Eurocentric Laws that Apply to Māori (Indigenous People of New Zealand): A Critique of the Marine and Coastal Area (Takutai Moana) Act 2011 and its Preceding Legislation

INTRODUCTION

This paper examines how Māori rights and interests in respect of their foreshore and seabed have been subverted and confiscated through the imposition and application of Eurocentric laws which are paternalistic and ignore and denigrate the perspective of indigenous Māori in New Zealand. It is not intended to be a full forensic review of the history of litigation and legislative application in relation to the Foreshore and Seabed.

Instead, this paper discusses traditional Māori understandings of their rights in respect of their rohe moana (marine area) including the foreshore and seabed according to tikanga Māori (indigenous custom) and as recognised by Te Tiriti o Waitangi (the Treaty of Waitangi) and its principles. We then go on to consider how recently the common law had affirmed those rights with a particular focus on the significance of the 2003 New Zealand Court of Appeal decision *Ngāti Apa v Attorney-General*[1] and what impact subsequent legislation (the Foreshore and Seabed Act 2004 and the Marine and Coastal Area (Takutai Moana) Act 2011) have had on those rights.

The paper argues that the failure (or more accurately the refusal) of lawmakers in New Zealand to acknowledge and appropriately recognise Māori rights in respect of the foreshore and seabed and the flagrant disregard for the developing common law doctrine of aboriginal rights illustrates how even today, imperialism and euro-centricity are deeply entrenched into the New Zealand legal psyche. This inherently inhibits this body of law from achieving consistency with Te Tiriti o Waitangi and the rights that are meant to be guaranteed and protected within it.

MĀORI CONNECTION WITH THEIR LANDS AND ENVIRONMENT

An important starting point for this paper is setting out the fundamental basis upon which Māori connect with their environment and their lands. Former Chief Māori Land Court Judge who then became a Justice of the High Court, ET Durie provided the following analyses of the nature of Māori rights to land;

> *Maori see themselves not as masters of the environment but as members of it. The environment owed its origins to the union of Rangi, the sky, and Papatuanuku, the earth mother, and the activities of their descendent deities who control all natural resources and phenomena. The Maori forebears are siblings to these deities. Maori thus relate by whakapapa (genealogy) to all life forms and natural resources. There is whakapapa for fish and animal species just as there are for people. The use of a resource, therefore, required permission from the associated deity. In this order, all things were seen to come from the gods and the ancestors as recorded in whakapapa.*
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> *There are at least two classes of land rights – the right of the community associated with the land, and the use rights of individuals or families.*[2]

1 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643

2 Durie, E.T. 'Custom law: address to the New Zealand Society for Legal and Social Philosophy' in Victoria University of Wellington Law Review (1994) 24: 325-331, p.328

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He also went on to say[3];

> *…while individuals or particular families had use rights of various kinds at several places, the underlying or radical title was vested in the hapu. This served to prevent a transfer of use rights outside the descent group without general hapu approval. In addition, the allocation of use rights within the group was regularly adjusted by the rangatira (chiefs). The essential point however is that the land of an area remained in the control and authority of an associated ancestral descent group, and, like fee tail, neither the land as a whole, nor a use right within it, could pass permanently outside the bloodline.*
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> *Individual land rights accrued from a combination of ascription and subscription, from belonging to the community and from subscribing to it on a regular basis. While the community's right to land, in pure terms, was by descent from the earth of that place, the individuals right required both membership and contribution. Descent alone was not enough. Descent gave a right of entry, but since Maori had links with many hapu and could enter any one, use rights depended as well on residence, participation in the community, contribution to its wealth and the observance of its norms.*
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> *Land rights were thus inseparable from duties to the associated community, from being part of it, contributing to it, and abiding its authority and law. There was not room for absentee ownership, only the right of absentees to return*
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> *Similarly, no land interest existed independent of the local community or which was freely transferable outside of it. Probably the nearest cultural equivalent to the Maori use right arrangement was an entailed license to the use of a particular resource, without prescribed rent but with obligations to return benefits to the community to the fullest, practicable extent. Moreover, the right was to a particular resource. There were no [individual] exclusive rights to all types of use of a defined parcel, or no exclusive [individual] right to a prescribed land block.*

The relationship of Maori with the coastal land and waters saw iwi Māori exercise the authority of tino rangatiratanga, under tikanga Maori (Māori custom). Under tikanga Māori there were five ways (take) in which rights to land were acquired[4]:

- take tupuna (inheritance from one's ancestors)
- take raupatu (conquest)
- take tuku (gifting)
- take taunaha, (naming during discovery and exploration), and
- take ahikaa (keeping the home-fires burning)

Dr Angela Ballara has described the relationship of these take in the following way[5]:

> *Land ownership in Maori society required that ancestral claims go hand in hand with inherited mana over the land, plus occupation or other use. Yet*

[3] Durie, E.T. 'Will the settlers settle: cultural conciliation and law' in Otago Law Review (1996) 8(4): 449-465, p.453
[4] Boast, P 'Maori land law' Wellington, Butterworths, 1999
[5] As described by Boast, Ibid at p43.

> *descent from an owning ancestor alone was insufficient; it had to be from an ancestor whose descendants had continued to occupy it. Descendants who lived elsewhere eventually lost their rights – their claims grew cold. Inheritance of land was from that limited group of ancestors known to have first cleared and cultivated or otherwise used the resources of the land, and who had handed down their rights from generation to generation of people who also occupied the land. The concept of ahikaaroa (long burning fires) presupposed continuous occupation or use of the land by descendants of ancestors with mana to the land*

ROHE MOANA vs FORESHORE AND SEABED

On that basis, there is understandably a stark contrast between the Māori traditional concept of their "rohe moana" and the comparatively more limited area which comprises the "foreshore and seabed".

The Māori worldview is often described as holistic and as such in this context it precludes the compartmentalisation of beach and sea into dry land above high tide, tidal land uncovered at low tide, land permanently covered by sea, and the waters of the sea itself as is contemplated by English laws.[6] Instead, Māori perceive their rohe moana as merely an extension of dry land albeit covered by water. For that reason, Māori law, use, authority, and rights were (and continue to be seen as) extending seamlessly from land fronting the beach, out into the ocean.[7] In contrast, the foreshore and seabed as a legal concept has been defined[8] as the area between the high water mark and the outer boundary of the territorial sea, currently fixed at 12 nautical miles.

This fundamental difference in perspective becomes an important feature of the development of the law in this area often to the detriment of Māori. This is primarily due to the fact that Māori understandings of their roles and responsibilities in relation to these areas are diametrically opposed to the European paradigm which promotes individual rights, controlled by the Government, in respect of distinct and definable areas of land. Rather, tikanga Māori (or Māori custom) contemplates that Māori who reside in these areas and live off the land are kaitiaki (caretakers) of these areas since for the benefit of the collective and those rights and more importantly responsibilities did not simply disappear after the arrival of colonialists. Māori continue to treat the land that is covered by the ebb and flow of water, and the basket of food, medicine and resources that are contained within the water as they always have, with the respect that these taonga (treasures) deserve.

TIKANGA MĀORI & TE TIRITI O WAITANGI

As touched on above, tikanga Māori is the foundation of Māori understandings of rights in respect of their land and the natural environment and all things that affect their iwi (tribe), hapū (sub-tribe) and whānau (family units). Tikanga has also been described as a set of behaviour guidelines for daily life and interaction in Māori culture[9] and is commonly based on experience and learning that has

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6 Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, (2004) Wai 1071 at p18.

7 Ibid at p18.

8 It is noted that there are alternative definitions including in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at 673, Keith and Anderson JJ described the foreshore as "the area of beach frontage between the mean high water mark and the mean low water mark" which is similar to the Crown Grants Act 1908. However, statutory definitions in more recent legislation depart from this s9 of the Marine and Coastal Area (Takutai Moana) Act 2011 defines the landward boundary of the marine and coastal area as the "line of mean high water springs" which follows the Foreshore and Seabed Act 2004.

9 Te Taura Whiri website, accessed 6 November 2018, http://www.tetaurawhiri.govt.nz/maori-language/tikanga-maori/

been handed down through generations.[10] It is based on logic and common sense associated with a Māori worldview.[11]

Although tikanga is not necessarily the same across tribal groups, tikanga Maori is derived from a vast body of knowledge, wisdom and custom gained from residing in a particular rohe (geographic area) for many hundreds of years, developing relationships with other neighbouring communities as well as those further afield, and learning from practical experience what works and what does not. [12] To that extent, tikanga Māori is considered by our indigenous people to be the equivalent of English law with the important distinction that it derives from a very different place to the English law and as such it cannot be reduced to writing and thereby set in concrete by legislation.[13]

Tikanga Māori as with all aspects of Māori life, therefore underpins from a Māori worldview what guidelines/rules apply to the use, management and protection of the rohe moana of a hapū or iwi and that interrelationship has been aptly captured by the Waitangi Tribunal:[14]

> "*In the traditional Māori worldview, there is no matter that does not have tikanga attached to it. And the foreshore and seabed – te takutai moana, te papamoana – are quintessentially bound up with tikanga. Tikanga imbues consideration of every aspect of the elements themselves, and how humans interact with them*."

In accordance with tikanga Māori there is no distinction to be drawn between whenua (land) that is dry and land that is covered by the sea. It is simply the case that the whenua continues underneath the sea.[15]

Tikanga Māori remained the unfettered law of the land until Te Tiriti o Waitangi was signed on 6 February 1840 by representatives of the British Crown and various Māori chiefs of Aotearoa (New Zealand). The signing of Te Tiriti ultimately resulted in a declaration of British sovereignty over New Zealand (a fact which is still disputed by Māori and which has been the subject of a separate Waitangi Tribunal inquiry[16]) and the application of British laws and customs to all peoples of New Zealand including Māori.

The two texts of Te Tiriti (being the English text and the Māori text) have been a central focus of legal debate over the decades. What has become clear is that the two texts are not a translation of the other and do not mean the same thing. For example, important, and often talked about discrepancies between the two texts include that the use of the word 'kāwanatanga' in the Māori text does not translate to 'sovereignty' as set out in the English Text of Te Tiriti but is more appropriately described as 'governance' or 'governorship'. Conversely, the use of the phrase 'tino rangatiratanga' or 'unfettered chiefly powers'[17] in the Māori Text is often relied upon by Māori to assert that sovereignty over their lands, resources and other taonga was never ceded to the British Crown but rather Māori authority was retained and preserved. Pākehā (non-Māori) have traditionally based their understanding on the English Text, which supports the prevailing view and the view which our New Zealand legal system is based upon, that Māori ceded sovereignty to the Crown.

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10 Te Taura Whiri, above n 9.
11 Ibid.
12 Wai 1071 Report, above n 6 at p2.
13 Ibid at p2.
14 Ibid at p1.
15 Professor Margret Mutu and Sir Hugh Kawharu evidence to the Waitangi Tribunal (2004) Wai 1071.
16 Waitangi Tribunal, *Te Paparahi o Te Raki Stage One Report He Whakaputanga me Te Tiriti* (2014) Wai 1040
17 Brief of Evidence of Professor Anne Salmond, Te Paparahi o Te Raki Inquiry, Wai 1040, #A22 including translations from the works of Merimeri Penfold.

Despite the contentious nature of the two texts of Te Tiriti, it is still considered a founding document of New Zealand and through the incorporation of aspects of Te Tiriti into New Zealand domestic law, and assertions of Te Tiriti rights being advanced by Māori throughout the years, we have seen a distinct treaty jurisprudence develop particularly through the production of reports by the Waitangi Tribunal. The Waitangi Tribunal is a permanent commission of inquiry tasked with researching and inquiring into breaches of Te Tiriti and its principles by the Crown or its agents. The Tribunal is also provided with the ability to recommend ways in which the Crown can and should remedy any breaches and provide redress to the Claimants with well-founded claims.

One of the most important aspects of the Waitangi Tribunal from a Māori perspective is that it provides an independent forum for Māori to be able to air their grievances and have the claims of the people heard and recorded. It is from that perspective a cathartic process of huge significance to Māori particularly on a more spiritual level.

Notwithstanding this, an important limitation which must be borne in mind is that the powers of the Waitangi Tribunal are largely recommendatory only, except in very specific circumstances. This means that while the Tribunal is required to inquire into and make findings in respect of Crown breaches of Te Tiriti, any finding of Te Tiriti breach and as a result, recommended redress, is entirely up to the Crown to accept and implement (often, and sadly, the Crown does not accept or implement the findings of the Waitangi Tribunal) .

This limitation is important in the context of this paper, as it demonstrates that whilst the Waitangi Tribunal as a specialist institution provides an important forum for Māori to be able to provide their perspective on how laws have been, and continue to be, affecting them in a negative way and provide solutions about how they can be changed to suit Māori rights and needs, lawmakers often ignore the perspective provided by the Tribunal and continue to adopt a very Eurocentric view in developing, creating, implementing and applying laws. This prevents Māori from being able to advance very far beyond the claims they make, and assert their kaitiaki role over the very lands and resources that they have continuously and consistently preserved and protected for generations.

RECOGNITION OF MAORI RIGHTS UNDER THE COMMON LAW

Although arguably a more restrictive set of rights than those which were provided for under tikanga Māori, the doctrine of common law Aboriginal title provides a sound basis for recognition of Māori property rights in the foreshore and seabed. In the situation where the Crown has colonised countries with indigenous peoples, the common law will recognise the pre-existing property rights of those indigenous peoples as a qualification on the sovereign title of the Crown. This arises through the simple fact that the indigenous peoples were already there[18], living in communities according to their own laws and customs.

The case of *R v Symonds*[19] incorporated the concept of Aboriginal title into New Zealand law and confirmed that customary rights could only be lawfully extinguished by cession, that is by the free consent of the indigenous people (a fact which as noted above is still widely contested by Māori). Another well-known case in this area is *Amodu Tijani v The Secretary, Southern Nigeria*[20] where the Privy Council affirmed that the common law has also recognised pre-existing property after a change in sovereignty:[21]

[18] *R v Van der Peet* [1996] 2 SCR 507, paragraph 30 per Chief Justice Lamer
[19] *R v Symonds* (1847) NZPCC 387; see also *Nireaha Tamaki v Baker* (1901) NZPCC 371.
[20] *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 1 AC 399, at 407-408.
[21] Ibid at 407-408.

> "*A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing.*"

The other mode of lawful extinguishment is therefore by legislation or executive action where there is a 'clear and plain intention' to extinguish customary rights. President Cooke of the Court of Appeal, as he then was, explained the doctrine in Te Ika Whenua as follows[22]:

> *"Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title, which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights*."

On that basis, the position according to the English law and base common law principles is that unless and until Māori cede sovereignty over their rohe moana or foreshore and seabed or the Crown through legislation seeks to take away Māori rights over those areas, they are preserved and remain.

It must be noted that the legal tests for extinguishment of such title are very strict. The High Court of Australia has held that extinguishment may be either by executive or legislative action, but in either case there must be "a clear and plain intention to do so"[23]. This principle has been followed by the New Zealand Courts in *Faulkner v Tauranga District Council (1995)* Blanchard J said[24]:

> *It is well settled that customary title can be extinguished by the Crown only by means of a deliberate Act authorised by law and unambiguously directed towards that end. Unless there is legislative authority or provisions such as were found in ss 85 and 86 of the Native Land Act 1909, the Executive cannot, for example, extinguish customary title by granting the land to someone other than the customary owners. If it does so the grantee's interest is taken subject to the customary title: Nireaha Tamaki v Baker (1901) NZPCC 371. Customary title does not disappear by a side wind.*

The next two cases which dramatically changed the legal landscape in respect of Māori rights in the foreshore and seabed were the Court of Appeal decisions *Re Ninety Mile Beach*[25] and *Ngati Apa v Attorney-General*[26].

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22 *Te Runanganui o te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20 p.23
23 *Mabo v Queensland* (No 2), (1992) 175 CLR 1, 64 (per Brennan J.)
24 *Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 363.
25 *Re Ninety Mile Beach* [1963] NZLR 461.
26 *Ngati Apa v Attorney-General*, above n 1.

Re Ninety Mile Beach

The plaintiff in the case, Waata Tepania, was the chairman of the Taitokerau Māori District Council, a member of the New Zealand Māori Council, and a member of both the Taitokerau and Aupouri Maori Trust Boards. Mr Tepania was a leader and elder of both the Aupouri and Rarawa tribes.

The application was made to the Māori Land Court (a court originally set up to convert Māori customary titles into freehold grants and now statutorily required to facilitate and promote the retention, use, development, and control of Māori land as a taonga tuku iho by Māori owners[27]) under section 161 of the Māori Affairs Act 1953[28] asking the Court to investigate title to and issue a freehold order in respect of the foreshore of the Ninety Mile Beach in Northland.

In November 1957 the Māori Land Court released its decision which included a finding that immediately before the Treaty of Waitangi was signed in 1840, Te Aupouri and Te Rarawa tribes owned and occupied the foreshore in question according to their customs and usages.[29] Despite his finding, the Chief Judge referred the case to the Supreme Court for an opinion on two substantial questions of law:

1. Has the Maori Land Court jurisdiction to investigate title to, and to issue freehold orders in respect the foreshore — namely, that part of the land which lies between mean high-water mark and mean low-water mark? And;
2. If so, is the Maori Land Court prohibited from exercising this jurisdiction by reason of a Proclamation issued by the Governor under s. 4 of the Native Lands Act 1867 on 29 May 1872?

The Supreme Court held that the Maori Land Court did not have the jurisdiction to investigate title to the foreshore for various reasons one of which was that existing legislation[30] provided an efficient restriction upon the jurisdiction of the Māori Land Court which in effect forbade it from undertaking the investigation as contemplated by the application.

The Applicant appealed to the Court of Appeal in 1963 and the Court of Appeal dismissed the matter for two principal reasons. Firstly, the reasoning of the Supreme Court was upheld that the Māori Land Court was prevented from conducting an investigation as a result of existing legislation at the time which purportedly denied the Court that right; and secondly, that Māori Land Court investigations of title to land adjacent to the sea had extinguished customary rights below high water mark.

The state of the law on this issue in the early 1960s was such that on the one hand it was recognised that Māori property/ownership rights existed where they could be proven, on the other hand, the only forum to be able to investigate those rights was effectively stripped of any power to be able to undertake that exercise. Maori remained in limbo for the next 40 years.

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27 Section 2 Te Ture Whenua Act 1993.

28 The Māori Affairs Act created the Māori Land Court, which currently operates under Te Ture Whenua Act 1993. Professor Richard Boast has described the Court and its predecessor the Native Land Court established under the Native Lands Acts 1862 and 1865 as New Zealand's "oldest statutory Tribunal and arguably its most important".

29 *Wharo Oneroa a Tohe* (1957) 85 Northern MB 126 (85 N 126) (25 November 1957) at 128.

30 S150 of the Harbours Act 1950

Ngati Apa v Attorney-General

The *Ngati Apa* case involved several Maori iwi applying to the Māori Land Court for declarations as to the status of land comprised of foreshore and seabed in the Marlborough Sounds. Both the Māori Land Court (now under the 1993 Act) and Māori Appellate Court determined that the Māori Land Court had jurisdiction to hear the application. The Crown then appealed by way of case stated to the High Court and the High Court held that the Māori Land Court had no jurisdiction to hear the application in reliance upon *Re Ninety Mile Beach* and various statutes. The Māori interests appealed to the Court of Appeal.

On appeal the Court had a very narrow issue to decide upon. The question to be answered was whether or not the Maori Land Court had jurisdiction to investigate Māori customary ownership to the foreshore and seabed. In the end, the Court of Appeal overturned the ratio in *Re Ninety Mile Beach*

The Court of Appeal overturned the ratio of *In Re the Ninety-Mile Beach* in its 2003 decision *Ngati Apa v Attorney-General* and reaffirmed the doctrine of native title established in *R v Symonds*. A summary of the key findings is best articulated in the following sections of the judgment by Chief Judge Elias' reproduced below:

> *"…I have had the advantage of reading in draft the judgments of the other members of the Court. Like them, I am of the view that the appeal must be allowed and the applicants must be permitted to go to hearing in the Maori Land. Court. I am of the view that the judgment of Judge Hingston in the Maori Land Court was correct. I consider that in starting with the English common law, unmodified by New Zealand conditions (including Maori customary proprietary interests), and in assuming that the Crown acquired property in the land of New Zealand when it acquired sovereignty, [as seems the premise of Judge Ellis], the judgment in the High Court was in error. The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with law. I agree that the legislation relied on in the High Court does not extinguish any Maori customary property in the seabed or foreshore. I agree with Keith and Anderson JJ and Tipping J that In Re the Nine-Mile Beach was wrong in law and should not be followed. In Re the Ninety Mile Beach followed the discredited authority of Wi Parata v Bishop of Wellington (1877) NZ Jur (NS) SC 72, which was rejected by the Privy Council in Nireaha Tamaki v Baker [1901] AC 561. This is not a modern revision, based on developing insights since 1963. The reasoning the Court applied in In Re the Ninety-Mile Beach was contrary to other and higher authority and indeed was described at the time as "revolutionary".*

Elias CJ further explained that the proper interpretation of the Harbours Acts:

> *Such legislation, by its terms, applied to future grants. It did not disturb any existing grants. Indeed, substantial areas of seabed and foreshore had already passed into the ownership of Harbour Boards and private individuals by 1878. I agree with the conclusion of Keith and Anderson JJ that the legislation cannot properly be construed to have confiscatory effect. Although a subsequent vesting order after investigation under the Maori Affairs Act 1953 was "deemed" a Crown grant (s162), that was a conveyancing device only and applied by operation of law. It was not a grant*

> *by executive action. Only such grants from Crown land were precluded for the future by the legislation. More importantly, the terms of s150 are inadequate to effect an expropriation of Maori customary property*[31].

Therefore, in Summary;

1. The Court of Appeal overruled the longstanding authority of In Re the Ninety-Mile Beach (as decided in the Court of Appeal).
2. Customary title over the foreshore and seabed (if any), had not necessarily been extinguished by certain statutes; and
3. The Maori Land Court had jurisdiction to determine applications that areas of the foreshore and seabed had the status of Maori customary land

POLITICIAL RESPONSE TO THE NGATI APA DECISION

The fallout from the *Ngati Apa* decision created widespread public misconception. The general assumption of the New Zealand public was that they would be prevented access from the beach (dry area of sand above the foreshore) and that business and development would be stymied in these areas if Maori customary title was awarded. It uncovered considerable resentment in mainstream Aotearoa/New Zealand against perceived advantages which may be enjoyed by Maori that saw petitions from the public demanding beaches for all New Zealanders.

Immediately following the *Ngati Apa* decision the government of the day began to develop an urgent and, in our view, rushed foreshore and seabed policy to effectively reverse the *Ngati Apa* decision through the introduction of the Foreshore and Seabed Act. Of particular concern for Māori was that the proposed legislation provided that "*…the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown."*[32] This provision was intended to remove the possibility that anyone else could be found to have ownership or property interests in the public foreshore and seabed (unless those interests derived from the Crown).

There was also a distinction made in the proposed Act between "public" foreshore and seabed and "private" foreshore and seabed which resulted in an extra sting for Māori as those areas of the foreshore and seabed which were then held in private ownership would be exempt from the legislation. No group other than Maori had its rights affected to such an extent. The proposed Act would extinguish un-investigated customary title in the foreshore and seabed and would preclude Maori from seeking customary title through Courts.

This was seen as a drastic (and in our view draconian) action for the government to take and has been criticised by Professor Boast as a "completely unnecessary" political crisis:[33]

> "*Probably the Government in 2003 would have been well-advised to have done nothing, and to wait and see how cases fared in the Māori Land Court and on appeal.*"

In addition to legal and academic criticism[34], the proposed legislation also generated extensive objection and opposition from Maori who organised a hikoi (march) from Northland to

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31 *Ngati Apa*, above n 1 at [60].

32 Section 13(1) of the Foreshore and Seabed Act 2004

33 Professor R Boast, Foreshore and Seabed, Again (2011) 9 NZJPIL at 274.

34 We note that even the Attorney-General Margaret Wilson in presenting her New Zealand Bill of Rights compliance report to Parliament on 6 May 2004 conceded it was discriminatory but went on to state that it was justifiable in a free and democratic society : see Attorney-General Report on the Foreshore and Seabed Bill (2004) at [56].

Parliament in 2004 to protest against legislation that sought to place the seabed and foreshore in public ownership, contrary to a very clear decision from the Court of Appeal. The implementation of this legislation also became the catalyst for the formation of the Māori Party.

In addition to the strong political action taken by Māori, they also turned to the only available forum to challenge the proposed Crown policy, the Waitangi Tribunal. Māori Claimants in the Waitangi Tribunal process claimed that the text of Te Tiriti creates a Te Tiriti Right under Article 2 which protects their interests in respect of the foreshore and seabed. The relevant sections of the text of Te Tiriti are reproduced below: [bold mine]

> The English version of the Second Article states:
>
> *Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand … the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually **possess** …*
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> The Māori version to the Second Article states:
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> *Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou **wenua** o ratou **kainga** me o ratou **taonga** katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua - ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.*
>
> *[The Queen ratifies [whakarite] and agrees to the unfettered chiefly powers [tino rangatiratanga] of the rangatira, the tribes and all the people of New Zealand over their lands, their dwelling-places and all of their valuables [taonga]. Also, the rangatira of the Confederation and all the other rangatira release [tuku] to the Queen the trading [hokonga] of those areas of land whose owners are agreeable, according to the return [utu] agreed between them and the person appointed by the Queen as her trading agent [kai hoko]].*

In the English version of the Treaty there is a focus in Article 2 upon those things that are in the "possession" of Māori. Therefore the nature of what is "*possessed"* or what can be "*possessed*" in terms of the Treaty, is not a matter that is determined by English law or, for that matter, in terms of an English cultural paradigm. Instead, what Māori "*possessed*" in terms of the Treaty and Article 2 is a matter which may only be carried out with reference to the Māori cultural viewpoint.[35] The claimants also provided significant evidence about their traditional understandings and relationship with their rohe moana.

In the end, the Tribunal produced a number of findings in favour of Māori including that:[36]

> "*… the Treaty of Waitangi recognised, protected, and guaranteed te tino rangatiratanga over the foreshore and seabed as at 1840. The foreshore and sea were and are taonga for many hapū and iwi. Those taonga were the source of physical and spiritual sustenance. Māori communities had rights of use, management and control that equated to the full and exclusive possession promised in the English version of the Treaty. This promise*

[35] Waitangi Tribunal, *The Whanganui River Report* (1999) at p291.
[36] Wai 1070, above n 6 at p28.

> *applied just as much to the foreshore and seabed as, in 1848, it was found to apply to all dry land. There is in our view no logical, factual, or historical distinction to be drawn. In addition to rights and authority over whenua, Māori had a relationship with their taonga which involved guardianship, protection, and mutual nurturing. This is no liberal sentiment of twenty-first century but a matter of historical fact.*
>
> *The Crown's duty under the Treaty, therefore, was actively to protect and give effect to property rights, management rights, Māori self-regulation, tikanga Māori, and the claimants relationship with their taonga; in other words, te tino rangatiratanga.*

In addition, Professor Boast has also noted that the 2004 foreshore and seabed policy was discriminatory as it targeted property rights that were by definition Māori and provided legal certainty only for non-Māori. He refers to the following passage from the Waitangi Tribunal report which aptly captures that sentiment[37]:

> "*…the common law rights of Māori in terms of the foreshore and seabed are to be abolished, and their rights to obtain a status order or fee simple title from the Māori Land Court are also to be abolished. The removal of the means whereby property rights can be declared is in effect a removal of the property rights themselves. The owners of the property rights do not consent to their removal. In pursuing its proposed course under these circumstances, the Crown is failing to treat Māori and non-Māori citizens equally. The only private property rights abolished by the policy are those of Māori. All other classes of rights are protected by the policy. This breaches article 3 of the Treaty of Waitangi.*"

The discriminatory nature of the 2004 foreshore and seabed policy also attracted international scrutiny after Māori groups requested that the United Nations Committee on the Elimination of Racial Discrimination (CERD) invoke its early warning and urgent action procedure to review the foreshore and seabed bill. The Committee found in March 2005 that the Foreshore and Seabed Act 2004 which had in this short time been swiftly introduced, discriminated against Māori under the Convention on the Elimination of Racial Discrimination. According to Dr Claire Charters and Dr Andrew Erueti this constituted the first time that New Zealand has been criticised by an international human rights tribunal for breaching the human rights of indigenous peoples and also the first time the New Zealand government reacted negatively.[38]

Despite these very clear findings and considerable opposition, the government introduced the Foreshore and Seabed Act 2004 which in our view shows the low priority that is afforded, even in current times, to Māori rights in New Zealand and illustrates that they remain vulnerable to a Government who is forced to legislate in order to appease themselves and the political majority.

That was not the end of it. In 2011 the Marine and Coastal Area (Takutai Moana) Act was introduced into parliament by the governing National and Māori Parties. The Act moved away from a Crown ownership regime to a non-ownership regime in an attempt to address the criticisms arising from the 2004 Act. This legislative action followed a recommendation from a 2009 Ministerial Review Panel that recommended that the new legislation should provide that no one owns, or can own,

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[37] Wai 1071 Report, above n 6 at p129.

[38] C. Charters & A. Erueti, 'Report From the Inside: the CERD Committee's Review of the Foreshore and Seabed Act 2004' [2005] VUW Law Rw 12.

what was designated the "public foreshore and seabed"[39]. Notably the new act maintained the arguably discriminatory distinction between public and private foreshore and seabed areas.

The Act also sets out new statutory criteria (as opposed to those set out in common law principles) for determining what is referred to as "customary marine title"[40] to areas of the foreshore and seabed. The Act places the onus of proof squarely on the Māori applicant, as opposed to the presumption of the existence of aboriginal title until otherwise extinguished as has been recognised by the Courts. In addition to customary marine title the Act also provides for a further albeit lesser type of right known as a "protected customary right"[41].

The Act then provides for a process of Crown Engagement, to attempt to negotiate a settlement of interests between the Māori applicant and the Crown (provided Māori can prove they interests to the Crown).

Although the opportunity for Māori applicants to assert their rights has been (to an extent) reinstated, Māori groups have raised concerns about the statutory framework resulting in a new Waitangi Tribunal inquiry. In the first stage of that Inquiry, the Tribunal will consider the following questions:

1. To what extent, if at all, are the MACA Act and Crown policy and practice inconsistent with the Treaty in protecting the ability of Māori holders of customary marine and coastal area rights to assert and exercise those rights?
2. Do the procedural arrangements and resources provided by the Crown under the MACA Act prejudicially affect Māori holders of customary marine and coastal area rights in Treaty terms when they seek recognition of their rights?

The preliminary claims have included that:

- The statutory test imposed by the Act is onerous and places a high burden of proof on hapū/iwi and other groups to prove their interests. For example, in order to be awarded customary marine title the applicants need to demonstrate to the Court that they have:
    - held the area in accordance with tikanga exclusively (s51(a)); and
    - exclusively used and occupied it from 1840 to the present day without substantial interruption (s51(b)(i)); or
    - received it, at any time after 1840, through customary transfer.
- The statute fails to consider how continuous customary activities have been interfered with and/or prevented from occurring by the Crown
- The statute also imposes a limitation period on making claims of this nature

In addition to those claims which arise directly from the provisions in the Act, other issues that arise include the fact that the Eurocentric nature of the statutory test based on proving individual rights is adversarial and creates division and friction amongst Māori who are pitted against each other in order to protect their customary rohe moana. It is also claimed to encourage dissension from the general public who it is clear from the reaction in 2003/2004, have shown they are adverse to the idea of Māori having recognised rights in the foreshore and seabed.

[39] Ministerial Review of Foreshore and Seabed Act 2009
[40] Section 58 of the Marine & Coastal Area (Takutai Moana) Act 2011
[41] Section 51 of the Marine & Coastal Area (Takutai Moana) Act 2011

CONCLUSION

The state of the law on Māori rights in respect of the foreshore and seabed has been dominated by the political whims of the government of the day. This has resulted in a contemporary confiscation of Māori rights and interests in the foreshore and seabed and in a climate where the independent views of the Judiciary confirmed that Māori those customary interests existed and despite extensive protest and opposition from Māori (more than 20,000 people marched on Parliament in protest in May 2004). This is not and has not been conducive to a relationship of partnership between Māori and the Crown as is contemplated under Te Tiriti, nor is it a signal that the Crown are willing to take their Te Tiriti duties, responsibilities and obligations to Māori in this area seriously. The 2004 Act in our view shows the lengths to which the Crown are willing to go to abolish as opposed to protect Māori rights.

The Courts, although having stumbled in our view with the *Re Ninety Mile Beach* decision, have largely made findings which recognised the potential for t Māori rights in the foreshore and seabed areas to exists, and supported the ability for applicants to have an avenue for those claims to be raised (namely the Māori Land Court).

Under the latest legislative regime, there have been approximately 385 applications seeking Crown Engagement and 202 applications filed in the High Court seeking recognition of customary marine title or a protected customary right or both. These numbers only confirm the significance of this issue for Māori.

The key for Māori is that their world view, their rights, their governance, their connection to what they hold precious (their land, treasures and resources whether covered by water or not) continues to be subsumed and subverted by a colonial governance regime that seeks to deprive, rather than protect Indigenous Rights. At some point, giving effect to Te Tiriti and its principles must be given prevalence.

Anei anō te mihi ki a tātau ki a koutou e karanga mai ana ki te hui, ki te korero mō ēnei take hohonu

"Kaua e mate wheke mate ururoa"

Don't die like a octopus, die like a hammerhead shark