NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o nga Kaupapa Ture a Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 3 • NUMBER 2 • NOVEMBER 2005 • ISSN 1176-3930

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PO Box 600
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New Zealand

November 2005

The mode of citation of this journal is: (2005) 3 NZJPIL (page)

The previous issue of this journal is volume 3 number 1, June 2005

ISSN 1176-3930

Printed by Stylex Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

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SETTING THE STATUTORY COMPASS: THE FORESHORE AND SEABED ACT 2004

Paul McHugh*

This article is an extended postscript to an earlier one in this journal. It considers the new jurisdictions established in the Foreshore and Seabed Act 2004. The general features of the two statutory jurisdictions, their inter-relationship and the relevance of overseas case law to the interpretation of the Act are discussed. The Act attempts to tightly rein in the scope for judicial interpretation. However, necessarily, there are core questions that the courts will need to resolve; in particular, the boundary-line between the High Court jurisdiction to issue territorial customary rights orders and that of the Māori Land Court concerning customary rights orders. The early outcomes will affect Māori willingness to engage the dense legalism of the Act.

I INTRODUCTION

The Foreshore and Seabed Act 2004 (FSA) received the royal assent in the last rancorous weeks of 2004. An article I had written for a 2004 edition of this journal scrutinised the Bill, as introduced, and posited the format of a prospective New Zealand jurisprudence of the common law aboriginal title-rights over the foreshore and seabed.[1] The article acknowledged the essentially counterfactual nature of that inquiry, given the government's firm and apparently unshakeable resolution to replace the inchoate common law regime with an all-encompassing statutory scheme. Legal certainty was to replace the uncertainties of what might be decades of common law incrementalism highly susceptible to the haphazard and context-specific character of litigation. This short follow-up article considers the Act in its final form in the light of my earlier commentary on the Bill.

I should add that I was invited by the Select Committee that considered the Bill to make a full presentation on the nature of common law aboriginal title, particularly as it has

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1 P G McHugh "Aboriginal Title in New Zealand: A Retrospect and a Prospect" (2004) 2 NZJPIL 139.

developed in other jurisdictions, most notably Canada and Australia. This presentation was given in September 2004 and included points also made in the earlier article for this journal. A great many of the points noted there and in my presentation drew a response apparent in the final shape of the FSA, which, in the new detail inserted before the third reading and after the reporting back, differed considerably from its introduced form. Most submissions to the Select Committee had outright and vehemently rejected the principle of what was perceived as unilateral legislation. That was a constitutional principle properly raised by those many submissions, but a matter on which I avoided comment given the evident determination of the government. I did, however, remark on the need for proper resourcing and clearer redress where territorial title-rights were concerned. It was plain too, I commented, that the Act would deliver coastal Māori into an intense and probably debilitating legalism, but that that fate was inevitable sooner or later, once the law of property landed on their beaches. It would have come with (though expedited by) or without the proposed legislation. That, however, is what the FSA attempts to accomplish – the substitution of an uncertain, speculative common law regime for a statutorily encompassed one.

The judgments in *Ngati Apa v Attorney-General* (*Ngati Apa*)[2] established that Māori customary property rights over the coastline *might* exist under, first, the common law and, secondly, the more straitened statutory jurisdiction of the Māori Land Court. The recognition of those property rights was the barest that might be given, amounting to nothing more than an indication that some rights could potentially exist. Since much relied upon presentation of appropriate facts, there remained the possibility, judges intimated in *Ngati Apa*, that the legal hypothetical could result in little, maybe even nothing, for Māori. The Court of Appeal in *Ngati Apa* did not explain the relationship between the two sources of Māori right. Moreover, the Court did not explain the nature of the common law aboriginal title and the range of rights that might be allowed by the inherent common law jurisdiction even once the factual threshold, or matrix, was established at law and met in the particular case by evidence. Also, even if the Marlborough Sounds application had been remitted to the Māori Land Court and even if that Court and, after it, the Māori Appellate Court had made a vesting order under the statutory jurisdiction of Te Ture Whenua Māori Act 1993 (TTWMA), at some stage New Zealand's highest court would have had to explain and set out the level of factual evidence required at law to sustain such an order under the statute. In other words, whether Māori entitlement derived from the statutory (Māori Land Court) or inherent (High Court) jurisdiction, there remained outstanding issues as to the factual matrix necessary to sustain a particular type of right,

2 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA). See Richard Boast "Māori Proprietary Claims to the Foreshore and Seabed after *Ngati Apa*" (2004) 21 NZULR 1.

specifically rights equivalent to or approaching exclusive ownership. To repeat, the recognition of the customary property right by the judgments in *Ngati Apa* was the barest. It opened the door a crack, saying no more than that customary rights might still be there at law subject to the appropriate proof, leaving open the threshold to establish the maximum potential right: exclusivity.

The outcome of the post-*Ngati Apa* controversy, as embodied in the FSA in its final form, has been a supposition going beyond a cautious acceptance that Māori property rights over the foreshore and seabed might be there. The Act, for all its tiptoeing language otherwise, embodies the systemic acceptance that they are. But, of course, in the gesture of statutory recognition lies also the new and exclusive basis for their legal presence. In shoe-horning the common law aboriginal title-rights into an entirely statutory format, those customary rights are returned to the "statute-based approach" that once ruled the legal approach to Māori customary rights. According to this, any such rights had no basis in the common law or even the Treaty of Waitangi, but existed solely to the extent of their statutory recognition.[3] The FSA goes to lengths to ensure that approach: section 10 specifies that the jurisdiction of the High Court "whether under any enactment or any rule of law or by virtue of its inherent jurisdiction" to entertain "any customary rights claim is replaced fully" by the FSA. Those claims are limited to any claim that is "based on, or relies on, customary rights, customary title, aboriginal rights, aboriginal title, the fiduciary duty of the Crown, or any rights, title, or duties of a similar nature".[4] That is as exhaustive as it is possible to be. Likewise, section 12 limits the Māori Land Court's statutory jurisdiction to that set out in the Act, even where the application was made before passage of the FSA. Māori rights over the foreshore and seabed now live entirely within the compass of the FSA.

The pattern of aboriginal rights jurisprudence, at its broadest, has embodied three legal phases or eras.[5] First, there was a pre-history in which aboriginal rights were excluded from the common law legal system of each jurisdiction. Then, there commenced a period of legal rights-recognition during the 1970s and 1980s reversing that exclusion. The legal system signalled that it was prepared to recognise and articulate a set of aboriginal rights. The courts awakened and responded to aboriginal peoples' claims, doing so in what was initially a highly indeterminate and inchoate manner. In the early groundbreaking

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3 This approach is discussed in Paul McHugh "Aboriginal title in New Zealand Courts" (1984) 2 Canta LR 235.

4 Foreshore and Seabed Act 2004, s 10(2).

5 Most fully P G McHugh *Aboriginal Societies and the Common Law* (Oxford University Press, New York, 2004) chs 7–9; also Paul McHugh "What a Difference a Treaty Makes – The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law" (2004) 15 PLR 87–102.

judgments, lofty judicial language suggested high moral as much as legal principle was involved. The spectre of a more full though as-yet unarticulated set of rights activated all sites of law-making (litigation, legislation and negotiation) inside each jurisdiction, such that by the 1990s a new post-recognition phase or type of legalism had begun. This became the contemporary era of "rights-integration and -management" in which the downstream, second-generation questions of aboriginal rights were addressed. No longer was it a question of rights-recognition but, rather, the frenzy of legalism concerned the manner in which those rights inhabited the legal system. Aboriginal rights had to be "integrated" with those of other rights-bearers inside the legal system, such as local authorities, resource consent holders, landowners and, to the extent they held any rights, the general public. Those rights also had to be "managed" by the rights-holders through legally appropriate and accountable mechanisms acceptable and acclimatised to the host common law legal system. Integration and management represent an ongoing and contemporary process of constant legalism, being a phenomenon of all jurisdictions with a rights-bearing aboriginal population.

These phases have not, of course, been self-contained, for the processes of integration and management carry important consequences for the nature and extent of the aboriginal right back to which they relate. For many aboriginal groups, the devil has lurked downstream in the detail and to some extent swum against the flow back to the watershed itself. Further, rights-integration and -management represent a form of legalism already familiar to the New Zealand legal system. The resolution of historical claims, Māori sea fisheries and tāngata whenua[6] rights under the Resource Management Act 1991 (RMA) have been distinct "rights" that have generated their own intense post-recognition legalism wherein the central and outstanding issues (often unresolved) have been essentially those of integration and management. If Māori engage with the FSA as intensely as they have with those other mechanisms, then it is certain that those types of issue will arise. The capacity of the FSA to accommodate those processes is, however, another matter. Indeed, the FSA seems so intent on the initial question of rights-recognition that its attention to the inevitable post-recognition legalism is very patchy.

One cannot help but agree with the observation that the FSA is founded on the supposition that the white electorate will not stomach an extension of Māori rights,[7] or at least such a publicly visible one as that caused by *Ngati Apa*. So although it has an apparent "give nothing, take nothing" guise, it also contains careful prophylactics to forestall the politically-awkward extension of Māori rights that *Ngati Apa* was perceived as licensing.

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6 *Tangata whenua*: people of the land, the indigenous inhabitants.

7 Colin James "Rhetoric Likely to Win the Present, but not the Future" (1 February 2005) *New Zealand Herald* Auckland.

Alongside that anxiety about judicial activism, there is also the hope (and not a very confident one) that in one vital respect – to which I will come soon – judges will turn in the more conservative direction to read down, if not nullify the High Court jurisdiction altogether. So the legislation is trying to bridle judicial liberality yet encourage a containing conservatism whilst also presenting the façade of ostensible neutrality by apparently leaving the resolution of these matters to the courts. That torturous and breathless logic is a political fix, of course; the compromise seemingly accommodating all.

That might have been an effective strategy in the Parliament of 2004, but those who live with the aftermath – this legislation – must interpret and apply it. It is my belief that perhaps the most crucial body of interpreters – the courts – will be very aware of this political context. I do not think the independent-minded bench will step so easily and pliably into the role the legislation attempts to give them. Interpretation will not be cut to the pattern the government has traced onto the statute. Nor, for that matter, will it tend entirely towards the Māori direction. There is palpable neurosis in this legislation. It goes like this: the government, convinced of the need for a legislative solution yet unwilling to be seen itself to concede more than Māori might have had at common law, but also not wanting Māori to get any less than their legal entitlement or the courts to award more than the least politically-combustible outcome, has reined in the scope for interpretation very carefully. However, whilst also anticipating if not fearing that the most rather than the least may indeed eventuate (that is, exclusive ownership rights), the statute puts in place mechanisms to accommodate that outcome (and in so doing makes the chances of the minimum legal result less rather than more likely). This is legislation reflecting the political inclemency and storminess of the year in which it was begotten.

Once the glare of early publicity settles, it may be that the intense legalism of the FSA will mostly occur outside the public gaze as with the other sites of post-recognition legalism. The media still reports occasional controversies in the claims resolution processes, the administration of the RMA and sea fisheries, but the reality is that most of this legalism (some of it very intense nonetheless) occurs below the public sight-line. In that regard, the political perception that Māori rights are best addressed in a more intimate setting is, I think, correct. More constructive relations between Māori and the Crown occur when the Treaty partners engage outside a public gaze prone to misapprehension and populist stirring of the Orewa kind.[8] Treaty settlements are announced in a blaze of positive publicity and their processes no longer draw such political heat apart from crazy

8 I refer here to a controversial speech by Don Brash, Leader of the National Party: "Nationhood" (Speech to the Orewa Rotary Club, Orewa, 27 January 2004). The speech was critical of Māori claims, especially those to the foreshore and seabed, and won his conservative National Party electoral popularity. Online at <http://www.national.org.nz/Article.aspx?ArticleID=1614> (last accessed 21 October 2005).

(usually misreported) moments, such as the alleged claim to "ownership" (a much misused word) of the airspace over Lake Taupo.[9] The warmth accompanying the recent announcement about Mount Maunganui is a case in point.[10] This year, the Whakatohea application[11] sparked media attention as the first test of the new legislation and the alarmist responses it attracted reflected the momentum from the rancour of 2004. The interpretation of the FSA will need to be settled in the courts, but that process is so carefully bridled that an extreme outcome is unlikely, however much the bench may bite at the bit.

It should be stressed that the haphazard development of a common law jurisprudence would probably not have produced over time a set of rights any more substantial than those embodied in the FSA. There is a danger in thinking – or dreaming – that over time the common law would have evolved a more generous outlook than that taken by the FSA. Looking at the overseas patterns, the auguries for Māori of a set of powerful common law rights forged through the courts is not entirely promising, however receptive the New Zealand bench may presently seem to them in the afterglow of *Ngati Apa*. The FSA will produce something for Māori. For them it will probably be less than they hoped and certainly more cumbersome than they anticipated. They now have no choice other than to work with this statute. When their mana[12] over the foreshore and seabed entered the rights-based medium of the law, some form of legalism became inevitable. Whatever happened afterwards, statute or not, once *Ngati Apa* was handed down and legal attention had turned to the foreshore and seabed, the arrival of a complex and possibly – indeed, probably – stifling legalism was a foregone conclusion. An intense jurisprudence of some sort would have grown whether enclosed by a quick-fix statute or spreading incrementally and partially through the moss-like and slippery common law. To reiterate, post-recognition legalism would have grown with or without the FSA. This legalism, whatever

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9 The press coverage of this matter did not identify the different shades of ownership rights in relation to the Lake, depicting the undoubted "public" right of ordinary civil flight as jeopardised. The ownership rights of Tuwharetoa are the same as any owner of land in relation to the airspace over their own land, no more and no less. The reporting is typical of a certain tendency to depict Māori ownership as a greater threat (and a mysterious and ominous one) than non-Māori (and unproblematic) ownership. The "Lake Taupo" outburst in the press was, in a sense, a replaying writ smaller of the foreshore and seabed hysteria.

10 Early in 2005, it was announced that the famous coastal landmark at the tip of a very popular beach in the Bay of Plenty, Mount Maunganui or Mauao, was to be returned to Māori: "The Mount to be Given Back to Māori" (3 February 2005) *New Zealand Herald* Auckland.

11 Chief Māori Land Court Judge Joe Williams agreed in March 2005 to hear the claim for kaitiakitanga (authority and guardianship) over 50 km of coastline running east of Whakatane on behalf of the Whakatohea iwi. See (August 2005) *Māori Law Review*, 4–5.

12 *Mana*: Māori term signifying a sense of identity, pride and strength of spirit.

its source and pressure points, was always going to prod issues of mana without, of course, being a substitute for it. Māori mana along the coastline endures and inheres apart from the new tide of legalism that now crashes on those shores.

II THE TERRITORIAL CUSTOMARY RIGHT AND CUSTOMARY RIGHTS ORDER

The FSA 2004 is a mechanism for the recognition of Māori rights over the foreshore and seabed. It identifies two potential types of right: the territorial customary right and the customary rights order. Different processes apply to each. The territorial customary right is the nearest equivalent to exclusive ownership and is ascertained through processes located in the High Court, whilst customary rights orders are non-exclusive use-rights processed through the Māori Land Court. The territorial customary right represents a notional acceptance of the Kirby position that some form of "qualified exclusivity" might have been cognisable at common law.[13]

There are, then, two types of potential right with different tracks. This distinction matches the common law's differentiation between an exclusive (territorial) aboriginal title and non-exclusive (non-territorial) aboriginal title use-rights. Non-territorial rights are non-exclusive in the sense that they are held over land in respect of which the aboriginal rights-holders have lost the right to exclude other people. Non-exclusive ownership is sometimes said to resemble a "bundle of rights",[14] each of which is specifically identified. The issue that aboriginal people have had with the "bundle of rights" approach is that it is inherently reductive, reducing their spiritual and holistic connection to land to a shopping list of discrete and specific use-rights and activities. In that sense, the retention of the right to exclude becomes crucial because it is through assertion of the right to control access that aboriginal peoples can ensure the integrity of their relationship with land.

A The Territorial Customary Right

1 The recognition question

In written submissions to the Waitangi Tribunal and in the earlier article for this journal, I explained that the common law could not "recognise" an exclusive or territorial aboriginal title over the foreshore and seabed. "Recognition" was, I explained, a preliminary question courts had to address in aboriginal title claims to see if the right claimed – such as exclusive ownership of tidal land – was of an order that the common law

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13 *Western Australia v Ward* (2002) 191 ALR 1, para 591 (HCA) Kirby J.

14 See for example *Western Australia v Ward*, above n 13, para 95 (HCA) Gleeson CJ, Gaudron, Gummow and Hayne JJ.

could potentially recognise.[15] Tidal land, I continued, was a special juridical space subject at common law to supervening public rights of such an extent that whilst use-rights were certainly possible, there could be no presumptive exclusive ownership.[16] In other words, the greatest common law aboriginal title over the foreshore and seabed consisted of a "bundle of rights", a non-territorial package not amounting to exclusive ownership though still potentially extensive (subject to the requisite evidence). Of the common law courts that had already considered this matter, only one senior judge, Justice Kirby in the High Court of Australia, had argued that Crown ownership of tidal land, whilst necessarily limited by what he depicted as a very narrow spectrum of public rights, could be subject to the "qualified exclusivity" of a territorial aboriginal title.[17] That, I argued, was the approach of a single judge and one that cut against the clear grain of judgments. To the extent those judges accepted the possibility of an aboriginal title over tidal land, it was on a non-territorial basis and a circumscribed one at that.[18] The Tribunal endorsed that submission, noting that it would require a "bold" New Zealand court to take the "qualified exclusivity" approach,[19] but echoing my hopeful expectation that our courts would not be as ungenerous in framing the non-territorial rights under the inherent jurisdiction. To the

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15 The Canadian version of this test, a slightly narrower one concerned with the common law's articulation of the Crown's position as sovereign, is that of "sovereign compatibility", first explicitly articulated by Justice Binney in *Mitchell v Canada (MNR)* [2001] 1 SCR 911. The recognition test applied in Australia under section 223 Native Title Act 1993 (Cth) extends to rights that do not go to the sovereignty of the Crown, such as intellectual property rights inside a native title: *Bulun Bulun v R and T Textiles Pty Ltd* (1998) 86 FCR 244 (including those rights that would fracture a skeletal principle of the common law) and see *Western Australia v Ward*, above n 13, para 583 (HCA) Kirby J.

16 But that was not to exclude titles derived from statute or specific Crown grant (as with some isolated English examples). An aboriginal title is essentially a presumptive one, being Crown-recognised rather than Crown-derived, and hence a territorial aboriginal title could not arise over the foreshore or seabed through legal principles associated with Crown sovereignty that, by common law, is qualified *ab initio* by public rights. Professor F M Jock Brookfield takes issue with that conclusion in "Māori Claims and the 'Special' Juridical Nature of Foreshore and Seabed" [2005] NZ Law Rev 179, relying on those very few British cases. He does not consider cases from other jurisdictions where an aboriginal title was involved except for *Yarmirr*, below n 17. Further, the common law does not give primacy to possession (of any land, covered by sea or not), although it will respond to it where the relativities allow. At common law, legal title will always trump possession: statutory limitations periods put that capacity into a time-frame. With respect, by head counts and logic, my conclusion stands although, as I explain, the Foreshore and Seabed Act 2004 has rendered it obsolete.

17 *The Commonwealth v Yarmirr* (2001) 184 ALR 113, para 268 (HCA) Kirby J.

18 Notably *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).

19 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy: Wai 1071* (Legislation Direct, Wellington, 2004) para 3.3.4 [*Report on the Crown's Foreshore and Seabed Policy: Wai 1071*].

extent that Māori might successfully claim exclusive rights over the foreshore and seabed, it came, I submitted, not through the common law but from the statutory jurisdiction of the Māori Land Court under the TTWMA. It made the gesture of legal recognition that the common law of itself almost certainly would not provide. There had been controversy for over a century as to the scope of the statutory jurisdiction, which after *Re the Ninety Mile Beach*[20] was thought not to extend over tidal land. Of course, *Ngati Apa* ended that misapprehension when it signalled that maybe the statutory jurisdiction allowed a vesting order for those areas. It all depended very heavily, the Court stressed, on the specific facts.

There is a paradox in the format of the FSA. The jurisdiction that the common law undoubtedly did provide before passage of the Act – its non-territorial "bundle of rights" jurisdiction – has been given to the Māori Land Court to determine customary rights orders. Meanwhile, that which the inherent jurisdiction previously lacked – the capacity to recognise a territorial aboriginal title over tidal land – is in its nearest and virtual equivalent (the territorial customary right) vested in the High Court. So the FSA criss-crosses the jurisdictions, giving each court the capacity that the other previously had.

2 *The factual matrix for the territorial customary right*

Territorial customary rights are defined in section 32. The term means "a customary title or an aboriginal title that could be recognised at common law." The use of the words "could be recognised" is a not-so-well-disguised invitation to the courts to follow my lead and that of the Tribunal so as to hold that exclusive ownership of the foreshore and seabed cannot be recognised by the common law. If courts were to accept that invitation then it would instantly nullify sections 32–45 of the Act. Just the description of the outcome indicates its unlikelihood. The courts will interpret the Act so as to give it as much viability as possible. As I told the Select Committee looking at the Bill, in making elaborate provision for the territorial customary right, the Bill (and now the Act) effectively answers the recognition question in the affirmative. Although the words "could be recognised" hint otherwise, the statute elsewhere supposes in plentiful detail that qualified exclusivity of the Kirby sort can exist at law. So many provisions are founded on that supposition that a court would not turn around and say it was not possible after all. For example, section 4 – the purposes section – speaks of the FSA enabling the High Court "to investigate the full extent of the rights that may have been held at common law, and, if those rights are not able to be fully expressed as a result of this Act", to facilitate the statutory redress. Section 33 also seems to suppose that the common law would have awarded territorial aboriginal title. Whatever I had submitted before introduction of the Bill on what the common law

20 *Re the Ninety Mile Beach* [1963] NZLR 461 (CA). And see Richard Boast "*In re Ninety Mile Beach* Revisited: The Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 VUWLR 145.

simpliciter might or might not "recognise", the very presence of the territorial customary right jurisdiction makes backtracking impossible. It represents a statutory version of the Kirby model and also invites the extension of dry land principles to tidal land.[21]

Section 32 sets up two standards that the High Court must apply and mesh in determining territorial customary rights. It must refer to those of the common law (an aboriginal title that can be "recognised at common law") and also the statutory criteria set out in paragraphs (a) and (b). Between them they establish the factual requirements or factual matrix to be met for a territorial customary right to issue. What, one might ask, does each standard entail and how do they relate one to the other?

The reference to the "common law" suggests scope for judicial development of the territorial customary right jurisprudence by reference not only to overseas case law but also injection of a distinctly New Zealand element. The common law that will do the recognising is, after all, that of New Zealand. That might mean, for example, that the Treaty has some role to play in the elaboration of the common law component of the territorial customary right. Further, the purposes section cited above enables the High Court "to investigate the full extent of the rights that may have been held at common law." The extent, however, to which a true New Zealand common law will influence the shape of a territorial customary right is almost certainly limited, if not negligible, given the dominance and careful prescription of the statutory criteria that follow. These must also be used by the High Court, so that if the New Zealand common law by itself set a lower threshold, then the statutory criteria would arguably supplement and raise it. The preservation of the inherent jurisdiction to award qualified exclusivity – ironically, one that the High Court would probably never have taken anyway – is, therefore, largely illusory. The real crux for a territorial customary right will not be the notional New Zealand common law but compliance of the evidence with the statutory criteria as set out in section 32.

Section 32(1)(a) requires the claimant group's title to be "founded on [their] exclusive use and occupation of a particular area of the public foreshore and seabed". This is a

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21 Professor Brookfield, above n 16, argues that the Foreshore and Seabed Act 2004 demonstrates that Parliament believed that at common law there might be "qualified exclusivity" aboriginal title over title land. From the time the Bill was introduced, I made plain my belief that the legislation would provide the recognition the common law probably could not have supplied. Professor Brookfield has overlooked my conclusion, published in a commentary by the NZ Law Society (March 2005), contained in my Select Committee presentation (which was available online) and repeated in a series of lectures I delivered June–September 2004, including one at the Faculty of Law at Auckland University. Debate over what the common law could or could not have recognised before passage of the Foreshore and Seabed Act 2005 has become pointless given the unlikelihood of a very narrow interpretation of section 32.

requirement of "factual presence", a version of the Canadian approach to aboriginal title. Section 32 adds a requirement that the factual presence must have been "without substantial interruption" since 1840 (the year of Crown sovereignty) to the commencement of the Act on 17 January 2004.[22] The right is limited to the "particular area" over which it has been actually exercised.[23] Those features of this section respond directly to the *R v Marshall*[24] litigation in Canada, pre-empting the recurrence of similar issues in the New Zealand setting.

Section 32(1)(b) further requires the claimant to be "entitled … until the commencement of this Part, to exclusive use and occupation of that area." This is a requirement of "customary entitlement" being one that necessarily will be determined according to customary law or tikanga Māori[25] (an adaptation of the Australian "normative association" approach). In *Western Australia v Ward*[26] the majority of the High Court of Australia refused to decide when or whether a spiritual connection unaccompanied by more tangible physical forms would suffice.[27] The Australian native title jurisprudence suggests that spiritual association alone under customary law may suffice,[28] but the High Court of Australia has yet to address the issue directly. In addition, for Justice Kirby, the application of the "normative-basis" test to the qualified exclusivity of the native title over the seabed did not require actual enforcement by the tribal owners: the assertion of exclusivity within the customary system was enough in itself. Judges in New Zealand, however, will not have to consider such issues because section 32(3) of the FSA states clearly that "no account may be taken of any spiritual or cultural association with the area, unless that association is manifested in a physical activity or use related to a natural or physical resource."

Neither of these approaches were specifically set out in the Bill as introduced to direct the High Court's application of its territorial customary right jurisdiction, however it seemed to me that they were implicit in it. The synthesis of the Canadian and Australian tests is now put beyond doubt.

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22 Foreshore and Seabed Act 2004, ss 2, 32(2)(a).

23 Foreshore and Seabed Act 2004, s 32(1)(a).

24 *R v Marshall* [2003] NSCA 105; [2005] SCC 43 (20 July 2005).

25 *Tikanga*: Māori customary ways.

26 *Western Australia v Ward*, above n 13.

27 *Western Australia v Ward*, above n 13, para 64 (HCA) Gleeson CJ, Gummow, Gaudron and Hayne JJ.

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

The FSA adds another element to that synthesis, providing that "exclusive use and occupation" will arise "only if" the group has had "continuous title to contiguous land".[29] Before the Tribunal and, more especially, the Select Committee, I indicated that under the Bill as introduced (where the territorial customary right jurisdiction was vastly less specific than it is in the Act), a court developing the inherent jurisdiction would almost certainly set this as a necessary (though perhaps not sufficient) condition for a territorial customary right. Since the territorial customary right is based upon de facto exclusivity and control of access, ownership – or at least the rightful control – of land along the coastline would be indispensable to its effective assertion. This would enable the coastal group to maintain control of all except sea-borne forms of access. I raised that somewhat speculatively and briefly in my submissions to the Tribunal when there was no Bill and I was proceeding on the supposition that (for want of a better term, a Kirby-like) qualified exclusivity might arise under the common law. I came to it again on a more sustained basis before the Select Committee when the Bill made such provision, suggesting (and doubtless playing to politicians' wariness of courts) that contiguous ownership might be included in the legislation. As introduced, the Bill did not contain any such provision. The Tribunal, which held its hearings in January 2004 before the Bill was introduced, fretted aloud and in its later report that such a test would favour those groups who by the accident of fortune had not lost their coastline. Uneven results could occur, I agreed, but that was a consequence of common law aboriginal title and the statutory jurisdiction of the TTWMA protecting extant rights rather than those lost historically in breach of the Treaty. Such losses were addressed through the Treaty claims processes rather than a property rights regime. The FSA is most insistently a property rights mechanism. It therefore sets contiguous ownership, which is defined in section 32(6), as a necessary requirement for a territorial customary right. Judges do not have to come to this conclusion themselves because the Act does it for them.

The crunch point in the application of the FSA will not be the articulation of the legal test for a territorial customary right, which is set out comprehensively, so much as the evidentiary threshold a claimant group must pass in order to satisfy the requirement of "exclusivity". This still, necessarily, must be a matter of judicial interpretation. The evidentiary threshold for a territorial customary right set by the High Court will represent the boundary between the two jurisdictions. If there is any uncertainty in the demarcation of the jurisdictions, it will not arise from the legal tests each must apply so much as from identification of the level of evidence necessary to prove exclusivity through a combination of actual circumstance, assertion under tikanga and contiguous ownership. So far as the evidence itself is concerned, the High Court can look at any "that it thinks relevant", including evidence of

29 Foreshore and Seabed Act 2004, s 32(2)(b).

non-commercial fishing activity. The Court "may receive as evidence any oral or written statement, document, matter, or information" that it "considers to be reliable, whether or not that evidence would otherwise be admissible."[30]

3 Overlapping and overlaying territorial customary right claims

Applications for a territorial customary right are to be made by a "group".[31] The FSA does not define a "group" but it does require it to establish "exclusive use and occupation" under common law[32] and the statutory criteria.[33] The "group" is not defined although where ownership of contiguous land is concerned it is taken to mean past members, including the deceased. Further, the Māori Land Court customary rights order jurisdiction does not use the same term. Whereas a "group" applies for a territorial customary right, the customary rights order applicant entity must be a "whanau, hapu, or iwi, through its authorised representative". Clearly a "group" seeking the territorial customary right may be a whanau, hapu or iwi,[34] but plainly the term is not to be read as so limited. To complicate this matter, the High Court has a jurisdiction – a completely meaningless one as far as I can tell – to determine customary rights orders under Part IV of the Act. This, doubtless, is the sop to New Zealand First – the "Auckland Regatta"[35] part of the statute protecting everyone's customary rights as they were in 1840 – that will never be effective. Here, "group" is defined to mean "a group of natural persons with a distinctive community of interest" and does not include "persons whose only connection to the group is as successors in title to any land".[36]

Anyone with the faintest familiarity with Māori culture will be aware that stretches of the coastline will be subject to overlapping claims between, if not among, "groups" and that what constitutes the "group" will be a matter of contention within iwi. It is very likely

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30 Foreshore and Seabed Act 2004, s 34(2).

31 Foreshore and Seabed Act 2004, s 33.

32 Foreshore and Seabed Act 2004, s 33.

33 Foreshore and Seabed Act 2004, s 34.

34 *Whanau*: extended family; *hapu*: genealogically-linked sub-tribe; *iwi*: tribe linked by descent from common ancestor.

35 The Leader of the New Zealand First Party, Winston Peters, whose support was necessary to ensure passage of the foreshore and seabed legislation, insisted that the 'customary rights' of all New Zealanders, not just Māori, should be protected. He cited the example of the Auckland Regatta as a 'customary right' that potentially should be allowed protection under the Act: "United Future gazumped by New Zealand First" (7 April 2004) *New Zealand Herald* Auckland. Part IV of the Act is the price of New Zealand First's support.

36 Foreshore and Seabed Act 2004, s 66.

that there are stretches of New Zealand coastline where tribes have contested mana, or even where their mana is seasonal.[37] The FSA rather blithely provides for a "group" to make an application without acknowledgement of the very considerable issues of identity and mana whenua and mana moana[38] that will lie behind that simple word. Cross-claims and disputed claims within iwi will almost certainly arise with attendant questions of mandate and representation. That prospect is inevitable, as the short histories of the fisheries settlement and Treaty settlement processes both show, as well as the longer history of the Māori Land Court. It will particularly become the case if the High Court gives as ample scope to the territorial customary right jurisdiction as they can within the rigid statutory criteria for proof.

Since the FSA does not define a territorial customary right "group", other than to imply that it is not confined to whanau, hapu or iwi and suggest that it will be natural persons with a distinctive community of interest, it may be that definitive judicial interpretation is necessary. The High Court may attempt an exhaustive definition of the term or it may take a more flexible and dynamic case-by-case approach. However, it will almost certainly be called upon to take a stance on overlaying and overlapping claims.

Overlaying claims will arise when, for example, a whanau claims territorial customary right rights that are simultaneously claimed by hapu and/or iwi. How is the High Court to decide which of these "groups" is entitled to be recognised as the applicant? Tikanga along the coastline will vary, with the relative profiles of hapu and iwi reconfiguring not only in particular locations but over time: the fixity of contiguous ownership will say nothing of this dynamic process. The criteria that the High Court must apply under common law and section 32 would allow it to place the group anywhere inside a circle that is as wide as the iwi and as small as the whanau. It is all very well to express the hope that the Court may use its jurisdiction therapeutically, as to conciliate a riven iwi or hapu, but that supposes a judicial disposition and patience that might quickly evaporate.

There is also the possibility of overlapping claims to consider. Since the FSA states that only one group must make out the requisite exclusive use and occupation, a claim by two or more to the same stretch will lead to neither succeeding since that fact alone – duality of claim – will negate one another's exclusivity in fact and by customary entitlement. The requirement of contiguous ownership will also complicate such claims: for example, in bays or inlets. The existence of sustainable overlapping claims will render impossible any

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37 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 Māori custom (*tuku* or gift) Ngati Mahuta assume guardianship.

38 *Mana whenua*: mana over land; *mana moana*: mana over sea. See *mana*, above n 12.

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 v British Columbia*.[39] There is no reason why the High Court cannot so interpret "exclusive use and occupation" in the FSA. However, it will require the proactive and cooperative management of claims by applicants and a degree of involvement unusual for High Court judges. Claimants may agree to disagree and put on a united front before the Court. The façade of unity will not, however, be enough. Unless it is endorsing a negotiated agreement with the Crown (in which anything is theoretically possible) the High Court must ensure the group has a full charter and dispute resolution mechanisms in place before it can make the territorial customary right order.[40] Faced with conflicting claims to a particular stretch, the High Court might adjourn proceedings to allow the parties by their own processes to merge into the single "group" required by the statute. Once that group is in place, it must also meet the governance requirements of the FSA. The High Court is given authority to make rules for applications under section 33, and may need to frame a procedural code for itself if it is swamped with applications.

The possibility – even probability – of overlapping claims highlights the key feature of the territorial customary right jurisdiction. It makes exclusivity an absolute bar to be crossed. As Her Honour Judge Stephanie Milroy of the Māori Land Court pointed out to me in conversation, this fails to take account of the essentially porous notion of exclusivity in tikanga and the actual patterns of Māori presence on the coastline not only at any given moment in time, but through time. The juridical requirement of exclusivity is set at 1840 and cannot absorb the natural changes of custom and usage that any human society naturally experiences, particularly highly competitive iwi living at comparatively close quarter and contesting mana over a resource from which they traditionally derived their chief supply of protein.

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39 *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 (SCC) para 158 Lamer CJC: "The possibility of joint title has been recognized by American courts: *United States v. Santa Fe Pacific Railroad Co* (1941) 314 US 339. 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."

40 Foreshore and Seabed Act 2004, ss 41, 42.

4 Territorial customary right redress

Section 37(1) provides that where a territorial customary right finding has been made, ministers "must enter into discussions with the applicant group for the purpose of negotiating an agreement as to the nature and extent of the redress to be given by the Crown." The Crown is obliged to engage once a territorial customary right issues, but only by way of "discussions", a term that differs from "negotiations", which contemplate an eventual outcome. Further, under section 38(3), "No court has jurisdiction to consider the nature or the extent of any matter that the Crown proposes, offers, or gives for the purpose of any redress." Under section 96, the Crown can also negotiate a redress package before a territorial customary right finding has been made, but the High Court must confirm that the statutory criteria are met, otherwise the agreement will have no effect. It is conceivable, at least on the face of this, that such an agreement might be reached but nullified by the applicant group's failure to satisfy the legal requirements for a territorial customary right.[41] That would be a most invidious outcome, putting the Court in the role of executioner. This provision did not appear in the original Bill and it was inserted to guarantee New Zealand First MPs that the Crown would not negotiate at a lower threshold than the legal one. One way or another, any redress agreement must still be attended by a High Court territorial customary right determination.

One can only hope that the first determination is the outcome of a consensual process under section 96 sent to the High Court for rubberstamping. A precedent-setting determination under an adversarial application might result in the Court setting a high factual threshold that stymies an agreement-led approach to territorial rights. In that regard, the outcome of the present negotiations with Ngati Porou and Ngati Porou o Hauriki will be watched keenly. Hopefully, they will result in section 96 applications reaching the High Court before a Crown contested application under section 33.

It is notionally possible that "discussions" with the Crown, whether pre-[42] or post-determination[43] of a territorial customary right, might result in the award of freehold title over tidal land[44] or some other rights-package of a qualified exclusivity nature. This may entail alternative or fuller redress than that offered by the comparatively lesser and

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41 It should be noted that High Court confirmation does not extend to the entirety of the redress package, so much as the satisfaction by the applicants of the legal criteria for a territorial customary right.

42 Foreshore and Seabed Act 2004, s 96.

43 Foreshore and Seabed Act 2004, s 37(1).

44 Subject, of course, to the access and navigation rights of sections 7 and 8 of the Foreshore and Seabed Act 2004.

obligatory fallback position of a foreshore and seabed reserve.[45] If there is any real flexibility in the FSA, then, it only becomes meaningful once the territorial customary right determination is in hand and it depends upon the willingness of the Crown to offer redress more tantalising than the statutory minimum. And, as has been seen, the Crown's hand is a free one, carefully set out as an unreviewable discretion.

The FSA is concerned with extant property rights, not with the resolution of historical claims with a foreshore and seabed dimension. Historical claims redress negotiations might include the coastline and so produce marine-related outcomes that are not constrained by the FSA processes. The leverage for Māori here, of course, is not the extant property right encased in the FSA, but the different one of Treaty settlement. Section 101 has been inserted "to avoid doubt". It contemplates such agreements and specifically excludes them from the Act. The irony now is that historical claims, being outside the FSA, may give Māori greater political leverage in redress negotiations with the Crown than the inchoate property rights within the FSA. If that transpires, it will have reversed the Waitangi Tribunal's anxiety that those groups who had retained their coastline would come out of this process in a stronger position than those relying upon the historical claims processes.[46]

As to the minimum statutory redress, consider what it requires of a successful applicant group under section 33: the group must propose a charter reached by agreement amongst the applicant board, the regional council responsible under the RMA and the Crown,[47] with whom, chances are, discussions have just collapsed. The draft agreement must set out the persons or bodies to be represented on the foreshore and seabed reserve board and the resources required for the operation of the board. Section 42 sets out requirements for the charter. It must establish the board as a legal entity and set out the board members' powers, authorities and discretions; it must provide for membership (number, appointment, remuneration and tenure of board members), conduct of board meetings, charter revision and preparation of a management plan. There must be a process for the resolution of any internal disputes. This set of requirements strongly echoes the Law Commission's expressed concerns about post-settlement phase (that is, rights-management) issues.[48] These requirements are exacting and they are the precondition to

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45 This outcome would, however, require special legislation under the Foreshore and Seabed Act 2004, s 14(2)(a).

46 *Report on the Crown's Foreshore and Seabed Policy: Wai 1071*, above n 19, para 3.3.3.

47 Foreshore and Seabed Act 2004, s 41.

48 New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (NZLC 13, Wellington, 2002).

the High Court awarding the statutory minimum protection that ostensibly safeguards the property right. It is difficult to see this as an incentive for any would-be applicant group.

This minimum redress package was included in the Act after criticism of the open-ended outcome of a territorial customary right finding as framed in the original Bill. Under the Bill, there was no assurance that a territorial customary right finding would result in anything for a successful group other than a nebulous right to enter "discussions" with the Crown. The foreshore and seabed reserve is the response to that, giving the applicants, once they have jumped through the rights-management governance hoops, certain rights inside the RMA.[49]

5 Extinguishment of the territorial customary right

Once the factual matrix for a territorial customary right has been made out, the High Court will consider the legal question of extinguishment. In *Ngati Apa*, the Chief Justice followed overseas approaches when she indicated that this question should be addressed once the factual matrix has been made out. She said:[50]

> Whether any such [common law aboriginal title] interests have been extinguished is a matter of law. Extinguishment depends on the effect of the legislation and actions relied upon as having that effect. At this stage it can only be considered against an assumption that the appellants will succeed in establishing property interests as a matter of tikanga. Other legislation (such as the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992) may limit the legal efficacy of such property. Whether such limits apply to any property cannot sensibly be considered in advance of findings as to the existence and incidents of any customary property.

In that regard, the FSA maintains a feature of the Bill as introduced in leaving it to the High Court to determine extinguishment according to the common law. Unlike the statutory criteria for the factual matrix, which supplement and overlay (if not overwhelm) any that the New Zealand common law may set, no statutory formula for extinguishment of the territorial customary right has been set. Here, the High Court will develop its own test under its inherent jurisdiction, building upon the "clear and plain intention" approach already set out by the Court of Appeal[51] and the case law of other common law jurisdictions. The Court of Appeal indicated in *Ngati Apa* that general legislation vesting

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49 See more fully Bronwyn Arthur "'Rights-Bearers' and 'Rights-Integration'" in New Zealand Law Society *Foreshore and Seabed Act, the RMA and Aquaculture* (New Zealand Law Society, Wellington, 2005) 37, 45–48.

50 *Ngati Apa v Attorney-General*, above n 2, para 49 Elias CJ.

51 *Ngati Apa v Attorney-General*, above n 2, para 49 Elias CJ, para 148 Keith and Anderson JJ expressly applying North American case law (*Choate v Trapp* (1912) 224 US 665, 674–675).

the foreshore, inland and territorial seabed in the Crown had not accomplished that result,[52] nor had general regulatory legislation such as the RMA.[53] The Court sidestepped the question of area-specific legislation for the Marlborough Sounds; however, there was a clear indication from the Chief Justice that aboriginal title-rights were unlikely to survive legislation vesting title in harbour boards (vesting legislation).[54]

It must be stressed that under the territorial customary right jurisdiction, the High Court will not necessarily be concerned with the total extinguishment of any title that may have been recognised by the New Zealand common law. Rather, it will look to see if the de facto exclusivity crucial to the factual matrix has been removed at law. As a matter of law, the applicants may have lost the right and capacity to control access to their coastline leaving other attributes of the common law aboriginal title intact, thus transforming what was potentially a territorial right to a non-territorial one. If the qualified exclusivity necessary for a territorial customary right cannot be maintained at law then the High Court steps out of the picture. Having decided that the requisite exclusivity has gone at law, although there in fact, the High Court must remit the application to the Māori Land Court to consider the lesser option of a customary rights order.

The range of Crown activity that can extinguish common law aboriginal title is usually set at legislation and executive action under statute or, less certainly, prerogative vesting exclusive possession rights in others, such as the issue of a Crown grant in fee simple. It has been seen already that New Zealand courts have accepted that extinguishment can happen in those ways. However, whilst the FSA leaves the territorial customary right extinguishment test to the High Court, it sets in parallel a statutory extinguishment test for the customary rights order.[55] The ways of extinguishing the residual non-territorial common law aboriginal title include and possibly go beyond the usual common law means. It can happen through the vesting of title in a person or group other than the

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52 Namely the Harbours Acts of 1878 and 1950; Crown Grants Act 1866, s 12; Territorial Sea and Fishing Zone Act 1965; Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977; Foreshore and Seabed Endowment Revesting Act 1991, s 9A.

53 *Ngati Apa v Attorney-General*, above n 2, paras 75–76 Elias CJ, para 170 Tipping and Anderson JJ and para 192 Tipping J.

54 *Ngati Apa v Attorney-General*, above n 2, para 58 Elias CJ: "There seems no argument that, if the legislation confers freehold interests, it extinguishes any pre-existing Māori customary property rights inconsistent with such interests. The terms of the legislation were not however the subject of argument. And it is artificial to consider the question further in the absence of identification of any customary property. I consider it preferable to avoid answering the question in its terms, while indicating that any customary property in the areas vested seems unlikely to survive." Also Keith and Anderson JJ at para 181.

55 Foreshore and Seabed Act 2004, s 51(2).

applicant whanau, hapu or iwi by: Crown grant under statute (unexceptionable) or the prerogative (resolving that uncertainty); the common law (mysterious); statutory vesting (unexceptionable); or by "administrative action" (mysterious and mischievous). A lawful reclamation will extinguish[56] as will an interest "that is legally inconsistent with the activity, use, or practice for which the customary rights order is sought"[57] – the Australian "inconsistency of incidents"[58] test. The same statutory test for extinguishment is applied in Part 4 to the (effectively redundant) customary rights order jurisdiction of the High Court.[59]

I suspect that the High Court will refuse to set a uniform test for extinguishment by tethering their common law test for the territorial customary right jurisdiction to the statutory one for the customary rights order. Nonetheless, as the focus of the High Court inquiry is directed solely and narrowly towards the legal removal of (the qualified) exclusivity, it seems that a residual non-territorial title is more vulnerable to extinguishment under the FSA test than it would be under the unmodified common law.

B The Customary Rights Order

The customary rights order represents a statutory mechanism for the identification of non-territorial aboriginal title-rights. It creates new jurisdictions for the High Court and Māori Land Court.

The Māori Land Court and the High Court are given dual jurisdiction to issue such orders, under Part 3 and Part 4 of the FSA respectively. The High Court jurisdiction – some 25 sections in all – is to all intents and purposes redundant since it has no jurisdiction to entertain such claims when they are "able to be recognised and protected by an order made by the Māori Land Court under Part 3" or subject already to processes inside the Māori Land Court.[60] Since the High Court is obliged to divert all customary rights order matters to the Māori Land Court, it remains unclear in what circumstances High Court jurisdiction might run where Māori Land Court jurisdiction does not. If customary rights orders are to have any potency, then, it will be through the Māori Land Court jurisdiction and not that of the High Court.

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56 Foreshore and Seabed Act 2004, s 51(2)(b).

57 Foreshore and Seabed Act 2004, s 52(2)(c).

58 *Western Australia v Ward*, above n 13, paras 78, 82.

59 Foreshore and Seabed Act 2004, s 74.

60 Foreshore and Seabed Act 2004, s 73(1)(a).

The Māori Land Court is put at the centre of the customary rights order jurisdiction. The cornerstone to this jurisdiction lies in the definition of the customary rights order and the statutory standards of proof and extinguishment. Those key steps of proof and extinguishment are set out with great specificity. Once proof is made, the statutory test of legal extinguishment must be performed.[61] These two steps match the common law process but they are both put on a statutory footing. In both regards there is no room, however notional or token, for common law criteria such as appear (illusorily at least) in the territorial customary right jurisdiction. Plainly, this suggests even greater executive wariness of the Māori Land Court bench than that of the High Court. Of course, it is also consistent with the entirely statutory basis of the Māori Land Court's jurisdiction and its lack of any inherent common law jurisdiction.

1 Proof and content of a customary rights order[62]

So far as the first question of proof is concerned, customary rights orders can only issue in respect of an association that "is manifested by the relevant whanau, hapu or iwi in a physical activity or use related to a natural or physical resource".[63] That activity, use or practice must satisfy the statutory criteria. As set out in section 50, these criteria require the physically manifested practice to have been:

(i) integral to tikanga at and since 1840; and

(ii) carried on under tikanga in a substantially uninterrupted manner since 1840; and

(iii) neither prohibited by any enactment or rule of law nor extinguished as a matter of law.

Essentially, the core requirement for a customary rights order is physical manifestation of a particular use or activity under tikanga in a substantially uninterrupted manner since 1840 (the factual matrix). The standard of proof set by section 50 reflects the common law doctrine's concern with extant property rights that are aboriginal in source. As with the territorial customary right jurisdiction, the statute fuses common law standards set in Canada and Australia. It should be noted also that the jurisdiction also refers to *tikanga*, and in respect to that – in the context of the very rare exercise of determining customary

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61 Foreshore and Seabed Act 2004, s 51.

62 More fully, see now the excellent analysis of section 50 in Shaunnagh Dorsett and Lee Goddens "Interpreting Customary Rights Orders Under the Foreshore and Seabed Act: The New Jurisdiction of the Māori Land Court" (2005) 36 VUWLR 3.

63 Foreshore and Seabed Act 2004, s 49(2).

title over land under the TTWMA – the Māori Land Court has taken a very broad and expansive approach.[64]

What is less clear is how this rehousing of the common law non-territorial aboriginal title-rights in the Māori Land Court will operate. Running through the foreshore and seabed debate of 2004 was uncertainty in non-Māori quarters (in the political sphere not least) as to what particular rights might comprise the non-territorial bundle represented by the customary rights order. In *Ngati Apa*, the Court of Appeal simply indicated that in theory, but subject to particular proof before the Māori Land Court under its statutory jurisdiction, customary rights over the foreshore and seabed remained unextinguished. The Court of Appeal avoided identifying any type of right other than to note that the obvious one – sea fisheries – was inside a statutory compass. The effect of the sea fisheries settlement legislation was not considered in *Ngati Apa*, although the Court accepted the possibility of other aboriginal title-rights. It noted that there was no special statutory jurisdiction for the Māori Land Court to recognise those non-territorial rights apart from a vesting order (too excessive in most situations) or status declaration (consequences too uncertain). The customary rights order jurisdiction is a literal response to that jurisdictional shortcoming.

It is instructive that Māori – and here, unusually, one can almost speak of Māori in monolithic terms – have eschewed the itemising game that Pākehā lawyers and politicians were playing through 2004 as the Bill was debated. The shopping list of potential customary rights invariably issued from Pākehā sources, with Māori responses ranging from dignified mirth to contempt. Unlike those who would compile the list, Māori know that much gets lost in translation. Indeed, the list soon exhausts itself after the usual non-fisheries entries of waka[65] landing, stone and sand extraction, access to wahi tapu,[66] and harvest of coastal flora. Māori, quite understandably, have instead entertained the legal option that has seemed to them most protective of their coastal mana. That the possibility of their holding a right to exclude is for most stretches of the coastline a legal option more apparent than real has not dimmed its attractiveness to those with coastline presence. It most squares with their conception of mana even though the territorial customary right will not be a likely prospect for many coastal groups. So long as they have been able (until now, that is), Māori have simply not engaged in this vulgar business of listing their non-territorial customary rights and pouring their mana into a peculiarly Pākehā pot.

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64 *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board* 25 Tai Tokerau MB 212 (23 February 1998, Judge Spencer).

65 *Waka*: canoes.

66 *Wahi tapu*: sacred sites.

Reductionism is an engagement that Māori are still resisting, as the Whakatohea application relating to 50 kilometres of the Bay of Plenty coastline makes plain. This application conceives of the customary rights order as a device to secure kaitiakitanga,[67] a general order transcending the need for particularised evidence. In short, the customary rights order may be greater than the mere sum of its parts. "Once more general uses, practices or activities are identified in the application the utility of requiring highly particularised notifications is largely lost … the application affects the area of public foreshore and seabed identified", said Chief Justice Williams of the Māori Land Court in accepting the Whakatohea application.[68] His acceptance of the application entailed no more than a willingness to have the legal point argued; however, it seems unlikely that such general customary rights orders can issue. Were that possible, all customary rights orders would be of the generic kaitiakitanga variety. The order would become a form of ownership shorn of the right to exclude but otherwise comprehensive in character. Further, it is difficult to integrate such a broad customary rights order with the detailed RMA provisions of the FSA and associated legislation that relate to specific usage rights rather than such broad, overarching "practices" as kaitiakitanga.[69] Nonetheless, this application will be the first test of the FSA and may well require eventual resolution at the highest level. Māori unwillingness to enter the itemisation process has not yet crumbled in the face of what seems a direct legislative attempt to ensure otherwise.

2 Extinguishment of customary rights

The statutory test for extinguishment is set out in section 51. This section has been commented upon already above, with the observation that it probably extends the common law test. As noted previously, the Māori Land Court must have reference to the statutory test only.

Section 51(1) is symptomatic of that inability to leave anything to chance, particularly where the Māori Land Court is concerned. It provides that "an activity, use, or practice has not been carried on, exercised, or followed in a substantially uninterrupted manner if it has been prevented from being carried on, exercised, or followed by another activity authorised by or under an enactment or rule of law." This, essentially, is a double-whammy. Where an aboriginal title-right activity has been prevented by reason of a rule of

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67 *Kaitiakitanga*: customary obligations of stewardship, the duties of a guardian of the land.

68 See Fran O'Sullivan "All eyes on Williams and Whakatohea" (31 March 2005) *New Zealand Herald* Auckland. Also (August 2004) *Māori Law Review*, 4.

69 This point was stressed by the other presenters in the recent series of seminars on the Foreshore and Seabed Act 2004 held under the aegis of the New Zealand Law Society (4–8 April 2005). As to how customary rights orders engage the structure of the Resource Management Act 1991, see Arthur, above n 49, 48–53.

law it is usually regarded as extinguished as, indeed, section 51(2)(c) indicates. Here section 51(1) is saying that such prevention will also take it out of the factual matrix. This double underlining is a good example of the twitchiness of this febrile legislation.

3 *The customary rights order right-holder*

Customary rights orders apply to a whanau, hapu or iwi.[70] A whanau, hapu or iwi applies for a customary rights order through its "authorised representative".[71] The eventual customary rights order will specify the area affected by the order, the whanau, hapu or iwi to which the order relates and "the legal entity declared by the Court to hold the order for the whanau, hapu, or iwi to whom the order applies".[72] Section 58(1) gives the Māori Land Court jurisdiction to replace "the holder named in the order with another legal entity to hold the order on behalf of the whanau, hapu, or iwi to whom the order applies." The customary rights order process formally starts through an "authorised representative" and ends with a "legal entity".

The FSA leaves it to the applicant group to identify its authorised representative through whom applications can only be made. This representative may, or may not, be the legal entity in which the customary rights order will eventually vest. The FSA supposes that identification of such a representative body will not be problematic and that there will be a natural consensus amongst those seeking the customary rights order. If it is not clear-cut, however, it is possible the Māori Land Court may be drawn into the fray, but that will require it drawing upon aspects of its jurisdiction[73] beyond the compass of the FSA itself. It is possible, then, that there may be conflicting customary rights order applications in respect of the same area, as where the three levels of ownership are in contest over where primary management responsibility vests under tikanga – with whanau, hapu, or iwi. Such crossfire will doubtless require the Māori Land Court to use its jurisdiction in a more creative and therapeutic manner than the FSA indicates. As with the "authorised representative" who kicks off the formal customary rights order process, the FSA contemplates this process of identification of the right-holder at its endpoint as inherently unproblematic, whereas the reality may not be so straightforward. The scheme of the FSA is such that tikanga is regarded not as a highly vital and dynamic (and hence contested) body of custom and practice so much as a positive code that can be isolated by forensic enquiry.

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70 Foreshore and Seabed Act 2004, ss 48(1), 50(1)(a).

71 Foreshore and Seabed Act 2004, s 48.

72 Foreshore and Seabed Act 2004, sch 1, para 7(1)(a).

73 Such as its power under section 30 of Te Ture Whenua Māori Act 1993 to appoint representatives.

The question of identification of the right-holder (which must be a "legal entity") is further complicated by section 50(3), which allows the granting of customary rights orders in respect of the whole or part of the same area of the public foreshore and seabed to any combination of one or more whanau, hapu or iwi. The Act provides for multiple customary rights orders covering the same stretch of coastline, hinting at the scenario of a cacophony of authorised representatives (claiming rights) and legal entities (eventually exercising them). A single composite, as opposed to multiple, customary rights order straddling several groups is also contemplated by the Act.[74] Here, there will be more than one group but the customary rights order must emanate from their "authorised representative" and vest in a "legal entity". How, one might ask, is that body to be identified? The FSA contemplates an applicant group selecting its own authorised representative but there may be situations where that is more easily said than done. The Court might select and appoint a representative of the several groups involved through (again, one presumes) its section 30 TTWMA jurisdiction. However, there is no matching express jurisdiction to enable the Māori Land Court to assist in the construction of a legal entity if that is needed for the group to hold the composite customary rights order.

In short, and as with the territorial customary right jurisdiction, there is a rather blithe assumption in the FSA that matters of representation and right-holding identity will not be problematic. The experience of the Treaty claims resolutions processes, fisheries settlement and administration of the RMA – those other sites of post-recognition legalism – has been precisely the opposite.

4 Customary rights order rights-management

The FSA does not seek as comprehensive a rights-management package for customary rights order grantees as it expects of those holding a territorial customary right and it gives the Māori Land Court a policing role. The customary rights order holder can determine those entitled to carry out the activity under the order and can limit or suspend (as by rahui[75]) the activity. In exercising those functions, "the holder must act in the best interests of the whanau, hapu, or iwi on whose behalf the relevant" customary rights order has been made.[76] The Māori Land Court is given jurisdiction under the same section, on the application of a member of the grantee group, to "review the exercise of powers by the holder of that order".[77] The Māori Land Court can "enforce the duties of the holder by

74 Foreshore and Seabed Act 2004, s 50(3)(b).

75 *Rahui*: customary prohibition against using or entering particular areas.

76 Foreshore and Seabed Act 2004, s 53(2).

77 Foreshore and Seabed Act 2004, s 53(3).

giving directions".[78] It can also replace the holder named in the order without depriving the grantee group of the benefits of the order.[79] The Māori Land Court is also given the jurisdiction to vary or cancel the order upon application of the holder only.[80] That limitation of applications is designed, presumably, to prevent vexatious applications by competing or dissentient groups or persons who already will have had their day in court at the substantive hearing wherefrom the customary rights order originated. Where there are objections, all applications for a customary rights order must be conducted in a public hearing.[81]

III CONCLUSION

The FSA sets up elaborate machinery for the identification of Māori rights over the foreshore and seabed. It is premised upon the distinction made by the common law between territorial and non-territorial aboriginal title. The former is housed in the territorial customary right jurisdiction of the High Court, the latter in the customary rights order jurisdiction of the Māori Land Court. Apparent room is left for the inherent jurisdiction to develop the New Zealand common law on questions of proof and extinguishment of any territorial customary right, with detailed statutory criteria for proof probably supplanting any offered by the common law itself. The customary rights order jurisdiction is entirely on a statutory basis. Once a territorial customary right or customary rights order is established through the rights-recognition tests for factual matrix and non-extinguishment, there will be downstream rights-management and -integration issues. The rights-management issues may be considerable where a territorial customary right is concerned, even where grantee groups opt for or are left with the statutory minimum of the foreshore and seabed reserve. The Māori Land Court is given a supervisory jurisdiction over customary rights order management.

The FSA represents a grand statutory scheme, the operation of which remains uncharted. Its prospective course is complicated by the uncertainty as to the evidence Māori will lead in support of applications under the Act. The FSA, like the *Ngati Apa* judgments, has issued in a setting where the nature of those rights has been by suggestion of their existence. Māori have emphatically verified that suggestion, but they have done so in terms of the ownership arising from tikanga and mana rather than through compliance with criteria set by the common law. The response of the FSA is to put that verification to

78 Foreshore and Seabed Act 2004, s 53(4).

79 Foreshore and Seabed Act 2004, s 58.

80 Unless that holder has ceased to exist (if a legal entity) or died (a natural person): Foreshore and Seabed Act 2004, s 60.

81 Foreshore and Seabed Act 2004, s 62.

highly legalistic, property-based tests of proof and non-extinguishment. Māori notions of ownership must satisfy those set by Pākehā legalism. There are large elements of incommensurability between the two systems, and the supposition cannot be made that the territorial customary right and customary rights order, as the particular forms of the FSA, accommodate Māori.

At its most generous – a qualifier difficult to apply to this statute – the FSA contemplates a form of "qualified exclusivity" arising from a territorial customary right. At least in the contemplation, that is an outcome greater than the aboriginal title-rights over tidal land recognised in other common law jurisdictions. That outcome is achieved not through the statutory minimum redress, which is a form of limited co-management. Rather, it may be the outcome of a territorial customary right agreement between the Crown and the territorial customary right holder. Māori ownership of the foreshore and seabed of a qualified exclusivity type is not of right and of itself the award of a territorial customary right does not guarantee it. As a territorial customary right is indispensable to either get the Crown to the negotiating table (the post-determination route) or seal a bargain already reached (the pre-determination one), the complex attendant legalism is unavoidable. The message is that the Crown will only make deals where it is obliged to discuss (because a territorial customary right is either held or likely), and even there it is committed to no more than the minimum. The Act puts territorial customary right "discussions" into a non-justiciable "political trust".

Legislation rehousing the common law aboriginal title has a precedent: Australia's Native Title Act 1993 (Cth). That Act sets up elaborate rights-determining machinery and draws the federal courts into amplifying the common law rights of the inherent jurisdiction within the circumscribed boundaries of a host statute. The Act, which was controversially amended by the Howard Government in 1998, puts statutory criteria of proof and extinguishment alongside those generated from the common law. It contemplates agreements between governmental and Aboriginal parties (termed indigenous land use agreements) and also sets rights-management (governance) requirements. In short, New Zealand's FSA has much in common with the Australian model.

Given the guarded mood with which the New Zealand legal profession usually looks across the Tasman, that parallel should also serve as a warning. The Social Justice Commissioner of Australia's Human Rights and Equal Opportunity Commission (HREOC) is charged with producing an annual Native Title report assessing the extent to which Australia is meeting its commitments under the international human rights covenants through the native title processes. Each year, the report makes depressing reading as the Commissioner notes yet again the chronic and continuing under-funding of the native title processes and how those areas that absorb the funds relate to the adversarial aspects rather

than negotiation procedures. The result has been to encourage litigation, much of it high-profile and bitterly-fought, with the outcome usually maintaining the history of ill-will and resentment. Consequently, the indigenous land use agreement procedures and co-operative mechanisms of the Act have been overshadowed, if not neglected.[82] Further, the legalism of the Native Title Act 1993 (Cth) has required Aboriginal nations to produce, very quickly, the kind of human capital that it takes generations rather than mere years to develop: there is a large shortfall of the experience and education necessary for the present generation of Aboriginal leaders to cope with the onerous legal and administrative demands of the native title processes. Whilst land claims resolution has been prioritised, building capacity amongst the Aboriginal clan nations has not. It is a long-term issue requiring appropriate policy responses that are still mostly lacking. In the pressing short-term it has lead to certain land councils – non-traditional bodies established by statute, where the requisite skills are available though centralised mechanisms – taking roles and political profiles that make their position problematic, both in relations with governments and their Aboriginal constituencies.

The Australian pattern is not, one hopes, an augury for the New Zealand experience under the FSA. We are at the outset of this experiment with a statutory code for the articulation of aboriginal title-rights. But a glance across the Tasman demonstrates the need for such systems to be fully resourced with a particular commitment to the issues of capacity-building and negotiated outcomes. In that regard, one welcomes the government's announcement that extra Māori Land Court judges will be appointed to cope with the added workload resulting from the FSA.[83]

The FSA is heavyweight machinery. It may take some time to wind into action given the reluctance of Māori to engage in the kind of reductionism that its legalism contemplates. Moreover, the pattern of Māori engagement inside other present-day sites of rights-recognition has been marked by an initial wariness and unwillingness to participate until they have been assured that tangible rewards will ensue. Māori will have to be convinced that there is something to be gained from participation inside the structure of the FSA. The historical claims and sea fisheries processes started very slowly but soon climbed into a higher, busier gear once Māori became willing to enter those arenas. When that happened, there was also an inrush of the politics of mana. This is the phase at which

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82 Human Rights Equal Opportunity Commission *Native Title Report 2001*, ch 2 <http://www.hreoc.gov.au/social%5Fjustice/ntreport%5F01/> (last accessed 13 September 2005); *Native Title Report 2003*, ch 3 <http://www.hreoc.gov.au/social%5Fjustice/ntreport03/) (last accessed 13 September 2005). The Commissioner has consistently concluded that this failing puts Australia in breach of its international legal obligations.

83 Ruth Berry "More Māori Land Court Judges promised" (28 April 2005) *New Zealand Herald* Auckland.

the FSA is poised as this is being written. If Māori become convinced that there is something to be gained from engaging this machinery, they will enter its sphere. Much will turn upon the Whakatohea application and the Ngati Porou "discussions". This participation, if it progresses beyond the gingerly, will in turn set in train dynamic and organic cultural processes in which the terms of the encounter between the encompassing legalism of the FSA and tikanga will probably not be as loaded in favour of the former as the legislation seems to assume. Pākehā legalism, with its positivist agenda of prediction and control, has a history of unexpected and unintended consequences when it meets the robust world of tikanga. For all its careful attempts to create a legal regime incapable of delivering surprise outcomes and to give the Crown a freehand in its coastline related discussions with Māori, if or once the politics of mana pour into the administration of the FSA, the result will not be as tidy as this nervous and edgy legislation would like.