessary to focus on the particular obligation or interest that was the subject matter of the particular dispute and "whether or not the

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142 The Canadian cases use the term "infringement" to refer to the prioritisation of other interests over the aboriginal. The term does not mean extinguishment so much as the construction or management of a regulatory regime in which other interests (such as conservation, commercial non-aboriginal, recreation) are given priority and which the aboriginal owners must therefore suffer.

143 *Delgamuukw*, above n 32, para 168 Lamer CJC.

144 *Guerin v The Queen* [1984] 2 SCR 335 ["*Guerin*"].

145 *Delgamuukw*, above n 32, para 168 Lamer CJC.

146 *Wewaykum Indian Band v Canada* [2002] 4 SCR 245 ["*Wewaykum*"].

Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation".<sup>147</sup>

By the Canadian approach the Crown—and, in some cases, third parties—have a duty to consult as a result of an aboriginal title and the discretionary power the Crown holds in relation to it. As the above extracts indicate, the fiduciary standard expected of the Crown will depend upon the particular circumstances.<sup>148</sup> Since *Delgamuukw* Canadian courts—most notably the British Columbia Court of Appeal—have amplified the consultation dimension of aboriginal title and rights.<sup>149</sup> In *Taku River Tlingit First Nation v Ringstad* (31 January 2002) Justice Rowles decided that the Crown was obliged to consult with First Nations without the requirement of first proving in court the aboriginal rights being claimed.<sup>150</sup> The *Tlingit* decision was approved in *Haida Nation v British Columbia (Minister of Forests)* (27 February 2002), when the Court of Appeal held unanimously that there was an obligation on the Crown and on third parties to consult with First Nations about potential infringements of claimed aboriginal title or aboriginal rights.<sup>151</sup> The Court of Appeal extended the duty to consult to third parties exercising statutory rights (logging companies) and local government (non-Crown public bodies). Whereas the fiduciary duty could be seen as statutorily delegated to the public or quasi-public bodies, third parties are not in a fiduciary position to aboriginal peoples. The *Haida* judgment signalled that the

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147 *Wewaykum*, above n 146, para 83 Binnie J.

148 The Canadian cases indicate that an aboriginal title will be of that order requiring consultation. Perversely, where an aboriginal right is concerned it needs to be shown that consultation was part of its pre-contact form: *Treaty Eight Grand Chief Halcrow*, above n 61. In that case also the Federal Court held that the fiduciary duty would not be read into all legislation giving the Crown a discretion to act (para 69):

This must be so because, in matters of public law, there will generally not be a reasonable expectation that the Crown is acting for the sole benefit of the party affected by the legislation. For this reason, it is my conclusion that, in matters of public law, discretion and vulnerability can exist without triggering a fiduciary standard. There would have to be special circumstances, other than those created by the legislation, to justify the imposition of a fiduciary duty on the Crown.

149 For earlier cases in the immediate wake of *Delgamuukw* see Sonia Lawrence and Patrick Macklem "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 29 Can Bar Rev 252.

150 *Taku River Tlingit First Nation v Ringstad* [2002] BCCA 59 (Huddart J concurring, Southin J dissenting).

151 *Haida Nation v British Columbia (Minister of Forests)* [2002] BCCA 147. The Supreme Court heard the appeal from this case in March 2004 (leave to appeal granted 27 January 2003 [2002] SCCA no 417). In November 2002, the Provincial Government responded to the *Taku River Tlingit* and *Haida* decisions, by presenting its *Provincial Policy for Consultation with First Nations* regarding consultation concerning aboriginal rights and/or title.



scope of the consultation required and the strength of the obligation to seek an accommodation would be proportional to the potential soundness of the claim for aboriginal title and/or rights. It indicated that there would be at least an entitlement to damages from any infringement that had not been properly consulted. These would depend on the quality of the consultation and accommodation process. These two cases showed the willingness of courts to require consultation in situations where an aboriginal title (or right) was neither preceded nor accompanied by a court determination. *Haida* added an enforceable legal duty on third parties, not just the Crown, to consult with the (alleged, because judicially undetermined) aboriginal owners.

In the New Zealand context a common law duty to consult could not operate in relation to the passage of legislation where constitutional convention governs the exercise of the legislative power in Maori affairs. Dicey famously called these non-justiciable rules the "morality of the constitution" unenforceable in the courts.<sup>152</sup> Nonetheless, the duty to consult in relation to the regulation and potential infringement of an aboriginal title would apply in New Zealand to administrative decision-making under regulatory regimes for the coastline and, if one follows *Haida*, to those third parties exercising statutory rights under the regulatory regimes. Consultation is already woven into the Resource Management Act 1991 (RMA) and various statutory regimes, through the *tangata whenua* provisions. Nevertheless it is possible a New Zealand doctrine of aboriginal title might follow the Canadian and establish a supplementary jurisprudence of consultation. How this would sit alongside the statutory processes is highly moot. It may be that the common law aboriginal title requirements of consultation go beyond the statutory, by setting a more intensive level, by extending to a wider set of parties, and by giving a right to damages and other remedies unavailable in normal judicial review.

In the *Maori Council* case the Court of Appeal indicated that the "Treaty principles" recognised by section 9 of the State-Owned Enterprises Act 1986 did not impose an open-ended obligation to consult. In any event, the Court was not considering a common law duty derived from the aboriginal title. Nor, it may be added, did it consider the duty to consult at the level of constitutional principle—that is, as a constitutional convention applying to the passage of major Maori affairs legislation.

In *Ward* the High Court of Australia noted that the courts had not developed any notion of the appropriate remedies attaching to an aboriginal title.<sup>153</sup> Nonetheless there is an entitlement to compensation<sup>154</sup> for the extinguishment of an aboriginal title unless that

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152 A V Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, MacMillan, London, 1960) 422.

153 *Ward*, above n 29, para 21 Gleeson CJ, Gaudron, Gummow, and Hayne JJ.

154 In this unformed area the cases do not distinguish "compensation" from "damages".

right has also been removed or put inside a totalising statutory regime (as in Australia under the Native Title Act 1993) or transmuting one (as in New Zealand under the Foreshore and Seabed Bill). In *Te Runanga o te Ika Whenua Inc Society* (1994)<sup>155</sup> Cooke P indicated *obiter* that the extinguishment of an aboriginal title by less than fair conduct or on less than fair terms would be likely to be a breach of a fiduciary duty that was widely and increasingly recognised as falling on the colonising power. He added that it might be that this requirement had to yield at times to the necessity of the compulsory acquisition of land or other property for specific public purposes recognised in many societies; but there was an assumption that on any extinguishment proper compensation would be paid. The Supreme Court of Canada indicated likewise in *Delgamuukw*:<sup>156</sup>

In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.

The Court also indicated that the nature of the consultation attending the infringement or extinguishment would be considered in awarding damages. It would help determine whether—in the words of Cooke P—there had been "fair conduct". This jurisprudence of compensation is unformed, although there have been some dramatic examples of the fiduciary principle being applied against governments, notably *Guerin* in Canada and the present *Cobell* litigation in the United States.<sup>157</sup> It may be added that this use of the courts has generated intense discussion and disagreement within aboriginal culture as to its appropriateness. Many have preferred negotiated nation-to-nation settlement rather than supplication to the courts (which, some say, demeans their aboriginal sovereignty).

An aboriginal title can also be extinguished by cession. These cessions, or treaties as they are known in North America, are not interpreted and applied strictly according to the law of contract. The rule of interpretation is associated with *Jones v Meehan* (1899) (and has also been adopted in Canada<sup>158</sup> and New Zealand):<sup>159</sup>

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155 *Te Runanganui o te Ika Whenua Inc Society v Attorney-General*, above n 25, 24 Cooke P for the Court.

156 *Delgamuukw*, above n 32, para 169 Lamer CJC.

157 See <<http://www.indiantrust.com>> (last accessed 13 October 2004) for an account by Elouise Cobell of her mission to render the Federal Government accountable for its mismanagement of billions of dollars worth of Indian trust funds. The litigation has claimed some high-placed victims, including Secretaries of the Interior for contempt of court. The case, which was commenced long before the Enron scandal, raises real issues about double- and ethnically-based standards applied by the law to the administration of beneficiary assets.

158 *Calder*, above n 13, 208 Hall J.

159 *Jones v Meehan* (1899) 175 US 1, 20 S Ct 1, 44 L Ed 49.

It must always be borne in mind that the negotiations for the treaty are conducted, on the part of the U.S., by an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians ... are a weak and dependent people who have no written language and are wholly unfamiliar with all of the forms of legal expression, and whose only knowledge of the terms on which the treaty is framed is that imparted to them by the interpreter employed by the U.S.; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Extinguishment may be partial, and it may be that certain transactions, when examined in the light of the above principles, are regarded as having reduced rather than removed the aboriginal title. Such cessions as the massive purchases of Ngai Tahu land in the mid-19th century might not be regarded today as entailing a presumptive blanket extinguishment of common law aboriginal title, particularly along the coastline. Apart from the saving for *mahinga kai* these transactions were so massive and so flawed that they could not be regarded as a conscious cession of all aboriginal title rights. Any claim that an aboriginal title has been ceded over the foreshore or seabed as a result of landward dealings by the customary owners will require a close forensic examination of the transaction(s) and how the Maori owners apprehended its character. Since *Ngati Apa* overturned *Ninety Mile Beach*, it is not safe to presume that because the landward ownership has gone from Maori hands, so too have the seaward rights. Intriguingly, the Chief Justice has said that such enquiry may reveal that while the lesser *whanau* interest has gone the larger overlying tribal title might remain.<sup>160</sup> It might transpire that there was a better grasp by Maori of the consequences of smaller, more involved and detailed transactions than the large sweeping cessions. Maori may have understood certain transactions involving frontage land as diminishing the traditional rights over the abutting foreshore and sea, as by removing any claim to exclusivity.

Extinguishment raises issues of remedies, an area where doctrinal development has been slight.<sup>161</sup> The right to compensation arising from an extinguishment or inadequate

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<sup>160</sup> *Ngati Apa*, above n 1, para 88 Elias CJ. This is a new suggestion in aboriginal title litigation, indicating that there may be layers of aboriginal title to extinguish—the lesser one of the occupant group plus the overarching one of the tribal nation itself.

<sup>161</sup> This is certainly the case in Canada. However, it should be noted that Australian extinguishment law contains significant detail on both procedural rights and compensation, and involves a combination of common law, the operation of statutes like the Racial Discrimination Act 1975 (Cth), the Native Title Act 1993 (Cth), and state and territory legislation against the background of the constitutional guarantee of just terms in the Commonwealth of Australia Constitution Act 1900 (UK), s 51(xxxi). In *Tee-Hit-Ton v United States* (1955) 348 US 272 the Supreme Court held that

consultation arises from the fiduciary position of the Crown. An action on the fiduciary duty is related to but distinct from an action on the aboriginal title, although both invoke the Court's inherent jurisdiction. The former sets out standards of Crown accountability, the latter protects extant property rights. The scope of the Crown's fiduciary duty to Maori has been completely unexplored, mainly because of the dominance of Treaty principles and the Court's principle of non-justiciability to the conduct of historical grievance negotiations. Like aboriginal title, the fiduciary question has been an area of the inherent jurisdiction begging attention. This also represents a prospective jurisprudence the character of which might be considered briefly as well.

In considering the fiduciary obligation of the Crown to Maori, a New Zealand court would need first to explore the impact of the adjustment of the Limitation Act 1950 in the revision of Maori land law in Te Ture Whenua Maori Act 1993. This might apply the limitations period to actions for the extinguishment of aboriginal title. At that time the statutory limitation period was applied to actions on customary title, but, it must be borne in mind, an action on the fiduciary duty is not such an action. Moreover, the Limitation Act does not run for breaches of trust. Supposing limitations posed no problem, a New Zealand court would need to hold the fiduciary standard applicable to the Crown in respect of particular extinguishments. This would be a highly particularised inquiry for each block of land or stretch of coastline. In that regard one must again distinguish the Canadian from the Australian approach. In Canada, courts have been more willing to extend those principles of equity into the public (or at least aboriginal) sphere, whereas the Australian courts have refused. In *Cubillo v The Commonwealth* (2000), Justice O'Loughlin refused to find that a fiduciary relationship arose in relation to the "Stolen Generation" notwithstanding the "vast power of the Commonwealth ... over Aboriginal people"<sup>162</sup> under the Aboriginal Ordinance 1918 (NT).<sup>163</sup> The existence of such a duty, he said, depended on the facts, and this was one of guardianship over children.<sup>164</sup>

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there was no legal obligation on the Federal Government to pay compensation under the Fifth Amendment for the statutory extinguishment of Indian title, merely a "moral obligation".

162 *Cubillo v The Commonwealth* (2000) 174 ALR 97 ["Cubillo"], 501.

163 The High Court upheld the constitutional validity of this legislation as for the "benefit" of Aboriginal peoples in *Kruger and ors v The Commonwealth of Australia*; *Bray and ors v The Commonwealth of Australia* (1997) 146 ALR 126 (HCA). Section 6 of the Ordinance entitled the Director at any time: "to undertake the care, custody, or control of any aboriginal or half caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half caste is or is supposed to be, and may take him into his custody."

164 *Cubillo*, above n 162, 503 citing *Paramasivam v Flynn* (1998) 90 FCR 489 and distinguishing *Bennett v Minister for Community Welfare* (1992) 176 CLR 408.

In Anglo-Australian law, the interests which [these] equitable doctrines ... have hitherto protected are economic interests ... . Here, the conduct complained of is within the purview of the law of tort, which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from intentional or negligent wrongful conduct, is to be compensated. That is not a field on which there is any obvious need for equity to enter ...

Supposing a New Zealand court takes a Canadian-like approach to the Crown's fiduciary duty towards aboriginal title, it must then identify the remedies available against the Crown for breach of such a duty, chief (or even only) of which would be a declaration under the Crown Proceedings Act 1950.

The Foreshore and Seabed Bill prevents the fiduciary duty being developed by the courts under their inherent jurisdiction in parallel to the common law aboriginal title. Clause 9 of the Bill makes it plain that the High Court has no jurisdiction to hear a "customary rights claim" other than through the means set out in the statute. Those claims mean any "in respect of the public foreshore and seabed that is based on the recognition at common law of customary rights, customary title, aboriginal rights, aboriginal title, fiduciary duty of the Crown or rights, titles, or duties of a similar nature". This provision precludes an action on the fiduciary duty for compensation for extinguishment or poor consultation.

Indeed and to repeat, the effect of clauses 9, 10, and 11 is such that all remedies – those relating to extant aboriginal title rights as well as those affecting extinguishment or non-consultation – lie inside the Bill itself.

Where a territorial aboriginal title or TCR is concerned, the High Court finding is referred to the Attorney-General and Minister of Maori Affairs for redress (clause 33). The Ministers to whom this finding is referred "must enter into discussions with the group", the purpose of which "is to consider the nature and extent of any redress that the Crown may give". Clause 34 makes it plain that "no relief may be claimed" in respect of a TCR "other than the redress that the Crown may give".

There has been concern regarding the lack of specificity around the redress available in the event of the High Court issuing a TCR order. Since this is akin to finding an interest equivalent to freehold ownership, Maori representatives have argued that the Bill should give TCRs equivalent protection. The Government's position has been that it must be able to balance the public interest in the development and control of the coastline with the Maori one, and that this process is best done through negotiation (either voluntarily under clause 112 or compulsorily under clause 33) rather than a uniform, predetermined outcome for all TCRs. Maori concern on this issue is undoubtedly justified, despite the Government's assurance that the range of redress is possible through compensation, some form of title (including shared title with the Crown), and co-management structures.

Nonetheless it should be noted that the redress provisions will be subject to judicial review. The Bill's scheme already protects the public interest in the shoreline and ocean in clauses 6, 7, and 8 (navigation, fishing, and recreational user). So one can expect that in negotiating with Maori holding a TCR and in denying redress of the "qualified exclusivity" kind, the Crown will need to prove extra public interest beyond that already covered by the Act. Judicial review may put the Crown to proof going beyond the mere invocation of "public interest". In refusing redress or limiting it, the Crown will certainly be required to demonstrate a compelling and additional public interest (such as that related, for example, to the generation of electricity by the ocean). My presentation to the Select Committee claimed whilst it could be presumed the Crown would approach redress negotiations in good faith, it would be preferable were the "supervening public interest" standard made explicit, so obviating the need for yet more draining litigation.<sup>165</sup>

There is the related question of what the statutory rights entail given the replacement of the common law remedies (themselves admittedly hazy).

The scope of the rights in the TCR will be the subject of "discussion", a slippery term, preferred to "negotiation" (clause 33(2)). The outcome of these may, presumably, be a range of features incorporating compensation, some form of title (subject always to the public rights protected under the Bill), or co-management or related participatory management rights. The Bill gives no indication or hint of the redress possibilities, a serious shortcoming given that a TCR amounts to exclusive ownership and would come after an exhaustive round of legalism in the High Court, followed, perhaps, by a more enervating sequence of applications for judicial review. The right, even if subject to a supervening public interest, should be seen to be treated no less seriously than freehold title.

In the meanwhile, in the period when Crown and the TCR holding group are in negotiation, the character of their rights pending redress is unclear. Unlike the Australian native title regime, the Bill makes no provision for permitted future uses, yet courts are disabled from giving any relief save that given by the Bill. What, for example, if negotiations between the Crown and TCR holders break down? What interim protection will the TCR holders enjoy given the constraints on court relief?<sup>166</sup> Subject to the statutory band of public rights, the TCR holders will have exclusive entitlement to those resources (sand, for example) and forms of exploitation (aquaculture and eco-tourism, as more

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165 Mr Tim Castle, Special Independent Legal Advisor to the Committee strongly endorsed this position in his report published as an appendix (along with my Executive Summary) to the *Report of the Fisheries and other Sea-related Committee*, above n 5, Appendix A, 28, 42–44.

166 See the suggestion of Professor F M Brookfield of Crown trusteeship pending the outcome of litigation: "Trusteeship may solve the problem" (30 August 2004) *New Zealand Herald* Auckland.

examples) that have not been statutorily vested in the Crown (like oil and petroleum). Their management will also be subject to regulatory regimes such as the Resource Management Act and fisheries legislation. Certainly a TCR will involve at least the "veto right" described by Justice Kirby as a consequence of the "qualified exclusivity". These rights would probably subsist even while negotiations with the Crown were outstanding, as the courts will always have the inherent capacity to protect the integrity of the TCR since the right to "discuss" could otherwise be rendered meaningless.

The importance of a TCR therefore appears to lie more in the preventive than commercial potential for the group (which cannot, recall, alienate the right). The adjective "aboriginal", while apprehending the right to exclude, might also limit the reach of territorial title. In *Delgamuukw* the Supreme Court of Canada noted that despite the fact that the jurisprudence was somewhat underdeveloped, it was clear that the use of lands held pursuant to a territorial *aboriginal* "title" was not restricted to the practices, customs, and traditions of aboriginal peoples integral to distinctive aboriginal cultures.<sup>167</sup> Nonetheless the Chief Justice said there were inherent limitations:<sup>168</sup>

Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. As discussed below, one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).

If "aboriginality" is some sort of constraint, the rights of TCR holders to develop their coastline commercially may have a limit. Eco-tourism and aquaculture would surely

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<sup>167</sup> *Delgamuukw*, above n 32, para 119 Lamer CJC.

<sup>168</sup> *Delgamuukw*, above n 32, para 128 Lamer CJC.

qualify, but would activity that compromised the "special bond" like removal of sand-hills or construction of a jetty over *wahi tapu*? That of course is a constraint that ordinary landowners do not suffer, and it may be one that it is hard to justify under the Bill of Rights Act equality and non-discrimination provisions. It may also be difficult to envisage—other than in a speculative manner, as here—aboriginal owners acting in such a manner. If that is indeed a constraint then it is one that would have to be addressed in the redress "discussions" and any eventual outcome.

CROs are statutorily defined as non-proprietary rights, which, strictly, is also the common law position given their inalienability. The Resource Management Act 1991 (RMA) will be changed to incorporate CROs. These changes will require all decision-making under the RMA to recognise and provide as a matter of "national importance" the protection of recognised customary activities (clauses 43 and 74). The RMA will not be allowed to prevent the exercise of CRO activity, nor applied to require a resource consent for a recognised customary activity (clause 75). Resource consents will not be allowed for an activity that would have a significant adverse effect on the exercise of the customary right (clause 90). Customary rights holders may derive a commercial benefit from the right but it must be within the "scale, extent, and frequency that apply under the order" (clause 46). The Bill thus answers affirmatively but with limits a question that has bedevilled the common law, particularly in Canada. The prioritisation of CROs in environmental management decisions and regulation has strong elements of the Canadian approach in *R v Sparrow* (1990).<sup>169</sup> Under *Sparrow*, aboriginal interests are given a substantive and procedural ranking that decision-makers are required to observe in exercising regulatory functions and other engaging in other activity that may "infringe" those rights.

## V CONCLUSION

The statutory jurisdiction of the Maori Land Court and the inherent jurisdiction of the High Court provide separate means for the recognition of Maori property rights in the seabed and foreshore. The Court of Appeal in *Ngati Apa* did not examine the interrelationship of the two. In developing the inherent jurisdiction attending common law aboriginal title over the foreshore and seabed, a New Zealand court will need to address the fundamental questions of recognition, proof, nature, and extinguishment. The Treaty of Waitangi will guide them in that task. Exclusive Maori ownership (territorial title) would probably be regarded as inconsistent with the nature of Crown sovereignty and incapable of recognition by the common law, although a bundle of discrete, specific rights (non-territorial title) would arise. For policy reasons tied in to the history of Maori claims against the statutory jurisdiction, the Crown has decided that the High Court can

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<sup>169</sup> *R v Sparrow* [1990] 1 SCR 1075.



determine the existence of territorial title over the foreshore and seabed by issuing TCR orders. Once legislation to that effect is in place, any restraint on the common law will have been superseded. It is proposed that the High Court will determine those TCRs according to the "common law". It will then have to set out the basis of the "exclusive" title looking at both factual use and occupation (the Canadian dry-land test) and the continuity of Maori custom (the Kirby one). The relevant date will be that of Crown sovereignty (1840) whichever test is adopted, and certainly if a fusion of both is made as clauses 28 and 31 of the Bill suggest ("exclusive occupation and possession"). The High Court will next have to articulate a test of continuity of "traditional" association, with much riding on the view it takes of "tradition". That continuity will have to have been "substantially uninterrupted". The ownership of contiguous land would likely be a necessary but not sufficient condition for a TCR. The High Court might set a standard of proof over and beyond that, bearing in mind the need to ensure that the TCR and CRO provisions have as much operative scope as possible. As the test of "exclusivity" will separate the TCR and CRO jurisdictions, the test for extinguishment of the former will concentrate on the legal removal of the right to exclude.

The Maori Land Court, meanwhile, will determine non-territorial title by issuing CROs. Unlike the TCR jurisdiction (the "common law"), the Maori Land Court will determine the non-territorial bundle to a detailed new statutory jurisdiction that blends the factual and normative tests. Unlike the TCR jurisdiction, the CRO jurisdiction is constituted by the Bill in a careful manner that sets out comprehensive tests for proof and extinguishment, setting the former at the more onerous end of the common law scale and the latter at the easier. This means that where a CRO application is concerned, proof will be a demanding requirement but extinguishment a comparatively undemanding one (especially give the cryptic inclusion of "administrative action").

Just how the statutorily reincarnated territorial and non-territorial aboriginal titles over the foreshore and seabed will co-habit remains to be seen. Much will depend on the scope the High Court gives the territorial title TCR provisions under the "common law" and the interpretation of its non-territorial title inquiries by the Maori Land Court under the new statutory jurisdiction. In any event, clarification will require detailed forensic inquiries into each stretch of the coastline. What the practical effect of a TCR or CRO will be remains unclear, particularly given that redress for the former is at the discretion of the Crown (but subject, presumably, to judicial review). The inherent jurisdiction also includes actions against the Crown on its fiduciary duty to Maori. This is a separate aspect of the jurisdiction, a cause of action apart from aboriginal title. Aboriginal title protects extant rights while the fiduciary duty establishes standards of Crown accountability for its treatment of those rights. The Foreshore and Seabed Bill also extinguishes the fiduciary cause of action.

There is a deeper objection to the Bill, and this is something that Pakeha legalism cannot answer, indeed aggravates. This is the commodification of the shoreline that Maori for generations have revered as sacred, life-sustaining ancestral territory over which they have gone about their customary activity mostly without hindrance (fisheries excepted since the early 1960s). Once this resource came under increased demand and a casual plenitude that somehow accommodated all-comers turned into scarcity, the encroachment of legalism into the customary realm, as indeed into all coastline activity at large, was inevitable. That legalism brought with it the Pakeha law of property, the Western way of making allocative determinations in situations of scarcity. In *Ngati Apa* the Court of Appeal extended the law of property to the ancient Maori interest in the coastline, even though it left unanswered many questions about the character of those rights. For Maori, this law has a highly reductionist tendency, dissecting an integrated worldview into an itemised list of activity. It is only natural that Maori should seek the form of right—exclusive title—that most protects that outlook and which enables them to control and prosper from any development of their coastline. If the Court of Appeal regarded that ultimate goal as a remote one, applicable to no more than the isolated rock outcrop or beach, then the Foreshore and Seabed Bill's TCR jurisdiction makes it considerably less so.

But, one may wonder reverting to the Treaty dimension sidelined early in this article, is the triumph of this complicated legalism a failure of the Treaty relationship? And drawing upon the retrospective offered in opening this article, is this not a jarring of two distinct historical phases? The 1980s represented a period of rights-recognition when statute and court identified key Maori rights. At that time the legal model was essentially binary and oppositional: the "Crown" versus "Maori". Once the New Zealand legal system began processing those rights during the 1990s, as through Treaty settlements and the elaborate jurisprudence of *tangata whenua* provisions of the Resource Management Act 1991, it moved into the downstream issues of rights-integration and -management.<sup>170</sup> This produced a legalism of much greater complexity than the simple binary one of the decade before. Rights-integration and rights-management produced a layered multipartite legality of an inter-iwi, intra-iwi, and pan-iwi character: it affected the public and business sectors in a widely variegated manner. Litigation was undoubtedly a part of that, much of it sidelining the old adversary—the Crown—and drawing in other combatants. Consensus-based engagement has also been a feature of the complex post-recognition legalism, signified by a wide range of contractual relations involving Maori groups.

The foreshore and seabed controversy upset that new pattern by throwing the legal system back into the 1980s water of rights-recognition. One motivation behind the

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170 See P G McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford University Press, Oxford, forthcoming) ch 8.

Foreshore and Seabed Bill undoubtedly lay in the Government's anxiety to accelerate the process of rights-identification and to bring that particular and new set of Maori rights into the contemporary phase alongside the other more established ones. The harsh realities of life inside that phase, its incessant and sometimes cacophonous legalism, constitute a prospective history (and augmented cultural pressure) for iwi and their relationship to the foreshore and seabed whatever statutory action is taken. Even doing nothing would still have resulted in the new Supreme Court eventually determining what facts could at law sustain a vesting order under Te Ture Whenua Maori Act 1993. Once rights-recognition has commenced there will inevitably follow the banging and high-pitched legalism of rights-integration and management. This furious legalism, already witnessed in the fisheries and various Treaty settlements, will come to Maori and their relationship with the foreshore and seabed irrespective of the passage of the Bill, just as forms of it have swamped other aboriginal cultures in like jurisdictions as they too struggle with the overwhelming legalism that follows rights-recognition. The irony may become that too many rights are as disabling as none at all.