SUPPLEMENTARY SUBMISSION TO FISHERIES AND OTHER SEA RELATED LEGISLATION SELECT COMMITTEE ON THE FORESHORE AND SEABED BILL

BY

LG POWELL

A. Introduction

1. At the hearing of the select committee on 25 August 2004 the submitter was invited to prepare a supplementary submission on various matters raised in the course of the oral submission before the select committee. Subsequently counsel assisting the select committee provided a copy of the submission presented by Dr McHugh to the select committee with a request for any comments the submitter may have. In addition, Te Ope Mana a Tai undertook to provide supplementary material to the select committee in response to the issues raised by Dr McHugh and this supplementary submission should also been read as a supplementary submission of Te Ope Mana a Tai in respect of those matters.

2. The submitter is available to discuss the matters raised in the supplementary submission with the select committee if requested to do so.

3. For the purposes of this supplementary submission the contact details of the submitter are:

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B. Specific Issues

4. The submitter will address the following issues in this supplementary submission:

4.1 Overview of defects in Foreshore and Seabed Bill;

4.2 Te Ture Whenua Maori Act 1993 and "unintended consequences"- the Cook Islands Act 1915;

4.3 Previous use of Te Ture Whenua Maori Act 1993 with regard to foreshore and seabed – the Cavalli Islands application;

4.4 Outcome of the Privy Council appeal in respect of the *Marlborough Sounds* decision;

4.5 Comments on the McHugh submission.

C. Overview of defects in Foreshore and Seabed Bill

5. This section of the supplementary submission summarises the oral submissions presented to the select committee.

6. The central defects in the Bill are as follows:

6.1 The vesting of ownership in the Crown and the consequent extinguishment of customary ownership rights in the foreshore and seabed

6.2 The failure to provide any tangible remedies in exchange for the extinguishment of customary ownership rights

Vesting of Ownership in the Crown

7. Clause 11 of the Bill provides that "*full legal and beneficial ownership*" over the foreshore and seabed is vested in the Crown as its "*absolute property*". There is simply no room in the Bill for any recognition of customary rights of ownership over the foreshore and seabed itself. Put simply customary rights of ownership are extinguished.

8. It is well-established that customary rights of ownership, at least in times of peace, should not be extinguished without payment of fair compensation and the consent of customary right holders. Both these preconditions must be met. It is patently clear that the consent of customary right holders has not been obtained and as set out below, no tangible remedy is provided and certainly there is no guarantee of fair compensation.

Failure to Provide Tangible Remedies

9. Three types of "remedies" are proposed in the Bill:

   9.1 Ancestral Connection Orders;

   9.2 Customary Rights Orders;

   9.3 High Court declarations with regard to territorial customary rights

Ancestral Connection Orders

10. It is noted that ancestral connection orders under the Bill are harder to obtain than certificates of title under the Te Ture Whenua Maori Act 1993. While a certificate of title under Te Ture Whenua is a tangible recognition of ownership/proprietary interests, an Ancestral Connection Order is of negligible legal effect. If able to be obtained, it simply provides for holders to be consulted at certain stages of the resource management process, where iwi are already consulted. As the Prime Minister noted during Parliamentary question time on 8 April 2004:

> *"There will be no additional requirements placed on individuals or local authorities as a result of recognising Maori ancestral connection with areas of the public foreshore and seabed."*

11. A copy of the transcript of the relevant questions and answers is annexed and marked "A".

Customary Rights Orders

12. The concept of Customary Rights Orders in the Bill is fundamentally flawed. The Customary Rights Orders are premised on the basis that customary rights are only specific rights to do or take certain things. This ignores Maori concepts encompassing a far wider and more substantial customary authority. The thinking behind the Customary Rights Orders reduces concepts such as Tino Rangatiratanga, Kaitiakitanga, Mana Whenua, Mana Moana and Mana Tupuna to merely an "*activity, use or practice* ".

13. The criteria set out in the Bill make it unlikely that Customary Rights Orders will be able to be obtained:

13.1 The Bill requires the activity, use or practice to be integral to Tikanga Maori. While the types of activity (and the only activity ever seriously suggested by the Government has been the gathering of Hangi stones) will undoubtedly be consistent with Tikanga it is a nonsense to say that such minor rights are integral or fundamental to Tikanga in the sense that Tikanga will not survive unless such rights are recognised, which is the meaning suggested in the Bill.

13.2 The Bill imposes a requirement of continuity for Customary Rights Orders (since 1840), which is not imposed for the recognition of customary rights under the common law (a point accepted by Dr McHugh in his evidence before the Waitangi Tribunal).

13.3 Any contrary legal rights will prevail over Customary Rights Orders.

13.4 The prescriptive level of detail required by schedule one to the Bill (in having to describe the "*scale, extent and frequency*" of the "*activity, use or practice*") not only seeks to impose a level of detail inconsistent with the nature of the customary rights purportedly being protected, but also imposes a requirement of continuity that permits of no flexibility in the scale and frequency of the exercise of customary rights over the years - regardless of whether such variation was consistent with Tikanga Maori.

13.5 An already expensive process (in which legal aid will not be available) will be rendered more expensive by the fact that the Bill specifies that appeals will be to the High Court rather than to the Maori Land Court.

High Court Declarations

14. The jurisdiction of the High Court to declare that **but for the Bill**, territorial customary rights would have existed should not be confused with a tangible remedy for Maori. First, the recognition of territorial rights is limited to the common law. If, as Dr McHugh suggests, the common law itself cannot recognise exclusive rights of ownership no declaration will be forthcoming. There is no recognition for the fact that **but for the Bill** the applicants may well have been entitled to a certificate of title under Te Ture Whenua. Secondly, it is an expensive procedure. Not only will legal aid not be

available under the Bill as drafted, but the applicants will not even be entitled to costs against the Crown if they are successful. Finally, even if a declaration is obtained, there is no obligation on the Crown to provide redress. The only obligation is for the Crown to enter into negotiations. The applicant is in the same position as the Treaty claimant, entirely reliant upon the grace and favour of the Crown.

D. "Unintended Consequences" and the Cook Islands Act 1915

15. In the original submission a number of points were made to the effect that in no way could the decision in the *Marlborough Sounds* case be seen as an unintended consequence of the jurisdiction in Te Ture Whenua.

16. A further example is evident from the provisions of the Cook Islands Act 1915. The Cook Islands Act was drafted by Sir John Salmond, who also drafted the New Zealand Native Lands Act 1909. Whereas the New Zealand legislation contained no specific provision limiting the extent of the jurisdiction of the Maori Land Court or the definition of what land could constitute customary land, the Cook Islands Act specifically provided at section 419:

> *"Native customary title, whether already judicially investigated or not, shall not extend or be deemed to have extended to any land below the line of high water mark, and all such land, except so far as it may have been granted by the Crown in fee simple before the commencement of this Act, is hereby declared to the Crown land."*

17. There is no doubt that given Salmond was aware of the issue, had it been intended to remove the jurisdiction of the Maori Land Court in New Zealand a provision similar to section 419 would have been inserted and the fact that no such provision was inserted is telling. Relevant sections of the Cook Islands Act are annexed and marked "B".

E. The Cavalli Islands Application

18. At the hearing of the original submission the submitter paid tribute to the Hon. Dover Samuels as the first applicant in respect of the foreshore and seabed following the enactment of Te Ture Whenua and the repeal of the Harbours Act 1950. A copy of the Maori Land Court minutes of the Cavalli Islands

application are annexed and marked "C" as they provide a useful articulation of the ownership interest claimed by Mr Samuels which cannot be met through the provisions of the current Bill.

F. Outcome of the Marlborough Sounds Privy Council Appeal

19. The submitter has been advised by counsel for Port Marlborough Limited that the port company has withdrawn its appeal to the Privy Council. Accordingly, the decision of the Court of Appeal is unchallenged.

F. Comments on the McHugh submission

20. For reasons of space and time it is not proposed to address all points raised by Dr McHugh in detail. At a broad level, however, it is important to note that there is a contrary view to his belief (for example expressed in paragraph 67 of his submission) that the development of the New Zealand common law would follow an Australian rather than a Canadian approach. Moreover, there is an alternative school of thought that proposes that a fully-developed New Zealand common law in this respect might differ significantly from both/either of these other jurisdictions, due to the history of this country, and in particular, the influence of the Treaty of Waitangi. Annexed and marked "D" is an analysis carried out by the submitter of Dr McHugh's evidence presented on behalf of the Crown in the Waitangi Tribunal inquiry into the Crown's policy on foreshore and seabed, which analysis was presented as submissions in that inquiry. In particular it should be noted that Dr McHugh appears to have misconstrued a number of significant Canadian decisions leading to a distorted view of the development of the common law and its ability to recognise exclusive proprietary rights in the coastal marine area.

21. There are also a number of the specific problems with the position taken by Dr McHugh:

    21.1 Dr McHugh's analysis fails to address the loss of existing remedies available to Maori under Te Ture Whenua and the comparative benefit of the present remedy with those available under the Bill.

    21.2 Dr McHugh appears to be suggesting that the wording of the clauses of the Bill setting up the jurisdiction of the High Court declarations

serves to widen ability of common law to recognise exclusive territorial customary rights (for example at paragraph 96). With respect this is a misreading of the relevant clauses of the Bill, and in particular clause 29. Far from widening the ambit of the common law, if the common law cannot recognise exclusive territorial customary rights, the applicant will not be entitled to receive any relief from the High Court. Given that Dr McHugh's own interpretation of the common law is that the common law would be unable to recognise exclusive territorial customary rights in the coastal marine area, the inevitable result if he was correct, would be that the High Court jurisdiction would be of no assistance to Maori whatsoever.

21.3 Dr McHugh is simply wrong when he suggests that the Bill "*houses the full range of aboriginal title possibilities from territorial (TCRs) through bundled to stand alone, site-specific discrete rights (CROs)...* [while also incorporating] *circumstances where mana remains but ownership rights... cannot be shown... through what are termed 'ancestral connection orders"* (paragraph 96). The reality is as set out earlier in this supplementary submission - that none of the remedies provided in the Bill give rise to any Maori ownership interest in the foreshore and seabed in contrast to that presently provided under no mandate. It is simply a misnomer for Dr McHugh to talk about either the High Court or the Maori Land Court having jurisdiction to investigate "*title*" or "*non-territorial title*" as in neither case are titles issued in the sense of recognising any ownership interest in the foreshore and seabed. Quite simply Dr McHugh has failed to understand the detailed provisions of the Bill and in particular the legal effect of the remedies proposed.

E. Conclusion

22. It is submitted that the points raised in the supplementary submission provided further support for the argument that the best option for resolution of the foreshore and seabed debate is to initiate a longer process of consultation and policy development - the longer conversation identified by the Waitangi Tribunal, rather than pressing ahead with the bill in its present form.

DATED at Auckland this 22 day of October 2004

L G Powell

" A "

7. Dr DON BRASH (Leader of the Opposition) to the Prime Minister: What requirements will be placed on individuals and local authorities by the recognition of what she has called "the ancestral connection Maori have with particular areas of the foreshore and seabed"?

Rt Hon HELEN CLARK (Prime Minister): There will be no additional requirements placed on individuals or local authorities as a result of recognising Maori ancestral connection with areas of the public foreshore and seabed. In preparing policies and plans under the Resource Management Act, local authorities will prepare these documents in consultation with holders of ancestral connection orders and will take into account relevant planning documents of holders of ancestral connection orders. Already, under the 1991 Act, councils prepare plans and policies in consultation with tangata whenua.

Dr Don Brash: Is the Prime Minister aware that the Attorney-General has previously confirmed that most or all of the New Zealand foreshore and seabed will be subject to claims of ancestral connection by Maori; if so, what can the "strengthened ability to participate in decision-making processes over the relevant coastal area." in yesterday's announcement mean, other than a preferential status for Maori over almost all the New Zealand seabed and foreshore?

Rt Hon HELEN CLARK: I think the member is confusing a number of concepts here. As I said, there are no additional requirements. We are endeavouring to ensure, by making it possible for there to be a register of ancestral connection orders, that those who should be consulted are consulted.

"B"

COOK ISLANDS ACT 1915

An Act to make better provision with respect to the government and laws of the Cook Islands

PART 10 - CROWN LAND

354. All land in the Cook Islands vested in Her Majesty—

All land in the Cook Islands except land which by this Act or before the commencement thereof is or has been vested in any person for an estate in fee simple is hereby declared to be vested in [Her Majesty], subject, however, to all rights lawfully held therein by any person at the commencement of this Act, whether by virtue of Native custom and usage or otherwise howsoever.

PART 12 - CUSTOMARY LAND

419. Native customary title limited by high-water mark—

(1) Native customary title, whether already judicially investigated or not, shall not extend or be deemed to have extended to any land below the line of high-water mark, and all such land, except so far as it may have been granted by the Crown in fee simple before the commencement of this Act, is hereby declared to be Crown land.

[(2) For the purposes of this section and of section 428 of this Act, the term "high-water mark" means the line of medium high tide between the spring and neap tides.]

"C"

Extract from minute book: 21 KH 148 – 151
Appln No: 56
Date: Thursday 2 December 1993
Place: Kaikohe
Present: A D Spencer, Judge
M George, Clerk of the Court

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56 SECTION 93/93 - CAVALLI ISLANDS

Dover Spencer Samuels o/o

Attendance list circulated.

This application is to set aside a fishing reservation in the title to the Cavalli Islands.

I wish first to establish the jurisdiction of the Court. The fishing grounds are an integral part of the land mass of the Cavalli Islands (as they are known by Pakeha) - there is no starting of the land, or finishing of the land, by boundary between the land above the sea and below it in terms of traditional use by Maori - in exercise of tino rangatiratanga. All the islands are in Maori ownership except Motukawanui which the Crown alleges it owns - this is subject to a claim before the Waitangi tribunal. That was the Rev Marsden's first land fall in 1814 when his Journals describe the land of that island having populous occupation by Maori.

I seek the recognition of the tino rangatiratanga by an Order of this Court in respect of the traditional fishing grounds - which can be specifically identify - which are a part of the identity of the islands themselves and the traditional way of life of their owners. The only island with which Maori have become dissociated is Motukawanui as previously mentioned.

This is not a wild-cat claim - it is specific to already established ownership by whakapapa, and the use of those (also) specific areas by those identified people holding the mana over the islands and the contiguous fishing ground. We wish to protect our customary rights and title against the claims of others, which are politically motivated. We wish to take these things out of context - we have the cultural and spiritual connection with that place and those customary uses, taonga not to be sullied or muddied by these conflicts. There are no boundaries or divisions between mana whenua and mana moana - they are one, a continum, rather than something adjoining. I refer to the earlier determination in the Maori Land Court by order in Council in 1948 which identified the iwi and the islands' relationship. I produce to the Court a statement backgrounding that relationship. (Produced "A").

The fear of the people is that legislation may take away or not recognise the tino rangatiratanga of these taonga. We seek a recognition of our rights in the Court.

COURT There is a question here of the status of these islands - are they in fact Maori freehold land or customary land? The setting aside of the land as a Maori reservation is not, conclusively, a determination of the status of the land. Title does not issue per se from the setting aside of a Maori

Reservation, but rather it acknowledges the use and those entitled to use rather than title. This is a question that needs to be answered.

Mr Samuels: I ask that the application be varied from s.338/93 to s.129/93, to determine the status of the land. I also seek to amend the application as to whom it includes, to correspond with the Order in Coucil dated 25/8/46. i.e. to include the people of Wainui.

COURT The application is varied accordingly both to be pursuant to s.129/93 and in the particulars of the application, as sought.

Rauna Walker: I wish to register the interest of the Whakarara Committee which represents all the people with an interest in this matter and ask that the application be brought by the Committee rather than by any individual.

Mr Samuels: I am happy to amend the application as to who is bringing it but ask that this be completed at the next hearing.

COURT The application will have to be on notice to the Crown, the Northland Regional Council and the Far North District Council. Adjourned to next Kaikohe.

Copy to applicant, DOSLI, Department of Conservation, Northland Regional Council and Far North District Council, Mrs Iwa Alker, R D 1, Te Ngaere, Kaeo.

Extract from minute book: 21 KH 240-243
Place: Kaikohe
Present: A D Spencer, Judge
M George, Clerk of the Court
Date: Wednesday 4th May 1994

55 **S.129/93 CAVALLI ISLANDS**

Dover Samuels o/o

Attendance list circulated.

Mr Saint, solicitor, attends on behalf of the Dept. of Conservation.

Mr Samuels: Notice was sent by the Court to the people listed in a memo. dated 25/2/94.

I refer to a minute of the Court whereby the application was amended to be pursuant to s.131/93.

The Islands in question were set aside as a Maori reservation on 28/9/81 and vested in trustees of whom the following are still alive:

Wallace Heta (present)
Peter George (present)
Joe Samuels
Edward Stewart
Mane Pere.

All of the trustees consent to today's application. Also all the hapu named as the beneficiaries of the reservation are represented today by kaumatua. They support this application.

fol 241 **COURT** - reads aloud a memorandum from the Deputy Registrar dated 23/2/94 - it would appear (subject to evidence and submissions to the contrary) the islands have a customary land status with an overlay of designation as to use of a Maori Reservation, administered by trustees.

Mr Samuels: The applicant concurs with the Court's interpretation - the evidence and research shows that to be the case.

Mr Saint: I am here to protect Motukawanui.

Mr Samuels: As to the status of the title to that island, it is not a part of this application. As to traditional Maori fisheries it is not a most important element of our submission.

We see this application as 3 components:

1 s.131/93 - the status of the islands, being customary Maori

2 s.129(2)(a)/93 - tikanga Maori, which gives effect to its status

3 By s.338/93, the land being declared a reservation as to the fishery as part of the tikanga, gives effect to its customary land status and the inherent tikanga.

The 3 are inseparable - the customary status, the tikanga and its preservation. It is a trinity.

fol 242 - Mr Samuels points to a map showing the 13 islands in the Maori Reservation. In total there are 25 ie there are 12 "untitled" islands within that group.

The hapu named in the reservation in 1948 were:

Ngaitupango
Ngati Miru
Ngati Kura
Ngatiruamahue.

I would point out that the reservation makes reference to mutton birds as a use - that is but one use. At the hearing before Judge Pritchard on 20th August 1947 it was noted that the Maori had this area as a traditional fishing ground.

The reservation will need amendment - to include other hapu omitted by the 1981 order - Ngati Kaitangata, Ngati Rehia and others. That will be the subject of another application.

I would now ask our kaumatua to address the Court.

Marlin Epiha: I confirm the names of the 3 islands for which freehold title has been given. I endorse the comments about "tikanga" - it is an appropriate long-ago structure which applies in this case.

fol 243 I also endorse the peoples to whom "proprietorship" should be acknowledged, to include the people of Takou Bay and Ngati Rehia.

Wallace Heta: I tautoko Marlin. I am happy that it is proposed to amend the reservation as to the people entitled. I have previously heard of as many as 18 hapu mentioned. I am pleased the door has been left open to them.

Sid Kira: A question for another time is how did the 3 islands get title - and these 13 islands were not?

David Williams: I support the kaupapa. The representation of trustees must also be revisited.

Louisa Collier: We are asking for kaitiaki to a reservation for kaimoana off-shore from all these islands, whatever their status.

COURT Resource Management issues are not the business of this Court. What <u>is</u> is, the tikanga and what the status of land is. But the Court cannot set aside islands in freehold title as reservations without the consent of their owners.

COURT Following an invitation, the application is adjourned to Friday 12th August 1994 at 10.00 am at the Ngapuhi Marae, Matauri Bay. The applicant is to establish the tikanga for which they are seeking presentation. Copy to applicant and those who attended.

Extract from minute book: 77 WH 62-69
Place: Ngapuhi Marae, Matauri Bay
Present: A D Spencer, Judge
M George, Clerk of the Court
Date: Friday 12th August 1994

106 **S.131/93 CAVALLI ISLANDS**

Dover Samuels o/o

Attendance list circulated.

I refer to the minutes of the hearing on 4th May 1994 - in particular at the conclusion of the minutes.

At the last hearing it was evident that the status of the land in question is customary Maori land to satisfy s.131/93; it remains to establish the tikanga pursuant to s.129/93 and the purpose of the reservation pursuant to s.338/93.

In terms of customary use and tikanga, it is up to Ngatikura and the other whanau/hapu to determine the tikanga, which is not a matter for any outsider to determine.

I now proceed to the tikanga, which I submit that the fishing grounds are a part of the totality of the reservation. The islands are the navigational coordinates for the location by fisherman of the fishing ground - used by us from time immemorial. Our maunga Whakarara relates to the islands in the sea as related in the tauparapara given by our kaumatua during this morning's mihi. On the island are urupa and wahi tapu - registered publicly. The islands are
fol 63 used for gathering oi (mutton birds).

In terms of tikanga, there was no difference between, for example, between the mahinga kai of kumara on land and kai moana of the sea. On the land there was the papakainga and mahinga kai adjacent to it. The same relationship applied to the islands and the toka hiinga. Both were part of the one holistic entity of people and place - creation.

We have been concerned that we have not been consulted as to decisions made for our taonga - the decisions have been made by others. I refer the Court to the Preamble of the Act where by s.2(3)/93 the Maori words prevail over the English, it is provided that the rangatiratanga be protected.

Te Haupuru Heta: - reads aloud the Maori version. The word "desirable" in the 3rd line of the English version is an attempt only to get close to the Maori - na te mea e tika ana kia..... - it is <u>right</u> to give effect to the spirit of the Treaty.....

Hera Richards: The word tika should be in capital letters in the Act - to be within taha Maori. It is not a little word but an important word.

Mr Samuels: I also refer the Court to the last sentence in the English version
fol 64 of the Preamble where it says the Court is "to establish mechanisms to assist the Maori people to achieve the implementation of these principles."

I am asking the Court to record the status of tikanga as <u>prevailing</u> over any other person or body's interests in the reservation. It is not merely a matter of consultation but participation by tangata whenua. This is within the rangatiratanga - kawanatanga relationship (described as "exchange") - referred to in the Preamble. That expresses the relationship of Article 2 and Article 3 of the Treaty. Article 3 enables the Crown to legislate e.g. the <u>Resource Management Act</u> etc., but the relationship itself of Maori to Crown, by rangatiratanga of the one and kawanatanga of the other, stands independently of the exercise (the secondary function) of kawanatanga by

legislation. This applies in respect of all legislation and all Government departments. The tikanga is the exercise of rangatiratanga (is the secondary function for Maori in the same way as legislation is the secondary function of kawanatanga).

Te Haupuru Heta: I submit that these the functions (by Maori from rangatiratanga) and the Crown (from kawanatanga), in their exercise is
fol 65 expressed by the word "fiduciary".

COURT - discusses the meaning of "fiduciary".

Mr Heta: I confirm that is what I mean - the Crown to act in good faith to Maori.

COURT Are you a loyal subject to Her Majesty the Queen?

Mr Heta: I stand tall and straight to answer the question, I am and have been to her, her father, and his, before her. I must confess to sometimes the loyalty being stretched!

COURT That is the flip-side to the Crown's good faith to Maori in the fiduciary relationship - the reciprocal loyalty by Maori to the Crown.

Mr Samuels: I still ask that the Court make a declaration pursuant to s.131/93 that the toka hiinga is an ingredient of tikanga which in turn is an element in determining the customary land status as provided in s.129(2)(a)/93. The expression in s.129(2)(a)/93 of tikanga arises from the objective of protecting rangatiratanga in the Preamble of the Act.

Mr Clark Saint - solicitor with the Dept of Conservation. My interest in today's application only relates to Motukawanui and have no instructions to
fol 66 otherwise appear in opposition to today's application.

I would assist the Court however by drawing the applicant's attention to the Crown already having claimed the seabed by the Territorial Sea and Exclusive Economic Zone Act 1977. There is a Bill before Parliament where there is an intention to bring the "seabed" within the definition of "land of the Crown" as it appears in the Land Act 1948 - refer to Conservation Amt Bill No 2. It has been before a Select Committee and has been reported back for its Second Reading. For the purposes of s.338/93 the Court's jurisdiction is limited to General and Maori land. The legislation once passed would designate the seabed Crown land.

The Treaty of Waitangi Fisheries Claims Settlement Act 1992 (commonly known as the Sealords Settlement), by s.34, Regulations could be passed reserving to Maori the right to regulate fishing etc in a specified area - it is the mirror to the taiapure fisheries legislation.

Mr Samuels: I comment upon the Crown having "claimed" the seabed - against whom? They have forgotten the rangatiratanga side of the equation.

This application is not about taiapure fisheries - whilst it may be argued that the Crown has made provision for tikanga, it subordinates rangatiratanga to kawanatanga. That is not the relationship - they stand together, not one subordinate to the other. We do not expect the Crown to ask for our permission before they introduce legislation.

COURT Is there a veto on legislation?

Mr Samuels: No. We are working within this Act - the Court's jurisdiction under Te Ture Whenua Maori Act, as previously described in relation to the Preamble, s.129(2)(a) and s.131/93.

Anaru Kira: What enables us is whakapapa - to the exercise of tikanga which is not secondary to rangatiratanga but mutual with it.

Tikanga has many elements - all are a part of each other.

Adjourned for lunch.

Court resumes

Mr Anaru Kira: Tikanga is based upon whakapapa from Creation (Rangi and Papa) coming through to kaitiaki such as tangaroa. We all have a whakapapa to each other, to the marae and the marae within this rohe; to the maunga, to these islands and to the seabed. The tikanga of "maitaitai" and "taiapure" are foreign to this rohe. Rather we relate to everything themselves by whakapapa not through the medium of taiapure etc.

fol 68 These things existed before the Treaty. The intercession of the Treaty I accept, but not where it permits alienation through kawanatanga violating rangatiratanga. It does not allow the alienation of our taonga our tikanga.

COURT - explains the need for evidence - although contrary to the oral tradition of Maori - which can be committed to writing, stories by fishing practices etc are essential.

Mr Samuels: I could speak for some time on toka and Te Wiriwiri - which is one only of many coordinates.

Court stands down to enable people to discuss how they could provide the evidence.

Mr Samuels: Everyone is sensitive about their information being made available. I have notified local authorities and Crown agencies of both the hearing on 4th May 1994 and today. We ask the Court to accept a challenge. I ask the Court to determine the status pursuant to s.131/93 - it does not determine "ownership" in a way which conflicts with kawanatanga. Rather it is a recognition of the status of the hapu with its tikanga.

Mr Saint: I confirm that I too have given notice to other Crown agencies.

COURT The Act, provided by s.55/93, no fresh evidence may be adduced without leave of the Appellate Court.

Statements of evidence from each witness in writing will be necessary. Any personal information, or sensitive information -
fol 69 referenced in the brief or evidence - can be recorded on tape and kept under security until after the appeal period has elapsed. After that time the recordings can be returned to those to whom the information belongs - s.69(1)/93.

Messrs Saint and Samuels are to provide memoranda as to notice previously given to interested parties, no later than 7th October 1994.

Application adjourned to Fri 25th November 1994 at 10.00 am, Ngapuhi Marae, Matauri Bay.

MP:MG/4

Mrs Registrar, please notify all interested parties on Messrs Samuels and Saint's memoranda no later than 21st October 1994 of the hearing date - also forward copies of minutes.

Copy to applicant and those who attended and Mrs Heather Ayrton, PO Box 703, Kaikohe.

"D"

MCHUGH SUBMISSION

1. The first point that must be emphasised about Dr McHugh's submission is that it dealt only with the common law recognition of customary interests and is therefore of no relevance to the statutory jurisdiction of the Maori Land Court under Te Ture Whenua. To a large degree Dr McHugh's evidence substantially supports the position taken by the claimants in relation to the government's final proposals. In considering how the New Zealand common law may develop, Dr McHugh noted such an exercise is necessarily speculative. For the reasons given in this submission a number of the final conclusions drawn by Dr McHugh as to the possible shape of the common law are not supported by his analysis, and in particular it is submitted his comparison of the law as it stands in Canada and Australia does not provide a basis for preferring the Australian approach, because a full analysis of the Canadian law had not been completed. Accordingly, it is submitted that it is still very much open whether the common law of New Zealand could, in an appropriate case, recognise some form of exclusive possession in the coastal marine area.

2. The starting point for Dr McHugh's analysis is to note that the New Zealand Courts have not dealt with the issues raised by common law recognition of customary rights and that there is a need to develop a "*local jurisprudence of common law aboriginal title*".[1] In particular New Zealand Courts will have to clarify core elements of recognition, proof, nature and extent and extinguishment and apply them in the New Zealand context.[2] Importantly Dr McHugh notes:

> *"It is certain that New Zealand courts will fashion their own version rather than clone the Canadian or Australian approach"*[3]

3. In particular Dr McHugh is clear that Treaty principles will inform the development of the common law in New Zealand,[4] and notes a number of key issues where the New Zealand approach may well vary from that followed in other jurisdictions including the measure of proof, the extent that continuity

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[1] McHugh paragraph (i)

[2] McHugh paragraph (xvii)

[3] McHugh paragraph 28

[4] McHugh paragraphs 32-33

will be required[5] and whether actual physical presence will be needed to establish aboriginal title, or whether spiritual association alone will be sufficient.[6] Taken together Dr McHugh's submission was that the common law of New Zealand would be capable of recognising a substantial range of interests, some exclusive, some of which may include a commercial component. Dr McHugh was also very careful to identify the difference between the common law and the statutory jurisdiction of the Maori Land Court under Te Ture Whenua.[7]

4. Following his introductory section Dr McHugh looked at the history of common law aboriginal title. Dr McHugh placed the development of the doctrine in the last quarter of the 20th century. In that regard he suggested that the first New Zealand recognition was in 1986 in *Te Weehi v Regional Fisheries Officer*. With respect such an analysis overlooks the fundamental starting point of the recognition of customary rights in New Zealand which began with the Treaty of Waitangi, and was subsequently recognised in the New Zealand Courts beginning with *R v Symonds*.[8] Quite clearly the property rights of Maori were recognised from the signing of the Treaty, through the old land claims process, through direct Crown purchases and ultimately, through the creation of the Native Land Court.

5. In the second part of the section on the development of common law aboriginal title in paragraphs 14-16, Dr McHugh noted the judicial unwillingness "*to extend...aboriginal title into more dynamic and modern forms within the compass of the common law doctrine, but that ambition was restrained by the doctrines juridicial foundation*".[9] It should be noted that the difficulties experienced by indigenous peoples referred to by Dr McHugh is not so much a doctrinal problem as the way cases have been approached by the judges in those jurisdictions. It should not be assumed that the same level of judicial inflexibility would necessarily occur in New Zealand, particularly given the fact that the Treaty principles will inform the development of such common law remedies.

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[5] McHugh paragraphs (vii), 57 and 71

[6] McHugh paragraphs (viii) and 63

[7] McHugh paragraph 37

[8] For a chronology of relevant New Zealand decisions see Elias CJ in *Marlborough Sounds* paragraphs 14-33

[9] McHugh paragraph 15

6. The balance of Dr McHugh's evidence (from paragraph 40) involved an analysis of what he describes as the "*four steps towards a New Zealand common law aboriginal title*", namely recognition, proof, nature and extent, and extinguishment.[10] As a preliminary point Dr McHugh noted correctly that some rights currently exercised by Maori pursuant to tikanga may not be recognised by the common law. This raises an important point in terms of the Treaty that the Crown is under an obligation to protect all property rights that may be proven, so to the extent that the law is incapable of recognising particular rights a mechanism should be provided to enable the recognition and protection of that right.

7. Dr McHugh's analysis of the four steps will now be considered in turn.

Common law recognition (McHugh paragraphs 44-59)

8. From paragraph 44 Dr McHugh considered the differing approaches of the Australian and Canadian courts to the recognition of aboriginal title. Dr McHugh categorises the Canadian approach as being based upon "*the use and occupation of ancestral land*"[11] as compared to the Australian approach based upon "*the continuity of property rights under traditional law and custom... recognised by the common law of Australia*".[12] Based on this perceived difference, Dr McHugh suggested that New Zealand would follow the Australian approach.[13] With the greatest respect it is submitted that Dr McHugh's categorisation of the Canadian approach is rather simplistic. In particular, far from ignoring traditional law and custom, occupation in terms of Canadian law is to a significant degree ascertained through analysis of law and custom. For example in *Delgamuukw*, Lamer CJ noted "*the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples*"[14] This approach has continued to be followed in Canada including in the recent cases of *R v*

[10] McHugh paragraph 40

[11] McHugh paragraph 44

[12] McHugh paragraph 44

[13] McHugh paragraph 45

[14] Delgamuukw paragraph 148

Marshall[15] and *R v Bernard,* [16] neither of which were mentioned by Dr McHugh.

9. Quite clearly the Canadian approach on this issue is much more subtle than that suggested by Dr McHugh in his submissions. It is submitted that it is a mistake to try and differentiate the Canadian and Australian approaches on the basis he attempted to do. There is accordingly no particular reason for selecting the Australian approach over the Canadian approach in this regard.

10. Having arbitrarily dismissed the Canadian approach, Dr McHugh then embarked on a more detailed analysis of the Australian case law. In terms of the building block of recognition, he noted that if "*there is an inconsistency or if coexistence of two normative systems* [common law and aboriginal title] *is not possible, recognition will not be made*"[17] In this regard Dr McHugh then turned to consider the Australian approach (or approaches) to common law recognition in relation to native title claims to the sea and seabed[18] Although Dr McHugh considered the three approaches taken in the High Court of Australia, as he notes at paragraph 52, based on the Court of Appeal judgment in *Marlborough Sounds "there can be no outright rejection of any aboriginal title for Maori over seabed whatsoever*". This is important for two reasons. First, and of critical importance from a New Zealand point of view, Dr McHugh noted the initial test of recognition is met in New Zealand (which is a fundamental difference from both the majority[19] and Callinan J [20]in *Yarmirr*), and secondly, it recognises that customary interests in the foreshore and seabed are capable of recognition as interests in land. The latter point immediately demonstrates the inadequacy of the government's final proposals which specifically rule out any such recognition. Such an approach in New Zealand is supported by Dr McHugh's observation that under English law it is possible to have ownership of the foreshore and seabed in an "*exclusive fee simple sense*" so "*why not the Australian or New Zealand*?[21] It therefore does not follow, is extremely illogical and, it is submitted, totally

[15] Nova Scotia CA 10 October 2003 [2003] NSJ 361

[16] New Brunswick CA 28 August 2003 [2003] NBJ 320

[17] McHugh paragraph 46

[18] McHugh from paragraph 48

[19] McHugh paragraph 51

[20] McHugh paragraph 49

[21] McHugh paragraph 52

wrong in law, for Dr McHugh to then suggest at paragraph 53 (and repeated at paragraph 55) that "*a right to exclude or exclusive private ownership of the sea and seabed ...is a proposition that the common law cannot recognise at the outset*". Having just recognised that the New Zealand common law will meet a recognition test, Dr McHugh chose in any event to apply the non-recognition approach of the majority of the High Court Australia in *Yarmirr* who saw the foreshore and seabed as a "*special juridicial space*".[22] Quite apart from the points already noted by Dr McHugh in paragraph 52, such a distinction cannot be sustained in New Zealand. In particular the statutory regimes under both Te Ture Whenua and the Land Transfer Act recognise the issue of exclusive fee simple titles to both foreshore and seabed. As the government's final proposals note, there are in fact numerous titles throughout New Zealand to both foreshore and seabed which have arisen in a number of ways.[23] In such circumstances it surely cannot be inconsistent with the sovereignty of the Crown for the common law to also recognise such interests, should such be proven. In addition, the Crown sovereignty in New Zealand is subject to the property rights guaranteed in Article 2 of the Treaty of Waitangi. There is clearly no exception in Article 2 for property rights within a "*special juridicial space*".

11. Accordingly, the conclusion drawn by Dr McHugh in paragraph 55 that a prospective statutory declaration, such as that proposed in the government's final proposals, that there could be no Maori ownership of the foreshore and seabed, would not extinguish any rights they might hold under the common law, is clearly wrong.

12. The final part of this section of Dr McHugh's submissions discussed the question of the inalienability of aboriginal title. While he recognised that a statutory mechanism is required to render an aboriginal title into a "*commerciable*" form, in paragraph 59 he suggests that the jurisdiction of the Maori Land Court is incomplete "*since the only mechanisms available to it are the status declaration and the freehold order*". With respect it is hard to see how the jurisdiction can be classified as incomplete in this regard as the freehold order would seem to be in a form that met Dr McHugh's commerciable criteria.

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[22] McHugh paragraph 53

[23] Government's final proposals part 7

Proving aboriginal title (McHugh paragraphs 60-74)

13. In this section Dr McHugh again carried out a somewhat superficial analysis of Canadian jurisprudence, in this case with regard to the Canadian distinction between aboriginal title and aboriginal rights, before suggesting that New Zealand would follow the Australian approach rather than the Canadian. The purported justification is that he suggested that in Canada, property rights have been ossified as a "*museum piece frozen in pre-contact form*",[24] unable to hold a contemporary economic dimension, and, therefore unlikely to be acceptable in New Zealand.

14. Such analysis is once again not correct. Aboriginal rights in Canada are addressed on a case-by-case basis. There is a body of case law in Canada which deals with giving modern form to aboriginal rights. It is correct that the core part of the right must exist as at contact, but modern expression can vary considerably and can include commercial and economic interests.[25] Accordingly, in *R v Gladstone*[26] commercial fishing rights were recognised, while commercial aspects of Treaty rights to fish were recognised in both *R v Marshall* and *R v Bernard*.

15. Dr McHugh attempted to illustrate the "*absurdities*" of the Canadian law by reference to *28 Grand Chief Halcrow v Attorney-General of Canada*.[27] In that case however, the issue was that no rights recognised by the common law or constitution had in fact been pleaded by the plaintiffs, and so the court found that no aboriginal rights had been infringed.

16. Much of the rest of the section is taken up with the discussion of the Australian requirements for continuity. As Dr McHugh noted there are a number of questions that New Zealand courts will have to decide, and he does not suggest that the particular approaches followed by Australian courts

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[24] McHugh paragraph 61

[25] Eg: R v Sparrow paragraph 27, R v Sundown paragraph 32-33 and Mitchell v Canada paragraph 95:

The modernization and increased economic value of a claim is not necessarily fatal to its existence. Drivers of economic value are different today than they were in the past. A "frozen rights" theory has been rejected by the courts as incompatible with the purpose of s. 35(1) Sparrow, supra, at p. 1093. Aboriginal rights are capable of growth and evolution: "s. 35(1) is a solemn commitment that must be given meaningful content" (Sparrow, supra, at p. 1108).

[26] (1996) 137 DLR (4th) 648 (SCC)

[27] McHugh footnote 42

would necessarily be accepted in New Zealand.[28] At paragraph 72, he does suggest that iwi/hapu who have "*maintained a stronger hold over the ownership of frontage land... would prove and hence reap a fuller 'bundle' from the common law than those who have not maintained similar control*". With respect such a conclusion does not necessarily follow. As Dr McHugh himself had noted earlier in his submissions, the effect of *Marlborough Sounds* is to take away any preconception about the effect of the sale of adjoining land. As a result if two groups were able to prove substantially similar rights, they would both be entitled to the same protection from the common law irrespective of whether one had alienated more adjoining land than the other.

The nature and extent of common law aboriginal title (McHugh paragraphs 75-101)

17. In this section Dr McHugh spends a considerable amount of time rightly criticising the Australian "*bundle of rights*" approach, yet ultimately suggested that it would be adopted in New Zealand for the reasons given earlier in his submissions - that the common law cannot recognise an exclusive title to the foreshore and seabed.[29] Once again, in contrast, there is almost no analysis of the corresponding Canadian approach.

18. Dr McHugh's criticisms of the Australian approach include the comment that the bundle of rights approach "*tends to compound the fragmentation of the aboriginal worldview and relation with land*"[30], it excludes the aboriginal rights to control access even to dry land,[31] is "*disingenuous*"[32] and he cannot understand "*how the right to control access given by aboriginal custom disappears at the common law intersection.*"[33]

19. Given these criticisms it is impossible to see why a New Zealand court should necessarily follow the Australian approach, and Dr McHugh appears to do so

[28] In particular whether physical manifestation of association is necessary and to what extent continuity is required

[29] McHugh paragraph 53 and 55 – see discussion in paragraphs 14 and 15 above

[30] McHugh paragraph 78

[31] McHugh paragraph 80

[32] McHugh paragraph 81

[33] McHugh paragraph 87

only because of his flawed starting point that the common law cannot recognise exclusive interests in the foreshore and seabed.[34] While Dr McHugh suggests that the New Zealand court would take a more extensive approach than Australian courts, it presupposes using the Australian bundle of rights approach. In conducting his analysis he has suggested that New Zealand courts would prefer "*the analytically more rigorous Australian jurisprudence in preference to the Canadian*", but gives no reasons why this should be so (particularly given his criticism of the lack of analysis in the Australian approach) and he himself ignores the fact that the Supreme Court of Canada rejected the bundle of rights approach in *Delgamuukw.*[35] It must be emphasised that it is not suggested that the Canadian approach is necessarily the correct one, although Dr McHugh acknowledges the similarities between Canada and New Zealand in the sense that both countries are trying for reconciliation and settlement to a much greater degree than has occurred in Australia.[36] On the contrary Dr McHugh provides no good reason why either the Canadian or Australian approach should be followed, a point he himself noted previously in his submissions. Surely as a matter of law it will be open for the New Zealand courts to develop their own approach to the recognition of aboriginal title in the foreshore and seabed, incorporating, where appropriate, the best features of both the Canadian and Australian experience, while ensuring that the test adopted is consistent with the guarantees given in the Treaty, given that those guarantees were, as Elias CJ noted in *Marlborough Sounds*, part of the New Zealand common law.

The extinguishment of aboriginal title (McHugh paragraphs 102-120)

20. There is little that is contentious in the final section. In his discussion of both the concept of infringement and consultation however, Dr McHugh again showed an incomplete understanding of the approaches taken in Canada. With regard to the concept of infringement Dr McHugh suggests that the concept occurs when other interests are given priority over the aboriginal rights or title "*and the aboriginal owners must therefore suffer*".[37] This does not do justice to the state of the Canadian law relating to infringement. If an infringement occurs, the Canadian courts require justification of infringement

[34] McHugh paragraph 87 - see discussion in paragraphs 14 and 15 above

[35] Delgamuukw particularly paragraphs 110-111

[36] McHugh footnote 86

[37] McHugh footnote 98

and, unless the infringement is justified it is of no force and effect pursuant to section 35 of the Constitution Act[38]. Likewise, in relation to consultation Dr McHugh has not noted that both the *Taku* and *Haida* decisions have been appealed and are to be heard by the Supreme Court of Canada in March 2004. In addition both of these cases still left open a number of significant questions regarding the extent of the duty to consult in Canada, and the remedies available for failing to consult.

Conclusion

21. It is submitted that Dr McHugh's submissions, both written and oral, provide significant support for the proposition that iwi/hapu stand to gain much more through the proper evolution of the New Zealand common law (informed by the Treaty of Waitangi) than is being offered through the government's final proposals and the removal therefore of that remedy is a significant breach of the Treaty.

[38] See R v Sparrow