Pākia ki uta pākia ki tai

Report of the Ministerial Review Panel

Ministerial Review of the Foreshore and Seabed Act 2004

Volume 1

He Taurere Takutai

Tērā tētahi whare i hanga
I te marae ātea o Hine Tuaoneone

Aurere ana te moana
Ngunguru ana te whenua
I te auētanga o te motu
Pākia ki uta, pākia ki tai

Tū kau noa te whare pūngāwerewere
Toro atu ana te kōrurutanga ki mamao
He rā kūtia mō te hunga o raro
Ko te hinapōuri, he pōuriuri
Tē hiki e

Tē kite atu i te pūāhurutanga
He mātao te takuahi
Ngā tara o te whare, pīrahirahi e
Whakairohia e te ringa naho
Torutoru noa i hinga
I ngā whakawai a tōna poho e

Ka nuku te one, oreore te kiri
Pānekeneke ana i raro wae
Pākia rawatia ana e te tai o riri
Ka timu, ka whawhati
Ka pari tonu mai
Ki tōna tūranga motuhake e

Tērā tētahi whare i hinga
I te marae ātea o Hine Tuaoneone e

Hana O'Regan

A Lament for the Sea Coast

There was a house built
Upon the swept dunes of Hine Tuaoneone

The sea groaned
The land growled
As the lament of the nation
Slapped upon shore and tide

It stood, this spider's house
Its shadow cast far
Eclipsing all it cloaked
Night and darkness did not recoil

No refuge could be found
Its hearth stone cold
Its walls paper thin
Its carvings etched in haste
It beckoned but few into its breast

The sand shifting, moving,
Sliding under its feet
Lashed by the angry tide,
Pushed away, and broken
Still the tide returned
To claim its place

There was a house that fell
on the swept dunes of Hine Tuaoneone

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30 June 2009

Tēnā koe Te Rōia Matua

Ko te tuatahi he mihi ki a rātou katoa kua mene atu ki te pō, ki te hunga i para i te huarahi mō tātou katoa o te ao kōmiro nei, nei rā te maioha a mātou kua mahue mai nei i te mata o te whenua ki a koutou, moe mai rā, haere atu rā, okioki mai rā i ngā manaakitanga o ngā tūpuna.

Kāti rā, ki a tātou te hunga ora, te waihotanga mai o rātou mā, tēnā tātou katoa. Kai ngā iwi o te motu me ō koutou maunga whakahī, tēnā anō koutou katoa i aro mai ki tā koutou kaupapa, arā ko te arotake o te Ture o Te Takutai Moana i ngā marama e whā kua hori atu nei.

Our first respects are to those who have departed to the night, to all those who paved the paths for us here in the world of the living, we who remain here upon this land greet you. May you rest well and in peace. We turn our respects to the living, to the many prestigious mountains and their peoples who have engaged with us in the Review of the Foreshore and Seabed Act in the past four months, we thank you.

We have the honour of presenting you with our report on the Review of the Foreshore and Seabed Act 2004 ("the Act").

A significant majority of submissions favoured repeal of the Act, mainly on the grounds that the Act elevates the public interest at the considerable expense of Māori customary rights. Only 5 percent of submitters wanted to retain the Act unchanged. Had there been powerful public support for the Act we would have expected to have encountered it, but we did not.

We conclude that the Act should be repealed, and the process of balancing Māori property rights in the foreshore and seabed with public rights and expectations must begin again.

Our report outlines, for your consideration, certain options about how this balance could be achieved. Although these opinions are not necessarily easy to pursue, we consider them equitable.

Due to the timeframe of this review, we were unable to have the "longer conversation", endorsed by the Waitangi Tribunal in 2004 and supported in submissions, on what should be done after repeal of the Act. As a result, our options, plus other possible amendments and alternatives, have not yet been discussed with those who will be affected by them. We therefore emphasise, and trust, that our options will not be reported as the final word on these matters, but will be accepted as a catalyst for further discussion.

Ka whati te tai, ka pao te tōrea
When the tide ebbs, the tōrea strikes

Heoi ano, naku nā

Taihākurei Edward Durie | Richard Boast | Hana O'Regan

He mihi
Acknowledgements

This Review has been an intensive and demanding process that has taken us to many towns and cities and into many communities over the past four months. The time constraints have been considerable and the process challenging. During the public consultation round we often had to limit and tightly manage the time available for discussion, and hold meetings late into the evenings. The reactions we have received have, for the most part, been wonderfully supportive with most participants appreciating the chance to participate in the process and air their concerns.

We were committed at the outset to doing all that we could within the time available to make this process as accessible and transparent as possible, and to commit to the review with the level of integrity and professionalism required to do justice to the task.

Mā ngā pakiaka te rākau e tū – By the roots the tree stands

We would like to take this opportunity to recognise the support and efforts of the Secretariat over the past four months. Their commitment to this kaupapa, the hours they have invested, and their considerations of the Panel at every point in the process have enabled us to accomplish this Review within the associated constraints – and we thank you all for that.

We would like especially to thank Benesia Smith and Catherine Nesus and their team: Angela Rego, Marama Paki, Susan Chamberlain, Jessica Douglas, Āwhina Fleming, Tui Gilling, Rachel Groves, Amanda Hyde, Joanna Mason, Beverley Murray, Keri Neho, Pratima Namasivayam, Patrick Davis, and Tiopira Piripi.

We acknowledge the work of Jenny Rouse and Anthony Pātete who have contributed significantly in researching and writing for the report and the Panel. We also thank Andrew Erueti and Claire Charters for their contribution on the international legal context and implications of the Foreshore and Seabed Act. Once again, your combined efforts and support have been greatly appreciated.

The Panel would like to recognise the team from Te Puni Kōkiri, especially Sam Bishara and Toroa Pōhatu; the facilitators John Whaanga, Herewini Te Koha, Basil Morrison and Mary Bourke; and translator Rangi McGarvey and transcriber Maureen Dawson, all of whom assisted us in our journeys around the country and provided support to the Secretariat with the organisation and facilitation of the consultation meetings. Thank you.

Finally, the Panel would like to acknowledge the considerable tolerance, wonderful hospitality and support we have received across the country from the respective marae and community centres which have hosted us. Ngā mihi maioha ki a koutou katoa. Thank you.

Ngā mihi ki a koutou katoa, ngā kaitaunaki, ngā pukumahi, ngā ringa rehe, tēnā koutou, tēnā koutou, tēnā koutou katoa.

Purpose

This is the report of the Ministerial Review Panel (the Panel) appointed by the Attorney-General on 4 March 2009 to undertake a review of the Foreshore and Seabed Act 2004 ("the Act").

First, we briefly outline here the background to the issue of the foreshore and seabed, to provide some context to our purpose and this report. In Chapter 1 we comment more fully on the issue and on the context within which it "exploded onto the national scene"[1] in 2003, resulting in the Foreshore and Seabed Act 2004.

Public interest in the issue of the foreshore and seabed was triggered by the June 2003 decision of the Court of Appeal in *Attorney-General* v *Ngāti Apa* ("the *Ngāti Apa* case" or "the *Ngāti Apa* decision")[2]. In summary, the Court ruled that:

- the Crown was wrong to contend that certain statutes affecting the foreshore and seabed had had the effect of extinguishing such Māori customary title as might exist; and
- the Māori Land Court has jurisdiction, under Te Ture Whenua Māori/Māori Land Act 1993, to determine whether any part of the foreshore and seabed is still Māori customary land.

While the decision gave rise to uncertainty regarding the "ownership" status of the foreshore and seabed, it also confirmed that this could be tested in the Māori Land Court. However, rather than let that process run its course, the government decided to legislate. The Act vested in the Crown title to all foreshore and seabed land not already in private ownership. It also made some provision for Māori customary interests to be recognised in limited circumstances.

There was considerable opposition to the government's decision to legislate, to the speed with which it did so, and to the provisions of the Foreshore and Seabed Bill. Our report begins with a narrative timeline of key events (see 1.1) which demonstrates the unusual speed with which the legislation was enacted.

Three key issues emerge from our review of submissions to the Select Committee which considered the Bill in 2003: public ownership, access and navigation, and protection of Māori customary interests in the foreshore and seabed. In our view, these issues remain at the very heart of ongoing concerns about the legislation. They are fundamental to the vast majority of submissions made during our consultation in April and May 2009, irrespective of whether those submissions generally supported or opposed (or proposed amendment of) the Act (see 2.4).

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[1] Submission 7-16-3, Human Rights Commission.

[2] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA)

The Act declares as its object "to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders". However, to Māori (and significant numbers of others the Act abrogates Māori customary rights to the foreshore and seabed, discriminates against Māori and denies Māori the human rights guaranteed to all New Zealanders under international conventions.

The fundamental issue which remains undetermined is essentially whether the Government confiscated Māori customary interests in the foreshore and seabed through the Act, and by imposing restrictive rules on the circumstances in which a customary interest in the foreshore or seabed might now be recognised. In addressing our Terms of Reference we have been drawn to consider that underlying issue.

Why review the Foreshore and Seabed Act 2004?

The National Party and the Māori Party agreed to review the Act in their Relationship and Confidence and Supply Agreement of 16 November 2008.

The Ministerial Review Panel

Hon Taihākurei Edward Durie DCNZM (Panel Chair)

Hon Taihākurei Edward Durie (Ngāti Raukawa, Ngāti Kauwhata, Rangitāne), retired, is a former Judge of the Māori Land Court (1974–1980), Chief Judge of the Māori Land Court (1980–1998), Chair of the Waitangi Tribunal (1980–2002), Judge of the High Court (1998–2007) and member of the Law Commission (2004–2007).

Richard Boast MA (Waikato) LLM (VUW)

Richard is an Associate Professor in Law at Victoria University where he teaches courses in Property Law, Legal History and Māori Land Law. He is a practising barrister who has given specialist expert evidence or presented legal submissions dealing with foreshore and seabed issues to the Waitangi Tribunal, including the Muriwhenua, Te Whanganui-a-Orotu and Tauranga inquiries. He has written books and articles about New Zealand legal history and natural resources issues, including a textbook on the Foreshore and Seabed Act 2004 (*Foreshore and Seabed*, 2005) and *Buying the Land, Selling the Land: Governments and Māori Land in the North Island*, 1869-1921 (2008).

Hana O'Regan (Kāi Tahu), MA (Otago)

Hana has been engaged in Māori education in the tertiary sector for the past 17 years. Specialising mainly in the areas of Te Reo Māori, identity development and Kāi Tahu language and culture regeneration, Hana has played an active role in the language revitalisation strategy of her people. A board member of The Māori Language Commission Te Taura Whiri i Te Reo Māori since 2003, she is currently the Director of Māori and Dean of the Māori Faculty at Christchurch Polytechnic, Institute of Technology.

Terms of Reference

Having regard to the Relationship and Confidence and Supply Agreement between the National Party and the Māori Party (16 November 2008) to undertake a review of the Foreshore and Seabed Act 2004, the Panel is asked to provide independent advice on:

a What were the nature and extent of the mana whenua and public interests in the coastal marine area prior to *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643;

b What options were available to the government to respond to the Court of Appeal decision in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643;

c Whether the Foreshore and Seabed Act 2004 effectively recognises and provides for customary or Aboriginal Title and public interests (including Māori, local government and business) in the coastal marine area and maintains and allows for the enhancement of mana whenua.

d If the Panel has reservations that the Foreshore and Seabed Act does not provide for the above, outline options on what could be the most workable and efficient methods by which both customary and public interests in the coastal marine area could be recognised and provided for; and in particular, how processes of recognising and providing for such interests could be streamlined.

The Panel will also need to consider how these processes will integrate with legislation that regulates the coastal marine area.

In undertaking this work the Panel will:

- Consider the approaches in other Commonwealth jurisdictions to recognise and provide for customary and public interests in the coastal marine area.
- Consider the submissions by the public and other publicly available reports made to the Fisheries and Other Sea-related Legislation Select Committee in 2004 on the Foreshore and Seabed Bill and the Waitangi Tribunal's 2004 *Report on the Crown's Foreshore and Seabed Policy*; and
- Undertake consultation with Māori and the general public through a series of public meetings and hui.

The Panel is encouraged to invite key commentators to speak to it and will receive written submissions.

The Ministry of Justice will provide secretariat support to the Panel.

The Ministerial Review Panel is to provide a written report to the Attorney-General addressing these matters by no later than Tuesday 30 June 2009.

In Summary

The Terms of Reference posed specific questions.

The first concerned the nature and extent of customary and public interests in the coastal marine area.

In summary, we consider the whole of the coastal marine area is subject to customary interests unless expressly extinguished by some specific act. Traditionally, food supplies on land were limited but the sea was plentiful and the coastal marine area, like the inland waters, was covered by a layer of overlapping use rights, which, like any other form of use rights over the area, have continued to evolve and develop as times have changed.

What then of the public interest in the coastal marine area? The public interest may reflect the traditional focus of European settlers on the land rather than the sea. In any event in law, the public interest in the coastal marine area is confined to limited rights of navigation and fishery. But, there has grown over the last 100 years a national culture that sees the coastal marine area as not just a shipping lane but as a public recreation ground that is the birthright of every New Zealander.

There are thus competing and conflicting cultural views.

Taking an approach based on the Treaty of Waitangi, which was a Treaty to provide for two peoples on this land, we think it is time to expect that both cultural views should be recognised in law and to the extent practical, reconciled. This approach is consistent with the opinion of nearly all Māori at our hui. They supported an open access regime. And of course it was also supported by non-Māori.

The Terms of Reference then asked about the options available to government when the issue arose in 2003 and whether the option of legislating chosen by the government was effective in providing for both customary and public interests.

To provide properly for both interests it was conceivable that it may have been necessary to legislate but, in our view, the legislation that was enacted – the Foreshore and Seabed Act 2004 (the Act) – did not in fact provide fairly for those interests. One key problem in 2003–4, however, was not the concept of a new model as such but rather the timing and process chosen to implement it. It elevated the public interest at the considerable expense of customary interests. The vast majority of submitters, Māori and non-Māori, agree. They support some form of legislation but strongly oppose the Act.

The Act severely discriminated against Māori. Supporters of the Act claimed there was a legal uncertainty but the Act took away the right to go to Court to have the uncertainty resolved. It imposed extremely restrictive thresholds for the recognition of customary interests and severely reduced their nature and extent. It drew on legal tests that had developed in other countries whose historical treatment of the issue was entirely different from our own. It was simply wrong in principle and approach. The timing and the process were also wrong. It caused much anguish and concern to Māori and to many non-Māori as well.

We are clearly of the view that the Act must be repealed.

The final question was to the effect of what should be done if we came to that view. We were particularly asked to outline the options and the most workable and efficient methods to provide for customary and public interests and how processes could be streamlined.

We propose a new Act based on the Treaty of Waitangi principle of providing for both Māori and Pākehā world views. It would provide that hapū and iwi, and the general public, both have interests in the coastal marine area, that both interests must be respected and provided for but that both must be limited by that which is reasonably necessary to accommodate the other.

The new Act should also acknowledge that customary rights in that area belong to hapū and iwi with traditional interests in it, not to all Māori, and that they are property rights and so, should not lightly be taken away. Hapū and iwi should therefore have access to the Courts if they wish to determine the nature and extent of their common law rights before the balancing of customary and public rights is considered. The Act should also seek to promote equal treatment between regions and between iwi. It should be provided that the right of general access is not a right of free access but of reasonable access and that the alienation of the foreshore and seabed should be restricted.

We consider the ultimate apportionment of customary and public interests should not be left to the Courts. The issues are not just legal. For example, the common law does not provide fully for public expectations. Instead there should be discussions or negotiations once the broad principle of seeking a balance has been provided for.

But how is that to be set up? There were so few submissions on the practical steps to be taken that we have not sought to be prescriptive. We have set out two alternatives at either end of the spectrum. Hopefully they will stimulate further thought on the appropriate action.

The first proposal is for the establishment of a national body, comprised of representatives of central and local government, Māori, and public interest groups to oversee the coastal marine area and to develop specific proposals by which the matter can be progressed after further consultations.

The second proposal focuses on the continuation of regional negotiations between the Crown and hapū and iwi. In considering how the process might be streamlined, there are provisions for the early determination of appropriate regions and the establishment of entities to represent the hapū and iwi concerned.

However, both proposals recognise that settlements must accommodate the three customary elements of customary usages (like harvesting), customary authority (which could be reflected in shared management arrangements) and ownership of the seabed. While the first two would normally be dealt with regionally, a national settlement may be needed for the last.

We hope that these proposals will promote further dialogue before the optimum design is settled and final decisions are made.

Report structure

This report is presented in three volumes.[3]

Volume I

Chapter 1, "Background", begins with a narrative timeline of key events, then comments on the issue of the foreshore and seabed and the context within which it "exploded onto the national scene"[4] in 2003, resulting in the Foreshore and Seabed Act 2004.

Chapter 2, "Consultation and submissions", provides an overview of the current opinions and submissions on the Act as emerging from several consultation hui and public meetings. It also describes the review process itself.

Chapter 3, "What of different world views?", introduces what we see as a critical issue in the foreshore and seabed debate, namely, that the coastal environment is differently seen in terms of Māori culture and when viewed according to the beach and outdoor culture that has evolved in New Zealand. This chapter seeks to explain those two world views. It considers that, to give full effect to the objectives of the Treaty of Waitangi, both perspectives should be accommodated to the most practical extent. When undertaking that exercise however, the Māori world view should not be regarded as just a world view. It is also a property right.

The purpose of Chapter 4, "Finding an accommodating framework", is to consider how people seem, at this point, to approach the issue through different lenses which then shape the positions they take. We then propose a new paradigm within which to work towards resolution of the foreshore and seabed issue.

Chapter 5, "How the law developed", considers how New Zealand law provided for customary interests in the foreshore and seabed and why the government stepped in to change that law after the *Ngāti Apa* case. It summarises developments leading up to that case and considers how the new law was significantly at odds with the historic development of the New Zealand law on Native or customary Title. The chapter also provides a brief analysis of the Act and its principal effects in the ensuing four and a half years.

Chapter 6, "What is wrong with the Act?" outlines the Panel's own conclusions, based on the evidence we have received, researched and considered, on the Act.

In Chapter 7, "What should be done?", we provide our independent conclusions on the questions in our Terms of Reference.

Volume 2: Appendices

Volume 3: Summary of submissions

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[3] In the interests of consistency, the spelling of Māori words and macronisation has been standardised throughout this report (including passages quoted from submissions and cited references).

[4] 7-16-3, Human Rights Commission.

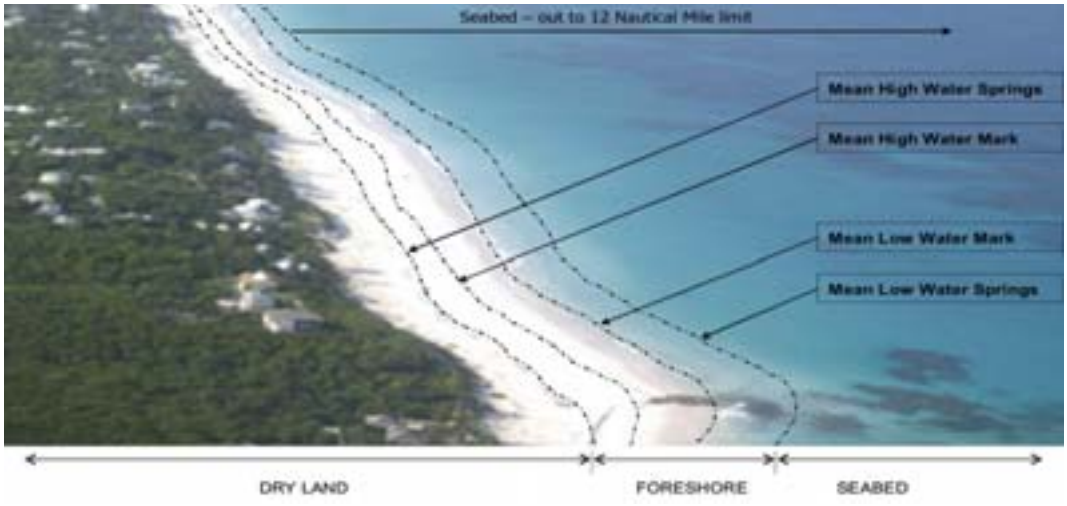
Glossary

Foreshore and seabed

In the Act the foreshore and seabed means the area between the line of mean high water springs (high water mark) on its landward side and the outer limits of the territorial sea (12 nautical miles) on its seaward side. The foreshore and seabed includes the air space and water space above the land, and the subsoil, bedrock and other matters below. In practical terms, it is the seabed and the "wet" part of the beach that is covered by the ebb and flow of the tide (see diagram). It does not include the dry land on the beach next to the intertidal zone. It includes the beds of rivers that are part of the coastal marine area.

Public foreshore and seabed

This means the "foreshore and seabed" minus "specified freehold interests". Specified freehold interests are defined in the Act (s 5) to mean, essentially, some forms of private title in the foreshore and seabed, including land held pursuant to a certificate of title under the Land Transfer Act 1952 and Māori freehold land. The importance of this lies in section 13 of the Act which vests only "public" foreshore and seabed in the Crown. Thus section 13 would not apply, for example, to areas of Māori freehold land in the foreshore and seabed.



Coastal marine area

The coastal marine area is an area that equates to foreshore and seabed as defined in the Act, but is the term used principally in the Resource Management Act 1991. It is defined in section 2 of the Resource Management Act as the foreshore, seabed, coastal water, and air space above the water "of which the seaward boundary is the outer limits of the territorial sea" and of which the landward boundary is the line of mean high water springs, except where the line crosses a river mouth, at which point the boundary is the lesser of one kilometre upstream from the mouth of the river or "the point upstream that is calculated by multiplying the width of the river by five". The difference between this and "foreshore and seabed" is that the coastal marine area also includes seawater itself. This is because the RMA also regulates discharges to and taking of coastal water. When it comes to river mouths the definition of "foreshore and seabed" in the Foreshore and Seabed Act adopts the same boundaries as the definition of the coastal marine area in the RMA.

Customary rights order

A type of order obtainable under the Act from either the Māori Land Court (in the case of whānau, hapū and iwi) or the High Court (in all other cases). Unlike a territorial customary rights order, which relates to an area, a customary rights order relates to recognition and protection of activities (eg, fishing for whitebait or collecting hāngi stones).

Crown minerals

The Crown only owns some, not all, minerals. It owns all minerals that are beneath Crown land, all minerals that have been nationalised from time to time (gold and silver, uranium, and all petroleum and natural gas), and all minerals beneath private land that has been Crown granted after 1948. This means, for example, that many of the coal reserves in New Zealand are privately owned. The Crown Minerals Act 1991 applies, principally, only to Crown-owned minerals. Section 2 of the Crown Minerals Act simply defines "Crown owned minerals" as "any mineral that is the property of the Crown". No person may prospect or explore for, or mine, any Crown-owned minerals without a permit from the Ministry of Economic Development (Crown Minerals Act 1991 s 8). However the taking of sand, shingle, etc, from a river or lake or the coastal marine area does not require a permit from the Ministry; such takings will, however, normally require a resource consent under the Resource Management Act 1991 (Crown Minerals Act 1991 s 8(2)(b)).

Māori customary land

This is land held "by Māori in accordance with tikanga Māori" (Te Ture Whenua Māori/Māori Land Act 1993 s 129(2)(a)). It means essentially all land in continuous Māori ownership that has not been investigated by the Māori Land Court. Until the *Ngāti Apa* decision it was assumed that very little such land was still in existence.

Māori freehold land

This means land in continuous Māori ownership, title to which has been investigated by the Māori Land Court. Ownership details will be recorded in the Māori Land Court records and usually the land will be the subject of a certificate of title under the Land Transfer Act 1952. Māori freehold land is defined in section 129(2)(b) of Te Ture Whenua Māori/Māori Land Act 1993 as land "the beneficial ownership of which has been determined by the Māori Land Court by freehold order".

Mean high water springs (MHWS)

This is the inland boundary of the "foreshore and seabed" as defined in the Act, section 5. The Act gives no definition of MHWS itself. According to the government's December 2003 *Foreshore and Seabed: A Framework* (p 5), this line was chosen because it was "closest to public understanding of what comprises the foreshore, and is consistent with providing public access". "Spring" tides are the highest tides and occur twice a month. The line differs from that adopted in the Crown Grants Act 1908 section 35 which defines the seaward boundary of blocks of coastal land granted by the Crown as "the line of high-water mark at ordinary tides". The Crown Grants Act line is lower down the beach than the Foreshore and Seabed Act line, significantly so in some areas.

Native Title

"Native Title" or "Aboriginal Title" is a doctrine of the Common Law. It is a Rule of Law which stipulates that on the acquisition of sovereignty the property rights of the indigenous people remain intact and enforceable in the Courts unless (according to the doctrine as applied in New Zealand) the property interests have been extinguished by the Crown. Native Title is undoubtedly a part of New Zealand Common Law, as was made clear in the *Ngāti Apa* decision.

Queen's chain (marginal strips)

The term "Queen's chain" has no formal legal meaning. What is usually meant by the Queen's chain is "marginal strips" or sometimes "lands reserved from sale". Section 110 of the Land Act 1892 stipulated that in all sales or dispositions of Crown land a strip of land 66 feet (now 20 metres) wide was to be reserved around the sea coast, the margins of all lakes exceeding 50 acres, and along the banks of all rivers and streams more than 33 feet in width. This provision may have reflected earlier surveying practice in some parts of the country. Generally, however, the "Queen's chain" dates from post-1892 Crown grants. The current equivalent of section 110 of the 1892 Act is section 58 of the Land Act 1948. There are now many thousands of marginal strips. They are administered by the Department of Conservation under the Conservation Act 1987. Marginal strips are not part of

the foreshore and seabed but run inland of it. The seaward boundary of a marginal strip would in most cases be the Crown Grants Act 1908 boundary line.

Territorial customary rights order

A type of order obtainable from the High Court under the Act. It is meant to reflect and recognise an area governed by customary title. The definition of "territorial customary rights" is set out in section 32 of the Act. Essentially, the applicant group has to show that it had a customary title at Common Law and also meet a number of additional statutory criteria.

Usufructary rights

A property right to share in the benefits or productions of the land of another. Usufructuary rights can be recognised and protected by a range of legal methods, including licences, easements and "profits à prendre" ("rights to take"). Some of these methods, such as easements, are registrable property rights under the Land Transfer Act 1952.

Glossary of Māori terms

Kupu	Tikanga	Whakamārama
atua	God	
ahikā/ahikāroa	the long-burning fires	a customary concept of Māori land tenure that refers to the continued generational occupation and use of an area that is symbolised by the burning of the fires
hapū	sub-tribe/clan	
hara	sin/offence/violation	
hau kāinga	home people	a term used to refer to the local Māori hapū/those of the kāinga or village
hui	meeting/gathering	
iwi	tribe	
kai	food/to eat	
kaitiaki	caretaker/guardian	
kaitiakitanga	guardianship	this refers to the practice of and the values within the role and responsibilities of guardianship
katoa	all/everyone	
kāwanatanga	governorship	the act of governing
mahinga kai/ mahika kai	food-gathering areas	this term is used to refer to the areas where foods were gathered and processed, and also in a broader sense to incorporate all the resources contained with those areas
mai rānō	from time immemorial	
mana	pride, control, power, authority over	
mana whenua	control and authority over the land	
mana moana	control and authority over the sea	
mana tūpuna	ancestral mana	that mana that derives from one's tūpuna through whakapapa or genealogy
mana tangata	personal mana	mana that is achieved, maintained and developed by an individual
mana ātua	mana of the gods	
manaakitanga	the act of showing manaaki, of looking after and respecting others	extending one's practice of hospitality
Māori	person(s) of Māori descent	
moana	the sea/ocean	the domain of Tangaroa

Pākehā	New Zealander(s) of predominantly European descent	
papatai moana	seabed	
pātaka kai	storehouse/pantry	
rāhui	place under restriction	a custom that involves placing restrictions of access and use over an area for cultural reasons, often as a result of death
rangatiratanga	sovereignty/self-determination/ independence	all the responsibilities and associated power of executing the role of a rangatira
raupatu	conquest/confiscation	a customary concept of Māori land tenure that refers to conquest and which came to refer to the land confiscations of the 1860s
rohe	area of interest	
takutai	foreshore	this area includes the "coast" and is not limited to the mean high water mark or the mean low water springs as it overlaps the English definitions of foreshore and seabed
Tangaroa/ Takaroa	God of the Sea	Māori God of the Sea, responsible for the ocean and associated resources
taonga	treasure/something precious	
tauiwi	non-Māori New Zealander(s)	
tikanga	custom/cultural practice	the term implies the correct way of doing something, and the way in which it is done
tipuna/tūpuna	ancestor(s)/grandparent(s)	
wāhi tapu	sacred place(s)	
whānau	family group	in Māori society this was the term often given to refer to the extended family

Chapter 1 Background

Chapter 1 Background

1.1 Timeline of key events

19 June 2003	**The Court of Appeal decides *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) ("the *Ngāti Apa* case" or "the *Ngāti Apa* decision").**
18 August 2003	The government releases a policy paper covering the foreshore and seabed entitled *Protecting Public Access and Customary Rights: Government Proposals for Consultation*. It sets out four principles as a framework for policy development: Access; Regulation; Protection; Certainty.
Late 2003	A public consultation process on the government's policy commences (10 hui and 41 public meetings).
October 2003	Te Rūnanga o Ngāti Porou commences discussions with the Crown on its interests in the foreshore and seabed.
December 2003	The government releases *The Foreshore and Seabed of New Zealand: Report on the Analysis of Submissions*.
17 December 2003	The government releases a discussion paper entitled *Foreshore and Seabed: A Framework*.
Early 2004	Joint discussions continue between Te Rūnanga o Ngāti Porou (on behalf of certain hapū of Ngāti Porou) and Te Rūnanga o Te Whānau (on behalf of the hapū of Te Whānau a Apanui) and the Crown.
20–23 and 28–29 January 2004	The Waitangi Tribunal holds an urgent hearing on the Treaty compliance of the Crown's proposed policy.
4 March 2004	The Waitangi Tribunal delivers its *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071).
8 April 2004	The Foreshore and Seabed Bill ("the Bill") 2004 is introduced into Parliament.
5 May 2004	Following a nationwide hīkoi, an estimated 50,000 people demonstrate opposition to the Bill outside Parliament.[5]
6 May 2004	The Attorney-General reports to Parliament that the Bill is consistent with the New Zealand Bill of Rights Act 1990.
6 May–12 July 2004	The Fisheries and Other Sea-related Legislation Select Committee hears submissions on the Bill.
1 November 2004	Te Rūnanga o Ngāti Porou (on behalf of certain hapū of Ngāti Porou) and Te Rūnanga o Te Whānau (on behalf of the hapū of Te Whānau a Apanui) sign separate Terms of Negotiation with the Crown in relation to their interests in the foreshore and seabed.
4 November 2004	The Fisheries and Other Sea-related Legislation Select Committee reports back to Parliament on the Bill. The Committee could not reach agreement on whether the Bill should be passed and did not recommend any amendments.
16 November 2004	A Supplementary Order Paper is tabled in Parliament which makes a number of significant changes to the Bill.

[5] "Remembering the hīkoi" http://www.stuff.co.nz/auckland/northland/local-news/northern-news/2349554/Remembering-the-hikoi, 22 April 2009, accessed 14 May 2009.

16 November 2004	The Foreshore and Seabed Bill and Resource Management (Foreshore and Seabed) Amendment Bill receive their Third Readings in Parliament.
24 November 2004	**The Foreshore and Seabed Act 2004 (the Act) and Resource Management (Foreshore and Seabed) Amendment Act 2004 receive Royal Assent.**
Early 2005	Ngāti Porou ki Hauraki Trust (on behalf of Ngāti Porou ki Harataunga ki Matāora) commences discussions with the Crown in relation to their interests in the foreshore and seabed.
March 2005	The United Nations Committee on the Elimination of Racial Discrimination ("CERD") releases its first decision on the Act noting that "the legislation appears (…) to contain discriminatory aspects against the Māori (…)".[6]
September 2005	Te Rūnanga o Te Whānau (on behalf of the hapū of Te Whānau a Apanui) signs a Statement of Position and Intent with the Crown in relation to their interests in the foreshore and seabed.
16–25 November 2005	The United Nations Special Rapporteur on Indigenous Rights, Rudolfo Stavenhagen, visits New Zealand.
19 December 2005	Ngāti Porou ki Hauraki Trust (on behalf of Ngāti Porou ki Harataunga ki Matāora) signs an Agreement to Negotiate (similar to Terms of Negotiation) with the Crown in relation to their interests in the foreshore and seabed.
August 2007	CERD adopts its concluding observations on New Zealand's fifteenth to seventeenth periodic reports and reiterates its recommendation that a renewed dialogue between the Crown and Māori take place in order to seek ways of mitigating the Act's discriminatory effects.
5 February 2008	Te Rūnanga o Ngāti Porou (on behalf of certain hapū of Ngāti Porou) signs a Heads of Agreement with the Crown.
28 February 2008	Te Rūnanga o Te Whānau (on behalf of the hapū of Te Whānau a Apanui) signs a Heads of Agreement with the Crown, including a draft Deed of Agreement.
8 May 2008	Ngāti Pahauwera signs the first combined Treaty settlement and foreshore and seabed Terms of Negotiation with the Crown.
12 June 2008	Te Rūnanga o Te Rarawa signs Terms of Negotiation with the Crown.
29 September 2008	Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill is introduced into Parliament.
30 September 2008	Ngāti Pahauwera signs an Agreement in Principle with the Crown relating to its interests in the foreshore and seabed and the settlement of its historical Treaty claims.
31 October 2008	Ngā Hapū o Ngāti Porou and the Crown sign the Ngā Hapū o Ngāti Porou Foreshore and Seabed Deed of Agreement.
4 November 2008	Ngāti Porou ki Hauraki Trust (on behalf of Ngāti Porou ki Harataunga ki Matāora) signs a Milestone Document with the Crown.
6 November 2008	Te Rūnanga o Te Rarawa signs a Milestone Document with the Crown.

[6] UN Committee on the Elimination of Racial Discrimination "Decision on Foreshore and Seabed Act 2004" (11 March 2005) Decision 1 (66): New Zealand CERD/C/DEC/NZL/1, para 6.

8 November 2008	A general election results in a change of government from a Labour-led minority government to a National government.
16 November 2008	The National Party and the Māori Party agree to review the Act in their Relationship and Confidence and Supply Agreement
9 December 2008	Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill is reinstated by the 49th Parliament.
2 February 2009	Ngā Hapū o Ngāti Porou and the Crown agree to extend the timeframe for filing in the High Court an application under section 96 of the Act, to 30 March 2009.
4 March 2009	The government announces a Ministerial Review of the Foreshore and Seabed Act 2004, membership of the Review Panel and Terms of Reference.
30 March–19 May 2009	The Ministerial Review Panel undertakes public consultation and receives submissions as part of the Review.
30 April 2009	Ngā Hapū o Ngāti Porou and the Crown agree to extend the timeframe for filing in the High Court an application under section 96 of the Act, to 30 September 2009.

1.2 The issue

The foreshore and seabed issue is essentially whether the government unjustly expropriated Māori customary interests in the foreshore and seabed by vesting the foreshore and seabed (that was not already privately owned) in the Crown, through the Foreshore and Seabed Act 2004 (the Act), and by imposing restrictive rules on the circumstances in which a customary interest in the foreshore or seabed might now be recognised. The Act declares as its object "to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders". However, to Māori (and many non-Māori) the Act abrogates Māori customary rights to the foreshore and seabed, is selectively discriminatory (against Māori) and denies Māori the human rights guaranteed to all New Zealanders under international conventions.

This big issue had small beginnings. In its submission the Human Rights Commission reminded us that:

> (…) the foreshore and seabed issue started with Marlborough District Council's refusal to give Ngāti Apa a mussel-farming licence to farm in their traditional rohe. The iwi subsequently faced many more barriers to try and overcome this decision, and their case was appealed through the Courts. What started as a very specific grievance ended up as a polarised national issue. (7-16-3, Human Rights Commission)

Public interest in the issue was triggered by the June 2003 decision of the Court of Appeal in *Attorney-General v Ngāti Apa*[7]. In summary, the Court ruled that:

- the Crown was wrong to contend that certain statutes affecting the foreshore and seabed had had the effect of extinguishing such Māori customary title as might exist; and
- the Māori Land Court has jurisdiction, under Te Ture Whenua Māori/Māori Land Act 1993, to determine whether any part of the foreshore and seabed is still Māori customary land.

The Court of Appeal found that the High Court could also determine that question.

Immediately prior to this decision, government policy and legislation relating to the foreshore and seabed was based on the understanding that Māori customary title to the foreshore and seabed had been extinguished.[8] For their part, Māori had asserted their ownership from first contact. Āpihai Te Kawau repeated that position at a conference called by the Governor in 1879:

> It was only the land that I gave over to the Pākehās. The sea I never gave, and therefore the sea belongs to me. Some of my goods are there. I consider the pipis and fish are my goods. I have always considered them my goods up to the present time. (Āpihai Te Kawau at Ōrākei, 1879,[9] quoted in 4-97-1, Merata Kawharu and Don Wackrow on behalf of Ngāti Whātua o Ōrākei Māori Trust Board)

The *Ngāti Apa* decision was a watershed; responses to it have been described as ranging from "universal astonishment" to being "entirely predictable" (in the context of legal history).[10]

The government in 2003 considered that the *Ngāti Apa* decision gave rise to substantial uncertainties about the ownership of the foreshore and seabed. It was particularly concerned that:

- the decision could lead to the alienation of substantial areas of the foreshore and seabed into private ownership and restrict public access to the coastline; and

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

[8] Following *In Re the Ninety-Mile Beach* [1963] NZLR 461 (CA) (see Volume 2, Appendix 1).

[9] Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (The Tribunal, Wellington, 1988) 89.

[10] Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) vi.

- in enacting Te Ture Whenua Māori/Māori Land Act 1993, Parliament never intended the Māori Land Court to have the power to place the foreshore and seabed in Māori ownership.

The government decided to legislate in order to clarify the status of the foreshore and seabed. The Act vested title to all foreshore and seabed not already in private ownership in the Crown. In addition, it made some provision for Māori customary interests to be recognised in limited circumstances.

Section 3 of the Act states, "The object of this Act is to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whānau, hapū, and iwi with areas of the public foreshore and seabed."

The *Ngāti Apa* decision and its aftermath impacted significantly on the relationship between Māori and the Crown. This was not only because the Act was seen to abrogate property rights but also because of the limited extent of consultation on the Act and the speed of its enactment. Māori concerns were heightened by their associated beliefs, values and interests. Māori property rights are correlated with identity and, specifically, mana in its many forms including mana ātua, mana tūpuna, mana moana and mana whenua. As many submitters reminded us, from the earliest days of the colony rangatira clearly articulated the unassailability of their mana. For example:

> The Queen stipulated in the Treaty that we should retain the mana of our lands, the mana of our forests, fisheries, pipi grounds and other things (…). (Eruena Paerimu at Ōrākei, 1879,[11] cited in 4-97-1, Merata Kawharu and Don Wackrow on behalf of Ngāti Whātua o Ōrākei Māori Trust Board)
>
> It was I that brought the Government here, and through that we have been deprived of our mana over the land, and over those fisheries that have been spoken of. Now, in my opinion we should apply to the Government to restore our mana, and that all our fisheries be returned to us. (Patoromu at Ōrākei, 1879,[12] quoted in 4-97-1, Merata Kawharu and Don Wackrow on behalf of Ngāti Whātua o Ōrākei Māori Trust Board)

And today's submitters clearly articulate the same position:

> For us the issue has never just been a sterile debate about rights or politics but a question that goes to the essence of our integrity and our place as tangata whenua. (4-84-2, Moana Jackson on behalf of Ngāti Kahungunu Iwi Incorporated)
>
> The customary rights of iwi/hapū are derived from mana and expressed through their individual tikanga. (7-44-3, Te Ope Mana a Tai)
>
> When the Treaty was signed the whole country was unquestionably in Māori ownership and while subsequent alienating tools confiscated Māori lands, the foreshore and seabed was never relinquished. Nor did Māori abdicate their mana and rangatiratanga over it at any time. (7-34-2, Betty Williams)
>
> (…) it was recognised that that group held the mana and or control. This is a custom of Māori to respect the mana of the people of the land (…). The longer and stronger your presence in the area, the more you are likely to be looked upon as being the people of that land (…) it has become an inherent right that you just know and feel you have. You could say it has become by now, part of your DNA. (1-6-2, Ngāti Porou ki Hauraki Trust)

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[11] Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (The Tribunal, Wellington, 1988) 89.

[12] See [1879] *AJHR* Sess II G-8 18.

> There are no easy answers, but [the Act] isn't an answer at all. The Act is an insult. The Act is a breach of the Treaty, and the Act must go. In place of the Act we have to find some real way of recognising our mana and our rights. (4-1-1, Maria Pera on behalf of Te Rūnanga o Awarua)

> (…) it is the mana, it is the mana that you have to talk, to carry, to save and correct those things, actions of the government. It is no different from the times of our elders unto this day. (4-46-1, Tame MacCausland)

Thus, in the Māori world view and the understanding and tikanga that emerge from it, customary property rights are indissoluble and are highly integrated and interdependent.

In early 2004 the Waitangi Tribunal reported under urgency on the government's foreshore and seabed policy. The Waitangi Tribunal concluded that in choosing to legislate the Crown "seriously breached"[13] the principles of the Treaty of Waitangi by failing to respect tino rangatiratanga and the good-faith obligations of partnership,[14] denying "active protection to Māori people in the use of their lands and waters to the fullest extent practicable",[15] expropriating Māori property while leaving other private property intact and denying Māori their options to pursue due process under the law.[16] Furthermore, the Tribunal found that the Crown breached Article 2 by not protecting tino rangatiratanga over foreshore and seabed and actively assuming ownership for itself without consent or compensation,[17] and Article 3 by abolishing Māori Common Law rights in respect of property and denying Māori the protection of the Rule of Law.[18]

Opposition to the Foreshore and Seabed Bill characterised the government's decision to legislate as unacceptably interventionist, overriding the option of allowing the judicial process to take its course and thus removing the right to due legal process.[19] Introduction of the Bill led to the largest Māori protest since the Māori Land March in 1975, and culminated in a march on Parliament by an estimated 50,000 people.[20]

Submissions on the Bill overwhelmingly opposed it. Of the 3946 written submissions, approximately 94 per cent opposed the Bill in general terms.[21] Broadly speaking, this opposition related to either:

- concerns about denying Māori the right to pursue claims through the Courts; or
- the Crown's power to alienate the public foreshore and seabed by passing subsequent legislation (section 14(2) of the Act).

Those who supported the Bill focused on public ownership, the access and navigation provisions, and the provisions for Māori customary interests (see 5.4.4).

Submissions to this Panel have described the passage of the Act in highly critical terms:

> It is a cause of profound regret that (…) all of our people have had to endure so much because of the hasty, ill-considered and essentially colonising actions of the Crown. (4-84-2, Moana Jackson on behalf of Ngāti Kahungunu Iwi Authority)

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[13] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy:* Wai 1071 (Legislation Direct, Wellington, 2004) 129.

[14] ibid 130-131.

[15] ibid 132-133.

[16] ibid 134.

[17] ibid 128.

[18] ibid 129.

[19] Foreshore and Seabed Bill 129-1: Report of the Fisheries and Other Sea-related Legislation Select Committee, 2004.

[20] "Remembering the hīkoi" http://www.stuff.co.nz/auckland/northland/local-news/northern-news/2349554/Remembering-the-hikoi, 22 April 2009, accessed 14 May 2009.

[21] Foreshore and Seabed Bill 129-1: Report of the Fisheries and Other Sea-related Legislation Committee, 2004.

> As far as we're concerned [the government] trampled upon the mana of our people, of Te Arawa which was carried by Ngāti Makino and Waitaha, that's why we objected. It was trampled upon, we were trampled upon and we were treated as people of no repute and this hurt us grievously. (4-46-1, Tame MacCausland)

> In my 75 years I've never experienced the overwhelmingly seething discontent among our people which I witnessed on all these occasions (…). The passage of the Foreshore and Seabed Act is in serious breach of the second clause of the Treaty of Waitangi and (…) the process of the passage was deliberately manipulated to suppress Māori opposition to the Bill and, in doing so, failed to uphold due democratic process. (7-34-2, Betty Williams)

> The Foreshore and Seabed Act 2004 is the most egregious breach of the human rights held by Māori in the contemporary era. (7-43-2, Treaty Tribes Coalition)

> The Foreshore and Seabed Act will never be viewed by iwi/hapū as anything other than an instrument of confiscation. (7-44-2, Te Ope Mana a Tai)

> It remains a concern that a fundamental issue regarding (…) customary and aboriginal rights was mismanaged by the Crown to such an extent that it caused gross racial tension (…) (7-310-1, Te Hunga Roia Māori o Aotearoa/The Māori Law Society Inc)

> I thought as a nation we had got past the raupatu of Māori land, but apparently we haven't and the Foreshore and Seabed Act extinguished Māori property rights without even the basic decency to find out what those rights were or talk to Māori properly about how we can respect those rights (…). When Ngāi Tahu marks the signing of the Treaty next year we want to be able to celebrate [the fact] that the biggest breach of the Treaty in my lifetime and our lifetime is no longer the law. (4-1-1, Maria Pera on behalf of Te Rūnanga o Awarua)

The Act was an attempt to "settle" core issues surrounding rights and interests in the foreshore and seabed by establishing a new legal framework. Nonetheless (and to some, precisely because of this) the Act remains highly contentious. It is important to note that in the four and a half years since it became law very few have used the Act to determine their customary rights over foreshore and seabed. Nine applications for a customary rights order have been made to the Māori Land Court under section 48 but no order has yet been issued. One application has been made to the High Court under section 33. Five Māori groups (including one that also had applied for a customary rights order) have entered into negotiations with the Crown as provided for under section 96 of the Act (see 2.3). Only one, Ngā Hapū o Ngāti Porou, has reached a Deed of Agreement. From many quarters, both Māori and non-Māori, there is frustration and uncertainty about aspects of the administration of the Act, including its interrelationship with other legislation governing the coastal marine area.

Ever since the *Ngāti Apa* decision, debate around the foreshore and seabed issue has been highly politicised. This was particularly so in the months preceding the passing of the Act when the issue was subject to intense media scrutiny, much of it sensationalised, polarised and presented simplistically as a clash between Māori assertions and perceived public interests. Given the significant level of non-Māori protest against the Bill the issue was seriously divisive, giving rise to vociferous argument throughout the country. As the Human Rights Commission observed:

> [The Act] was a decisive set-back in Crown–Tangata Whenua relationships and also in relations between Māori and other New Zealanders. (7-16-3, Human Rights Commission)

While Māori have remained the most determined and persistent opponents of the Act, it has given rise to a wide spectrum of responses from a range of stakeholders representing the interests of most sectors of New Zealand society. It is useful to recognise that there remains considerable public misunderstanding of the context, provisions and administration of the Act.

Chapter 2 Consultation and submissions

The purpose of this chapter is twofold:

1 to outline the process by which the Panel has undertaken this Review and provide an overview of the submissions we have received; and

2 to illuminate the positions that submitters take on the Foreshore and Seabed Act as represented through their submissions. Later in the report (Chapters 3 and 4) we will consider the perceptions underlying those positions.

2.1 Review process

The Panel was appointed by the Attorney-General on 1 March 2009 and charged with reporting back by 30 June 2009. The Terms of Reference for the Review require the Panel to undertake consultation with Māori and the general public through a series of public meetings and hui. We strived to ensure that, wherever possible (given the time available), everyone who wanted to had the opportunity to share their views on the Act.

In addition, we have reviewed *The Foreshore and Seabed of New Zealand: Report on the Analysis of Submissions* published by the Department of Prime Minister and Cabinet in December 2003,[22] the Waitangi Tribunal's 2004 *Report on the Crown's Foreshore and Seabed Policy,*[23] submissions and other publicly available reports made to the Fisheries and Other Sea-related Legislation Select Committee which considered the Foreshore and Seabed Bill in 2004, and other documentation pertinent to the passage of the Act and the current review.

We developed and distributed an *Issues Paper* and *Discussion Paper* on the key issues on which we wished to hear submissions. The purpose of these documents was to inform people about the Act and to focus submissions on particular topics. A further document on the principles of consultation outlined our expectations of the consultation process.

A dedicated website (http://www.justice.govt.nz/ministerial-review/) was established to raise public awareness of the Review. It contains background information on the Act and the Review, and invited submissions from interested parties by including an online submission form. In addition, notice of the consultation hui and public meetings was advertised in newspapers, broadcast on radio and distributed to marae and other community networks. These publications/pānui encouraged people to attend the hui and meetings, and to make oral and/or written submissions.

A full Record of Inquiry, including a list of all interested parties who made submissions, or who were consulted in some other manner in the course of the review, is in Volume 2, Appendix 5.

Meetings with departments

The Panel met with relevant government agencies responsible for administering legislation that intersects with the Foreshore and Seabed Act:

- Ministry of Justice (Foreshore and Seabed Act 2004);
- Te Puni Kōkiri (Te Ture Whenua Māori/Māori Land Act 1993);

[22] ***The Foreshore and Seabed of New Zealand: Report on the Analysis of Submissions*** (Department of Prime Minister and Cabinet, Wellington, 2003).

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

- Ministry of Fisheries (fisheries legislation including the Treaty of Waitangi (Māori Fisheries) Settlement Act between the Crown and Māori);
- Department of Conservation (Resource Management Act 1991 (RMA) coastal issues, and conservation-related legislation);
- Ministry for the Environment (on the RMA generally);
- Ministry of Economic Development (Crown Minerals Act 1991).

Public consultations

The consultation process was open for submissions from 30 March 2009 until 19 May 2009. Twenty-one consultation hui[24] and public meetings were held at 16 locations throughout the country between 20 April and 19 May 2009. The Panel also met with:

- 29 nationally significant interest groups[25] between 6 April and 2 June 2009;
- the four groups which have been in negotiations with the Crown under section 96 of the Foreshore and Seabed Act for recognition of former territorial customary rights (see 2.3 below), and Ngā Hapū o Ngāti Porou who has signed a Deed of Settlement with the Crown;
- the group which has lodged a section 33 application to the High Court under the Foreshore and Seabed Act for recognition of former territorial customary rights;
- a group that has a customary rights order application currently proceeding before the Māori Land Court;[26] and
- groups on the Chatham Islands, via teleconference.[27]

We also held conversations with key commentators on the Act such as academics, members of the judiciary and people who have published on the subject. Some of these meetings were held in confidence. Only those who spoke at the interest group meetings, the public consultation meetings and/or hui, or made written submissions have been included in the total submission numbers outlined below.

We also received written submissions from 30 March until 19 May 2009. Submissions were received in a multitude of formats; for example, some submitters based their submissions on the questions and options contained in the *Issues Paper*. Others followed the more technical questions contained in the *Discussion Document*. The Māori Party posted a submission template and information on its website which appears to have been adopted and used by some submitters. The oral submitters tended to take a more "free-flowing" style. This range of submission formats and styles made the task of collating and summarising the submissions complex.

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[24] We would like to acknowledge the significant and invaluable support and assistance that Te Puni Kōkiri provided in arranging and supporting the consultation hui.

[25] New Zealand Marine Farming Association Inc; New Zealand Business Roundtable; New Zealand Seafood Industry Council Ltd; Resource Management Law Association of New Zealand Inc; Environmental Law Committee of the New Zealand Law Society; Federated Farmers New Zealand Inc; Petroleum Exploration and Production Association of New Zealand; The Pacific Institute of Resource Management; The Property Council New Zealand; Surf Life Saving New Zealand; Council of Outdoor Recreation Associations of New Zealand Inc; NZ Recreational Fishing Council; NZ Marine Transport Association; New Zealand Institute of Surveyors; National Urban Māori Authority; Human Rights Commission; Royal Forest & Bird Protection Society of New Zealand Inc; Human Rights Foundation of Aotearoa New Zealand; The New Zealand Council of Trade Unions; Local Government New Zealand; Electricity Networks Association; Outdoors New Zealand; Aquaculture New Zealand; Peace Movement Aotearoa; Treaty Tribes Coalition; Te Ope Mana a Tai; Te Ohu Kaimoana; Federation of Māori Authorities; Māori Women's Welfare League Inc; Saunders Unsworth representing 15 port companies.

[26] 2-1-2, Tihi Anne Daisy Noble on behalf of Kanihi-Umutahi whānau of Ngā Ruahine.

[27] 7-86-1, Chatham Islands Council; 7-239-1, Hokotehi Moriori Trust; 7-214-1, Ngāti Mutunga o Wharekauri Iwi Trust; 7-263-1, Te Rūnanga o Wharekauri Rekohu Inc.

2.2 Overview of submissions

The Panel received 580 submissions. Approximately one-third (236) were oral presentations, of which 155 were presented at hui and 81 at the public meetings. Figure 1 depicts the composition of the submissions by category.

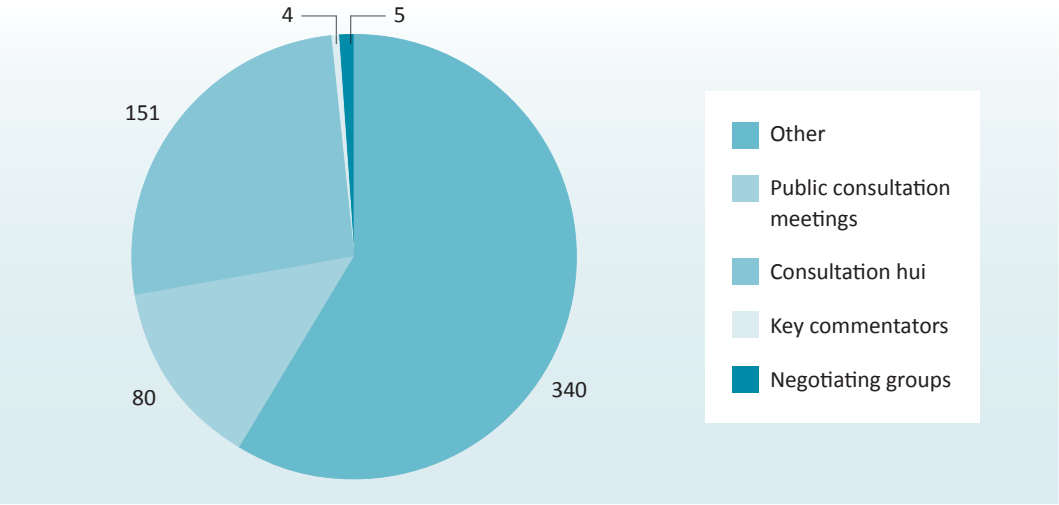

Figure 1: Submissions by category of submitter

It was not possible to categorise the submissions by ethnicity in a reliable manner. While provision was made for submitters to specify their ethnicity, this option was not always used, or people elected more than one ethnicity. In any case, ethnicity is not necessarily determinative of viewpoint; some Māori submitters tended towards what might be termed a "Pākehā world view".

Of the 358 submitters who expressed an opinion on what should become of the Act, the vast majority (approximately 85%) sought its repeal and either replacement of the Act with a new framework (62%) or a reversion to the status quo (i.e. to the post *Ngāti Apa* position in 2003: 23%). Even though approximately 10 percent proposed amendment of the Act, a number of those submitters also expressed a desire to repeal the Act. Approximately 5 percent submitted that the Act should be retained unchanged. (We discuss this further in our conclusion, at 6.1).

Figure 2 demonstrates the distribution of these submitters' views of what should become of the Foreshore and Seabed Act 2004.

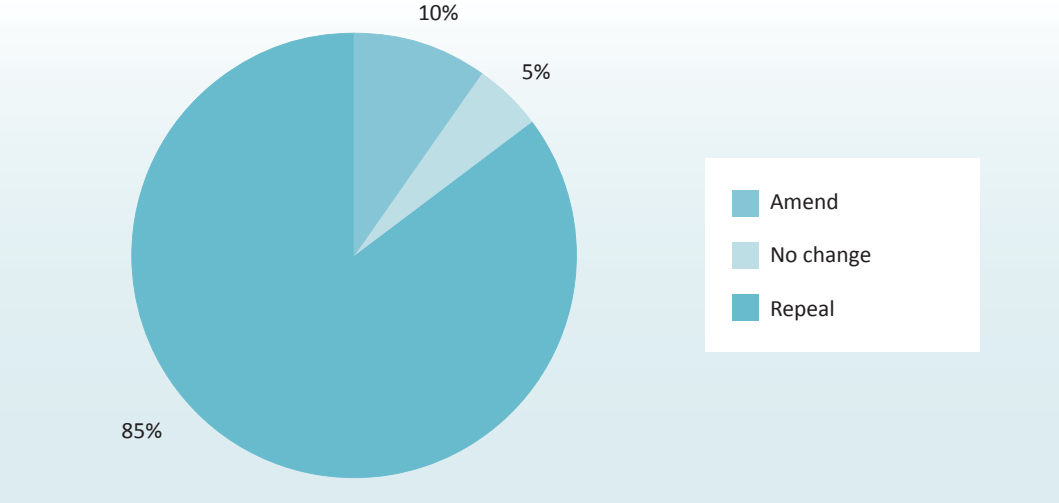

Figure 2: Submissions on what should become of the Act

2.3 Negotiations

Under section 96 of the Act the Attorney-General and the Minister of Māori Affairs may enter into an agreement with a group to recognise that, but for the vesting of the full legal and beneficial ownership of the public foreshore and seabed in the Crown, that group, or members of that group, would have had a claim for territorial customary rights over a specific area of the public foreshore and seabed.

2.3.1 Ngā Hapū o Ngāti Porou

Ngā Hapū o Ngāti Porou (being 50 of 52 hapū of Ngāti Porou) is the only negotiating group to have signed a Deed of Agreement with the Crown in accordance with section 96. Te Rūnanga o Ngāti Porou commenced discussions with the Crown in late 2003 and Terms of Negotiation were signed in November 2004. The Crown and representatives of Te Rūnanga o Ngāti Porou (on behalf of certain hapū of Ngāti Porou) signed a Statement of Position and Intent in September 2005. On 5 February 2008, the Crown and Te Rūnanga o Ngāti Porou (on behalf of certain hapū of Ngāti Porou) signed a Heads of Agreement which comprised a cover letter setting out the progress made to date and work to be completed, and a draft of the Deed of Agreement.

On 31 October 2008, representatives of the Crown and Ngā Hapū o Ngāti Porou signed Ngā Hapū o Ngāti Porou Foreshore and Seabed Deed of Agreement (the Deed). This was the first Deed reached under the Act. The Deed contains nine instruments that provide legal recognition and protection of the mana of ngā hapū of Ngāti Porou. The Deed also provides an additional level of protection and authority in areas where territorial customary rights are recognised. The group has not yet made a section 96 application to the High Court. The Crown and representatives of Ngā Hapū o Ngāti Porou have agreed to extend the timeframe for filing the High Court application to 30 September 2009. The Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill was introduced on 29 September 2008 to give effect to the Deed of Agreement, and is currently before the House of Representatives awaiting its first reading.

2.3.2 Other groups

Prior to this Review being announced, four groups were in direct negotiations with the Crown in accordance with section 96:

- *Ngāti Pahauwera Development Trust* (representing the confederation of hapū of Ngāti Pahauwera). The group signed terms of negotiation for joint foreshore and seabed and historical Treaty settlement negotiations with the Crown on 8 May 2008. The Ngāti Pahauwera Development Trust and the Crown signed an Agreement in Principle for the Settlement of the Historical Claims and Foreshore and Seabed Claims of Ngāti Pahauwera on 30 September 2008;

- *Te Rūnanga o Te Whānau* (representing the hapū of Te Whānau a Apanui). The group commenced discussions with the Crown in early 2004. Terms of Negotiation were signed in November 2004. The Crown and the negotiating representatives of the hapū of Te Whanau a Apanui signed a Statement of Position and Intent in September 2005. A Heads of Agreement, including a draft Deed of Agreement, was signed with the Crown on 28 February 2008;

- *Ngāti Porou ki Hauraki Trust* (representing Ngāti Porou ki Harataunga ki Matāora). Discussions between Ngāti Porou ki Hauraki Trust and the Crown commenced in early 2005. An Agreement to Negotiate was signed in December 2005 and on 4 November 2008 the Crown and negotiating representatives of Ngāti Porou ki Hauraki Trust signed a milestone document;

- *Te Rūnanga o Te Rarawa*. Discussions between Te Rūnanga o Te Rarawa and the Crown commenced in 2005. Terms of Negotiation were signed in june 2008 and on 6 November 2008 the Crown and negotiating representatives of Te Rūnanga o Te Rarawa signed a milestone document.

2.4 Key themes to emerge

Process

Before proceeding to review the key themes to emerge from our consultations we note that many submitters drew the Panel's attention to their desire to reiterate and underscore their previous submissions (for example to the Select Committee in 2004) as they consider they have not been heeded. This is also testament to the persistent nature of such concerns. There can be no doubt that these concerns remain at the forefront of many submitters' thoughts four and a half years on.

We note also that there is considerable ongoing concern about the overall process by which the legislation came into being in 2003-04, as well as during the current Review (particularly with regard to the short timeframe for consultation). We have heard from numerous submitters of their concern that the legislation is an abuse of the democratic process and human rights. Those submitters included significant numbers of Māori, but they ranged across the spectrum of individual submissions through to bodies such as the New Zealand Business Roundtable, the Human Rights Commission, the Bicultural Desk of the Catholic Diocese of Auckland and many other church entities. They were particularly concerned because of the:

- inadequate consultation processes;
- fundamentally discriminatory nature of the legislation;
- quashing of Māori rights to due legal process;
- legislative extinguishment of property rights;
- confiscation by Rule of Law which, by repeating history, represents a severe setback in Crown–Māori relations.

Many submitters expressed dissatisfaction that, in response to the *Ngāti Apa* decision, the government of the day legislated rather than allowed the Courts to determine the case:

> The Act breached constitutional rules protecting due process and access to the Courts because the government chose to pass the Foreshore and Seabed Act, when it should have appealed the Court of Appeal decision, or let the original case proceed through the Māori Land Court. (7-193-1, Greg Fife on behalf of the Fife/Topi whanau)

> It was to be left to the Court, which is a basic constitutional principle that the due process of the Courts should be seen to completion. (4-12-1, James Daniels)

> The original law was a rushed event passed in surges characterised by undue haste. Bad process was evident, submitters and peoples experienced no real consultation. Overall there was a rush to extinguish rights and make up new concepts ('public domain'). In particular, the due process of law was not allowed for Māori to follow. (5-70-2, Tim Howard on behalf of the Northland Urban Rural Mission)

Questions were raised by some submitters about the constitutional separation of the executive, Parliament and the judiciary:

> The Act (…) breached the rule of law and the doctrine of the separation of powers that outlines that Parliament must not interfere with the due process and decisions of the judiciary. (7-275-1, Abby Suszko)

> I think (…) that it doesn't matter really what the judiciary out there may do, ultimately there's a smoking gun up there [in Parliament] that can reverse it. And I think as a country we should be better than that. (4-19-1, John Mitchell)

> The Courts are empowered to make their finding in good faith and according to the law. How can the people have faith in the credibility of the Courts if governments can overturn their

> decisions by passing legislation at their convenience? The Courts are entitled to make their decision without interference by governments if they are to be 'without prejudice'. (7-126-1, The Dunedin Community Law Centre)

However, the great majority of submissions to the current review of the Act addressed (in whole or in part) the following issues:

- The Treaty of Waitangi
- Human rights
- Ownership and title to the foreshore and seabed
- Access and use rights
- Natural resources and environmental considerations
- Interrelated legislation
- The need for certainty
- Jurisdictional issues
- Legal procedures, thresholds and costs
- Constitutional issues
- The pathway towards resolution.

Submitters also commented on customary rights and responsibilities; structures, reclamations and leases; development of the Act; and the current review process.

Our principle concern in this chapter of our report is to give some idea of the perceptions of submitters on each of these issues. We aim to give appropriate acknowledgement to the submissions overall, and capture the flavour of what we have heard, and so we place heavy reliance here on submitters' own words.

Many submitters have expressed deep emotions, and we have become aware of a general sense of outrage at the legislation – principally, but certainly not exclusively, from Māori. Here, however, we present a representative range of statements to illustrate the perceptions held by a range of submitters.

2.4.1 The Treaty of Waitangi

A significant proportion of submissions focused on the Treaty of Waitangi as guaranteeing rangatiratanga, which included the promise that customary and other rights would be recognised and upheld. Many submitters took the view that the Act is a breach of the Treaty:

> The Treaty of Waitangi is the founding document of Aotearoa and Te Waipounamu, and the Treaty was signed in this rohe by our tūpuna. I know that our tūpuna had very clear ambitions for what would come from the signing of the Treaty. We would be partners in a nation (…). If we learn anything from the Foreshore and Seabed Act round 1, it must be that iwi and government must talk, because this is not rocket science, it is common sense and it means – and it's what the Treaty means – partnership. It means our mana must be respected, our property rights must be respected and our customary rights must be respected. (4-1-1, Maria Pera on behalf of Te Rūnanga o Awarua)

> Ngāti Hikairo demands recognition of the rights guaranteed to all Māori through Article 2 of the Treaty of Waitangi, and which is denied to us all through the Foreshore and Seabed Act 2004. (7-223-1, Frank Thorne on behalf of Ngāti Hikairo)

> I believe that the strong and enduring Māori opposition to this legislation is testament to the fact that the legislation does not respect the Treaty of Waitangi, and is widely seen as unjust. (7-49-1, Maire Leadbeater)

Perceived breach of the Treaty of Waitangi

Many submissions focused on the way the Foreshore and Seabed Act demonstrated the failure of the Crown to protect Māori customary rights, and specifically the abrogation of rights protected under the Treaty:

> Te U Taorua stand today to present to you as part of the continuation of the struggle of the peoples of Tuhoe to seek return of our lands, our waters, our fisheries, our forests, our relationships with the moana, our enduring right to care for all matters within the territories of the peoples of Tuhoe, as guaranteed by Te Tiriti o Waitangi. (4-42-1, Kiri Tuia Turourae)

> Don't take our foreshore and seabed (…) you have no right. The Treaty of Waitangi protects, for my mokopuna, access, unfettered access, to the foreshore and seabed. The government's response to the finding of the *Attorney General v Ngāti Apa* (…) has caused a lot of hara between both of our nations in this country. (5-3-1, Rosina Wiparata on behalf of her whānau)

> Perhaps most importantly the legislation further entrenches the Crown's redefinition of tino rangatiratanga as with little more than an ability to exercise a quasi-management role in the areas which it chooses. This is a fundamental diminution of iwi and hapū authority and a direct attack on the 'way of life' guarantees and protections of tangata whenua contained in the Te Tiriti o Waitangi. (4-44-1, Jimi McLean on behalf of Ngāti Makino)

> The Act is illegal, it's illegitimate (…) because it is an unconscionable breach of Article 2 of the Treaty of Waitangi in my eyes. (4-12-1, James Daniels)

> Our position is that we are fundamentally opposed to the Foreshore and Seabed Act because it dishonours Te Tiriti o Waitangi. It is inimical to the covenantal spirit in which Te Tiriti o Waitangi has been held amongst Catholic Māori, and I must say amongst ourselves, and it offends against Catholic social teaching as it relates to natural distributive and commutative justice to human rights in general and indigenous people's rights in particular. (5-53-1, Dr Susan Healy on behalf of the Bicultural Desk of the Auckland Catholic Diocese)

> The provisions of the Act are a serious breach of the letter, spirit and principles of the Treaty of Waitangi. (7-262-1, Murray Short on behalf of the Treaty Relationships Group of the Religious Society of Friends in Aotearoa/New Zealand Te Hāhi Tūhauwiri [Quakers])

Potential for ongoing dissension

Some submitters explicitly identified potential for future dissension as a consequence of the Act:

> [The Act's] fundamental premise is that the Crown owns all the foreshore and seabed not currently 'subject to a specified freehold interest'. Because of this premise all rights prescribed in [the Act] fall far short of the rights to which Māori are entitled. It is our view that any changes to amend or tweak [the Act] will not deliver better outcomes nor secure justice for Māori and may result in future claims against the Crown for new breaches of the Treaty of Waitangi. [emphasis in original] (7-302-1, Aotearoa Indigenous Rights Charitable Trust)

> Given that the Act was introduced in haste and the Crown's actions were very heavy handed and paternalistic, it would be better to revisit the issue and attempt to negotiate a process that could develop a positive outcome for all parties concerned, as it seems futile to be resolving historical Treaty breaches and creating new ones at the same time. (4-74-1, Agnes Walker)

> The Crown will have to listen to the tangi. The hikoi 2004 was the last of the mana moana and mana whenua loss. The hapū believes that we have become the taurekareka on their whenua and moana, it's a kōrero the gangs are claiming (Nomads). (7-52-1, Hone Peita on behalf of Waipuna Marae)

> (…) the Act does need to be removed, it stands as a mess. It's a hara for future generations that will cause future generations to be standing up for themselves at a future time (…). We would assume, given the Crown's current haste in 'settling Treaty grievances', that the Crown would want to do all it could to avoid creating new offences, new hara. (5-70-1, Tim Howard and Leanne Brownie on behalf of Northland Urban Rural Mission)

Treaty of Waitangi as guiding the way forward

Many submissions, however, identified the Treaty as a key resource for resolving the foreshore and seabed issue. We discuss the potential for resolution using a Treaty-based framework in Chapter 4. Examples of submissions on this point included:

> I believe the foreshore and seabed, if we can get it repealed, and revisit this whole process in a proper manner under the guidance of the Treaty of Waitangi, there are answers there that will take us further forward beyond where we've got so far. (4-8-1, Edward Ellison on behalf of Te Rūnanga o Ōtakau)

> It is critical that national and local government are reminded that they are our Treaty partner. They have legal, ethical and moral responsibilities and obligations to this significant relationship. Lack of Treaty recognition since February 6, 1840 is a travesty. The Review Panel and government have an excellent opportunity to rectify this unfortunate situation. (7-1196-1), Maiki Marks on behalf of Te Roopu Taiao Kororareka Marae)

> Let us look to Te Tiriti o Waitangi for the basis of our conversations. (7-144-1, Abigael Vogt)

> Te Tiriti was more than an affirmation of existing rights; it provided direction for growth and development and a foundation for a developing social relationship and contract (…) we believe that there was meant to be a bicultural relationship as in a partnership relationship and not a regime of uni-culturalism, which we feel that the Act demonstrated. (5-53-1, Dr Susan Healy on behalf of the Bicultural Desk of the Catholic Diocese of Auckland)

2.4.2 Human rights

International human rights form the basis of New Zealand's domestic human rights law, and are often what New Zealanders consider a core part of what we stand for as a country. The human rights relevant to consideration of the foreshore and seabed issue are:

- freedom from discrimination;
- equality before the law and the right to due process;
- access to justice;
- the right to property;
- the right to development; and
- the rights of indigenous peoples.

Freedom from discrimination

A large body of submissions highlighted the discriminatory nature of the Act in that it extinguished Māori collective property rights while protecting private property rights (most of which are held by non-Māori) in land adjacent to the coast:

> Te Hunga Roia Māori o Aotearoa contends that the Act is discriminatory because non-Māori property rights are not affected by the Act. If anything non-Māori property rights, regardless of their contentious existence in some instance, are legally protected, elevated and additionally provided with access to compensation if modified or removed. (7-310-1, Te Hunga Roia Māori o Aotearoa/The New Zealand Māori Law Society Inc)

> I'm getting up here out of a sense of injustice (…). But that's a discrimination that we've had to face, of being treated differently from others. Our property rights have been taken away, others who have property rights in the foreshore/seabed, those continue. We've been discriminated against. That was ignored by the Crown; that needs to be set right. (4-13-1, Te Marino Lenihan on behalf of the Reuben family of Tuahiwi)

> Māori citizenship is devalued because of the discriminatory nature of the proposals. The Act, as it stands, fosters conflict in the community, and actively disenfranchises and disempowers Māori to the disadvantage of the whole country. (7-145-1, Joan Hardiman on behalf of New Zealand Dominican Sisters)

> The [Act] (…) remove[s] rights from one group of the population only – Māori with coastal interests. This is clearly discriminatory. It makes a mockery of the 'one law for all New Zealanders' slogan (…), (7-117-1, Dorreen Hatch and Barbara Menzies)

Conversely, a very small minority held that the Act discriminates against non-Māori:

> The tests and procedures are inappropriate, as they discriminate against individuals (non-Māori) by not allowing them access to the same processes as iwi, hapū and whanau. (7-153-1, P Rene)

> The Foreshore and Seabed Act applies to one particular race only, and overrules the rights of other New Zealanders, who do have rights as well as natives of the land. In this interpretation the Act is discriminating against those non Māori. (7-146-1, John Patrik Wikstrom)

Equality before the law and the right to due process

The denial of due process was the focus of many submissions. Many submitters stated that the Act had overridden the right of Māori to due legal process, by denying Māori the opportunity to test and claim customary rights in Court. The decision by the government to legislate, rather than allowing the Court processes to run their course, was a core concern for many:

> The Act is a breach of the fundamental constitutional principle of due process, as the government of the day legislated over a decision of the Courts in place of pursuing the proper appeal processes, apparently because the rendered judgement was inconvenient. (7-43-2, Treaty Tribes Coalition)

> The right of all citizens to have access to the Courts is a foundational principle of the Westminster system of democracy. The passage of the Act to thwart by legislative fiat the ability of tangata whenua to contest their customary rights to the FSB (as upheld by the Court of Appeal) in the ordinary Courts of New Zealand will stand as an historical black mark against the constitutional and democratic integrity of Aotearoa/NZ until the legislation is repealed and the rights of tangata whenua restored. (7-239-2, Hokotehi Moriori Trust)

> [The Act] (…) seems to me to be an anomaly in placing an undue burden on our rights, and I think the biggest thing for me was taking away the right for us to pursue, for those who chose to, through the Māori Land Court, determination of ownership. (…) That opportunity should be reinstated. (4-8-1, Edward Ellison on behalf of Te Rūnanga o Ōtakau)

> Any new legislation should restore the ability of Māori, as equal citizens before the law, to apply to the Courts to have their legal rights determined. Their right to appeal any decision should also be restored. (7-16-3, Human Rights Commission)

> The right to justice is available to me as a person, as a citizen of Aotearoa but also as a Māori under Article 3 of the Treaty. But that right to justice states quite clearly that I ought to have the same rights as Pākēhas to be judged by my peers in a jury and before a Court. (4-54-1, Maanu Paul on behalf of Mataatua District Māori Council of the New Zealand Māori Council)

Access to justice

Some submitters referred to the recommendation made by the United Nations after its investigation into the Act, that legal aid should be made more easily available to Māori so they can access the protections in the Act:

> Given the complexities of this Act, the recommendation made by the UN should be considered by the Crown, and that was the Legal Services Act should be amended to ensure that legal aid is available to Māori, iwi and hapū as bodies of persons so as to afford them access to the protection mechanisms of human rights in order to eliminate discrimination against Māori collectives. (4-74-1, Agnes Walker)

> We did not believe that the principle of certainty required the overriding of other interests including the protection of customary rights. We believed the legislation contributed to a situation in which the most affected people felt very uncertain about the commitment of the government to protecting their human rights and access to justice. (7-221-1, Caritas Aotearoa New Zealand)

Right to property

A focus for some submitters was the need for recognition of a right to property. For example:

> While New Zealand's domestic human rights legislation is silent in relation to arbitrary deprivation of property, the right exists in international law. New Zealand is obliged to observe the provisions of the [Universal Declaration of Human Rights] by virtue of its membership of the United Nations. (7-230-1, Amnesty International Aotearoa New Zealand)

The right to property is protected under the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of Racial Discrimination (CERD) and other international instruments.[28] However, in March 2007, in a paper reviewing the issue of including a property right in the New Zealand Bill of Rights Act 1990, the Ministry of Justice observed:

> Unfortunately international treaties and constitutional texts offer little guidance as to the definition of the term 'property'. This task has been left to the Courts, and so by determining the scope of property they have determined the extent of the protection provided by the right to property (…) [overseas] Courts have held that the constitutional right to property covers – in addition to private property – communal property. This means that (…) customary interests in land can be treated as property worthy of constitutional protection.[29]

Right to development

Some submitters focused on the need for recognition of the right to development:

> The Act is inconsistent with international jurisprudence and New Zealand practice in that it fails to recognise the development rights that arise from customary ownership and obstructively restricts the exercise of customary use rights. (7-322-1, Ngāi Tahu Māori Law Centre)

> (…) the Muriwhenua fisheries claim report (…) says that Māori are entitled to development, and if Pākēha are entitled to development (…) then so are Māori. And it would seem to me that it is important to recognise that any discussion of Māori traditional rights must include the right to development. (4-39-1, Te Pouhu Douglas)

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[28] Department of the Prime Minister and Cabinet *Foreshore and Seabed Bill: Departmental Report 8 October 2004*, Introduction, 13

[29] Quoted in Bryce Wilkinson, *A Primer on Property Rights, Takings and Compensation* (New Zealand Business Roundtable, 2008), 7 and cited in (7-2-1, New Zealand Business Roundtable), 7

The rights of Māori as indigenous people

Several submissions focused on the rights of Māori as indigenous people and expressed the view that recognition of the human rights of Māori are pivotal to understanding and resolving the foreshore and seabed issue[30]:

> Māori are the group whose rights are most at stake in this issue. Māori rights are fundamentally articulated in the Treaty of Waitangi and the Declaration on the Rights of Indigenous Peoples. These instruments in turn protect Māori customary rights (…). Māori therefore have rights that are not reducible solely to their customary rights. These include rights under the Treaty of Waitangi, legal rights and human rights, including rights of access to justice, public access, property (including a right of redress), and development. (7-16-3, Human Rights Commission)

Importance of international covenants

A significant number of submitters drew attention to New Zealand's international human rights obligations, with reference in particular to the:

- Universal Declaration of Human Rights;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- Declaration on the Rights of Indigenous Peoples;
- United Nations Committee for the Elimination of Racial Discrimination ("CERD"); and
- *Report of the [UN] Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rudolfo Stavenhagen, on his Mission to New Zealand (16 to 25 November 2005).*

International treaties form part of New Zealand's domestic law when they have been formally ratified and incorporated into New Zealand law through statute. Declarations of the United Nations General Assembly cannot be ratified, and have no formal legal application in New Zealand. A New Zealand Court or Tribunal could still, however, use the Declaration to assist the interpretation and application of New Zealand law.

New Zealand has ratified a number of treaties relevant to review of the Foreshore and Seabed Act, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. We note, however, that New Zealand voted against the adoption of the Declaration on the Rights of Indigenous Peoples. Some legal commentators take the view that while New Zealand may not have ratified an international treaty or adopted an international declaration, nonetheless the content of these documents may apply to New Zealand if they form part of customary international law.

Submitters' concerns on this matter were broadly concerned with:

- the Act as a breach of international law;
- the need for New Zealand to ratify the Declaration on the Rights of Indigenous Peoples;
- New Zealand's international human rights reputation having suffered as a result of the Act.

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[30] See, in addition, Volume 2, Appendix 3, Claire Charters and Andrew Erueti "International Law on Indigenous People's Rights and the Foreshore and Seabed".

The Act as breach of international law

Many submitters objected to the Act on the basis that it breached applicable international human rights laws:

> By protecting non-Māori but not Māori rights the Act breaches international human rights norms such as the Convention on the Elimination of All Forms of Racial Discrimination. (7-89-1, Sharon Lee Campbell)

> While this Ministerial Review goes some way to address the call from CERD to resume a dialogue, it is the content and outcome of that dialogue that will determine whether the discriminatory aspects of [the Act] remain. (7-302-1, Aotearoa Indigenous Rights Charitable Trust)

> AH NO. 1 are concerned that the recommendations of the Special Rapporteur have (…) never been implemented, and furthermore that the governments [sic] response to the Special Rapporteurs [sic] report was to attack his personal character despite [his] being a respected member of the international legal community duly appointed to examine New Zealand in his official role as a rapporteur for the United Nations. (7-297-1, Awanui Hāparapara No. 1 Trust)

Declaration on the Rights of Indigenous Peoples

Some submitters expressed dissatisfaction with New Zealand's failure to ratify the Declaration on the Rights of Indigenous Peoples. Furthermore, some felt that if this declaration were ratified, it should guide the development of a new regime in respect of the foreshore and seabed. One submitter stated:

> I recommend the review of the Act take into account the now internationally accepted standards contained in the Declaration [on] the Rights of Indigenous Peoples. In particular the Declaration requires State parties to honour treaties, and recognises the rights of indigenous peoples to their lands, territories and resources. (7-320-1, Dayle Lianne Takitimu on behalf of Te Rūnanga o Te Whānau)

New Zealand's international reputation

Some submitters expressed concern that the breach of applicable human rights laws and failure to ratify the Declaration on the Rights of Indigenous Peoples would have a negative impact on New Zealand's reputation in the international community:

> The New Zealand Government should be proving to the international community that we are redressing our pained history of unjust confiscation of traditionally held land, not continuing this legacy of raupatu as this legislation does. (7-244-1, Anna Parker on behalf of Dunedin branch of CORSO)

Balancing rights and limits on rights

Submitters emphasised that recognising human rights requires that the rights of all rights holders are balanced, and that corresponding responsibilities are also acknowledged. For example, rights of an owner of foreshore and seabed property should be subject to the responsibility to provide public access to that property. We reflect on these matters further below at 2.4.4 and 2.4.5.

> (…) if the Māori right to the foreshore and seabed was reconstituted as a tikanga right it could include a kawenata guaranteeing access. (7-229-1, Tania Kingi on behalf of Te Roopu Waiora Trust)

Other submitters also recognised that rights are not absolute and that they have limits:

> The human rights approach recognises that rights are universal, inalienable, interlinked and interdependent. It also recognises that rights are not necessarily absolute and can be subject to reasonable limits. (7-16-3, Human Rights Commission)

The way forward

Many submitters propose that the way forward is to embrace a human rights framework. We discuss this further in Chapter 4.

> Human rights norms should be the most important principles considered by the Ministerial Review Panel in making recommendations for future action. (7-221-1, Caritas Aotearoa New Zealand

> Treaty Tribes Coalition hoped that inserting human rights discourse into our national debate could support the perceived moral legitimacy of the rights of Māori, and provide a less politicised framework than the Treaty of Waitangi given the political climate. (7-43-3, Treaty Tribes Coalition)

> The new legislative regime should not unfairly penalise Māori, and must respect the rights to freedom from discrimination and equality expressed in the international covenants and conventions to which New Zealand is a signatory. The new legislative regime should be developed in partnership with Māori according to the core principles of preservation and protection of Māori customary rights, protection of public access, preservation of existing rights and inalienability. (7-16-3, Human Rights Commission)

2.4.3 Constitutional issues

A number of submissions proposed that constitutional arrangements be reformed. Issues identified by submitters were:

- recognition of the Treaty of Waitangi as New Zealand's founding document;
- recognition of tikanga in New Zealand's constitution;
- further constitutional protection of human and indigenous rights;
- ideas for the process of constitutional form.

Many submitters took the view that effective constitutional reform would avoid a repetition of the way in which the foreshore and seabed issue was dealt with:

> Māori ability to protect rights is hampered by the lack of constitutional protections afforded to Māori. [The Act] was unable to be stopped even though Māori consistently rejected it. (7-302-1, Aotearoa Indigenous Rights Charitable Trust)

> The Act (…) illustrates in bold terms, the ongoing legal vulnerability and political fragility of the rights held by iwi and Māori to notions of political expediency and majoritarian demand. Ultimately, the Act was passed because our constitutional architecture is porous and allowed it to be passed. The Act also illustrates the potential threat to the rights of all New Zealanders and other sectors of our society, should a relevant political cause arise. (4-15-2, Te Rūnanga o Ngāi Tahu)

Treaty of Waitangi as New Zealand's founding document

Many submissions firmly state that the Treaty of Waitangi is the founding document of New Zealand and should therefore form the basis of any constitutional reform. For example:

> Kororareka Marae [is] very concerned that successive governments have not, and continue to not honour the Treaty and the associated need for constitutional change to give full effect to its provisions. Ultimately there is no other way to ensure that the rights of Māori are fully respected and protected from the whims of the government of the day. (7-196-1, Maiki Marks on behalf of Te Roopu Taiao Kororareka Marae)

> We believe if you repeal the Act there needs to be a constitution, first and foremost. That's where we think discussions should start – with a constitution ensuring that Te Tiriti o Waitangi

> is solidly founded within that constitution (…) We still want to develop the original intent of Te Tiriti, which has never ever been done in this country, we believe. (5-74-1, Natasha Clarke on behalf of Patukiha, Ngāti Puta, and Hauai Trust)

> Any constitutional developments which occur to redress the breach of our human rights and recognise our unique status as tangata whenua must also be based on Te Tiriti o Waitangi. (5-75-2, Patuharakeke Te Iwi Trust Board on behalf of Patuharakeke hapu)

> And so, what's the use of having a Treaty if it's not been legislated? It's not protecting our rights. And that's the main thing, like in my claim, if that's all I ever do, is to get that Treaty put into legislation, especially Article 2, it would be far better than any of these other things. (5-26-1, Lance Waaka)

Recognition of tikanga Māori

Several submissions emphasised the need to recognise tikanga Māori in law or to elevate it to constitutional recognition or status:

> (…) that the government undertakes to conduct a constitutional inquiry, with an express commitment to exploring the entrenchment of the Treaty of Waitangi, human rights standards and constitutional recognition of tikanga Māori as an operative body of law in New Zealand. (4-15-2, Te Rūnanga o Ngāi Tahu)

Protection for human and indigenous rights

Several submitters stressed the importance of ensuring that any constitutional reform safeguard human rights and enshrine indigenous rights:

> New Zealand constitutional reform should ensure that in future no legislation may remove human rights or property rights enshrined under the Treaty of Waitangi. (7-334-1, Waikato Antiracism Coalition)

A minority specifically referred to the view of the United Nations regarding the desirability of constitutional reform:

> Treaty Tribes Coalition is (…) convinced that the Act illustrates, in rather violent terms, the need for consideration of constitutional change. The United Nations has repeatedly referred to the importance of undertaking constitutional dialogue and strengthening rights protections so that an overzealous legislature cannot, again, override fundamental human rights. (7-43-3, Treaty Tribes Coalition)

> The Special Rapporteur noted that controversy over the Act reflected the lack of constitutional recognition of the inherent rights of Māori and recommended the Act be repealed. (7-16-3, Human Rights Commission)

The process of constitutional reform

Several submissions saw the repeal of the Act and its replacement as a stepping stone along the path of constitutional reform and that, although constitutional reform would be a challenging process, the country would benefit from the outcome:

> We recommend that the government explore enduring constitutional arrangement to enable just and fair negotiations with tangata whenua as both are parties to Te Tiriti. (5-70-1, Tim Howard and Leanne Brownie on behalf of the Northland Urban Rural Mission)

> I consider that the Act of Parliament, as it is now, is a raupatu and needs to be rescinded, withdrawn, and completely obliterated and start again (…) to make new legislation that will fit. In fact, I'm of the opinion that you need to go right back to constitutional reform, and that will take more than a few years. But I feel that is a necessity. (4-56-1, Christopher Neave Brayshaw)

> Future foreshore and seabed legislation should not be developed until [a] constitutional review has been undertaken and the subsequent constitutional status of Māori has been confirmed in accordance with the Treaty of Waitangi and has secured [the] substantial support of the Māori community. (7-276-1, Daniel Te Kanawa)

> We do not envisage that the necessary realigning of the current constitutional order will be easy. However we are convinced that the discussion is necessary. We are also convinced that the necessary change requires not just a tinkering with the existing Parliament or even the establishment of a republic. Rather it requires in our view a fundamental re-constituting that results in a new system with a new legitimacy taken from this land and the ineffable hope of its people. If that should come to pass then perhaps the injustice of the foreshore and seabed [Act] may finally be laid to rest. (4-84-2, Moana Jackson on behalf of Ngāti Kahungunu Iwi Incorporated)

> The ongoing failure of successive governments to honour the Treaty and the associated need for constitutional change to give full effect to its provisions gave rise to the political environment in which the foreshore and seabed legalisation was passed (…). A government that has the courage to enter into (…) discussions is likely to find that genuine and enduring solutions are available, with a little creativity, and a commitment to achieving justice. Te Hunga Roia Māori o Aotearoa is excited by the possibility that this review may signal the current government's intention to embark on the journey towards true Treaty partnership. (7-310-1, Te Hunga Roia Māori o Aotearoa/The Māori Law Society Inc)

2.4.4 Ownership and title to foreshore and seabed property

Submitters presented a raft of opinions on the issue of ownership, be it Crown, Māori, private or other forms of ownership. Many of these opinions can be viewed in the context of differing world views, Māori collectivism versus the Western paradigm of individual rights as we have articulated in Chapter 3:

> (…) one of the clear problems that this country has is their perception of ownership. Ki tā te Pākēha ko au o Ngāti Koau, ko au ano tōku mana kei ahau anake te mana ki te tuku hei hoko i āku whenua i āku rawa. [According to Pākēha, I am myself, I have my own authority, only me, and I alone have the authority to sell my land or my assets.] And so that is the perception that Pākēha have of Māori, because that is the Pākēha perception, nōku ake te whenua nōku te mana hei hoko kia wai e hiahia ana ahau, mutu ki kona [this is my land, I have the authority to sell to whoever I want, end of story]. (4-54-1, Maanu Paul on behalf of Mataatua District Māori Council of the New Zealand Māori Council)

> The concept of ownership is a European concept upon which our laws, lives and commerce depend today. However my understanding is that it is foreign to Māori lore. In any case, the term ownership (of land) is largely misunderstood and does not confer rights on the title holder that cannot be affected by others. It is a title in fee simple and is not the "castle" that some landowner representatives advocate. (7-162-1, Richard Drake)

Customary rights

Māori "ownership" is essentially the expression of complex customary rights that include a proprietary interest. These rights are held collectively. Submitters' comments about what these rights encompass included:

> We state that our customary rights in the coastal marine area include, but are not limited to, the following:
>
> - Self-governance (ownership, control, regulation, management, and allocation)
> - Development (cultural and economic benefit)

- Exclusivity (in accordance with tikanga)
- Use (in its many forms), and
- Access. (7-44-2, Te Ope Mana a Tai)

> What we're talking about is the mana or rangatiratanga rather than what we might term title or ownership as in the narrow European concept. It just doesn't do it justice and it can be easily turned against us. (4-8-1, Edward Ellison on behalf of Te Rūnangao Otakau)

We note that these rights are not static but have evolved and adapted over time:

> Development encompasses the ability of iwi/hapū to use and develop the environment for their benefit for commercial as well as non-commercial purposes. The development right is not a static right that is cemented in tradition although it is guided by tikanga. (7-45-3, Te Ohu Kaimoana)

For many submitters the extinguishment of Māori customary property rights under the Act was an egregious action. They cited the lack of equity with other rights holders in the foreshore and seabed whose rights remained intact:

> [The Act] accommodates only registered ownership and interests while giving no standing to ownership rights arising from custom. (7-14-1, New Zealand Institute of Surveyors)

> Prior to the Act there was a view that the foreshore and seabed was Māori. And with a wave of a magic wand, without having to prove anything, the Crown said 'No, it belongs to everybody' – which wasn't quite right because there were some bodies the Crown didn't take it from. (4-134-1, Peter Moeahu on behalf of Ngāti Tewhiti)

The Act's vesting of the foreshore and seabed in the Crown absolutely was viewed by a few submitters as the unilateral imposition of another form of raupatu:

> The Act represents an act of theft: the Act vests full ownership in the Crown, in effect purporting thereby to take away Tino Rangatiratanga guaranteed in Article Two of Te Tiriti o Waitangi. It could be said to be one of the last Raupatu. (5-70-2, Tim Howard on behalf of Northland Urban Rural Mission)

According to many submitters, the Act's provisions for Māori did not equate whith what it denied them – inherent customary rights:

> Far from protecting aboriginal customary rights, this Act abrogates them. It effectively filters customary rights through the narrow perspective of Western philosophy, redefines and compartmentalises them, then hands them back in prescriptive form. Having accomplished this, it then invites Māori to apply for permission, by way of a 'customary rights order' to engage in customs which are patently their birthright. There has to be a fairer way. (4-104-2, Cameron Hunter)

> To call the change to establish various cultural and usufructuary rights a 'customary title', when it is a denial of any ownership at all, is a subterfuge. (7-145-1, Joan Hardiman on behalf of New Zealand Dominican Sisters)

> (…) we [are] mindful that a legislative framework that merely restores a notion of customary rights defined within the common law doctrine of aboriginal title is neither an appropriate nor just solution. Indeed it is our view it would only be marginally less restrictive than the current processes under the Act because it would retain a presumptive Crown authority to define the nature and extent of our rights, something it is neither capable nor entitled to do. (4-84-2, Moana Jackson on behalf of Ngāti Kahungunu Iwi Inc)

Individual property rights

The issue of private ownership aroused emotional responses:

> (…) many New Zealanders who at heart wished to see reconciliation of historic injustices against Māori, became very anxious about the possibility of private ownership of beaches. This contributed to a situation in which many responses were based more on emotion than knowledge of the facts. (7-221-1, Caritas Aotearoa New Zealand)

> [There was a] persistent allegation that if Māori had 'freehold title' and 'owned' the foreshore and seabed we would sell it to the highest bidder. Iwi took great pains of course to make it clear that we had no intention of doing so (…) (4-84-2, Moana Jackson on behalf of Ngāti Kahungunu Iwi Inc)

On the other hand, some were not averse to private ownership of discrete areas of foreshore and seabed:

> It is of vital importance to the continued viability of the port that Northport obtains security of tenure for both the existing reclamations and any future reclamations. (7-203-1, DLA Phillips Fox on behalf of Northport Ltd)

Crown ownership

Crown ownership of the foreshore and seabed was strongly endorsed in some submissions:

> (…) it is vital that the foreshore and seabed be vested in the Crown, the way New Zealanders always thought it was. (7-35-1, Helen Mosely)

A few asserted that ownership other than by the Crown would be discriminatory:

> It would be a disaster for New Zealand if ownership of the foreshore and seabed is granted based on race. (7-269-1, Raymond Scampton)

> I believe in equality of opportunity for all, irrespective of race, and am satisfied that vesting ownership of the foreshore and seabed with the Crown is an equitable device with which to accomplish this (…) if ownership – no matter how theoretical or accomplished by provisions for continued public access – were to be given to Māori, or to any other group based on race, I would feel like a second class citizen and would seriously have to consider whether or not I wished to continue living in a country that practised this form of government-sanctioned racism. (7-93-1, Evan Thomas)

Other supporters of Crown ownership, such as Fish & Game New Zealand (7-29-1) which declared Crown ownership as "a right of passage for all New Zealanders" to the beach, were equally supportive of pre-existing customary rights. Federated Farmers submitted:

> The Federation considers that private rights to the foreshore and seabed, including legitimate Māori customary rights and other common law rights must be upheld. (7-6-2, New Zealand Federated of Farmers Inc)

Conversely, many submitters firmly disagreed with Crown ownership of the foreshore and seabed:

> Any Act which effectively puts the coastal marine area into the hands of the Crown, which by 2005 consented to 35 million acres of mineral prospecting permits, offers no security for future generations of New Zealanders to enjoy the whole and healthy ecosystem of our coastal marine environment. This threat to sea and land did not exist when the area was under Māori jurisdiction in accordance with tikanga Māori. (7-141-1, Brain Elmes)

> Crown ownership does not guarantee that the land will be held in perpetuity any more than it would under Māori ownership in fee simple. (7-285-1, Ray Maurice Manawaroa Gray on behalf of Te Rūnaka ki Ōtautahi o Kāi Tahu)

Inalienability

A majority of submissions, many with opposing viewpoints, supported the inalienability of the foreshore and seabed. Many took issue, however, with the Crown's prerogative under section 14 of the Act to alienate in certain circumstances:

> The Crown has said that they needed to take the foreshore because it was concerned that Māori would sell it. However, section 14 clearly gives the Crown a right to sell it through a 'special Act of Parliament'. (7-42-1, Roimata Moore and Anahera Richards)

> (…) the possibility of sale of areas of the [coastal marine area] is not the only risk inherent in Crown ownership (…) Since the passage of the [Act], iwi, hapū and communities throughout the country have been deeply disturbed as they have watched the Crown effectively alienate large tracts of the seabed to offshore companies through the granting to them of Crown Minerals Act permits to prospect or extract minerals for the seabed. (7-44-3, Te Ope Mana a Tai)

Limitations on alienation were suggested in several submissions, including the provision of leasing arrangements and the inalienability of customary property rights:

> A further 'clog' on the freehold title is that there must be absolute prohibition of the alienation of foreshore and seabed land by way of sale of the freehold. Leases up to 60 years should be the limit of alienation. (4-59-2, Judge Heta Kenneth Hingston)

> (…) it is adamant that areas held under customary title cannot be transferred to freehold title or sold and must be administered for common use and benefit of all New Zealanders. (7-280-1, Michelle Marino on behalf of Ngāti Wai o Ngāti Tama)

Compensation

Several submitters saw the Act as a breach of common law property rights and that those rights were extinguished without consent, compensation or any guarantee of redress:

> The Crown actively assumed ownership of the foreshore and seabed without the consent of the Māori right holders. No redress or compensation was offered to Māori for their loss. (5-68-1, Tajim Mohammed on behalf of Te Rūnanga o Ngāti Rehia)

> The Magna Carta guaranteed that the property would not be seized by the Crown without compensation. (7-199-1, Te Atiawa Manawhenua Ki Te Tau Ihu Trust)

The way forward

Overall, many submissions considered that the best way to handle the ownership question was in a fair and equitable manner, with Māori having equal treatment to due process for the recognition and protection of their customary rights or interests:

> The challenge in addressing 'ownership' is finding the most appropriate way to translate and give effect to rangatiratanga and the concept of kaitiaki in a Western legal system. (7-45-2, Te Ohu Kaimoana)

> A joint Māori and Crown (Treaty of Waitangi partners) process should then be undertaken to determine both the matter of ownership and management of the foreshore and seabed. (7-235-1, Maniapoto Māori Trust Board)

> I want us Māori people to have a legal entitlement to the foreshore, and whether it be a straight out freehold title or whether it be just a customary title, I'm sort of not particularly bothered about it. But I think that an opportunity should be given for Māori people to have their title to the foreshore/seabed acknowledged. (5-21-1, Matiu Dickson)

2.4.5 Access and use rights

Public access in, on and over the foreshore was a key issue for many submitters. Concerns were expressed about a range of use rights, including cultural, lifestyle, recreational, environmental and commercial. A number of submissions also addressed the way in which the public discussion of the issue of public access to the beach was a significant factor in the passage of the Act.

Public access concerns and passage of the Act

Many submissions pointed to concerns about public access that were raised in the media prior to the passage of the Act. Many of these submissions expressed a sense of frustration at promotion of the perception that Māori planned to deny access at beaches, when this was not the case:

> (…) there was a cynical campaign of fearmongering over access which implied that Māori could not be trusted and would stop ordinary Pākehā from having BBQs at the beach. (4-84-1, Moana Jackson on behalf of the Ngāti Kahungunu Iwi Authority)

Māori submitters consistently emphasised that they have always granted or accepted appropriate public access, and only ever limit access or place guidelines around it for obviously appropriate reasons such as rāhui, wāhi tapu or environmental issues – and they will continue to do so:

> I can only point to the history of Ngāti Te Whiti, where our people welcomed the early settlers here around 1841. We weren't on the foreshore driving them away (…). Now the history of our people is that we haven't evicted anyone from anywhere. (4-134-1, Peter Moeahu on behalf of Ngāti Te Whiti)

> We, Te Tau Ihu iwi, would ensure public access as well as protecting existing customary rights and guaranteeing certainty in respect of the rights and interests of iwi katoa. (4-108-1, Fred Te Miha on behalf of Ngāti Tama Mana Whenua ki te Tau Ihu Trust)

> Public access must not be unreasonably compromised (7-222-1, Wayne W Peters and Associates on behalf of Ngātiwai Trust Board)

> The fabrication that tangata whenua would restrict access to the foreshore is discredited. Tangata whenua have never exercised prohibition. In the case of moana rāhui, this is simply to enhance the sustainability and express understanding of kaitiakitanga. (4-50-1, Taetaunuku Flavell on behalf of Tapaiki iwi)

> We will always, with consultation, have access to our beaches, our waterways, for any reason. We need to be part of that group that decides it. We believe that (…) if we do have our mahinga kai, our pingao areas, that need to be protected, we need to be able to rāhui. We need to have those tools with teeth (…) for environmental protection, sustainability and even our customary protection, our cultural protection. (4-110-1, Raymond Smith on behalf of Te Rūnanga o Ngāti Kuia)

A common concern to maintain public access

It is clear from our consultation that having public access is a very important issue to the "ordinary New Zealander". Many regard it as every New Zealander's birthright:

> (…) when my grandparents left from Scotland, there were quite a few restrictions on the foreshore and seabed and the rest of it, and one of the reasons for their migration, was to come to New Zealand which was free of those sort of things. It was when they brought in the seabed law, I thought to myself, 'Well, I always thought we were free to go to the beach any time we liked anyway.' I want the foreshore and seabed to belong to us all, not one race of people. (5-44-1, Colin Boock)

> Public access is essential for all outdoor recreation. Coastal and sea based outdoor recreation is far more popular than rural and back-country land based recreations, and is likewise one of the defining opportunities of being a New Zealander. (7-11-1, Council of Outdoor Recreation Associations of New Zealand Inc)

> If we were to select a single and fundamental principle it would be 'Guaranteeing public access now and in the future'. (7-106-1, Yachting New Zealand Limited)

> Traditionally we used to come out here to get our kai when we were young and take them back to Rotorua, and that used to happen every month or so. (…) traditionally it was our way of coming back, to Tauranga waka. (4-49-1, Hamuera Hodge)

It is important to note that there is a widespread lack of understanding or confusion about public rights to the foreshore and seabed. A number of people believe that the "Queen's chain" guaranteed public access to the foreshore and seabed. While there is a range of legislative provisions providing for public access to the foreshore and seabed, the Queen's chain was, in fact, not implemented (see Volume 2, Appendix 1). Submitters stated, for example:

> [There was] a conscious colonial decision in 1840, to make New Zealand's coastline and beaches accessible to the public – via the so called Queen's chain public access strips. Access to the coast has been one of our fundamental rights from the first days of nationhood. (7-11-1, Council of Outdoor Recreation Associations of New Zealand Inc)

> When they brought in this law, what bothered me at the time was, well, I thought we already had it so why should we be worrying? But then naturally, we became very conscious of the fact that the seabed seemed to belong to somebody else or could belong to somebody else. And as a kayaker, I like to be able to pull my boat up on the foreshore wherever I like and sit down and have lunch or something like that. And I don't feel like having to go and ask anybody for permission, because I think it belongs to us all. (5-44-1, Colin Boock)

Few submitters seemed to understand that the "right of public access" had been a perceived rather than an actual right. The Human Rights Commission (7-16-1) described "the right of public access" as an emerging "quasi-customary right" within New Zealand culture. Furthermore, the Commission observed that:

> Having unrestricted access to and along water margins has long been an expectation of the public. For Māori, this expectation would be based on customary access and the use of coastal resources confirmed by the Treaty of Waitangi. For non-Māori the expectation is founded on a legal history of reservations as along water margins for public use (such as marginal strips). (7-16-3, Human Rights Commission)

> The 'right to public access' is not found in any of the international human rights covenants and conventions. Indeed, the Waitangi Tribunal (…) commented [in 2004] that, aside from common law rights of navigation and fishing, the wider New Zealand public has 'long-standing privileges that do not amount to legal rights' which include 'free public access to the beaches and seas' and 'recreational uses, including boating'[31]. (7-16-3, Human Rights Commission)

Public access to areas in private title

While their concern did not form part of the scope of this Review, some submitters expressed the view that public access should be extended to areas of the foreshore and seabed currently in private title:

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[31] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy:* Wai 1071 (Legislation Direct, Wellington, 2004) 31

> I think there should be one law for all, and that there should be access all around the coastline of this country for all New Zealanders, irrespective. (4-109-1, Thomas Harrison)

> If any areas of the Act were to be strengthened, it would be those areas where the coastal strip or Queen's chain can be applied to coastal properties in private ownership to ensure that the public rights of access can be retained and maintained in the future. (7-12-1, NZ Recreational Fishing Council)

Some submitted that the foreshore and seabed should be treated as a public "common" with the public having unfettered access in, on and over the area:

> [It] should be owned and managed sustainably as a public common, by the Crown on behalf of all New Zealanders. (7-11-1, Council of Outdoor Recreation Associations of New Zealand Inc)

> It is essential that government enact unambiguous and secure rights of 'open access and use by all New Zealanders'. No reliance can be placed on current assurances from Māori, or anybody else. (7-28-1, Public Access New Zealand Inc)

Restrictions on public access

A number of submitters expressed that view that there are certain circumstances in which public access in, on and over the public foreshore and seabed should be restricted. Legitimate reasons presented for restricting access were safety, tikanga and environmental concerns.

Safety and access

Keith Ingram submitted on behalf of the Marine Transport Association (7-13-2) that while the public of New Zealand should retain rights of free access to coastal space, it was necessary to make an exception for safety reasons, for example, restricting access to ports. Other submitters expressed similar views:

> It is important for the safety of shipping as well as all others who use the sea, that there are rules establishing rights and responsibilities for access and navigation. However there should always be consultation with those who hold mana whenua and mana moana. (7-162-1, Richard Drake)

Tikanga and access

Some submitters expressed the view that certain situations such as rāhui could provide a legitimate justification for a limit on access to an area. Others expressed the view that specific areas such as wāhi tapu sites should also be non-accessible to the public:

> All I want to do is to be able to have access to the sea, to be able to walk over the shores to the sea. Now that's very simply my point of view, but I do want to acknowledge that there would be reasons sometimes (…) that when someone dies you don't want people going in that particular area. (5-15-1, Robin Boldarin)

> It seems appropriate to us that if Māori are generous enough to negotiate continued public access to most coastal land, that the New Zealand public should be able to be equally generous about respecting specific sacred or significant sites. (7-221-1, Caritas Aotearoa New Zealand)

Environmental reasons to restrict access

Some submitters expressed the view that access to the foreshore and seabed should be able to be limited to protect areas of particular environmental importance:

> The general rights of navigation are already limited by activities such as marine farming, port activities and with respect to undersea cables. There are possible cases where limitation of access is appropriate particularly in terms of landing rights on areas which are conservation reserves or places such as waahi tapu where sea access should be limited. (4-21-2, Te Atiawa ki Te Upoko o te Ika a Mauī Pōtiki Trust)

Use rights – recreational

The right of designated groups to use particular parts of the foreshore was noted by some submitters as being restrictive. For example:

> The Fishing Club of Mahia, plus others, wanted to build on our foreshore. We opposed it through the Environment Court and [were] left with a debt of $14,000, and we lost the case. Why we opposed it was [because] that beachfront was there for all people, Māori and Pākēha, and what we were seeing happening was buildings being put on that foreshore for fishing clubs, and whatever will go [there] in the next future. (5-39-1, Pauline Tangiora on behalf of Mahia Māori Committee of Rongomaiwahine)

Use rights – commercial

A number of submitters suggested to the Panel that the issue of public access was a smokescreen created by the Crown to enable it to assert ownership of the foreshore and seabed so that it could control and benefit from the exploitation of resources, in particular mineral resources:

> In 2002 Crown Minerals was charged with the responsibility of promoting mining in Aotearoa. It was no surprise to see multinational mining companies waiting in the wings for the Foreshore and Seabed Act to be passed as there was a raft of shell companies which had been registered from 2004 onwards. (7-129-1, Kiwis Against Seabed Mining)

> Since [the Act] has been passed, the government has auctioned off areas of the seabed along the west coast from South Auckland to Whanganui, under the Crown Minerals Act 1991, for mineral and petroleum exploration (…). The sale was conducted in secrecy without any consultation with tangata whenua; this reinforces the lack of credibility of the Crown as the caretaker of our resources and of Active Protection under the Treaty of Waitangi. (7-204-1, Raymond Smith on behalf of the Waimarie Branch of the Māori Party)

> I am alarmed at the sale of areas of the seabed since the passing of the Act. Awarding prospecting licences – in secrecy – under the Crown Minerals Act is (…) contrary to any claims the Crown has made of holding the foreshore and seabed 'on behalf of all the people of New Zealand'. (7-125-1, Frances Mountier)

Very few submitters identified that the government currently charges for access to the coastal marine area (the Department of Conservation, for example, operates as a commercial entity, charging track and hut fees in national parks). Given the paucity of submissions on government charges, it appears that the public accepts the Department of Conservation charging for the upkeep of paths and huts, for example, but strongly resists mana whenua doing the same. One submitter who did comment on this situation noted in addition that "we've been kept right out of all the [park] concessions" (4-108-1, Fred Te Miha on behalf of Ngāti Tama Mana Whenua ki te Tau Ihu Trust).

Continuing rights of access are a key issue for commercial entities. Many stressed the importance of certainty of access to enable them to invest with confidence in development of the coastal marine area, maintain and grow their assets (for example, reclamations), and rebuild assets at the end of their economic life. The Electricity Networks Association (7-21-1) was among those which does not have an opinion on who should own the foreshore and seabed, as long as the process of conducting its business is not complicated further. The Association noted that barriers of access, cost or protracted approval regimes would frustrate the necessarily timely repair and replacement of assets such as electricity lines, gas pipelines and fibre optic cables.

We discuss these matters further in Chapter 4.

2.4.6 Natural resources and environmental considerations

Most of the submissions relating to natural resources demonstrated submitters' interest in environmental and conservation matters, the majority stressing the paramount importance of ensuring environmental health and sustainability. Others were concerned to express a strong personal connection with New Zealand's natural environment as part of their cultural heritage:

> One thing is for sure, the foreshore, seabed, waters, flora and fauna of these precious islands are the birthright and natural heritage of all New Zealanders, and that is non-negotiable. (4-109-1, Thomas Harrison)

Kaitiakitanga

The cultural principle and practice of kaitiakitanga emerged strongly from a great many submissions. We discuss this matter further at 2.4.7.

Adequacy of environmental protection

Some submitters considered that local and central government have failed to monitor and protect the coastal marine environment from the consequences of public access, lack of respect for the environment, extractive industries and pollution. Some propose that Māori values, including kaitiakitanga, would provide a more effective framework for environmental protection:

> (…) what has transpired (…) is careless disregard for the foreshore and the people that live there. We have any number of cars parked on the foreshore with boat trailers. We have cars that drive all the way to the pipi bed disturbing the growth of pipi and also the birdlife that nest on that part of the beach. We have an increased amount of rubbish (…). We have cars driving up and down the beach amongst people sunbathing and children making sandcastles. We have speeding hoons doing wheelies and flipping their vehicles (…)
>
> (…) we are compelled to mention the rubbish that comes ashore in the form of mussel ropes and plastic netting used for holding anchors (…)
>
> (…) Who is expected to care for the beach under the Act? We, the locals cared for the beach prior to the Act. Since the Act, no one or no authority has come forward to clean (…). Are we, the locals, expected to clean the rubbish that belongs to all the public that was given the rights that we had taken from us. That is a bitter pill to swallow. (1-6-2, Ngāti Porou ki Hauraki Trust)

The New Zealand Institute of Surveyors (7-14-2) expressed the view that the role of the Minister for the Environment is hampered as the Resource Management Act 1991 lacks the economic, social and cultural provisions which are essential to sustainable management, as defined by the United Nations. Some submitters stated that the resource management system generally works well for Māori, while others presented the opposite view (see 2.4.8).

Adequacy of environmental consultation

Many submissions also expressed concern about the legal requirements for, and practices of, consultation with whanau, hapū and iwi, and other interested parties.

> (…) by 2005 there were eight applications for seabed prospecting made to the Ministry [of] Economic Development and, to reiterate, (…) under the Crown Minerals Act, they are only obliged to talk to iwi about any prospecting licences where that licence might interfere with wāhi tapu. There was very little engagement in that process for (…) iwi and no requirement to engage with the wider community, so it is a legitimate concern that has been raised. (7-100-2, Metiria Tūrei on behalf of the Green Party of Aotearoa New Zealand)
>
> The flow-on effects of sedimentation and mussel farms on the seabed are beginning to be understood. Solutions can be found but the requirement to find and implement those solutions has been lacking as neither local communities nor local iwi seem to be considered

> as stakeholders with any rights or as holding any influence. (7-228-1, Josephine Ann Smith on behalf of Ocean Bay Protection Society Inc)

> (…) when you have a mandate from the majority, then you have overall decisions in that particular area. And that's what the territorial local authority does. They have these hearings. I understand that tangata whenua needs to be consulted but once that process is done, you're ignored. Then it comes back to this definition, that they are guardians, therefore they are kaitiaki (…) in Tainui, the territorial authorities are the kaitiaki of the area – not Tainui. (5-19-1, Joe Kee)

> Clearly, in Local Government Act and Resource Management Act terms, it is iwi and local government, not the Crown, who need to work together into the future in relation to managing natural and physical resources. (7-264-1, Northland Regional Council)

Crown–Māori co-management

Many submitters stated that the Crown should work with Māori to explore an effective and meaningful method of environmental co-management to help restore and sustain the foreshore and seabed:

> [Ngātiwai Trust Board] (…) recognised that there were options preferable to a fee simple determination, and these included meaningful participation in the governance and management of the foreshore and seabed. This would include, for instance, empowerment of kaitiakitanga, development rights, participation in allocation decisions, and access to funding from Coastal Occupation Charges or their equivalent. (7-222-1, Wayne W Peters and Associates on behalf of Ngātiwai Trust Board)

> We endorse marine protected areas for scientific purposes only, but subject to a management plan and a scientific results review by tangata whenua. (4-108-1, Fred Te Miha on behalf of Ngāti Tama Mana Whenua ki te Tau Ihu Trust)

> The relationships that we have with our waters and our mahinga kai in those waters can be recognised by formal standing in governance and management. Whoever governs and manages our waterways, we need to be there to make those decisions together. (4-13-1, Te Marino Lenihan on behalf of the Reuben family of Tuahiwi)

Fisheries

Representatives of the commercial fishing sector such as the New Zealand Seafood Industry Council (7-3-1) expressed concern at a lack of clarity around whether fisheries issues can be considered under customary rights orders provided for in the Act and how the Māori Land Court will approach the issue:

> (…) SeaFIC wishes to see a regime which provides certainty for participants in commercial fishing and aquaculture in exercising their rights (…). However experience with the implementation of [the Act] has shown that the relationship between provisions in the Act, and commercial fishing, acquaculture, including existing settlements, is not clear cut. (7-3-2, New Zealand Seafood Industry Council Ltd)

Aquaculture

We received a number of submissions from people involved in the aquaculture industry. Graeme Coates, on behalf of the New Zealand Marine Farming Association (7-1-1), stated that certainty is key for the aquaculture industry. As long as no more grievances were created and aquaculture activities could proceed unabated, the Association did not mind "who the landlord is" (ie, who owns the foreshore and seabed). Similarly, Mike Burrell for Aquaculture New Zealand (7-23-1) noted there was a strong alignment of Māori and non-Māori interests in aquaculture and explained that Aquaculture New Zealand held a neutral position on iwi making claims of customary rights under the Act, provided that aquaculture is not affected.

The way forward

A recurring theme of submissions was the need for more effective management of natural resources. We address this matter further in Chapter 4. A number of submitters stated that any new foreshore and seabed regime must improve the environmental management regime for reasons of environmental health and sustainability:

> I am a Fish Care Volunteer for the Ministry of Fisheries (…). I am developing an understanding now of the importance of the health and sustainable use of our marine environments (…) to ensure that future generations are able to gather kai moana. I also understand the impacts land based activity can have on the marine environment and that there are still measures that need to be put in place to ensure the ongoing health of the sea. (7-228-1, Josephine Ann Smith on behalf of Ocean Bay Protection Society Inc)

> A broader solution is needed that addresses the cause of the foreshore and seabed issue. The foreshore and seabed issue started with objections to poor management of the marine environment and therefore, any solution must improve management of the marine environment. This could amount to a comprehensive review of management of the marine environment. (7-310-1, Te Hunga Roia Māori o Aotearoa/The Māori Law Society Inc)

2.4.7 Customary rights and responsibilities

Kaitiakitanga

The cultural principle and practice of kaitiakitanga emerged strongly from a great many submissions. Submitters expressed kaitiakitanga as being inherent in mana whenua mana moana:

> [We have] inherent rangatiratanga over the marine environment, constituted by the principle of mana whenua mana moana and given effect to under the principle of kaitiakitanga. (7-272-1, Ōraka Aparima Rūnaka Inc)

Monique Tāwhiri (5-49-1) was one of many who noted that customary rights are not just about harvesting; they also include planting and the sustainability of the resource. Many spoke of kaitiakitanga in terms of tikanga:

> Māori interrelated with nature, the environment and natural universal law. Therein lies tikanga Māori, coming out over the tapu nature of the environment and the interrelationship of human beings and their place in the world. So the high regard and respect for nature in the environment was controlled by the tapu and the tikanga which came out of the tapu. (4-138-1, Te Huirangi Waikerepuru)

Kaitiakitanga is clearly a core common interest shared by many submitters. It was recognised by some as a fundamental aspect of environmental management for sustainability. Cliff Mason and Kay Weir on behalf of the Pacific Institute of Resource Management (7-8-2) noted that "Māori represent a strong community who have demonstrated ability to sustainably manage a resource". Others stated:

> (…) I refer to the Māori values of kaitiakitanga and manaakitanga (…) Māori, better than any other group in this country, have an intimate knowledge of the ecology and broad balance of the foreshore and seabed. As far as possible in our present climate, and with adequate support, they have the indigenous knowledge and ability to ensure the wellbeing of the foreshore and seabed for generations to come, just as they preserved it for 500 or more years prior to the coming of the Pākēha. In relation to manaakitanga, I believe this tradition respects other people as well as the natural world and offers care, hospitality and welcome to all. (5-55-1, Peggy Howarth)

> Kaitiakitanga is a most important Māori concept and duty on hapū and iwi which must be acknowledged by the Crown (…). We want the Crown to be encouraging movement towards the concept of kaitiakitanga which would form the basis of all legislation related to whenua – this is an opportunity to model this concept to the world. (7-215-1, Women's Resource Network [Te Tai Tokerau])

Manaakitanga

Māori support public access precisely because it is encompassed within their world view – specifically within the concept of manaakitanga, a concept that is related to kaitiakitanga:

> There is the suggestion that Māori are unlikely to grant access to these places to those manuhiri who reside in our territories. We would refute any such representation which emanates from a position of ignorance of the generosity of Tūhoe as a whole. (4-42-1, Kirituia Turourae)

> It just gobsmacks me that the issue of access could be turned against us when we have this tradition of being, of sharing, and caring. (4-8-1, Edward Ellison on behalf of Te Rūnanga o Ōtākau)

2.4.8 Interrelated legislation

A large body of submissions commented on the coastal and fisheries management regime and its intersection with the Act:

> We do not think this Act relates well to other relevant legislation except where there are a few evident interconnections. This is a single purpose Act produced in haste in response to a perceived crisis. Its objective was limited and it does not provide a legislative basis for the administration, management or development of this important maritime area. (7-14-2, The New Zealand Institute of Surveyors)

Resource Management Act

Submitters had mixed views on the efficacy of the Resource Management Act 1991 (RMA):

> (…) the Resource Management Act is actually an acknowledgement of where we all fit in the world, because it's about our Tangaroa, Papatūānuku, Tawhirimātea, all those things we value. And so I would like to suggest that if there's a starting point, the RMA is the best one, because it filters down from central government into local government (…). (4-105-1, Mapuna Turner)

Some issues were, according to some submissions, better dealt with through the RMA:

> What it does do is it brings another layer of legislation on top of the legislation that's already operating in this country which is not working well. (5-46-1, Benita Wakefield)

> The Act has been criticised as not providing any greater protection for hapū and iwi than what is already available under the Resource Management Act and the Treaty settlements process. (…). The processes created by the Act are unfair and unworkable and the remedies ultimately available are ineffective. (7-297-1, Awanui Haparapara No. 1 Trust)

> (…) there are a wide range of other possible uses of coastal marine areas that may need protection, ranging from environmental concerns to activities of cultural and ethnic groups other than Māori. We are not sure that the Foreshore and Seabed Act is the best place to consider these wider issues, which may be best dealt with under Resource Management Act processes. (7-221-1, Caritas Aotearoa New Zealand)

Recreational and commercial interests perceived inequities between customary rights orders and resource consent applications:

> We are concerned that the granting of customary orders may give the ability to their holders to override the Resource Management Act and veto a proposal that may be granted under the RMA (…) (7-12-1, NZ Recreational Fishing Council)

Crown minerals

A topical issue for many submitters was mining rights in the marine environment issued under the Crown Minerals Act 1991 soon after the enactment of the Act:

> Whilst it may be viewed by the Crown that this is not disposal of foreshore and seabed, in accordance with our tikanga this is. (4-139-2, Whanganui River Māori Trust Board)

> Contrary to government claims that Māori wanted to sell the seabed, [we believe] the opposite to be true and that it was the government wanting access to the minerals which brought about the Foreshore and Seabed Act. (4-36-2, Vera van der Voorden on behalf of Kiwis Against Seabed Mining)

Commercial enterprises were concerned about effects the Act would have on their activities:

> (…) if legal title were to change in the future, we would welcome clearly formal processes for engaging with Māori in regard to applications for resource consents and/or minerals permits. (7-112-1, Trans-Tasman Resources Ltd)

Local government interface

The Act created new roles and structures in local government:

> We want Foreshore and Seabed agreements to achieve four things:
>
> 1 Adequately acknowledge local government's constitutional framework;
> 2 Integrate and interface well with our purpose and roles particularly under our core legislation the Local Government Act and the Resource Management Act;
> 3 Recognise the core principles we operate under: democracy, community and public participation in decision making;
> 4 Give local government an effective voice advising the agreement process so settlements are practical and the costs are considered. (7-20-2, Local Government New Zealand)

> So the Act does nothing for us, absolutely nothing, and if it wasn't for the goodwill of the District Council, it would do even less. (4-134-1, Peter Moeahu on behalf of Ngāti Tewhiti)

Fisheries (including aquaculture)

Several submissions focused on the Act's intersection with commercial, recreational and customary fishing:

> (…) experience with the implementation of the [Act] has shown that the relationship between provisions in the Act, and commercial fishing, aquaculture, including existing settlements, is not clear cut. (7-3-2, New Zealand Seafood Industry Council Ltd)

> A key issue to be considered (…) is the relationship between any regime that affirms customary rights in the foreshore and seabed and rights already granted under the fisheries and aquaculture settlements. (7-43-3, Te Ohu Kaimoana)

> Management tools for fishing and seafood gathering are provided for in [other legislation] (…). We do not believe that there needs to be any further duplication of these roles. (7-12-1, NZ Recreational Fishing Council)

The way forward

Generally, there was strong support for a comprehensive overview of the coastal management regime:

> We consider that this Act should be repealed and replaced with overarching maritime planning and resource legislation. Because customary rights should be accommodated as should the sustainable management and development and provision of a tenure infrastructure for this important maritime territory. (7-14-2, The New Zealand Institute of Surveyors)

> Providing effectively for tikanga will require a much more integrated framework for coastal management than exists currently. Perhaps something like the Oceans Policy process that appears to have been abandoned. (7-44-1, Te Ope Mana a Tai)

> (…) that a comprehensive review of management of the marine environment is undertaken to improve integrated management and co-ordination of decision makers to deliver improved environmental outcomes and efficiencies for users (…). (7-43-2, Treaty Tribes Coalition)

2.4.9 Structures, reclamations and leases

A number of port companies and district councils – with a range of opinions on the Act – were concerned that uncertainty surrounding the ownership of the foreshore and seabed would impede their commercial activities. Tauranga City Council (7-271-1) submitted that local authority land in the foreshore and seabed should not be vested in the Crown as public foreshore and seabed. The Council considered sections 13 and 14 of the Act create uncertainty as to the ownership of structures on the foreshore and seabed formerly owned by local authorities, and whether or how the councils can let or lease those structures:

> [Sections 13 and 14] provide that those parts of Council's structures below Mean High Water Springs vest in the Crown. There is uncertainty as to whether the Council is able to obtain leases or licences by seeking approval from the Crown itself, or from the Department of Conservation, or from the Regional Council. (7-271-1, Tauranga City Council)

On the operations of ports, another local authority stated:

> The Council believes that the current Foreshore and Seabed Act 2004 (…) is flawed, in that it has continued and exacerbated legal uncertainty regarding the rights and obligations of local authorities such as the Council (…). Where there is legal uncertainty about a local authority's rights and obligations in the foreshore and seabed, this creates risk for local authorities, as well as inhibiting any development of the area (…). The Council was unsure whether it now owned various port facilities that were now situated on public foreshore and seabed owned by the Crown. (7-179-1, Kevin Ross on behalf of the Wanganui District Council)

Saunders Unsworth, on behalf of the chief executive officers of 15 port companies, (7-99-1) expressed the view that uncertainty regarding the legal status of structures including boat ramps, marinas, moorings, pontoons, wharves and jetties, as well as ports needs to be resolved.

Reclamations

Several organisations articulated concerns over the uncertainty of the status of reclamations, a situation described by the Property Council New Zealand (7-9-1) as one of "incomprehensible confusion". Port companies submitted:

> The ability of port companies to manage their assets and maximise efficiency is compromised by the current law. New Zealanders benefit from efficient ports and we hope [for] a change in the law to permit the government to vest fee simple title for reclamations, which once completed are no longer foreshore and seabed. (7-99-1, Saunders Unsworth on behalf of the chief executive officers of 15 port companies)

2.4.10 The need for certainty

It was the government's intention in 2004 that the Act would provide certainty. For certain interests it did provide certainty, while for others it had the opposite effect.

Certainty created by the Act

Some organisations applauded the certainty provided for in the Act. For example, Federated Farmers of New Zealand (7-6-2) expressed the view that the Act "is important to Federated Farmers because it concerns property rights. Secure property rights are important to those who rely on land based resources to make their livings". Another submitter stated:

> The potential of the [offshore] ironsands [between Wanganui and Manukau Harbour] has been well understood in the international iron and sand industries for many years. However, it was not until the Foreshore and Seabed Act was passed that companies, including ours, had sufficient confidence that our investment and efforts would be protected under normal 'existing use rights' provisions. (7-112-1, Trans-Tasman Resources Ltd)

Uncertainty created by the Act

However, a majority of submissions from commercial sector groups expressed concerns that the Act introduced a great deal of uncertainty for commercial operations in the coastal marine area. Submissions from other groups and individuals drew attention to the uncertainty the Act created around Māori rights and new judicial procedures.

Uncertainty for commercial interests

Some commercial interests expressed the view that any recognition of Māori customary rights or ownership would exacerbate uncertainty for commercial ownership or operations over the foreshore and seabed:

> (…) recognition of claims for customary rights may in turn lead to unnecessary complications in existing legal procedures, and create significant uncertainty for persons operating in (or on the margins of) or occupying areas of the public foreshore and seabed. (7-205-1, The New Zealand Refining Company Ltd)

> PEPANZ supports the policy of providing certainty in relation to the status of the foreshore and seabed. If the Crown were to change the legal ownership of foreshore and seabed to satisfy Treaty claims and customary ownership interests, then those doing so need to be aware of the possible consequences on the petroleum exploration and production industry. (7-7-1, Petroleum Exploration and Production Association of New Zealand)

A few submitters suggested that certainty about rights and interests in the foreshore and seabed could best be achieved through a quick consultation process. For example, Connal Townsend, speaking on behalf of the Property Council New Zealand (7-9-1) explained that, from a banking and commercial point of view, there is no time in the present economic climate for the Crown to be giving confused messages about the matter, and a long consultation process may create anxiety and risk.

In contrast, the Human Rights Commission made the following observation:

> The Commission acknowledges that commercial interests need a degree of certainty in order to plan, forecast and generally go about their business. The Business Roundtable predicates this on ownership of private property, but this does not necessarily have to be the case. (7-16-3, Human Rights Commission)

Uncertainty for Māori

Several submitters considered that, by intervening in the judicial process after the *Ngāti Apa* decision, Parliament created uncertainty for Māori by passing the Act:

> Māori are rendered powerless through uncertainty whereas a Court-based process would give them a clear bargaining position based on the number and quality of recognisable rights. (7-145-1, Joan Hardiman on behalf of the New Zealand Dominican Sisters)

A number of submitters drew attention to legal uncertainty over customary rights even before the Act was in place:

> While we wish the Act had not been passed, going back to a position before the Act does not give us any certainty re the recognition of our customary rights and interests and we want certainty. (4-102-1, Margaret Kawharu on behalf of Ngāti Whātua ki Kaipara)

2.4.11 Jurisdictional issues

The Act provided a statutory mechanism for Māori to be granted new statutory rights by way of two new instruments, a customary rights order and territorial customary rights order. It did this, however, within the jurisdiction of the High Court, replacing that Court's former Native Title Common Law jurisdiction as far as that had application to the foreshore and seabed.[32] At the same time the Act excluded the foreshore and seabed from the Māori Land Court's ordinary jurisdiction under Te Ture Whenua Māori/Māori Land Act 1993. It thus cancelled the jurisdiction that the Court of Appeal in *Ngāti Apa* found the Māori Land Court to possess.[33] We discuss this further at 5.5.2.

Submissions on these matters focused in particular on the appropriate jurisdiction for recognising customary interests in the foreshore and seabed. A number of submitters stressed the fundamental importance of developing New Zealand jurisprudence on matters relevant to the foreshore and seabed.

Jurisdiction of Courts under the Act

Many submitters considered the judicial process for determining customary rights is constrained within the Act due to the imposition of "restrictions on the deliberations of the High Court or Māori Land Court" (7-14-2, The New Zealand Institute of Surveyors). Submissions on this general point included:

> The Foreshore and Seabed Act (…) takes a highly prescriptive and low-trust approach. By low trust I mean a very low trust in the jurisdiction of the High Court and the Māori Land Court, and the net result is that it presents Māori with very few options and very high transaction costs, out of all proportion to the remedies available under the Act. (4-22-1, Michael Doogan)

Māori Land Court

A significant number of submissions, however, expressed the view that the Māori Land Court is the appropriate forum for Māori wishing to seek recognition of their rights and interests in the foreshore and seabed. Many proposed enhancing its jurisdiction in these matters:

> I suggest that the Māori Land Court should continue to exercise current jurisdiction to determine title to customary land where title is sought. It may be appropriate to provide for additional members with tikanga expertise similar to s 33 Te Ture Whenua Māori. (4-59-2, Judge Heta Kenneth Hingston)

> An enhanced jurisdiction for the Māori Land Court would ensure that both public interests and customary rights are properly taken into account. The Land Court has a particularly strong and well-qualified bench and all members of the public should have confidence that the Land Court will exercise its judicial functions with care and will pay rigorous regard to evidence presented in Court. (7-27-1, Professor David V Williams)

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[32] Boast, Richard: *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) 121.

[33] Ibid, 122.

> Application [for customary orders] should in the first instance be made to the Māori Land Court but with a right of appeal by both applicants and objectors to the High Court. We suggest the Māori Land Court both because it preserves more of the effect of the *Ngāti Apa* decision and because it would in any case be drawn in on issues of tikanga and boundaries. (7-25-1, Hon Dr Michael Cullen on behalf of the New Zealand Labour Party)

> The Māori Land Court would investigate the customary status of that land and then could issue an order for its customary status, then you would have that under Te Ture Whenua Māori, and then the next step that you could transfer or convert that land, you would not then be able to do. So it will always remain customary land, therefore it's inalienable. It remains in the hands of that iwi and that hapū for mai rānō. (7-100-2, Metiria Tūrei on behalf of the Green Party of Aotearoa New Zealand)

Others submitted that a new body should assume some of the Māori Land Court's functions. For example, Tihi Anne Daisy Noble on behalf of hapū of Ngā Ruahine (2-1-1) submitted "that a new tribunal, properly resourced (…) should replace the Māori Land Court as the body for determining customary rights to the foreshore and seabed".

High Court

There was considerably less support for retention of the High Court jurisdiction on foreshore and seabed matters:

> (…) the High Court is not experienced in tikanga Māori (…) The Act in restricting the powers of the Māori Land Court wrongly places jurisdiction over tikanga Māori in the High Court. This is not the proper forum. (7-322-1, Ngāi Tahu Māori Law Centre)

Professor David V Williams (7-27-1) submitted "that the High Court jurisdictions need to be removed from any future legislation on customary rights" and the Māori Land Court jurisdiction enhanced.

Māori Appellate Court

Appeal from the Māori Land Court to the Māori Appellate Court, rather than appeal to the High Court, was the preferred option for some submitters:

> The Māori Land Court should be given more power in determining such issues relating to the foreshore and seabed, and furthermore, that the process exclude any intervention by the High Court, but instead use the Māori Appellate Court. (7-248-1, Friday Rountree on behalf of Ngapuhi ki Waitemata)

> Despite criticisms, appeals on customary rights orders are not made to the Māori Appellate Court, but straight to the High Court. This in itself raises the likelihood of significant additional costs for the recognition of customary rights. (4-152-2, Te Rūnanga-a-Iwi o Ngāti Kahu)

Other submitters suggested that if the Act were repealed, the Māori Appellate Court would play a key role in the judicial process during a transition period:

> We believe the Māori Land Court and the provisions of Te Ture Whenua Māori can apply in the transition and with the support of the Māori Appellate Court in that process, and that we can [then] look at drafting [new] legislation (…) (4-21-2, Te Atiawa ki te Upoko o te Ika a Māuī Pōtiki Trust)

> Following the repeal of this Act, application should be made to the Māori Land Court and if necessary its attendant Appellate recourse, to determine the ownership and/or control over the areas at issue. (7-108-1, Margaret Hunter on behalf of Ngawiki Trust)

> [After the repeal of the Act] I believe that "boundary" disputes between claimants to this land should be determined similar to the methodology in the Treaty of Waitangi Act; that is, application to the Chief Judge to direct the Māori Appellate Court to exercise jurisdiction with

> additional provision to include tikanga expertise similar to s 33 Te Ture Whenua Māori Act. (4-59-2, Judge Heta Kenneth Hingston)

Development of New Zealand jurisprudence

A number of submissions emphasised local jurisprudence on rights in the foreshore and seabed should be developed. (We discuss this further in Chapter 5.) Some made the point that the Māori Land Court's jurisprudence in relation to the foreshore and seabed was never sufficiently developed to enable the likely outcome of customary rights applications to be predicted:

> As a result of the 2004 Act no evidence has ever been heard by any Court as to the nature and extent of customary interests (…) all members of the public should have confidence that the Land Court will exercise its judicial functions with care and will pay rigorous regard to evidence presented in Court. (7-27-1, Professor David V Williams)

> We have an opportunity now to restore the opportunity for Māori to have their customary title investigated in the Courts, to look and develop jurisprudence on the issue that is relevant to our country and our country alone, as it should be, because we have a very different indigenous legal framework here in Aotearoa New Zealand, based on the Treaty and based on our own history, and that is the most appropriate means by which customary title should be determined. (7-100-2, Metiria Tūrei on behalf of the Green Party Aotearoa New Zealand)

> The new statutory tests given to the Māori Land Court and the High Court in the Foreshore and Seabed [Act] appear to be based on an opinion of how the Courts might apply Common Law principles in New Zealand. They draw heavily on overseas examples (…). By vesting full legal and beneficial ownership of the foreshore and seabed, we are missing an opportunity for our Courts to develop jurisprudence on customary rights and tikanga, based on our unique circumstances and history. (7-45-1, Te Ohu Kaimoana)

> The Privy Council has (…) confirmed that there is 'a body of law called native custom' in New Zealand that could develop and evolve over time.[34] (7-16-3, Human Rights Commission)

In contrast, some submitters took the view that tests should be codified rather than being tested in a drawn-out Court process. For example:

> (…) statutory codification of the Common Law tests should be retained subject to the Panel making any suggestions for change. To wait upon protracted legal arguments developing a New Zealand jurisprudence in this respect would defeat the purpose of what many are seeking: both certainty and equity. (7-25-1, Hon Dr Michael Cullen on behalf of the New Zealand Labour Party)

2.4.12 Legal procedures, thresholds and costs

A large number of submissions were received on the issue of the thresholds in the Act, in particular that for proving territorial customary rights. Many of these submissions made similar comments and most essentially rejected the thresholds. We set out below some of the reasons given by submitters for rejecting the thresholds in the Act.

Inappropriate for Court to determine tikanga

Some submitters expressed reservations over the involvement of the Courts in determining customary rights. Some of these submitters stated that it is not for a Court to determine tikanga. For example:

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[34] Citing Justice Williams (2000) cited in Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Huia, Auckland, 2003) 131.

> We disagree going to the [Māori Land Court] or any other court to carry out our traditional and customary practices (…). No court should be allowed to determine what activities occur within the customary area (…) there shouldn't be a court order. There were only mana whenua rights that were guaranteed under Te Titiri. (4-116-2, John Morgan, on behalf of Ngāti Rarua Iwi Trust)]

Failure to reflect Māori customary interests

A key theme of Māori submissions is that the thresholds do not reflect the nature of Māori customary interests in the foreshore and seabed:

> The statutory tests to have customary rights or territorial customary rights recognised are inconsistent with Māori customary law, are expensive, unobtainable and provide nothing of substantive benefit for those holding customary rights. (7-302-1, Aotearoa Indigenous Rights Charitable Trust)

> The applicant in a territorial customary rights order case must, in filing their application, state that 'but for the passing of [the Act]' they would have held customary rights over the foreshore and seabed in their respective area. The employment of the 'but for' expression requires the applicant to concede at the outset of the application that the Act displaced their rights. [We find] this abhorrent. (7-310-1, Te Hunga Roia Māori o Aotearoa/The Māori Law Society Inc)

> (…) the test of exclusivity is not practicable in Māori terms because of the practise [sic] of arranged intermarriage (…). We consider the [continuous–contiguous] threshold is not appropriate on the basis that although we sold some of the contiguous land, this did not affect our overall mana, control of access, and our use. (1-6-2, Ngāti Porou ki Hauraki Trust)

> The grounds for an order that a group would have held territorial customary rights are almost impossible to meet and the redress limited to either the creation of a reserve or the uncertainty of negotiations. (7-237-1, Karen Beazley on behalf of Te Rūnanga o Ngāti Whātua)

Inappropriateness of overseas jurisprudence in the New Zealand context

Many legally trained submitters expressed the view that the statutory thresholds (among other aspects of the legislation) demonstrated the inappropriateness of importing foreign jurisprudence into New Zealand law. For example:

> The territorial customary rights orders test illustrates the danger of importing foreign jurisprudence into Aotearoa/New Zealand without careful thought. The use of Canadian and Australian jurisprudence for the source of Common Law tests without the exploration of our own indigenous common law is a flawed approach to lawmaking. (7-310-1, Te Hunga Roia Māori o Aotearoa/The Māori Law Society Inc)

> (…) the adoption of the Australian developed threshold of 'substantially uninterrupted' is too high a threshold (…). In the drafting of the 2004 Act, inadequate consideration was given to alternative (Common Law) tests, for example the Canadian jurisdiction which uses 'continual use' or 'reasonable degree' of continuity. (7-100-3, Metiria Tūrei on behalf of the Green Party of Aotearoa New Zealand)

Inappropriateness and unfairness of the thresholds

Many submitters regarded the specific thresholds in the Act as being too difficult to meet, onerous to demonstrate, and unfair because they do not take into account the Crown's historical role in the alienation of land contiguous to the foreshore and seabed. The implications of raupatu are of very particular significance, as those peoples whose lands were subject to raupatu have been deprived of the very possibility of maintaining what they are now required to prove under thresholds in the Act, that is, contiguous title to and control over that land:

> In Taranaki we are further lumbered with the burden of raupatu and all the disadvantages that flow from that (…) we would just fail the most fundamental test ascribed to customary titles and practices. The most obvious is (…) we can't prove continuous occupation and use. You know raupatu put paid to that (…). So, at the very least, whatever the Crown does, raupatu iwi ought not to be further marginalised by prior unconscionable Crown legislation. (4-136-1, Greg White on behalf of Te Rūnanga o Ngāti Tama and Ngāti Mutunga)

> (…) the Crown has set an extremely high threshold for securing a territorial customary rights order (…) this immediately raises issues for Ngāti Awa. On the face of it, these tests for us would be very difficult to satisfy. There have been reasonably extensive use of the foreshore and seabed between Waitahanui and Ohine Harbour by non-Ngati Awa people since 1800, and by non-Ngati Awa people I mean ngā Pākēha, local bodies, and of course other people who lay claim to our area. To further complicate matters (…) Ngāti Awa, along with Whakatōhea and others, lost a vast majority of its coastal lands through the confiscations of 1866, awards to other tribes by the Native Land Court outside the confiscation area and subsequent alienations resulting from individualisation of titles. In short, Mr Chairman, the threshold that has been set by the Crown works against all the iwi that suffered under the confiscations. (4-48-1, Hohepa Mason)

> We do not think the threshold in section 50(1) is appropriate for customary land. Because it does not accommodate forced interruptions to the exercise of customary rights through circumstances (often official) beyond the control of the people concerned. (7-14-2, The New Zealand Institute of Surveyors)

> While some iwi have been able to engage in negotiations about their customary rights to certain foreshore and seabed areas, it is unlikely that this process can ever offer full justice to all iwi. Many areas were subject to confiscation and were unjustly alienated from their traditional iwi guardians in past colonial times. (7-49-1, Maire Leadbeater)

> The two tests set in the Act for recognising customary property rights are set too high (…). It is absurd that neither test takes any account of the fact that the Crown unfairly confiscated the land of many hapū and iwi in the 1800s. Neither does it account for domestic migration trends in the 1900s, which are not to be interpreted as acquiescence to the confiscation of customary lands. Furthermore, Taumutu submits that separating TRO and customary rights order in the manner undertaken by the Act separates and reduces our relationship with our whenua and does not allow us to give effect to our kaitiakitanga responsibilities. (7-213-1, Waiatarangi Williams on behalf of Te Taumutu Rūnanga Society Inc)

A number of submitters who commented on the thresholds regard them as being virtually impossible to meet, as a direct consequence of the history of colonisation:

> We have always said that it is unjustifiable in a colonised country such as our own (…) to require [proof of] exclusive use and occupation (…). It was never a practical option for the test. And not only that, but the legislation goes on to additionally require contiguous title to that land. (7-100-2, Metiria Tūrei on behalf of the Green Party of Aotearoa New Zealand)

> I do not think the tests in the Act, ss 32 and 50, are appropriate. They are far too severe. There can be no objection to Parliament's adopting the 1840 rule (…). McNeil[35] draws attention to the far more equitable rule that (adapted to New Zealand) would require proof of continued occupation and use only when present occupation or use is relied on as evidence of the 1840

[35] Kent McNeil "Legal Rights and Legislative Wrongs: Māori Claims to the Foreshore and Seabed" in Andrew Erueti and Claire Charters (eds) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (VUW Press, Wellington, 2007) 107-115.

> position. Revised legislation should adopt (mutatis mutandis) the Canadian threshold. (3-1-3, Emeritus Professor F M [Jock] Brookfield)

Urban Māori spoke of their unique disadvantage in the wake of a history of urban migration and development:

> Ngāti Whātua o Ōrākei, and for that matter many other hapū whose rohe is entirely urban, have been almost uniquely disadvantaged, we believe, by law in regard to the foreshore and seabed. On our rohe has been superimposed, of course, an urban environment. We have, for over 150 years, faced an environment with ever-decreasing scope to access our mana in regard to the foreshore and seabed. (4-97-1, Merata Kawharu and Don Wackrow on behalf of the Ngāti Whātua Ōrākei Māori Trust Board)

Tikanga Māori test

A number of submitters considered that the thresholds should take into account a group's spiritual and cultural association with the area. Several suggested that the legal threshold for determining territorial customary rights should be a "tikanga Māori" test based on the threshold for Māori customary land status as set out in Te Ture Whenua Māori/ Māori Land Act 1993 which refers to land "held in accordance with tikanga Māori":

> The legal tests for recognising Māori rights should be based solely on tikanga Māori. If, under tikanga Māori hapū, whanau and iwi possess rights, then statutory law should give effect to those rights. (7-200-1, Suzanne Ellison on behalf of Kati Huirapa Rūnaka ki Puketeraki)

> (…) the test for a territorial customary right under s 32 should be modified to better recognise the intent and spirit of the *Ngāti Apa* decision, which would have given greater weight to tikanga Māori in determining the recognition of a customary title or Aboriginal Title. (7-242-1, Dr Kenneth Palmer)

Recognition of non-Māori customary rights

Several submitters objected to the provisions in the Act that enable non-Māori to seek recognition of customary activities in the High Court. Emeritus Professor F M (Jock) Brookfield (3-3-1) submitted that "the provisions actually create rights where non [sic] existed before". Others stated:

> I do not believe that other groups of New Zealanders should be able to apply for a particular usage that they have more recently developed while Māori have had to wait this long for recognition of their customary practices. (7-257-1, Marie Tautari)

> Ōraka Aparima Rūnaka recognises that non-Māori have deep associations with the marine environment and supports these associations being respected. However the recognition of the ability for groups who do not have existing rights should be by agreement between the Crown and iwi as to a process for considering how those interests could be recognised. (7-272-1, Ōraka Aparima Rūnaka Inc)

> [We recommend] removal of non-customary customary rights order applications as this is a legally nonsensical jurisdiction to enable Pākehā to apply for customary rights in the High Court. It has no legal basis as Pākehā either took rights from Māori pre 1840 (customary rights) or from the Crown after 1840. (7-140-1, Ngaitai Iwi Authority)

> The idea that non-Māori might have customary rights is a legal nonsense and provisions in our law premised on such an idea are an embarrassment. (7-44-3, Te Ope Mana a Tai)

A small minority had no issue with the concept of allowing non-Māori groups to make application for recognition of activities, uses and practices in the coastal marine area. For example:

> There are probably not a great many examples, but I am aware of families such as [one] at Kakapo Bay and [one] at D'Urville Island who have had uninterrupted occupation of land and foreshore since the 1830s. (7-162-1, Richard Drake)

Some support for thresholds in the Act

Some, however, supported the legal thresholds for a customary rights order and the consequences of such an order being in place:

> I agree that applications should be allowed to the Court for recognition. That should not mean that an application has to be made to the Court (…). I think the tests are partly appropriate but (…) the right exists and should only need an order to confirm it – not to confer it (…). The customary rights are complex and sometimes difficult to define. The order can only confirm rights that exist and may only define them in part. [emphasis in original] (7-162-1, Richard Drake)

The costs to Māori

The majority of submitters on the matter of legal thresholds and procedures emphasised the heavy and disproportionate burden – financial and otherwise – the Act places on Māori, by requiring them to make application to the Courts and meet the thresholds for customary rights orders and territorial customary rights orders to be granted:

> To require a Treaty partner with pre-existing rights to go through an extensive judicial process in order to prove the other [partner] wrongfully abrogated their rights with the eventual outcome to be allowed to sit down and negotiate an agreement with the government seems to be an extraordinary waste of time, energy and resources, not to mention a clear breach of the Treaty relationship. (7-320-1, Dayle Lianne Takitimu on behalf o Te Rūnanga o te Whānau)

> Ngāti Hikairo oppose the painful, demeaning process of having to prove our claim to the foreshore and seabed. (7-223-1, Frank Thorne on behalf of Ngāti Hikairo)

> Looking at the current Act (…) any cost–benefit analysis that one would do to secure such things as a customary rights order would clearly say that the cost for Māori would far outweigh any benefit. The effort, the cost for instance, to get access to hāngi stones off the beach, if you've ever used those, is really a complete nonsense and, you know, the process is just overly difficult. The thresholds are overly high, you know, to the point where this really doesn't make a lot of sense. And this is clear because, as yet, not one customary rights order has been granted under the Act since 2004. (4-21-1, Te Atiawa ki te Upoko o te Ika a Maui Trust)

> Funding needs to be provided for whanau, hapū and iwi groups to undertake the necessary research to apply for these orders successfully. (7-304-1, Anne-Marie Jackson)

> I am concerned that, having fulfilled impossibly high statutory thresholds, a group that is successful in obtaining a customary rights order or territorial customary rights order in their favour is entitled to nothing more than the ability to sit down and talk with the government over appropriate recognition and redress. This is arguably a right hapū and iwi already have protected by the Treaty relationship. (7-320-1, Dayle Lianne Takitimu on behalf o Te Rūnanga o te Whānau)

The onus of proof

There is a clear call for the onus of proof to be reversed. Many submitted that the onus must rest on the Crown to prove that Māori customary rights have been extinguished, or that the foreshore and/or seabed was taken legitimately:

> The onus is on tangata whenua to prove they have a customary right. I think it should be the other way around. The onus should be on the Crown to prove that tangata whenua don't have the customary rights. (4-7-1, Aaron Leith on behalf of Awarua Rūnanga and the Wybrough whānau)

> Why [do] Māori [have] to justify their ownership of their taonga by giving their whakapapa tapu. The Crown should be justifying their wrongs. (7-52-1, Hone Peita on behalf of Waipuna Marae)

> We do act within the realms of 2009, living in New Zealand, and that is law, legislation. But that legislation needs to be sound. Of course it needs to include due process, but I wish to make the point that surely the onus is not on us to continually to have to justify who we are to the Crown, which I believe is what they tried to do in the Foreshore and Seabed Act. (4-13-1, Te Marino Lenihan on behalf of the Reuben family of Tuahiwi)

> (…) Māori must prove ownership. It should be the Crown that has to do this. As the Waitangi Tribunal stated in 2004, when considering the government's policy, 'a government whose intention was to give full expression to Māori rights under the Treaty would recognise that where Māori did not give up ownership of the foreshore and seabed, they should now be confirmed as its owners'. (5-56-1, Joan MacDonald on behalf of the Women's International League for Peace and Freedom)

2.4.13 The pathway towards resolution

A large body of submissions proposed moving towards resolution of the ongoing issue of the foreshore and seabed. Many welcomed this Review as the first step of a process which potentially offers a real opportunity to improve on the Act:

> We urge this inquiry to be innovative in its response to its Terms of Reference (…). (4-44-1, Jimi McLean on behalf of Ngāti Makino)

The New Zealand Business Roundtable (7-2-1) was among the majority of submitters who called for repeal of the Act and recognition of all rights holders in the foreshore and seabed. It cautioned against the issue becoming a "running sore" for years to come. Most submitters appear conscious of this in their quest for a just, ethical and equitable result based on mutual respect and accommodation:

> (…) if there [were] informed and considered discussions (…) between Māori and Pākehā then [a] consensus would be feasible (…). What is important is finding the right solution for all New Zealanders, not a hasty solution as was the case in 2004. (7-283-1, Christchurch City Council)

We have heard a broad range of pragmatic options for action which balance the interdependent rights and obligations of diverse rights holders. Most of these submissions are notable for being infused with good faith and underpinned by sentiments of inclusion, mutuality and justice:

> Set it right, what's good for Māori is good for the country. (4-13-1, Marino Lenihan on behalf of the Reuben family of Tuahiwi)

> We hope the government's decision in finding a way forward is both just and mana enhancing for all of Aotearoa New Zealand. (7-101-1, Josephite Justice Network of the Sisters of St Joseph Aotearoa New Zealand)

Many of the submissions quoted in earlier sections of this chapter proposed a way forward, and they have made a useful contribution to the conclusions and advice we offer later in this report. From the overall body of submissions which proposed and recommended the pathway ahead, several seminal issues emerged (which we explore in 4.2 and Chapter 7).

The first is the need for a longer conversation:

> (…) [we propose] that another substantial, in-depth nation-wide consultation and dialogue take place [after this review], paying full attention to all voices (…). (7-96-1, Jean Brookes on behalf of Auckland Anglican Social Justice)

> (…) the government needs to be prepared for a lengthy process, and a process that results in different arrangements for different groups. A 'one-size-fits-all' approach is not likely to be appropriate or enduring. (7-310-1, Te Hunga Roia Māori o Aotearoa/The New Zealand Māori Law Society Inc)

The second is a need for a working partnership between the Crown and Māori that is equal, sincere, constructive and transparent, in which the parties talk with, rather than past, each other:

> Arrangements already exist where Māori and the Crown co-operate in real models of partnership (…). I wish to see new or existing models of partnership between the Crown and Māori explored and established. (7-154-1, Barbara Mountier)

> Good process is crucial in establishing a constructive way forward. (7-249-1, Palmerston North Women's Health Collective)

The third is the absolute necessity of actively working towards mutual understanding and the reconciliation of cultural differences:

> The government has a responsibility (…) to use its position to educate and inform the public as a platform for dialogue between all New Zealanders on rights and responsibilities in relation to both the foreshore and seabed and Māori. (7-16-3, Human Rights Commission)

Chapter 3 What of different world views?

3.1 Introduction

Behind the public division over the Foreshore and Seabed Act 2004 (the Act), are two strikingly different views about property and access. For many Māori, as the consultation rounds showed, the coastal marine area is a private pātaka kai (food storehouse). For many Pākehā, it is a public playground and a national, commercial resource. Underlying these views are fundamental, cultural differences.

The question is not which culture is best. Each is suited to its own society. For a State like ours, founded upon two cultures, the question is not which is right but how both can be respected. Just as that was a key issue for Māori and Pākehā at the time of the Treaty of Waitangi, so too is it a critical issue in the current foreshore and seabed debate.

Equally, there are two legal systems at play, one represented in tikanga Māori, the other derived from English Common Law. Again, the question is not whose law should prevail. The question is whether both laws can be accommodated in a bicultural legal regime.

To begin the search for an accommodating paradigm, this chapter describes the two world views. It is done in general terms, given the need for an early response, but our proposals leave room for closer research in time, should that be required. The purpose is to start the development of better cross-cultural understandings.

3.2 Distinctive world views

The fish and fowl of the sea, like those of the rivers, lakes and swamps, undoubtedly provided the primary food resource for the New Zealand hapū. As a result, the natural features of the coastline, from secluded inlets and exposed beaches to the open seas (with all the associated islands, reefs, rocks and fishing grounds), were subject to an array of use rights, each invariably the "property" of specified whānau and hapū, and with different groups having different use rights in the same resource. Some usages however were the property of larger iwi groups. The Waitangi Tribunal detailed one such case relating to shark fishing in the Rangaunu Harbour of the Far North.[36]

The development of a complex lattice of rights running the full length of many tribal coastlines, extending from there to the high seas, was unsurprising. Such detailed rights are a feature of Pacific tenures. Today, many traditional use rights are protected in the constitutions of Pacific states.[37] We comment further on this in 5.6.

In addition however, when Māori came to New Zealand there were no indigenous animals and no plants that could be cropped. This was despite the fact that these islands were much larger than those they inhabited before. Fern root was plentiful and there were several berry varieties, but there were not the large, plantation trees and variety of crops that had grown in the home country. Once more, the focus was on the water resources, rather than the vast tracts of land, and there was a particular focus on the coast, even for hapū resident inland.

Indeed, the complexity of use rights in the sea zone probably exceeded the complexity of land rights. This was especially so since use rights in the coastal marine area, unlike those on land, were not restricted to local communities but frequently included distant hapū of the far flung interiors. Again, the Waitangi Tribunal has given examples, such as hapū from the remote, volcanic plateau fishing at the Whānganui river mouth, and of hapū from Urewera and Rotorua fishing at Ohiwa Harbour and Maketu, respectively.[38]

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[36] Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (The Tribunal, Wellington, 1988) 68–74.

[37] David V Williams "Indigenous customary rights and the constitution of Aotearoa New Zealand" in *Waikato Law Review*, Vol 14, 2006, 121.

[38] Waitangi Tribunal *Whānganui River Report* (Wai 167) (GP Publications, Wellington, 1999) 32-33; Waitangi Tribunal *Ngāti Awa Raupatu Report* (Legislation Direct, Wellington, 1999) 134; Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (The Tribunal, Wellington, 1988) 39, 68.

When turning to the system of land ownership introduced by Pākehā, one is reminded again how property laws are not universal truths but are cultural constructs, with rules that maintain particular, political ideologies. Māori focused on rights of access to specific, natural resources, rather than on the ownership of defined land parcels. Those natural resources were held by groups and the use of them was conditional on contribution to the wider, tribal community.[39] The English system is at the other extreme. It may be seen to reflect a shift from feudal communism to a system of private capitalism. This is most demonstrated by the progressive enclosure of lands over a period of at least 300 years. Under the English system, all the resources in a given area of land vested in individual owners, most often, a single person. Those land areas, or parcels, were held free of the former, feudal obligations to contribute to a community. They were held under the most liberal form of fealty known to feudal times – fee simple.

More remarkable, in comparison with the Māori circumstance, was the attention given to the development of dry land. No doubt this was due to the English capacity to husband the much larger variety of animals and crops to which they had recourse. It was also probably due to a much longer history of access to building stone and minerals.

Accordingly, when Pākehā came to this country, they did so with a view to taking, apportioning and farming the land, and to holding it according to defined parcels in individual ownership. There was no comparable attempt to capture sea rights. The sea was simply a means of getting here and of then getting about.

This comparative disinterest in the seas, and in other water regimes such as rivers and lakes, is reflected in the construction of new towns. Several, like Lower Hutt, Palmerston North and Hamilton, were so built that one could walk the main street unaware of a major river nearby. Māori kāinga, on the other hand, tended to be built around water regimes. For example, of the 32 marae in the Rotorua catchment the vast majority border lakes.

Similarly, the foreshores of harbour cities were lined with wharfs, warehouses and factories, generally serving land-based industries. It is only in recent decades that some cities have opened up wharf areas for the general public benefit and have developed extensive promenades or walkways along foreshores and riverbanks.

The sea was also used to despatch waste from freezing works, tanneries and other industries. Until the 1980s, there were a number of ocean outfalls disposing of raw sewage. Māori, on the other hand, disposed of waste to dry land, to avoid spiritual contamination.[40]

According to the Waitangi Tribunal, Māori were the predominant catchers of fish until the late 1870s, and in many parts of New Zealand at that time they were still predominantly reliant on fish for their food. From the 1880s Māori increasingly turned to farming. Even so, those who lived near suitable water regimes tended to be both farmers and fishers.[41]

Indeed, there was probably no major, national fishing industry until the introduction of trawlers in the early 20th century; and arguably, there was no intensive fishing industry until the introduction of the quota management system in the 1980s.[42]

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[39] E T Durie "Custom Law" (unpublished paper, 1994) 68. See also I H Kawharu *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) 59.

[40] See for example Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui–Waitara Claim* (Wai 6) (2 ed, The Tribunal, 1989) 8; Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8)) (2 ed, The Tribunal, 1989) 57.

[41] Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (The Tribunal, Wellington, 1988) chapters 4, 5.

[42] Ibid, chapters 6, 8.

3.3 Conflicting world views

The Waitangi Tribunal has described how, from early times, Māori and Pākehā conflicted over the taking of seafood.[43] In the 1980s the Tribunal also witnessed (and recorded) Māori anger over the despoliation of coastlines by industrial and domestic waste discharges.[44] However, in the context of the current foreshore and seabed debate, we are mainly concerned with the conceptual conflicts for example, that expressed in our earlier epigram, that that which is a pātaka kai for Māori is a playground for Pākehā.

To appreciate Māori concepts of sea rights it is necessary to have some understanding of the comprehensive, spiritual order that is seen to govern the use of all resources. For example, it is not enough to consider that one can give effect to Māori sea interests by reserving fishing areas for Māori communities in the way that some tidal flats were granted for private fishing purposes in England. As the Privy Council said as early as 1921:[45]

> (…) in interpreting the native title to land (…) much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.

The spiritual order assumes that Māori will maintain an interest in the overall management of natural resources according to a traditional, environmental ethic. The spiritual and mental concepts of Māori constitute a code of conduct to enforce respect for the natural world. This lies at the heart of tikanga Māori.

To describe tikanga Māori would also require a major work. We can only illustrate its essence. Experts in the area have described tikanga as "doing things the right way, and doing things for the right reasons"[46]. The Tribunal has considered:[47]

> [Tikanga] derives from the very detailed knowledge gained from residing in a particular 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.

With regard to natural resources the Tribunal has described tikanga Māori as representing the collective wisdom of generations of people whose existence depended upon their perception and observation of nature.[48]

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[43] See, for example, Ibid. chapters 4, 5.

[44] Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui–Waitara Claim* (Wai 6) (2 ed, The Tribunal, 1989); Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8)) (2 ed, The Tribunal, 1989); Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4) (2 ed, The Tribunal, 1989).

[45] *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399, 402 – 403. See also *Oyekau v Adele* [1957] 2 All ER 785.

[46] Tui Adams and others "Te Matapunenga: A Compendium of References to Concepts of Māori Customary Law" in *Te Matahauariki Institute Occasional Paper Series* (University of Waikato 2003) no. 8, 32.

[47] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy:* Wai 1071 (Legislation Direct, Wellington, 2004) 2, quoting from evidence of Document A30 Margaret Mutu, para 43.

[48] Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui–Waitara Claim* (Wai 6) (2 ed, The Tribunal, 1989), 7.3.

Tikanga views rivers, lakes and the coast as a single life-force, not something divided to water, beds, and banks. There is no division between the land and the sea or between the land and a river or lake. Such a merging of land and sea is not unique to Māori. It is similar, for instance, to the traditional land division of "ahupua'a" in the Hawaiian islands, which can extend from a mountain peak to a reef offshore. The ahupua'a represents "the exclusive tribal land and sea domains of the various groups, [including] deep sea fishing grounds beyond the reef."[49]

Alan Ward, who has written on Māori and Pākehā history and has worked on the national recognition of customary tenures in New Guinea, has observed the same:[50]

> For Māori, there was no distinction between the ownership of land, the possession of inland fishing sites, and the control of foreshore areas. These were all forms of tribal property, governed by customary practices. It was the Pākehā who drew a distinction between the ownership of land (…) and the ownership of the foreshore.

Most of the material we have seen points to a code of conduct based upon respect, deference and humility towards the natural order. The same code seeks to govern relationships between people. It is a values-based scheme promoting in all things, balance (or reciprocity), harmony, respect, sharing and nurturing.

This is a fundamentally different perspective from European traditions that see "man" as having power and authority to control, manage and exploit the environment, even if for the common good.

A superficial appreciation of the different values involved is enough to warn of the room for conflict. A deeper appreciation discloses why, so often, Māori are offended by the way non-Māori behave on the foreshore or at sea – cavorting, gutting fish, creating waste or intruding on areas that have been reserved for special use for several centuries.

There is another concept fraught with the potential for conflict. In Māori tradition, hapū and iwi also asserted mana or authority over coastal marine territories and presumed the right to control and exclude others. Today, the terms "mana whenua" and "mana moana" serve to capture this concept. The practical assertion of such political authority was probably more realistic in enclosed waters like harbours, inlets, sounds or lagoons but could equally apply to seas beyond the horizon or to sparsely populated areas.

There is no doubt that Māori presumed to "own" the sea. For example, the issue arose during the "First Māori Parliament" summoned by Governor Grey in 1879.[51] The Ōrākei leader, Āpihai Te Kawau responded:

> It was only the land that I gave over to the Pākehās. The sea I never gave and therefore the sea belongs to me.

This was a standard view amongst Māori leaders. In various reports the Waitangi Tribunal has recorded how Māori charged or sought to charge dues for European vessels entering "their" harbours, as in the Bay of Islands and at Kawhia.[52] And at the "Parliament" of 1879, several tribal representatives complained that the Queen was now collecting "the payment from vessels anchoring".

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[49] Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (The Tribunal, Wellington, 1988) 189. African and Native American indigenous peoples share a similar world view of unification between people and the living world, see Te Ahukaramu Charles Royal, "Indigenous Worldviews: A Comparative Study. A Report on Research in Progress" (Te Wānanga-o-Raukawa, version prepared, 21 February 2002) 25.

[50] A Ward *National Overview: Volume 2* (Waitangi Tribunal Rangahaua Whānui Series, Waitangi Tribunal, Wellington,1997) 338.

[51] *AJHR* 1879 Sess II G-8 cited in Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (The Tribunal, Wellington, 1988) 89.

[52] For example, Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (The Tribunal, Wellington, 1988) 59.

The position was no different with regard to the foreshore where leaders complained, for example, of "Europeans taking the fisheries where the flounders were caught and stealing my mussels", or of going over beds "without our permission". Āpihai Te Kawau saw the pipis and fish in his district as "my goods".

Similarly, the "ownership" of stranded whales depended upon the part of the foreshore where they landed, and much to the consternation of early whalers and explorers, a dinghy left unattended on the foreshore, even for as little as half a day, was seen to pass to the ownership of the associated hapū.

There was conflict from the outset, therefore, between the right of the Governor in Article 1 of the Treaty in relation to the seas, and the right of rangatira in Article 2.

From an introduction into the Māori world, and putting together the Māori conception of use rights, the spiritual underpinning for those rights and the political comprehension of mana, or control over the foreshore and the seas, one comes to appreciate why several Māori saw a certain political billboard, responding to the *Ngāti Apa* case, as deeply offensive. The billboard which asked who owns the beaches, "iwi or kiwi", was seen as showing an ongoing ignorance of cultural difference, demonstrating a refusal to take issues of cultural conflict seriously.

3.4 Changing world views

It ought not to be forgotten that the general public perception of the beaches as a public recreation ground is comparatively new. The Pākehā world view has changed.

We have already considered how the initial focus of the colonisers was on the land. Popular pictorial publications, like *New Zealand Yesterdays* suggest that our attraction to the beaches, or the "seaside" as it was called at the time, did not begin in earnest until the 20th century, after the popularisation of the image of God's Own Country by the former Premier, Richard Seddon.[53] The popular photographs of the *Auckland Weekly News*, which circulated from 1863 to 1971, show an increasing use of the sea for recreational bathing from the 1920s but, arguably, the concept of free access to the county's beaches, rivers and lakes, as the birthright of all New Zealanders, was not entrenched in the national psyche until the late 1940s, when there were better roads, more people owned cars and petrol was cheaper than before.

With this change of focus came the myth of the Queen's Chain, as some sacred, legal tenet conferring a right of access for all along river banks, foreshores and lake edges. In fact there never was such a legal doctrine.[54] The law on the establishment of the colony, which was still the law in 2004, conferred only a right of navigation and of fishery in the coastal waters. As we explain in Chapter 5, the Common Law's recognition of public rights in relation to the coastal marine area is considerably out of keeping with the popular perception of a New Zealander's inherent rights.

But all cultures change. It is plain today that the image of open beaches is now part of the culture that defines our national character and which makes us who we are. It must then be forcefully observed that, notwithstanding the development of this new cultural ethic, it is not an excuse for denying customary rights. In law, customary rights are as good as any other private, property right.

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[53] *New Zealand Yesterdays*, 2001, David Bateman Ltd, original text by Hamish Keith.

[54] Waitangi Tribunal *Whānganui River Report* (Wai 167) (GP Publications, Wellington, 1999) 22; Boast, Richard: *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) 6, 35.

3.5 Cultural reconciliation

The critical question then is whether there is room to ameliorate and accommodate both views within an alternative legal framework that does justice to all. Alternative frameworks are considered in the next chapter. However, from the previous discussion we are conscious of two caveats.

The first is that that which Māori possessed was not just a world view. As a matter of international human rights law it is also a property right so that, within reasonable limits, it must be protected.

The second is that in considering reasonable limits, we should have regard to the overarching objective of the Treaty of Waitangi to secure a place for two peoples, and from whose distinctive traditions, one might hope, a unique national culture will emerge. We discerned the germ of a common culture during the consultation hui, from the predominant number of Māori who expressed their desire to preserve Pākehā access to the foreshore and seabed, along with their own access to their traditional sites.

Chapter 4 Finding an accommodating framework

This chapter considers the frameworks which appear to inform people's perspectives on the issue and underpin the positions they take. We then propose an alternative, composite framework to work towards resolution of the foreshore and seabed issue.

4.1 Existing frameworks of analysis

While all those whom we spoke to would claim to subscribe to the fundamental democratic values of fairness and justice, the different perspectives that individuals have by which they determine understanding and analysis can result in people "talking past each other".[55]

We consider the use of terms like "all New Zealanders" much less constructive than seeking to understand the different perspectives that are held.

The majority of submitters framed the issue of the foreshore and seabed around key interests and perspectives, such as:

- the Treaty of Waitangi
- human rights
- property rights
- environmental sustainability
- economics and commerce.

We examine these perspectives, using the words of submitters, to illustrate the complexity of the foreshore and seabed issue and the potential for common ground to work towards resolving the issue.

4.1.1 Treaty of Waitangi framework

> Whakakorengia te ture, whakamanahia te Tiriti o Waitangi. (4-68-1, Lou Tangaere)

Many submitters to this review considered the issue of foreshore and seabed with specific reference to the Treaty of Waitangi. This is not surprising given that the Treaty is widely seen as the founding document of New Zealand, even in the absence of a written constitution. The Treaty continues to be invoked by both Māori and non-Māori as the seminal declaration of the co-existence of two peoples on the basis of mutual respect and accommodation.

A Treaty of Waitangi perspective involves adhering to the spirit and intent of its three articles, and the principles derived from those articles: partnership between the Crown and iwi; participation of both parties; and active protection of Māori interests by the Crown.

The Law Commission advised in 2001 that "the recognition of distinct cultural communities does not preclude the existence of a collective national identity."[56] This is precisely why it would be simplistic and ultimately futile to attempt to resolve the foreshore and seabed issue by compartmentalising Māori customary rights within a western paradigm. As one submitter to this review stated:

> A new framework would (…) create space for honest dialogue (…) The reality is most hapū and iwi would sit down with the Crown to discuss a mutually agreeable outcome (…) The Government do not need to redefine us, manage us, mandate us or require us to morph into some other being. They need to accept us as we are; as hapū, as Treaty partners. (1-3-2, Te Rūnanga o Te Whanau)

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[55] Joan Metge and Patricia Kinloch *Talking past each other: Problems of cross-cultural communication* (Victoria University Press, Wellington, 1978).

[56] New Zealand Law Commission "Māori Custom and Values in New Zealand Law Study Paper 9" (NZLC SP9, Wellington, 2001) 5.

It is a matter of particular concern to the Panel that many submitters considered the Foreshore and Seabed Act 2004 (the Act) to be the most serious breach of the Treaty that has ever been perpetrated (see 2.4.1).

Treaty principles

The Treaty principles – particularly those of partnership, reciprocity and active protection[57] – provide crucial building blocks for framing the way forward, based on mutual respect, justice, fairness, equity and sustainability. We consider that the Treaty principles must be invoked to guide future action if there is to be a fundamental level of trust between the Crown and Māori. We agree with the Waitangi Tribunal's earlier statement that the Treaty's fundamental recognition of diversity can be capitalised upon as "a positive way of improving our individual and collective performance".[58]

The previous government's analysis of the public submissions on the original legislation noted that "The vast majority of Māori, and some non-Māori, perceived the proposals as constituting a significant breach of the Treaty of Waitangi".[59] In the crucible of debate around the proposed legislation, commentator Tom Bennion signalled the wider significance of the Treaty framework:[60]

> The current debate is unfinished business of a hugely symbolic kind. The sea beach, the first meeting place of settlers and Māori, remains one of the final places where the Treaty relationship is being sorted out. In 2004 the country is being sent back to 1840 to reconsider its origins. The solution will say much about the development and maturity of the relationship between settlers and Māori in the intervening 164 years.

Using a Treaty of Waitangi perspective

Taking a Treaty perspective to the foreshore and seabed debate will require development of a Treaty model for the discussion and developing options. This will need to occur during the process of the Crown engaging comprehensively and directly with iwi.

Several submitters suggested undertaking a longer conversation between tangata whenua and the Crown to explore options available as recommended by the Waitangi Tribunal.[61] In support of that proposal, we draw government's attention to the following submission:

> (…) the Treaty relationship requires the government to engage with their treaty partners, hapū. The government is not able to unilaterally redefine who their Treaty partners are and appoint alternative groups or individuals to treat with. This may mean that the government needs to be prepared for a lengthy process that results in different arrangements for different groups. A 'one-size-fits-all' approach is not likely to be appropriate or enduring. (7-310-1, Te Hunga Roia Māori o Aotearoa/The Māori Law Society Inc)

In our view it will take considerable time, effort and goodwill to repair and rebuild the relationship of trust which is the necessary foundation for reviving and honouring the spirit, principles and text of the Treaty of Waitangi in order to move forward as a country. Notably, the Waitangi Tribunal reported to the previous government:[62]

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[57] See Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy:* Wai 1071 (Legislation Direct, Wellington, 2004) 130–136.

[58] Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui Waitara Claim* (Wai 6) (Brooker's, Wellington, 1989) sec 10.3.

[59] Adele Carpinter *The Foreshore and Seabed of New Zealand: Report on the Analysis of Submissions* (Department of Prime Minister and Cabinet, Wellington, 2003) 11.

[60] Tom Bennion "Land Under the Sea: Foreshore and Seabed" in Michael Belgrave, Merata Kawharu, and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, South Melbourne (Vic), 2005) 233-247, 243.

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

[62] Ibid, 140, citing Document 96(a).

> It is quite wrong for the Crown (…) to assume that the four principles around which the Crown seeks to develop its policy are not achievable within a Māori and Treaty compliant regime.

Given the weight of submissions that propose the Treaty relationship as fundamental to resolution of the issue, the Panel identifies this perspective as being of paramount significance to this review. The Treaty provides government and its diverse constituency with the most appropriate historical and political foundation, moral authority and guiding principles to develop a new paradigm for action to resolve the issue of the foreshore and seabed.

4.1.2 Human rights framework

We have considered the submission of the Human Rights Commission, which outlines a "human rights framework" that could be used to approach the foreshore and seabed issue.

> We believe that the government's objective of respecting and securing both customary rights and public access can be achieved by use of the human rights framework and a rigorous application of human rights principles.[63]

Human rights

The Commission submits that a human rights approach recognises that rights are universal, inalienable and interdependent, but also that they can be subject to reasonable limits. On that basis, the Commission submitted that a human rights based framework could assist the state to uphold and balance competing rights (7-16-3, Human Rights Commission).

It seems to us that the human rights approach emphasises equality and mutuality, legitimation and empowerment for all. It provides protection of individual and collective interests within the wider context of balance between competing interests where they occur. Significantly, it acknowledges the particular need to protect the interests of the most vulnerable groups in society.

Like many others, Ngāti Kahungunu submitted "that the Act is also a fundamental breach of human rights as outlined in numerous Human Rights Conventions, including the International Convention on the Elimination of All Forms of Racial Discrimination" (4-84-2). The Treaty Tribes Coalition noted that "human rights institutions of the United Nations have successively found that the Act discriminates against Māori" and that the United Nations "has routinely encouraged New Zealand to strengthen human rights protections with a view to entrenchment so that human rights are not subject to political override (…)" (7-43-2).[64]

We note in this context the 2006 comment by the United Nations Special Rapporteur on Indigenous Rights that, through the Act, the Crown:

> (…) extinguished all Māori extant rights to the foreshore and seabed in the name of the public interest.

AND that:[65]

> A return to the assimilationist model appears increasingly in public discourse, redirecting concern about collective rights and the place of Māori as a people within the wider society, to emphasis on the protection of the individual rights of all New Zealanders, including the rights to equal opportunity, due process of law and freedom from illegal discrimination on any grounds, including ethnicity or race.

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[63] Human Rights Commission to The Right Honourable Helen Clark, Prime Minister "Foreshore and Seabed: Protecting Both Public Access and Customary Rights" (24 November 2003) Letter.

[64] UN Commission on Human Rights "Indigenous Issues" (13 March 2006) E/CN.4/2006/78/Add.3 Annex: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rudolfo Stavenhagen, on his Mission to New Zealand (16 to 25 November 2005), para 79, http://daccessdds.un.org/doc/UNDOC/GEN/G06/118/36/PDF/G0611836.pdf?OpenElement, accessed 14 May 2009.

[65] Ibid, para 81, http://daccessdds.un.org/doc/UNDOC/GEN/G06/118/36/PDF/G0611836.pdf?OpenElement, accessed 14 May 2009.

Applying a human rights framework to the foreshore and seabed issue

The Commission contends that a human rights framework should be applied to the foreshore and seabed context and notes that "recent human rights developments – in particular, the work on the rights of indigenous peoples – has built greater understanding of the interrelationship between individual and collective rights" (7-16-3, Human Rights Commission).

In order to apply a human rights framework to the foreshore and seabed issue we need to identify the competing interests that must be balanced. In its submission, the Commission identified the principle rights that they consider would need to be balanced between rights holders. Drawing primarily from the Treaty of Waitangi and the Declaration of the Rights of Indigenous Peoples, these are:

- the rights of Māori as indigenous peoples ('rangatiratanga');
- the Crown's right to govern;
- the right to property (including the right of redress);
- commercial activities and development rights;
- the right of public access; and
- the right of access to justice.

We have examined the nature of these rights in submitters' minds in Chapter 2. We note that the Commission has condensed these into a set of foreshore and seabed specific principles which they consider should govern the development of future foreshore and seabed legislation. These principles include:

- the preservation and protection of customary rights;
- preservation of existing rights;
- protection of public access; and
- inalienability.

The Commission concluded by submitting that the Act should be repealed and that new legislation should be enacted that applies these principles. Specifically the Commission suggested that the new legislation should:

- recognise shared beneficial ownership;
- establish a co-management regime between local authorities and local iwi; and
- offer two options to Māori to affirm their customary rights – either through the Courts or through settlement negotiations.

The way forward

Given the weight of submissions from a human rights perspective, as reflected in Chapter 2, the Panel has identified the human rights framework as being of considerable significance to this review. The Panel concurs with the submission of the Human Rights Foundation that "It is important for the government to engage in the discussion with a human rights lens". (7-17-1, Human Rights Foundation of Aotearoa New Zealand).

4.1.3 Property rights perspective

One way to critique the Act is through a property rights perspective. In administering New Zealand's foreshore and seabed, careful consideration needs to be given to the form and allocation of property rights.

Two world views

As already discussed, the two world views prevalent within New Zealand society give rise to two very different conceptions and systems of property ownership and the rights that attach to it. The crucial difference between the two views of property rights hinges on an individual versus a collective ownership model.

Individual ownership allows for the property to be alienated, by sale or gift for example. Collective property is generally inherited and held in trust for present and future generations.

The problem with this perspective however, in the context of differing world views, is that it presumes exclusivity within the definition of property and hence property rights. That presumption is strongly aligned with the concept of property rights developed from the English legal tradition, but it does not exist in the same sense for Māori.

Māori property rights or Māori view of property rights

To Māori, "property rights" derive entirely from customary, collective ownership of property with ancestral associations, be that land, natural resources or any other taonga. Whānau, hapū and iwi have passed down through generations their beliefs, detailed knowledge and understanding of property held collectively. This is expressed through spiritual and cultural connections and traditional practices, is unbroken throughout history and is maintained in present practice:

> We have a great coastline, great fishing grounds, traditions and associations with that tide called Paraituru. That's us, that's part of us. We have exercised rangatiratanga, kaitiakitanga, over that resource from time immemorial in our traditions, from the mountains to the sea (…) (4-8-1, Edward Ellison on behalf of Te Rūnanga o Ōtākau)

> (…) all tangata whenua have a base tangata whenua interest in foreshore and seabed within their rohe. That is not a European-style tenure but is a Common Law tangata whenua title. That is the starting point and for each hapū relies on their ahi kā (…) therefore we say the radical title of the foreshore and seabed is held by the Crown but that carries the burden of Native Title interest of the tangata whenua within their rohe. (4-97-2, Merata Kawharu and Don Wackrow on behalf of Ngāti Whātua o Ōrākei Māori Trust Board)

Although customary property rights are rarely enshrined in New Zealand statutes, our attention has been drawn to a particular instance in which they are. The Ngāi Tahu (Pounamu Vesting) Act 1997 vests in Te Rūnanga o Ngāi Tahu the ownership of pounamu – wherever it lies, from the mountains right down to the beaches and into the seabed.

Many submissions to this review emphasised that before colonial settlement Māori held all of New Zealand according to their own laws and customs (tikanga), and that at the time of colonisation English Common Law recognised and protected their property and tikanga alike. With the signing of the Treaty of Waitangi Māori expected this recognition and protection to continue. In 1871 Paora Tuhaere, for example, asserted his mana whenua thus:

> (…) it was agreed by the chiefs, the owners of the land, that the Europeans should occupy the lands (…) The occupancy by the Europeans was simply occupation without ownership. (4-97-2, Merata Kawharu and Don Wackrow on behalf of Ngāti Whātua o Ōrākei Māori Trust Board citing [1871]AJHR I2 4-5)

Submitters approaching the issue from a property rights perspective as well as from the Māori viewpoint, are particularly critical of the Act's extinguishment of only Māori rights to due legal process to establish customary title over the foreshore and seabed through the Courts (for example, 7-2-1, New Zealand Business Roundtable; and 7-14-1, New Zealand Institute of Surveyors). One submission from a legal standpoint made the following observation:

> As a result of the 2004 Act no evidence has ever been heard by any court as to the actual nature and extent of customary interests (…) There were indeed customary interests that remained unextinguished by assertions of Crown ownership (…) the nature and extent of those interests might well [have varied] from place to place, and might well have been developed and in some cases enhanced by post-contact development, as well as in other cases adversely affected by colonial intrusions and Crown ownership claims. (7-27-1, Professor David V Williams)

Individual property rights

Many submitters told us that the Act brought significant protection for those whose property rights stem from a fee simple title because land already held in private ownership in fee simple (that is, land parcels adjoining 20.5 percent of the foreshore)[66] was expressly excluded from its provisions. The Panel found that even those who fervently believe in individual property rights see the Act as "a serious error" in that "it eroded private property rights [per se], including Māori customary rights to ownership" (7-2-1, New Zealand Business Roundtable):

> The central issue is the upholding of property rights that are critical for individual autonomy, prosperity and social cohesion (…) [The law should uphold] existing property rights to the foreshore and seabed, including legitimate Māori customary rights to title (if any) and lesser Common Law rights (…) (7-2-1, New Zealand Business Roundtable)

A third perspective on property rights

A third perspective on property rights, which is central to the Act, hinges on ownership being vested in the Crown. In legal systems deriving from English Common Law, any property controlled by a state or by a whole community is "public property".[67] However, the concept of "public" or "common" ownership can neither be equated with nor substituted for the collective principles and modes of operation which underpin property rights embodied in mana and tikanga Māori. It is precisely at this point, we perceive, that the property rights perspective employed in many submissions exposes serious public misunderstanding of the impact of different world views on approaches to and understanding of the issue of foreshore and seabed.

We have three major concerns over the way the Crown legislated in 2004 to assume public ownership of nearly 70 percent of coastal land which was not held under private title or as "Māori land" (under Te Ture Whenua/Māori Land Act 1993).

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[66] Tom Bennion, Malcolm Birdling and Rebecca Paton *Making Sense of the Foreshore and Seabed: A Special Edition of the Māori Law Review* (Wellington, 2004), 7, citing "Coast Ownership Report to Land Information Minister, December 2003".

[67] Bryce Wilkinson *A Primer on Property Rights, Takings and Compensation* (New Zealand Business Roundtable, 2008), 7; 7-2-1, New Zealand Business Roundtable.

First, the legislation subjugates tikanga to the power of parliamentary majority and statutory declaration:

> The purpose of the Act severely limits any customary ownership rights that may otherwise have accrued to Māori and as such pre-empts a considered and negotiated consideration of customary rights and interests (…) it accommodates only registered ownership and interests while giving no standing to ownership rights arising from custom. (7-14-1, New Zealand Institute of Surveyors)

> Then it impinges upon our relationship with Tangaroa, Papamoana and other atua, in our ability to assert mana and practice tikanga when required for the protection of our spaces. (5-18-1, Angeline Greensill)

> It is the role of the courts to determine property rights (…) There was no compelling argument from the government as to why Māori couldn't pursue their claims through the Court. (7-2-1, New Zealand Business Roundtable)

Secondly, by "vesting the full legal and beneficial ownership of the public foreshore and seabed in the Crown" (section 4(a)) in order to "protect" it "on behalf of all the people of New Zealand" (section 3) the Act overrides customary property rights by arbitrarily extinguishing them. In transforming the status of those property rights, the Act also subjugates Māori interests regarding the maintenance, protection and management of the property to "public interests" (by all accounts, unnecessarily), and allows for the property's alienation in certain circumstances (section 14(2)):

> It is our view that Te Tiriti did not grant power to the Crown to displace tikanga Māori nor Māori systems of tenure. (4-84-1, Moana Jackson on behalf of the Ngāti Kahungunu Iwi Authority)

> It was a knee-jerk reaction that the government took at the time, unfortunately, but also was an opportunity to secure the right to license, sell, farm off. (4-8-1, Edward Ellison on behalf of Te Rūnanga o Ōtākau)

> It is far too easy for the Crown, having acquired the coastal marine area to the disadvantage of Māori, to then sell, lease or otherwise obtain a pecuniary benefit under the cloak of meeting the rights and interests of other sectors of our community. (4-104-1, Cameron Hunter)

Thirdly, as discussed above, the Act alienates property rights inequitably by discriminating against Māori:

> The Act names Papamoana the public foreshore, privileges private property owners by excluding them from the effects of this legislation, but fails to recognise our rights, in fact extinguishes in print our rights to the foreshore and seabed, rights which we enjoy through take tupuna, the Common Law, and through our tūpuna signing of Te Tiriti o Waitangi. Kei whea te mana o ngā tūpuna ināianei, kei whea te tino rangatiratanga, kei whea the rights of British subjects? (5-18-1, Angeline Greensill)

Given the weight of submissions fundamentally concerned with "ownership" of and access within the foreshore and seabed zone, the Panel is of the view that the range of interests represented in property rights must somehow be accommodated and protected by any actions arising from this review.

Despite this view, the Panel acknowledges that to see the Act through a property rights framework is inherently difficult as it would require everyone to agree on a definition of property rights and then to develop legislation that recognises and provides for this right.

4.1.4 Environmental perspective

Within the coastal marine area an inevitable tension arises between competing interests and values systems. As canvassed in the previous chapter, these interests and values are, to a considerable extent, embedded in people's differing world views and are acted upon according to their different systems of knowledge and belief, and modes of operation.

We believe there is considerable common ground in understanding that the coastal marine area is a complex environmental ecosystem rich in natural, spiritual, cultural and potentially economic resources. And so tensions between competing interests and practices must be balanced if the natural environment is to be protected and nurtured for the common good.

Principal among these different and sometimes competing values systems are:

- Māori cultural values as expressed in mana whenua, mana moana, tapu, kaitiakitanga, oranga and manaakitanga;
- environmental values, including principles of protection for ecological values and biodiversity, the nurturing and conservation of natural resources, and sustainable resource management and use;
- economic and management interests linked to the commercial value represented in the natural resources of the coastal marine area, including economically strategic location;
- scientific interests; and
- what might be called lifestyle values including recreation, coastal location of private and public facilities, and tourism.

Māori cultural values

As explained in Chapter 3, the Māori spiritual order assumes that Māori will maintain an interest in the overall management of natural resources according to a traditional, environmental ethic. The spiritual and mental concepts of Māori constitute a code of conduct to enforce respect for the natural world.

This "code of conduct for the natural world" lies at the heart of tikanga Māori. The principle and practice of kaitiakitanga refers specifically to nurturing and sustaining the spiritual and physical health of the natural environment into the future. We have heard this expressed by submitters thus:

> Under the Pākehā law I'm the owner but under Māori tikanga I'm only the kaitiaki, I don't own any land, I have to look after it for our mokopuna and their mokopuna. That's what you call tikanga. (4-94-1, Dennis Thompson)

> I'm a grandchild. You all here are grandchildren from those beyond, so I'm thinking as a grandchild. I have to think about the 10 generations ahead. Not tomorrow. Not 50 years from now, but about 500 years from now. (5-10-1, Lavinia Pohatu Johnston)

Environmental protection

We noted a distinct divergence of submitters' views in regard to the appropriateness of the Crown having responsibility for conservation matters in the foreshore and seabed. A number of submitters addressed the role of tangata whenua in conservation matters, some remarking that neither the Conservation Act 1987 nor the Resource Management Act 1991 (the Resource Management Act) provides a meaningful mechanism for input by Māori.

We received submissions from sector interest groups and national organisations whose principal purpose relates to environmental protection and conservation. Kevin Hackwell for the Royal Forest & Bird Protection Society of New Zealand Inc (7-15-2), whose interest focuses on protection of biodiversity and natural features as they relate to the foreshore and seabed, noted the Society's concern with the potential for removing the role of the Minister of Conservation in determining restricted coastal activities (during the Resource Management Act reforms). The Society sees the Minister as the owner who should veto rights. On the other hand, Nanaia Mahuta (4-32-1) disputed the role of the Minister to exercise interests on behalf of the public in the coastal marine area.

As we state below, we see considerable scope for reconciling such views in the context of future legislation governing the coastal and marine environment.

Environmental sustainability

The purpose of the Resource Management Act is to "promote the sustainable management of natural and physical resources (s 5). The Resource Management Act sets the framework within which the environmental effects of activities can be identified and properly dealt with. Statutory responsibilities are devolved across various central and local government agencies. The Ministry for the Environment (6-2) advises that sustainable management involves four "well-beings": economic, environmental, social and cultural. From the perspective of a Māori submitter:

> The Resource Management Act is actually an acknowledgement of where we all fit in the world, because it's about our Tangaroa, Papatūānuku, Tawhirimatea, all those things we value. (4-105-1, Mapuna Turner)

We do not believe that most New Zealanders, when they talk about the desirability of access to and within the coastal marine area, are talking about unfettered access. And submissions from an environmental standpoint are clear that unfettered access should not be allowed, that access should be limited for reasons of environmental protection and sustainability. Another important factor with regard to environmental sustainability is cultural respect. The following statement from an individual submitter seemed to us to express a majority view:

> For me, the question is not whether Māori will be gracious enough to give us tauiwi access to the foreshore and seabed; it is whether we, as tauiwi, will acknowledge the gift of access by treating the foreshore and seabed with due respect as the precious living environments that they are, and not seek to exploit or desecrate them for short-term or economic gratification, thus spoiling them for generations to come. (5-55-1, Peggy Howarth)

Environmental management regimes

Unsurprisingly, organisations representing the interests of recreational users of the coastal marine environment also stress the ecological values of that environment and the importance of ensuring its sustainable protection and management. With respect to environmental management regimes, however, submissions from such organisations tended to fall into two camps. While some advocated, or at least recognised the possibility of Crown–Māori co-management, others favoured environmental management regimes controlled by the Crown or its designees. For example, Fish & Game New Zealand (7-29-1), while supporting "the principle of no decline in the healthy functioning and natural life-supporting capacity of coastal marine ecosystems and the natural functioning of coastal processes" and "upholding the Treaty of Waitangi", also submits:

> As the statutory managers of freshwater sports fish, game and their habitats, Fish & Game New Zealand must be consulted and provided with a right of veto over the harvesting of these resources in any legislation that impacts on them in conveying rights to other groups. (7-29-1, Fish & Game New Zealand)

Conversely, some submissions stated that the framework of conservation, resource management and public works has oppressed Māori. We entirely agree with those submissions which noted that the foreshore and seabed issue began with objections to poor sustainability management of the marine environment. To many, a solution to the issue requires a comprehensive review of management of the marine environment (see 2.4.8 and 4.1.5).

Reconciling interests

Throughout this report we have expressed the view that what matters most in respect of the cultural, statutory, economic and managerial regimes which might govern the foreshore and seabed in the future, is that they confirm and accommodate relevant interests in a balanced manner that does justice to all. Submissions to this review reinforced our view that New Zealanders have a fundamental interest in finding ways to understand and respect each other's viewpoints and reconcile their disparate interests, not least when it comes to caring for the natural environment:

> Our people do not go out deliberately to seek their rights to do harm to this country. We bring benefit when our rights are properly reinstated and we are able to exercise our rangatiratanga and under that, our kaitiakitanga duties to ourselves and, of course, the people we live with. (4-8-1, Edward Ellison on behalf of Te Rūnanga o Ōtākau)

Overall, it is clear that there is very significant common ground amongst us, and a significant overlap of what might otherwise be seen as competing interests, on the issue of environmental protection, use and sustainability. We stress here that this is a core principle which remains central to effecting resolution of the foreshore and seabed issue.

4.1.5 Economic and commercial perspective

Viewing this issue from a commercial perspective we note the broad scope of economic activities that take place in the coastal marine area. Resources and activities in the coastal marine area that are subject to a commercial or economic interest include oil and natural gas, minerals, ocean energy, fisheries, aquaculture and biotechnology. Additionally, there are a number of marine-based infrastructures, industries and services operating in the coastal marine area. These include ports, submarine cables and pipelines, ocean transport, the boating industry, the marine services industry and tourism.

Of particular interest to some submitters was ensuring that barriers are avoided that might otherwise stand in the way of achieving good economic outcomes in the future within the foreshore and seabed zone. We heard from several submitters that certainty and clarity around future decision making in the foreshore and seabed was paramount. To some, it did not matter who the owners were but it did matter that their ability to undertake timely decision making was not undermined.

Some submissions, particularly those from the private commercial sector, approached the issue with specific reference to economic and commercial factors. Their focus is on the need to manage both current economic activities and future opportunities for development in the coastal marine area.

Māori commercial perspective

Submitters stressed to us the need for Māori to be fully involved in decision making, for example regarding sand mining:

> (…) as long as we have a big say when it comes to commercial activities that we cannot control and that may have devastating effects on our place. (5-59-1, Greg McDonald on behalf of Tamata B whānau).

Given the interest in commercial participation expressed by many submitters, we are of the view that a commercial perspective on the foreshore and seabed could be accommodated through a co-management regime operated by hapū and iwi and the Crown in partnership. We note examples of this framework operating at the local level, such as the Te Arawa Rotorua Lakes restoration programme.

Treaty of Waitangi right to develop

For Māori, the right to development is a Treaty right. The Waitangi Tribunal stated this right extended to the development of their property through the use of new technologies and/or for new purposes. It included the ability to develop or profit from resources in which they have a proprietary interest under Māori custom, even where the nature of that property right that was not necessarily recognised under British law.[68] Submitters to the Panel cited the Māori fisheries settlement[69] deal as an example of the Crown recognising Māori property interests and giving effect to that interest.

Decision making for commercial activities

Certainty was a key concern for many submitters with commercial interests. Some indicated that it was not until the Act was passed that they had sufficient confidence that their investment and efforts would be protected under "existing use rights" provisions.[70]

Several submitters expressed strong views that any new processes that arise out of this review should not compromise their existing rights to operate or manage assets:

> (…) any changes should provide certainty for port operators over their existing rights to operate and control port assets. (7-231-1, Eastland Port Ltd)

Conclusion

Submitters spoke of the opportunity to reach a settlement over ownership of the foreshore and seabed on a similar model to the Treaty of Waitangi (Māori Fisheries) Settlement. Proactively aligning Māori with industry could be considered as a means of delivering on the principles of the Treaty. From a commercial perspective this would need to be achieved in a manner that protects existing property rights and incentives as well as the environmental concerns discussed above.

We consider that a deeper understanding of how a commercial framework could be used to address the issues is required before it can be fully assessed as a viable option for resolving the foreshore and seabed issue.

4.2 An alternative paradigm

Based on our analysis of the different perspectives outlined above, we consider it essential to establish a new paradigm within which to work towards resolution of the foreshore and seabed issue, regardless of which available option (other than maintaining the status quo) the government decides to proceed with.

Many submitters agreed there needs to be a pragmatic solution to the issue of foreshore and seabed ownership and control underpinned by cultural respect, with a "mutually enhancing inter-relationship between Māori and the Crown" (5-53-2, the Bicultural Desk of the Auckland Catholic Diocese). This needs to include a strong ethical framework given the widespread sense of betrayal and breach of trust which has been aroused by the foreshore and seabed debate.

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[68] Waitangi Tribunal Report on the Muriwhenua Fishing Claim (Wai 22) (The Tribunal, 1988) 234.

[69] Treaty of Waitangi (Fisheries Claim) Settlement Act 1992.

[70] 7-112-1, Trans Tasman Resources Ltd.

Such an ethical framework must, in our view, balance individual and collective rights, and actively promote mutual understanding and equality. It will require considerable good will and good faith on the part of both Māori and the Crown. We consider that this can best be met within a framework which combines a reenergising of the Treaty of Waitangi.

The Treaty provides government with the most appropriate historical and political foundation, moral authority and guiding principles to develop a new paradigm for action to resolve the issue of the foreshore and seabed. Likewise, we urge government to renew a focused commitment on meeting New Zealand's international human rights responsibilities and obligations, and extending that commitment in line with international norms. Together, the Treaty and a human rights framework provide a complementary set of guiding principles and indisputable moral authority to underpin government action on this issue and provide a durable resolution.

Having arrived at our considered position that the Treaty of Waitang and a human rights framework, when invoked in tandem, offer a meaningful and entirely appropriate basis on which to move forward on the issue of the foreshore and seabed, we wish now to acknowledge and consider other suggestions on the overall framework required if the country is to move forward.

"One law for all"

Several submitters were at pains to emphasise that all New Zealanders are "one people" under one law. Some echoed the notion (which also formed a minority viewpoint before the Select Committee in 2004) that Māori somehow gain preferential treatment through the legislation, for example:

> If I'm a racist for saying that there should be one law for all New Zealanders, that makes me a racist. What does it make someone who is demanding privilege due to ethnic background or wealth or anything else? I don't think I'm the racist, I admire Māori, I admire what they stand for, but we've got to have one law in this country for all New Zealanders. (4-109-1, Thomas Harrison)

We agree, of course, that all New Zealand citizens must live by the same legal standards. And the majority of submitters, both Māori and non-Māori, pointed out that a particularly deleterious effect of the Act was precisely to deny Māori access to "one law for all". This was effected both by denying Māori due process to test their customary rights in the Courts, and by exempting from the Act land held in private title, but not land understood by Māori to be in their collective ownership.

In his book, Pākehā and the Treaty, Patrick Sneddon wrote of the 2004 foreshore and seabed debate:[71]

> So as a nation, when we come to pass judgements on the nuances of an issue like the foreshore and seabed debate, the Pākehā mind assesses the rights, privileges and obligations of individuals and assumes that this included Māori. In contrast, the Māori mind goes to the rights, privileges and obligations of collectives, which to Pākehā count as extra benefits not available to them – a second bite of the cherry.

However, the very real problem that arises from the populist notion of "one people" under one law is quite simply that it does not recognise – indeed denies – the fact of the ethnic, cultural and social diversity of our population, which we would argue considerably enriches rather than divides our society.

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[71] Patrick Sneddon *Pākehā and the Treaty* (Random House, Auckland, 2005) 62.

We are acutely aware that the notion of "one people" is, in the main, rejected by Māori. Māori say that we are simply two peoples comprising one nation. They see the notion of "one people" emboldened within a western paradigm that is constructed upon those premises and values which underpin the majority culture, the effect of which is to deny their existence. Māori collective property rights have rarely been treated in law in the same way as have non-Māori property rights.[72]

More importantly, throughout this country's history Māori advocacy and claims have not been made on the basis of ethnicity but of inherited rights – just as non-Māori have made claims and had them met on the basis of inherited rights. Indeed, property and customary rights are not argued on the basis that people are ethnically Māori, but because they have historically inherited rights to specific areas and resources – in the same way as a non-Māori landowner is able to pass down his or her land and associated resources to their children, and so forth.

Cross-cultural respects

The notion of "one people" highlights the importance of cross-cultural understanding and respect underpinning action to resolve the cultural complexities inherent in the foreshore and seabed issue. Cross-cultural conflict tends to arise from tensions between different cultural imperatives, and competing individual and collective interests and rights. The Panel has been frequently reminded during the consultation process that some people still have difficulty dealing with the existence of culturally based differences of perception:

> I think Pākehā, when they hear the words 'customary rights', they think from their mindset of extraction and they think, 'Well, customary rights means harvest, taking, fishing, extracting from the land', and I think an ugly beast rears up and says, 'Well, what about my kai moana? I want my bit as well'. (5-43-1, Will Jenkins)

> People of Māori descent do not want the foreshore and seabed for any other reason than to make something out of it and this they will do. (7-35-1, Helen Moseley)

> [There should be] no belief-based rights such as "mana" (prestige, influence), or "ancestral association", leading to the exclusion of others. (7-28-1, Public Access New Zealand Inc)

> Since the Act was passed by government in 2004 there has been very little disapproval of the way in which it has operated and it has worked to the benefit of all (…) (4-107-1, Bernard Hadfield)

> I just find, from a Kiwi idea, when I saw the reactions from Māori, I was like, a little surprised because from my point of view, I couldn't see it because maybe I just don't see it your way. But I couldn't understand why they were getting so upset. Why were Māori getting so upset? Because for me, it's very simple – it belongs to us all. (5-16-1, Brent Pierson)

> The Crown doesn't have a true regard or understanding of our tikanga, or our talk about takutaimoana. (5-21-1, Matiu Dickson)

> [Māori] deserve more than to simply have their rights trampled over in the bid to appease the misguided concerns of the majority. (7-275-1, Abby Suszko)

The Panel has noted what seems to be a general shift in public opinion, with enhanced appreciation of cultural diversity. However, recent research by Joan Metge suggests that developing positive cross-cultural interaction remains a very significant and challenging project for this country, in both philosophical and practical terms:[73]

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[72] For example, the "wastelands" policy and perpetual leases of the colonial era.

[73] Joan Metge *Kōrero Tahi Talking Together* (Auckland University Press with Te Matahauariki Institute, 2001) 4.

> Although there is greater recognition of their right to manage themselves and their own affairs, Māori are still expected to conform to the majority pattern, to cope with moving between two cultural worlds where Pākehā generally live comfortably in one.

As a consequence, according to Metge:[74]

> Compensating for 150 years of domination, many articulate Māori insist on exclusive rights to practice and control the tikanga (right ways) inherited from their ancestors. Unwilling to educate Pākehā in Māori ways themselves, they are nevertheless quick to rebuke them for insensitivity or mistakes, making no allowance for ignorance, anxiety or learning difficulties. Pākehā with a good understanding of Māori language and culture often hold back from pursuing their interest out of respect and sympathy for what Māori have suffered, while many who would like to learn more are put off by fear of rebuff.

So it seems to consistently lead to the way in which the media has sought to exploit the issues, particularly as they apply to Māori and Pākehā relations and, as a result, has fuelled anxieties on both sides. A more recent example can be found in media reports of conflict over what have been portrayed as "iwi charges" for access to and use of Lake Waihora or Ellesmere. But the paramount example which clearly lives on is what one submitter recalled as the "huge amount of misinformation and deliberate obfuscation of the issues", particularly around the "biggest, greatest, whitest lie" that public access to the beach was under threat (5-67-1, Moea Armstrong). Patrick Sneddon has remarked of the earlier debate:[75]

> In 2004, as the debate around the ownership of the foreshore took hold, many Pākehā responded quite viscerally to the threat to public ownership of the beaches. As much as this was a taonga to Māori, something to be protected in respect of their rangatiratanga, so too was it an issue that put our Pākehā cultural identity under immediate threat. The response was widespread alarm and vigorous defence of 'our' coastline.

The mere mention of "the beach" and "customary rights" in the same context still arouses powerful sentiments, but it has become apparent to us that, in the main, Māori evoke positive associations between the two concepts while they remain problematic for others.

We consider it imperative, therefore, that certain lightning rods of cross-cultural misunderstanding (principally, the question of access to the beach) be neutralised swiftly as a necessary precondition for building genuine cross-cultural communication and respect between peoples, and hence moving forward.

Ongoing dialogue

In 1988 the Waitangi Tribunal, invoking a concept developed by Metge and Kinloch,[76] remarked that the history that had given rise to the Muriwhenua fishing claim had been revealed to be a "classic case of two cultures simply talking past each other", and it warned of the consequences:[77]

> So it was that for over a century the Treaty partners adopted their own positions, simply talking past each other, the Māori sometimes accepting whatever it was they could obtain but often demanding the whole, the non-Māori occasionally ceding something, but in all, very little. There is now, on both sides, a weight of entrenched prejudice to overcome.

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[74] Ibid.

[75] Patrick Sneddon *Pākehā and the Treaty* (Random House, Auckland, 2005) 139.

[76] J Metge and P Kinloch *Talking Past Each Other? Problems of Cross Cultural Communication* (Victoria University Press, Wellington 1988).

[77] Waitangi Tribunal *Report on the Muriwhenua Fishing Claim* (Wai 22) (The Tribunal, 1988) s1.8 and 8.4.

This history of talking past each other, which many Māori submitters maintained persists to this day, threatens to undermine any "top-down" move to resolve the foreshore and seabed issue. As government now looks to ways to introduce a durable solution, how might it renew meaningful and mutually respectful dialogue with Māori? And how might Māori and non-Māori find new ways to talk together?

Four and a half years ago the Waitangi Tribunal, in its *Report on the Crown's Foreshore and Seabed Policy* noted:[78]

> It is (…) very doubtful that the [previous] Government really understands where Māori are coming from. The adversarial way in which the issue has developed has led to people taking positions rather than really communicating. In our hearing, we heard from some outstanding people about their perspectives of where the Māori interests lie in terms of tikanga and identity. We think that the government needs to hear those kōrero.

The Tribunal identified "the longer conversation" as its primary recommendation among the options available to the then government. It stated:[79]

> We must begin with the option that was urged on us by all claimant counsel. Māori really want the process to begin again. They want the opportunity to sit down with government and properly explore the options that are genuinely available. As we have said, they consider they have not had that opportunity.

We have heard the call for a longer conversation overwhelmingly supported by Māori. It is pervasive throughout submissions to the review. Our own view that a joint Treaty and human rights framework will provide an appropriate basis for moving forward is premised on our very clear impression that there is an ongoing need for such a "national conversation" to take place. We address this again in Chapter 7.

We are of the opinion that if the nation were to embark on a very considered conversation (as if among neighbours, based within local communities) informed by accurate information, this would go a long way to mitigating misunderstanding, reducing cultural barriers to communication and diminishing mistrust of the government's avowed intention to resolve this issue. We concur with the Tribunal that unless the conversation occurs as a starting point, "it will not be at all clear what might or might not be able to be achieved."[80] This is a strategy that will largely succeed or fail on the investment in it of goodwill, real commitment, integrity and leadership.

The nature and quality of consultation is of the essence. We note that a great deal of consultation has already taken place on the foreshore and seabed issue, but we would dispute that it has been undertaken appropriately, and maintain that that is evident in the outcome – the Foreshore and Seabed Act. One submitter put it thus:

> To require a Treaty partner with pre-existing rights to go through an extensive judicial process in order to prove the other partnership wrongfully abrogated their rights with the eventual outcome to be allowed to sit down and negotiate an agreement with the government seems to be an extraordinary waste of time, energy and resources, not to mention a clear breach of the Treaty relationship. (7-320-1, Dayle Lianne Takitimu on behalf o Te Rūnanga o te Whānau)

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[78] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy:* Wai 1071 (Legislation Direct, Wellington 2004) 140

[79] Ibid, 139

[80] Ibid, 140

We state here that it is imperative that Māori be fully engaged as equal partners with the Crown. Acknowledging that the government wishes to resolve the issue adequately and sufficiently, we recommend a staggered approach that would allow for limited action to take place immediately whilst making provision for the "longer conversation" advocated by the Waitangi Tribunal. We agree with the Tribunal that:

> It may be that the conversations would be long ones, and would take place over an extended period. We think that is appropriate. The issues are complex. The rights being interfered with are important ones.[81]

We propose a conceptual framework which provides a very real basis on which a collective identity can be forged, to help build a more cohesive society. That identity is already complex and multifaceted. It is certainly not essentialised, and nor can its constituent cultures be conflated.

We anticipate that, should we work within this framework, there is the prospect of bringing about a very significant restoration of New Zealand's international reputation: first, as having an enviable historical record in the Treaty of Waitangi which, although effected within the framework of colonialism is a living document which continues to guide contemporary developments; and secondly, as a leading human rights practitioner and advocate in the international arena.

[81] Ibid.

Chapter 5
How the law developed

This chapter considers the distinctive way in which New Zealand law provided for customary interests in the foreshore and seabed and why government stepped in to change that law following the Court of Appeal's restatement of the position in *Attorney-General v Ngāti Apa* ("the *Ngāti Apa* case" or "the *Ngāti Apa* decision").[82] It provides an overview of the events and developments leading up to that case and considers how the government's new law was significantly at odds with the historic development of the New Zealand law on native or customary title. It considers that the predominant assumptions applying from the establishment of the colony were, first, that the whole country was Māori owned or, more technically, was held in Native Title, and, secondly, that the Crown had to point to some clear act of extinguishment of the Native Title before any adverse right could be admitted. The second principle was established in the Courts from as early as 1847[83] (see Volume 2, Appendix 1).

This chapter also provides a summary analysis of the Foreshore and Seabed Act 2004 (the Act) and reviews its principal effects in the ensuing four and a half years.

But first, we begin by examining the situation prior to *Ngāti Apa* case.

5.1 What were the nature and extent of mana whenua and public interests in the coastal marine area before the *Ngāti Apa* case?

Our Terms of Reference require that we should give independent advice on this issue. In responding we assume "mana whenua" interests were intended to mean the same as "customary" or "tikanga" interests, which are the terms more usually used when such interests are determined in the Courts.

The answer to the question was introduced in Chapter 3 in describing the distinctive Māori and Pākeha world views. We now consider more closely mana whenua as it sits within Māori law, and specifically the nature and extent of mana whenua in the foreshore and seabed.

Summary

In the Māori worldview, mana whenua is both a branch of Māori law and a source of identity. As a branch of Māori law and in the foreshore and seabed context, it regulates the relationship of Māori with the foreshore and seabed and its resources, and incorporates rules, norms and practices that can differ from whānau to whānau, hapū to hapū, iwi to iwi. It is unbroken in its extent in that it encompasses the entire foreshore and seabed area of New Zealand and stretches far beyond. It is a source of identity and of being.

Where the Māori and Pākehā worldviews meet, mana whenua has been refracted through different concepts, including the Common Law concept of Customary Title. In those situations, the nature and extent of mana whenua has evolved over time and continues to evolve today.

5.1.1 Mana whenua as it sits within Māori law

Māori law

In its study paper *Māori Custom and Values in New Zealand Law*, the Law Commission quoted Judge E Durie's succinct observation that:[84]

> There is as much a "Māori law" as there is a "Māori language".

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[82] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643.

[83] *R v Symonds* (1847) NZPCC 387 SC.

[84] Law Commission *Māori Custom and Values in New Zealand Law Study Paper 9* (Law Commission, Wellington, 2001) p 17 citing ET Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 Otago Law Review 449, 451.

This body of Māori law is often referred to as Māori custom law, built as it is on social norms and practices, as compared to institutional law, built on the institutional organs of an overarching authority.[85] The fundamental concepts underpinning Māori law have been canvassed in a number of works including Judge E. Durie's unpublished paper "Custom Law", the main themes of which are captured below:[86]

- Tikanga can be seen as Māori principles for determining justice. The word tikanga derives from the word tika. Tika can be explained as that which is right or just.
- The principles of tikanga provide the basis for Māori jural order.
- Tikanga is pragmatic and open ended. This pragmatism provides flexibility and adaptability. Tikanga cannot generally be reduced to a static rule.
- Kawa describes ritual and procedure and also refers to process and procedure of which karakia are a part.
- Kawa is rule like; it is more rigid than tikanga in that it can be reduced to a static rule.
- Māori norms could constitute law if the norm were sufficiently regular and its application or neglect provoked a predictable response.
- Whanaungatanga, mana, manaakitanga, aroha, mana tūpuna, wairua and utu can be described as conceptual regulators of tikanga, or as providing the fundamental principles or values of Māori law.
- Māori law is values orientated not rules based. An adherence to principles not rules enables change while maintaining cultural integrity.

The Waitangi Tribunal identified the following values that underline Māori approaches to land use:[87]

- a reverence for the total creation as one whole;
- a sense of kinship with fellow beings;
- a sacred regard for the whole of nature and its resources as being taonga from the kāwai tipuna;
- a sense of responsibility for these taonga as the kaitiaki and rangatira;
- a distinctive economic ethic of reciprocity; and
- a sense of commitment to safeguard all of nature's taonga for future generations.

Mana

Mana, as a concept, is often reduced to a single word when translated into English. These words include: authority, control, influence, prestige, power, reputation.[88] As with any translation, this approach aids understanding but inevitably means that the complexity and expansiveness of the concept can be left behind.

Briefly, mana describes the personal and political dimensions of Māori authority and shows the:

- connections between people and authority;
- association of authority with individual power and influence; and

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[85] ET Durie "Custom Law" (unpublished paper, January, 1994) p 4.

[86] Including ET Durie Custom Law (unpublished paper, January, 1994); Ministry of Justice *He Hinatore ki te Ao Māori A Glimpse into the Māori World* (Ministry of Justice, Wellington, 2001); Law Commission *Māori Custom and Values in New Zealand Law Study Paper 9* (Law Commission, Wellington, 2001); and Boast R, Erueti A, McPhail D and Smith NF *Māori Land Law* 2nd ed (Butterworths, Wellington, 2004).

[87] Ministry of Justice *He Hinatore ki te Ao Māori: A Glimpse into the Māori World* (Ministry of Justice, Wellington, 2001) p 47, citing Waitangi Tribunal *Ngāi Tahu Fisheries Report* (Wai 27) (Brooker & Friend Ltd, Wellington, 1992) 97, 5 WTR 517.

[88] See for example the Glossary of Māori terms appended to Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy:* Wai 1071 (Legislation Direct, Wellington, 2004).

- freedom for class mobility through the demonstration of mana-enhancing traits. These traits included honesty, integrity, reliability, keeping one's word, generosity, bravery, fearlessness, humility, respect, caring for others, community commitment and oratory.[89]

One translation provides that mana allows the exercise of control.[90]

Mana whenua

Mana whenua relates to mana in and over both the land and its resources:[91]

> Thus two types of mana came to be perceived, a mana in the land and a mana over it, both represented in the word 'mana whenua'. A mana in the land or whenua (whenua meaning also the afterbirth), derived by descent from the earth mother and sky father and their demi-god children. From them descent was traced through tūpuna (ancestors) to the tāngata whenua, the people of the land, or in Aotearoa, the original people who were deemed to have been here from before time.
>
> Mana over the land came from the prowess inherited from leading ancestors of whom the most famous were linked to the later waka. In the inclusive manner of Māori thinking it was not enough to have either mana tūpuna or mana tangata but, rather, one should have both, and thus have all ten toes embedded in the soil.
>
> (…)
>
> Descent from original occupiers was thus seen to give mana tupuna, the ancestral right to land, while descent from waka gave mana tangata or authority over the people of the district. In the 19th century 'mana whenua' became applied to both, to mean simply 'authority', for by inter-marriage, mana tūpuna and mana tangata had long been fused. The distinction remains important however, for Māori continue to claim mana whenua by virtue of mana tupuna, in respect of land they no longer own, occupy or control. The ancestral connection was an historical reality that could not be obliterated by political revolution, conquest or land sales.

Mana whenua has also been described as:[92]

> (…) the power associated with the possession of lands. It is also the power associated with the ability of the land to produce the bounties of nature.
>
> (…)
>
> Mana whenua was not equated with 'ownership', or with rights to use or have access to the resources on it. Rights of use only belonged to individuals or individual families. Such rights were inherited from tīpuna or acquired through enterprise and these rights were jealously guarded.
>
> (…)
>
> Mana whenua thus differed greatly from the idea of 'ownership' in the European sense. Mana whenua is the collective's right to exercise guardianship over the land.
>
> (…)

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[89] ET Durie "Custom Law" (unpublished paper, January, 1994) 5-6.

[90] Ministry of Justice *He Hinatore ki te Ao Māori A Glimpse into the Māori World* (Ministry of Justice, Wellington, 2001) 49.

[91] ET Durie "Custom Law" (unpublished paper, January 1994) 14-15.

[92] Ministry of Justice *He Hinatore ki te Ao Māori: A Glimpse into the Māori World* (Ministry of Justice, Wellington, 2001) 49.

> Individual ownership of land was not recognised in Māori society. The land and resources were used by Māori rather than owned by them. Māori recognised the land as their ūkaipō, which descended from the kāwai tīpuna and was maintained as such by their tīpuna. Spiritual beliefs and effective leadership helped to maintain effective control over the use of land.
>
> Rights and interests of individuals and whānau in the land derived from the hapū. Similarly, the hapū had special use rights of various places and resource areas but it did not own them. Iwi would base their rights to land on take [rights]. They maintained their take by placing physical signs on the land or through demonstrating their knowledge of the different uses of the land. Ahi kā required those who used the land to maintain the ability to control the land through continued use and occupation. The whānau, hapū and iwi were obliged to protect the land and exercise guardianship over it. This not only ensured that the well being of the present generation would be catered for, but that the following generations would benefit as well.

The reports of the Waitangi Tribunal have reflected the duality of mana whenua:[93]

> t]he relationship exists beyond mere ownership, use, or exclusive possession; it concerns the personal and tribal identity (…)
>
> (…)
>
> (…) the foreshore/seabed is papamoana, the continuation of whenua into and beneath the sea. We were reminded of a world view in which Māori extended their deep sense of spirituality to the whole of creation, acknowledging ātua who bequeathed all of nature's resources to them, in their creation stories. We heard of the interrelationships of the various ātua, especially of Tangaroa and Papatūānuku, and the merging of their energies with those of Ranginui where they meet on the papamoana, forming a lasting mauri. For some claimants, though customs differ, the waters lapping on the beach are part of the amniotic fluids nourishing the whenua and the tāngata whenua (…) They described resource use, regulation and management (through rāhui), and control of access not merely to food and resources, but to wāhi tapu and other sacred sites. They see the beach and sea, and their gifts, as taonga, to which obligations of kaitiakitanga are owed.

5.1.2 The nature and extent of mana whenua in the foreshore and seabed

In the Māori world view, the nature of mana whenua is that it is a distinct branch of law and a source of identity. It extends to the foreshore and seabed and beyond; it is unbroken and unassailable. Where the Māori and Pākehā world views intersect, the nature and extent of mana whenua has been refracted in different ways.

The Waitangi Tribunal

The Waitangi Tribunal has considered the nature and extent of mana whenua in the foreshore and seabed and wider coastal marine area in a number of reports, including the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (1988), the *Report of the Waitangi Tribunal on the Manukau Claim* (1989), the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claims* (1989), the *Ngāi Tahu Sea Fisheries Report 1992*, the *Ahu Moana: The Aquaculture and Marine Farming Report* (2002) and the *Report on the Crown's Foreshore and Seabed Policy* (2004).

In the *Ahu Moana* report the Tribunal considered the nature and extent of the Māori interest in aquaculture and in doing so considered the wider interest in the coastal marine area generally.

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[93] The first extract is from Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington, Legislation Direct, 2002) p 57. The second extract is from Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Legislation Direct, Wellington, 2004) pp 18-19.

It reviewed previous Tribunal findings and cited the *Ngāi Tahu Sea Fisheries Report 1992*:[94]

> Tribal territories were generally well defined and acknowledged between tribes. Each tribe had complete dominion over the land and foreshore – mana whenua – and over such part of the sea as they exercised mana moana.

The Tribunal concluded that:[95]

> We have found that Māori have a broad relationship with the coastal marine area and that as an incident of that relationship Māori have an interest in aquaculture, or more particularly, marine farming. In our view, taonga in the context of these claims extends to the rights that attach to that space.
>
> (…)
>
> We therefore find that Māori interest in marine farming forms part of the bundle of Māori rights in the coastal marine area that represent a taonga protected by the Treaty of Waitangi.

In the *Report on the Crown's Foreshore and Seabed Policy* the Tribunal considered tikanga Māori and the nature of customary authority in the foreshore and sea:[96]

> Here, we emphasise that we see no reason why Māori custom should stop where or when the tide comes in. Indeed, the claimants before us showed a much stronger connection to and use of the beach and its resources than they might have done to the mountainous interior and some of the ostensibly unoccupied acres that so much troubled Earl Grey.
>
> (…)
>
> (…) Māori have a holistic view that does not compartmentalise the beach and sea into dry land above high tide, tidal land uncovered at low tide, land permanently covered by the sea, and the waters of the sea itself. Māori law, use, authority and rights extended seamlessly from land fronting the beach, out into the ocean.

The Tribunal was guided by the findings of the Tribunal in the Report on the *Muriwhenua Fishing Claims* as to the extent of customary authority in the foreshore and sea area:[97]

> The Tribunal, which heard detailed evidence on that particular district, concluded that there was an 'inner' zone related to the continental shelf, stretching 12 miles out from shore. The hapū and tribes of Muriwhenua had full control over fishing and passage inside that zone. They claimed the same rights further out, but only insofar as they could be enforced against challengers. In the 'Māori idiom the hapū and tribes of Muriwhenua held the "mana" or "authority" of the whole of the Muriwhenua seas' within a minimum of the 12-mile zone. The nearest British cultural equivalent, the Tribunal found, 'is to consider that they exercised "dominion" over that part, or "owned" it as part of their territorial waters'. We accept this view that Māori tribes had dominion over their territorial waters as at 1840, and that in the particular circumstances of the Muriwhenua district, it extended for at least 12 miles out to sea.

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[94] Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington, Legislation Direct, 2002) p 56, citing Waitangi Tribunal *Ngāi Tahu Sea Fisheries Report* 1992, 100.

[95] Ibid, pp 57, 61, 62.

[96] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071) Legislation Direct, Wellington 2004) p 18.

[97] Ibid, p 20 citing Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claims* 2nd ed (Wellington, Government Printing Office, 1989) pp 196-198.

The Tribunal concluded that:[98]

> The whenua lies under the sea as well as forming the dry land.
>
> (…)
>
> The relationship of the tāngata whenua with the whenua is governed by tikanga Māori, which is the Māori equivalent of English law, but, compared [with] law in a Pākehā framework, was more integrated in and fundamental to people's daily lives.
>
> (…)
>
> 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 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 not liberal sentiment of the twenty-first century but a matter of historical fact.

The Common Law

Apart from during an early period, the Common Law has engaged positively with Māori law and mana whenua.[99] The Māori Land Court (previously the Native Land Court), as part of its specialist jurisdiction, has a long history of engaging with Māori law and mana whenua including mana whenua in the foreshore and seabed.[100] One example of this engagement is the following observation made in 1920 by Chief Judge Jones of the then Native Land Court:[101]

> [I]n fact, Māori rights were not confined to the mainland, but extended as well to the sea.

As part of the process of engagement, the higher Courts have tended to refract mana whenua through its own inherent concepts such as customary title. This bringing together of different concepts has developed within a landscape that is cognisant of the intersecting of two different worlds. These developments in the Common Law are examined more closely in 5.2 below.

Having closely considered the nature and extent of mana whenua in the foreshore and seabed, we now summarise Māori customary interests and compare them with public interests in the coastal marine area.

5.1.3 Summary of the Māori customary interests

In Chapter 3 we considered there were two aspects to Māori customary interests. One covers the use of resources in the coastal marine area. This may be described as a proprietary interest. The second, which may be seen as a political or territorial interest, refers to the assertion of mana or authority over coastal marine territories. We have expanded and supported our analysis above.

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[98] Waitangi Tribunal *Report on the Crown' Foreshore and Seabed Policy* (Wai 1071) Legislation Direct, Wellington 2004) p 18 ff.

[99] The excluded period is the period when *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) 72; 1 NZLRLC 14 was released and could be seen as ending when the Judicial Committee of the Privy Council questioned the validity of that judgment in its decision *Tāmaki v Baker* (1901) NZPCC 371; 1 NZLRLC 58.

[100] See for example the compilation of relevant records in Manatu Māori *Customary Māori Land and Sea Tenure: Ngā Tikanga Tiaki Taonga o Neherā* (Manatu Māori, Wellington, 1991).

[101] Taken from Boast, Richard: *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) p 54 citing Chief Judge Jones in his report on an inquiry into title to Napier Inner Harbour reported 1921 AJHR G-5.

We noted with regard to the proprietary interests that the sea was by far the primary food resource for coastal hapū. As a result, the natural features of the coastline, from secluded inlets and exposed beaches to the open seas (with all the associated islands, reefs, rocks and fishing grounds), were subject to an array of use rights each of which was the "property" of particular whānau and hapū (or of particular iwi in some cases). Indeed, the complexity of use rights in the sea zone probably exceeded the complexity of use rights on dry land. This was especially so since use rights in the coastal marine area, unlike those on dry land, were not confined to nearest occupiers but frequently included distant hapū of the remote interior.

In addition, custom recognised a right of overall authority and control held at a hapū level (sometimes personified in terms of the individual mana of an iwi leader). Today, the terms "mana whenua" and "mana moana" have popular currency in capturing this concept. The practical assertion of such political authority was probably more realistic in enclosed waters like harbours, inlets, sounds or lagoons but could equally apply to seas beyond the horizon or to sparsely populated areas.

Addressing our Term of Reference

We revert then to the first task set by our Terms of Reference, namely, to give independent advice on the nature and extent of mana whenua interests in the coastal marine area. We consider that on a full consideration of Māori custom, or tikanga, and setting aside all questions of political and practical convenience, the whole of the foreshore and seabed to the outer limits of the territorial sea should be seen as subject to Native Title unless it can clearly be shown that the Native Title to any specific part or in respect of any particular use right (arising, for example, from Māori commercial fisheries settlements) has been extinguished. It seems likely that extinguishment in respect of areas of foreshore and seabed would be proven only in respect of discrete areas such as those for reclamations, mining licences and port development, or where early deeds of sale expressly extinguished customary interests.

As we have said, and as we will consider again later in this chapter, this was the predominant position taken by the Crown in relation to dry land. It was all Māori customary land unless the customary title could be shown to have been extinguished. There is nothing in Māori custom that we have found to justify a different approach to the foreshore and seabed. On the contrary, Māori appear to have regarded the dry land and the coastal marine area in the same way, as subject to possessory use rights and political over-rights.

However, we are not critical of the fact of legislative intervention (although we are critical of the form that it took) given that there was an uncertainty. For example, we do not contend that the Māori Land Court would have adopted our opinion. Indeed it is anyone's guess what that Court might have done since its jurisprudence in relation to the foreshore and seabed was never sufficiently developed for a prediction to be made. While the Court did consider several applications to determine rights to the foreshore and seabed, the Crown appears to have deterred Māori from pursing applications of that kind. For example, in 1872 the Crown forbad the Court from inquiring into such cases throughout the Auckland Province by the simple promulgation of an Order in Council.[102] Another deterrent were the steps taken by the Crown, from the early 1900s, to contest Māori claims not only to foreshores but to rivers and lakes where similar considerations applied. For example, the Crown opposed the Māori applications in respect of the Whānganui River in proceedings that intermittently extended, through several Courts, from 1938 to 1962.[103]

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[102] (1872) *New Zealand Gazette* 347.

[103] Department of Māori Affairs, *Tai Whati: Judicial Decisions Affecting Māoris and Māori Land 1958 – 1983* (Wellington, 1983) p 96.

The result is that the Court never settled upon a single approach. In some cases the Māori Land Court determined that customary usages gave rise to only usufruct rights, like a right of fishery.[104] In other cases however, use rights were seen to confer an interest in land.[105] Similarly, it is not clear whether the Māori Land Court today would determine rights based upon what we have called the political or territorial aspects of custom, or whether in all cases it would require proof of actual use. In the Māori Land Court in 1957, Chief Judge Morison found, when treating custom as an issue of fact in relation to the Ninety Mile Beach, that the affected tribes "were the owners of the territories over which they were able to exercise exclusive dominium or control".[106] However, there are passages in the judgment of Chief Justice Elias in *Ngāti Apa* that suggest that the imperium, which might be considered as an equivalent for the customary concept of mana moana, had passed to the Crown. While we consider that the Crown's assumption of sovereignty did not in fact extinguish customary rights based on mana, we acknowledge that the legal position is uncertain.

In summary, it is overly speculative to consider what the Māori Land Court might have done if it had the chance to pursue applications to the foreshore and seabed; or what it might have done, following the *Ngāti Apa* decision, had the Act not been enacted. All we can do is to give our independent opinion on what the Court ought to have done were it to give full effect to Māori customary interests.

5.1.4 Summary of the public interests

As considered in Chapter 3, the Common Law's recognition of public rights in relation to the coastal marine area is considerably out of keeping with the popular perception of a New Zealander's inherent rights. At Common Law there are recognised public rights of navigation and fishery. The content of the former right shows its limitations. They are like rights in respect of a public road where one may not camp but must regularly "move on". The right of fishery was arguably subject to such customary use rights as had not been extinguished.

The legal position compares with the popular perception of "the beach" and "the seaside" and of the sea itself as a public recreation ground, the full enjoyment of which is the birthright of every New Zealander.

This popular perception undoubtedly influenced government in proposing a dramatic change to the law, in the form of the Foreshore and Seabed Act, notwithstanding that the Act did not go as far as many New Zealanders would have liked it to, to recognise the iconic role of seaside imagery in defining the New Zealand national character. More particularly, the Act sought to provide for general rights of public access and recreation in, on, over and across the public foreshore and seabed.[107] An equal concern for New Zealanders however, is the issue of access *to* the foreshore. This the Act did not address, touching as it does upon the sensitive issue of intruding upon the private property rights of landowners generally.

Addressing our Term of Reference

Accordingly, we answer the question of the public interest in the coastal marine area in this way: prior to *Ngāti Apa* the public interest in the coastal marine area, at law, was confined to limited rights of navigation and fishery.

Once more however, we are not critical of the fact of legislative intervention (although we are critical of the form that it took) given that the law was plainly out of kilter with the cultural expectations of New Zealanders generally, that the coastal marine area would be maintained as a recreational

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[104] See *Kauwaerenga* (1870) 4 Hauraki Minute Book 236 (1883); *Parumoana 1* Wellington Minute Book 147, 157-158.

[105] See *Ngakoro* (1942) 12 Auckland Native Appellate Court Minute Book 137.

[106] *In Re the Ninety-Mile Beach* (1957) 85 Northern Minute Book 126.

[107] Foreshore and Seabed Act 2004, s 4(d), s 7(2).

resource for the general public. The law had plainly to be enlarged if the cultural expectations of Māori or the cultural expectations of New Zealanders generally were to be met.

As we have said, there is patently room for conflict between the two cultural views. The critical question, as considered in Chapter 4, is whether there is room to ameliorate and accommodate both views within an alternative legal framework.

5.2 Legal developments prior to the *Ngāti Apa* decision

This section traces in more detail the development of the law on Māori customary rights in the foreshore and seabed so that the *Ngāti Apa* decision may be understood in better context. The main point is that the *Ngāti Apa* decision did not introduce anything radical or new. Rather, it restored the law to what it had been until an aberrant court decision in 1960 confused the legal landscape.[108] It is also apparent that, contrary to many comments following the *Ngāti Apa* case, the issue of customary rights in the foreshore and seabed was not new and had exercised judicial minds for many years previously. It is not practical to traverse the whole of the material in this chapter but some additional analysis is provided in Volume 2, Appendix 1.

As we have said, the basic assumption that has always applied in New Zealand since 1840 is that Māori had title to the whole of the land area of the country. From 1840–62 only the Crown could extinguish the Māori customary title to land (an aspect of the rule of English law known as "Crown pre-emption"). Until 1862 the Crown generally extinguished the pre-existing customary title by Crown deeds of purchase, or following the formal inquiry into and rectification of private purchases before 1840. Several of the early Crown deeds included areas of foreshore and seabed, and the associated Māori rights were either expressly extinguished or particular use rights were specifically acknowledged. Those Deeds provide evidence that the Crown purchase agents of the period had come to expressly recognise that Māori had proprietary interests in the foreshore and seabed.

In 1862, however, the first Native Lands Act was enacted, which was then repealed and replaced by the much more comprehensive Native Lands Act of 1865. The Native Lands Act ended Crown pre-emption and set up a new judicial body, unique to New Zealand, known as the Native Land Court (now called the Māori Land Court). The Native Land Court was given power to hear Māori claims to particular areas of land still in customary title, following which the successful claimant group was able to obtain a Crown grant to that area, converting it from land held in customary title to a freehold title. Later, Crown grants were assimilated to certificates of title under the Land Transfer Act 1952. From the Māori Land Court has come that important category of land known today as "Māori freehold land".

Māori claims to the foreshore and seabed have mainly been fought out in the Māori Land Court. In other Commonwealth countries cases about customary titles to land mainly surface in the ordinary Courts which apply the Common Law rules relating to Native or Aboriginal Title. But New Zealand has a distinct legal history and legal tradition of its own, in having set up a specialist Court to deal with this question at an early date. Moreover, this Court had the power to create titles which became freehold grants.

The Māori Land Court developed its own body of practice relating to the investigation of Māori claims to land. It worked on the assumption that all land must belong to some Māori descent group, and the question in issue was always: which group? Cases were often lengthy and contested, but the issues always involved hapū and iwi competing with one another. The Crown did not intervene in the process to assert either that the land was empty and unclaimed or that it was vested in the Crown. It was all assumed to belong to Māori. The existence of the Māori Land Court and its

[108] In *Re the Ninety-Mile Beach*, (1957) 85 Northern Minute Book 126.

specialist processes – which became very familiar to Māori – meant that the Common Law rules relating to Native Title became comparatively unimportant in New Zealand. It was the Māori Land Court, and the extent of its jurisdiction, which was the real issue.

As the years went by a particular problem became increasingly important: did the Māori Land Court have basically the same powers relating to land covered by water as it did to dry land? This long-standing question underpinned the *Ngāti Apa* decision in 2003 and it is still at the heart of the legal issues relating to foreshore and seabed today. Since the late-nineteenth century, three categories of land covered by water have been in issue: lakes, rivers, and the foreshore and seabed. By a process of historical accident rather than by any clear working out of legal principle, the law ended up in the confusing position of giving different answers in each case. But linking all three was the common idea that ownership of a lake, a river, or an area of foreshore was connected in some way with whoever owned the immediately adjacent dry land. In addition, if these "wet" areas did not belong to Māori, then they had to belong to the Crown. This reasoning was very significant – it had to mean either that lakes, rivers, and the foreshore and seabed were special in some way, or that the Crown had somehow extinguished Māori customary rights to these places.

The extent of the Māori Land Court's jurisdiction over land covered by water was fought out in a sequence of lengthy legal disputes over the course of the twentieth century. The cases related to lakes (eg, Lake Waikaremoana, Lake Taupo, Lake Omapere and the Rotorua lakes), river beds (of the Waikato and Whānganui rivers in particular), and areas of foreshore (eg, Napier Lagoon, the Ōrākei foreshore in Auckland, Hokianga Harbour, and Ninety-Mile Beach). It was eventually settled that lakes were in the same position as dry land: Māori could claim ownership of them, and the Māori Land Court could investigate title to them.[109] With rivers, the law ended up in a confused state (which is still the case today), where different rules apply depending on whether or not a river is regarded as "navigable".

In the case of the foreshore, there were a number of early Māori Land Court cases where the Court granted fishing rights or, on occasion, Land Court titles, which finally led to the Court of Appeal's *Ninety-Mile Beach* decision in 1963. It is important to say a little more about this decision as it essentially stood as the law for 40 years until it was in turn overruled by the Court of Appeal in *Ngāti Apa* in 2003.

The *Ninety-Mile Beach* decision began with an application made to the Māori Land Court by Waata Tepania, seeking an investigation of title to that part of the beach which lay between high-water and low-water mark (the foreshore, in other words – the seabed was not in issue in this case). The case was first heard in the Māori Land Court, which saw no particular problems with the application and made the orders asked for, dividing the beach between two Northland iwi, Te Aupouri and Te Rarawa. The Court concluded:[110]

> The Court is of the opinion that these tribes were the owners of the territories over which they were able to exercise exclusive dominion or control. The two parts of this land were immediately before the Treaty of Waitangi within the territory over which Te Aupouri and Te Rarawa respectively exercised exclusive dominion or control and the Court therefore determines that they were owned and occupied by these tribes respectively, according to their customs and usages.

In the view of the Māori Land Court, then, the approach to be taken to the foreshore was no different from the approach to be taken to dry land. The issue was not what had happened since 1840, but rather who had "exclusive dominion or control" at 1840. But the case did not rest there.

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[109] *Tamihana Korokai v Solictor-General* (1912) 32 NZLR 321 (CA).

[110] *In Re the Ninety-Mile Beach*, (1957) 85 Northern Minute Book 126.

The Crown appealed to the Supreme Court (now the High Court) and the Court of Appeal. The legal issue at stake was the core problem: could the Māori Land Court issue titles to the foreshore?

The Crown rested its case on the ancient rule of the English Common Law that deemed the Crown to have a "presumed prerogative title" to the foreshore and seabed. The Crown argument was basically, "as in England, so in New Zealand". The High Court and the Court of Appeal concluded that the answer to the question in New Zealand law could not rest on the English Common Law doctrines about the rights of the Crown over the foreshores and seas of England. The Court of Appeal took the position that the answer lay, rather, in the law and practice relating to the Māori Land Court itself.

The Court of Appeal's reasoning is complicated. Essentially, the Court of Appeal took as its starting point the effects of the Māori Land Court conducting an investigation of title to an area of former Māori customary land along the coast. If the foreshore and seabed had been included in the Māori Land Court title at that point, then it was owned by Māori as part of the freehold, or perhaps to the Crown or a private purchaser if Māori had alienated the land to them in the interim. Alternatively, if the Court had excluded the foreshore when it heard the original case, the title "remained" with the Crown. Or, a third possibility (and the usual position, as it happens), the Court might have said nothing at all about the foreshore, which would mean that title likewise "remained" with the Crown. The net effect of the case was that the Crown was deemed to have title to the foreshore.

Following *Ninety Mile Beach* no effective further steps were taken to vest the foreshore in the Crown by statute. The issue seemed to have gone away, and there the matter rested until *Ngāti Apa*. Some key legislation was enacted on the assumption or belief that the Crown "owned" the foreshore, an example being the Resource Management Act 1991 (the RMA), but the Crown's "right" essentially remained founded on a single decision of the Court of Appeal (Ninety-Mile Beach). During the 1990s that decision became the subject of a certain amount of academic criticism.

5.3 The *Ngāti Apa* decision: From the Māori Land Court to the Court of Appeal

The *Ngāti Apa* litigation originally began in 1997. Like the earlier Ninety-Mile Beach case, it began with an application in the Māori Land Court. Eight iwi (Ngāti Apa Ngāti Koata, Ngāti Kuia, Ngāti Rarua, Ngāti Tama, Ngāti Toa, Rangitāne and Te Atiawa) who were concerned about a number of legal issues relating to marine farming, applied to the Court seeking an investigation of title to certain lands below high water mark in the Marlborough Sounds. They also sought orders that if, contrary to their arguments, the land were found to be Crown land, that land would be held in a fiduciary capacity for the benefit of the applicants under section 18(1)(i) of Te Ture Whenua Māori/ Māori Land Act 1993 (TTWM).

The Attorney-General and certain other parties pleaded that the case could not succeed as a matter of law. The Crown argued also that the exercise of mana and spiritual relationships as raised by the eight iwi could not generate a title under TTWM, "but may give rise to non-title interests which are recognised and provided for in other legislation", such as the Resource Management Act 1991 or the Fisheries Act 1996.[111]

On 22 December 1997 the Māori Land Court released an interim decision. Although bound by the Court of Appeal decision in *Ninety-Mile Beach*, the Court felt able to distinguish that case on the basis that that decision only applied where the adjoining coastal land had been investigated by the Māori Land Court (which was not the case in the Marlborough Sounds). In these circumstances the Court found that it had jurisdiction to investigate what interests, if any, the applicants had

[111] Statement of Defence on behalf of the Attorney-General, 1 May 2000, para 3.3.

in the foreshores of the Marlborough Sounds.[112] It held also that it could undertake a similar exercise with respect to the seabed, notwithstanding section 7 of the Territorial Sea and Exclusive Economic Zone Act 1977, because that legislation went no further than to "statutorily assume the sovereignty".[113] It should be noted here that the Court did not decide that the foreshore and seabed in the Marlborough Sounds belonged to the eight iwi, but that the Māori Land Court had jurisdiction to carry out such an inquiry.

The Crown and other respondents appealed the decision to the Māori Appellate Court, which reluctantly agreed to state a case to the High Court on a number of points of law.[114] The High Court followed *Ninety-Mile Beach* and held that once the Māori Land Court had investigated title to a coastal block, at that point the customary title to the foreshore was extinguished.[115] The High Court held also that the Territorial Sea and Exclusive Economic Zone Act meant that customary title to the seabed – as opposed to the foreshore – had been extinguished. The High Court held the view "the present position is that the bed of the territorial sea and internal waters is vested in the Crown".[116] The effect was essentially to reverse the findings in the Māori Land Court at first instance.

The eight iwi then appealed to the Court of Appeal. The Court of Appeal's decision was released on 19 June 2003, about a year after the conclusion of argument, and was thus a very carefully considered statement. The Court of Appeal's decision was one of the most important legal texts on Crown–Māori relationships of modern times, probably the most significant since the well-known "Lands" case of 1987.[117] The significance of the case in fact extends much further than the particular issue of foreshore and seabed because it was a very clear and definitive statement that the Common Law doctrine of Native Title is part of New Zealand Common Law. Again, it is vital to note that the Court of Appeal did not state that Māori "owned" all the foreshore and seabed; the decision was about jurisdiction, that is, about whether the Māori Land Court could inquire into whether Māori had property rights in the foreshore and seabed.

In assessing the significance of the Court of Appeal's decision, it is important to make a distinction between the Court's conclusions regarding the foreshore, on the one hand, and the seabed, on the other. (It is necessary to consider these areas separately because at the time of the case the law relating to them was different.) With respect to the foreshore, the Court of Appeal did four main things. It:

- overruled its own earlier decision in *Ninety-Mile Beach*;[118]
- found that Māori customary title to the foreshore, if any, had not been extinguished by any general Act;
- declined to consider the effects of "area specific" legislation (such as Harbour Boards Acts) on ownership of the foreshore and seabed, reserving that matter for later cases; and
- rejected the argument put forward by the Crown and the other respondents that the various references to "land" in TTWM meant dry land only and excluded the foreshore and seabed.

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[112] *Marlborough Sounds* (1997) 22A Nelson Minute Book 1.

[113] *Marlborough Sounds* (1997) 22A Nelson Minute Book 7.

[114] Eight questions were posed for the High Court. They are set out in the Court of Appeal judgment in *Ngāti Apa*: (see [2003] 3 NZLR 643).

[115] *Attorney-General v Ngāti Apa* [2002] 2 NZLR 661, 675.

[116] Ibid, 683.

[117] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

[118] So held by Elias CJ, Keith and Anderson JJ, and Tipping J. Gault P however stated that Ninety-Mile Beach was rightly decided, principally because he saw the practical effect of the *Ngāti Apa* decision as very limited (see [2003] 3 NZLR 643, 676-677).

Given the importance of legal certainty, it is uncommon for the Court of Appeal to reverse itself, but sometimes cases arise where the Court feels that it has no option but to do so, as Justice Tipping stated:[119]

> The decision in Ninety-Mile Beach has stood for 40 years. Furthermore, it must have been regarded as correctly stating the law by those responsible for subsequent legislation. Hence a cautious approach should be taken to the suggestion that the case was wrongly decided. That said, I am driven to the conclusion that it was. While the reasoning in the two principal judgments has internal logic and consistency, the problem is that they do not recognise the appropriate starting point, namely that Māori customary title, and the associated status in respect of the land involved, became part of the Common Law of New Zealand from the start.

Chief Justice Elias was concerned by the assumptions made in *Ninety-Mile Beach* that all titles to land in New Zealand, including all Māori titles, emanated from the Crown. She also took the position that whatever rights to the foreshore and seabed the Crown had at Common Law in England had to give way before the rules relating to extinguishment of Native Title (equally a part of the Common Law). In her view:[120]

> The reasoning in Re the Ninety-Mile Beach was based upon that accepted in Wi Parata. So, too, was the reasoning in Waipapakura v Hempton, a case suggested to be of "dubious authority" by this Court in Te Rūnanga o Muriwhenua v Attorney-General at p 654. The approach in the judgment under appeal [ie, Justice Ellis's decision in the High Court] in starting with the expectations of the settlers based on English Common Law and in expressing a preference for "full and absolute dominion" in the Crown pending Crown grant is also the approach of Wi Parata. Similarly, the reliance by Turner J. upon English Common Law presumptions relating to ownership of the foreshore and seabed (an argument in substance rerun by the respondents in relation to the seabed in the present appeal) is misplaced. The Common Law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English Common Law. The Common Law of New Zealand is different [emphasis added].

In support of this Chief Justice Elias drew on a wide range of New Zealand and British Commonwealth decisions as well as a substantial body of academic legal commentary.[121]

With regard to the seabed, however, the Court of Appeal was confronted with a different legal issue, as there was legislation in place which vested the area between low water mark and the territorial sea boundary in the Crown. The issue was whether the words used in the legislation extinguished Māori customary title to this area. The Court of Appeal concluded that it did not. This issue was discussed most fully in the judgment of Justices Keith and Anderson, who gave three main reasons in support of this conclusion.

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[119] [2003] 3 NZLR 643, at 699.

[120] Ibid, 668.

[121] See ibid, 668-9. Cases relied on included *R v Symonds, Nireaha Tamaki v Baker, and Amodu Tijani v Secretary, Southern Nigeria*; academic literature included Boast, Richard "Re The Ninety-Mile Beach Revisited: The Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 VUWLR 145, F M Brookfield "The New Zealand Constitution: The Search for Legitimacy" in I Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives on the Treaty of Waitang*i (1989) pp 10-12; P G McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991) pp 117-126.

First, Justices Keith and Anderson found that, although the seabed had been "vested" in the Crown, that was not of itself "inconsistent with the continuing existence of Māori customary property".[122] The legislation vested in the Crown only its general or radical title (imperium) but not full property rights as a landowner (dominium). Second, the Territorial Sea legislation was aimed at "establishing against the world the 12-mile fishing zone", which again was a matter only of "the exercise of sovereignty, not beneficial ownership".[123] Third, and perhaps most importantly, the words used in the legislation did not clearly and plainly extinguish the Māori customary title – it is clear law in Australia, Canada, New Zealand and other countries that legislation purporting to extinguish indigenous customary property rights must always be "clear and plain" before the Courts will give effect to it.[124]

Thus, the Court of Appeal concluded in 2003 that Māori customary title still existed with respect to both the foreshore and the seabed. This meant that the way was open for claims to these areas to be pursued, both in the Māori Land Court under its ordinary statutory jurisdiction and in the High Court under the Common Law rules relating to Native Title.

5.4 In the wake of the *Ngāti Apa* decision

5.4.1 The Courts

A key question for this Panel is what exactly might have happened had the government of the day taken no steps and had it allowed cases in the Māori Land Court and the High Court to proceed. Following *Ngāti Apa*, in fact, a number of applications for foreshore and seabed titles began to accumulate in the Māori Land Court. Given the rapidity of the government's response to *Ngāti Apa* by introducing the Foreshore and Seabed Bill, there was no opportunity for any of these applications to be heard.

In March 2004 the Tairawhiti division of the Māori Land Court conducted a judicial conference at Gisborne that dealt with the claims filed to date. At the hearing the Crown applied for a stay of proceedings on the basis that the government intended to legislate on the matter and also because some of the parties to *Ngāti Apa* – although not the Crown – had appealed the decision to the Privy Council in London (ultimately, the appeal was withdrawn by the appellant). On 2 April 2004 the Court issued a reserved judgment rejecting the Crown application for a stay. However the legislation was passed in November 2004 before any of the applications proceeded to a hearing. There were some applications made in other registries of the Māori Land Court, which were also not heard. As far as the Panel is aware, in the wake of *Ngāti Apa* no applications were made in the ordinary Courts seeking declarations of Native Title to areas of foreshore and seabed at Common Law.

What might have happened?

The Māori Land Court

Assuming the TTWM remained unchanged, the Māori Land Court would have had two main options. First, it could have issued a status declaration under section 131 that a particular area of foreshore and seabed had the status of Māori customary land. Section 131(1) gives to the Māori Land Court "jurisdiction to determine and declare, by a status order, the particular status of any parcel of land, whether or not that matter may involve a question of law". Second, under section 18(h) the Court has jurisdiction:

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[122] [2003] 3 NZLR 687.

[123] Ibid, 688.

[124] This is a well-established rule. It is sometimes referred to as the "presumption against extinguishment". As Brennan J put it in the High Court of Australia in *Mabo v Queensland*, any instrument, statutory or otherwise, which purports to extinguish Native Title, must reveal a clear and plain intention to do so, whether the action be taken by the legislature or the executive.

> To determine for the purpose of any proceedings in the Court or for any other purpose whether any specified land is or is not Māori customary land or Māori freehold land or General land owned by Māori or General land or Crown land.

The *Ngāti Apa* decision did not itself give all the foreshore and seabed the status of Māori customary land under TTWM, but left this to the Māori Land Court to determine on a case-by-case basis. (What exactly the "status" of the foreshore and seabed was, if it were not Māori customary land, immediately after *Ngāti Apa*, is uncertain).

Acting on a case-by-case basis the principal task of the Māori Land Court would probably have been to satisfy itself that a Māori customary title existed and that it had not been extinguished. (In many ways the effect would have been similar to an inquiry in the High Court seeking a declaration that Native Title existed over any given area of foreshore and seabed.) In *Ngāti Apa,* the Court of Appeal saw making a status declaration as an important option for the Māori Land Court. It did not have to make a freehold order: the wording of TTWM allowed the Māori Land Court to make a status order only and leave it at that. According to Chief Justice Elias:[125]

> Under Te Ture Whenua Act a vesting order obtained under s 132 continues to change the status of customary land to Māori freehold land. But the Māori Land Court may now make a declaration of status of customary land under s 131 without that consequence. *The current legislation is therefore no longer an inexorable mechanism for conversion of customary land into freehold land* [emphasis added].

This seems to us to be a most important point and we will return to it later.

The same point was also discussed by Justice Tipping. He noted that it was "possible for the Māori Land Court to make a status order (…) *without the Court necessarily granting any further relief*" [emphasis added]. He continued:

> But it is material to note if the Māori Land Court makes a status order under s 131, it does not necessarily follow that a vesting order will be appropriate. Declining to make a vesting order would, in the words of the heading to s 132, involve declining to change Māori customary land to Māori freehold land. There may, however, be circumstances, such as when the foreshore and seabed are involved, when it would not be appropriate to change the status of the land in that way. *There is no inevitability that a status order under s 131 will convert to a Land Transfer Act title under s 139* [emphasis added].

This is crucially important, because it means that it did not follow from the Māori Land Court being able to conduct inquiries into foreshore and seabed that huge areas of the foreshore and seabed would have turned into Māori freehold land overnight, as seems to have been feared at the time.

However, the second option available to the Māori Land Court would have resulted in a quite different situation. The Court could have made a vesting order under section 132, which would certainly lead to the land passing into Māori freehold title. Section 132(1) states that the Māori Land Court "shall continue to have exclusive jurisdiction to investigate the title to Māori customary land, and to determine the relative interests of the owners of the land". The Māori Land Court can, then, only exercise this power over land which already has the status of Māori customary land. As we have seen, the Court of Appeal thought that in the case of foreshore and seabed there would have to be a status declaration before any such area could have the "status" of Māori customary land. (This is a different situation than applies to dry land, where the status of Māori customary land has always been simply assumed.) In carrying out its jurisidiction under section 132 the Māori Land Court is directed to apply Māori custom law. Section 132(2) of TTWM provides that:

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[125] [2003] 3 NZLR 658.

> Every title to and interests in Māori customary land shall be determined according to tikanga Māori.

Converting Māori customary land to Māori freehold land was, historically, the core function of the Māori Land Court, a function that the current Act retains.

As noted, a vesting order does generate a freehold title. A vesting order translates automatically into a registrable freehold title under the Land Transfer Act 1952.[126] This has been the law since 1894, if not before.[127] According to TTWM, once a vesting order is made the land becomes "subject to the Land Transfer Act 1952".[128] Every vesting order must "be transmitted to the District Land Registrar of the district in which the land is situated (s 139)"[129], then be entered "in the provisional register, and all the provisions of the Land Transfer Act shall, subject to this Act, apply accordingly". Thus, such a title would become indefeasible and would have all the special protections that Torrens system titles have in New Zealand law.

We have emphasised these provisions to make it clear that after *Ngāti Apa* the Māori Land Court certainly could have granted (in effect) freehold titles to areas of foreshore and seabed. But would it have done so? Assuming that the Court of Appeal's approach is correct, when might the Māori Land Court have simply made a status order, and in what circumstances or range of circumstances would it have taken the further step of making a vesting order?

Obviously we do not know, because the Māori Land Court was never given the opportunity to apply its statutory jurisdiction to the foreshore and seabed in the way that the Court of Appeal envisioned. But there is a helpful discussion of what could have happened in the Waitangi Tribunal's 2004 *Report on the Crown's Foreshore and Seabed Policy* (see 5.4.2). As the Tribunal observed, "a wide range of views was presented".[130] Some claimant counsel "predicted that the Māori Land Court's approach would be very permissive, and that most applications would result in a declaration of customary land, and such declarations would always mature into a vesting order".[131] At the other extreme was the Crown, which predicted that very few such applications would be successful:[132]

> The Solicitor-General told us there would only rarely be extant (existing) customary interests that would be so ample as to support a customary title. The Crown attached considerable significance to the limiting effect of the Crown–Māori fisheries settlement (the Sealord deal) on the ability of the Māori to show a continuing customary interest of magnitude.

Other claimant groups and the Tribunal itself took a middle position, which was that while substantial areas would end up as Māori customary land, the amount that would become Māori freehold land was comparatively restricted. The Māori Land Court would have had to develop a set of tests as to when a vesting order was, and was not, appropriate – perhaps refined on appeal. The Tribunal cautioned against too restrictive or cautious an interpretation. It noted the "strong emphasis" in the legislation "on the application of tikanga to the court's determinations in sections 131 and 132 [of TTWM] ".[133] Just as this Panel has heard a great deal about tikanga, so too was the Waitangi Tribunal presented with a great volume of evidence about the significance and the content of tikanga applying to the foreshore and seabed. The extent of this material persuaded the

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[126] Te Ture Whenua Māori Act 1993, s 139.

[127] See Native Land Court Act 1894 s 73.

[128] Te Ture Whenua Māori Act 1993, s 139(1).

[129] Ibid, s 139(2).

[130] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy,* Wai 1071 (2004), 93.

[131] Ibid, 67. The report noted, however, that this view recalls the nineteenth-century practice of the Court, the purpose of which was to establish title so that land could be alienated.

[132] Ibid.

[133] Ibid, 74.

Tribunal that "it would be wrong – and demonstrably wrong – to take a view of the extant interest of Māori in the foreshore and seabed that was too reductive". Also important was the wording of sections 2(1) and 2(2) of TTWM and the protection of rangatiratanga as embodied in the Treaty of Waitangi set out in the preamble to that Act.

The Tribunal's general view was that "land in the foreshore and seabed would be declared customary land, and would at least sometimes be vested as freehold land".[134] We agree. It is impossible to state this with any greater precision.

The High Court

The other possibility, post- *Ngāti Apa*, was that applications might have been made in the High Court seeking declarations at Common Law that particular groups had Native Title over defined areas of foreshore and seabed. In the Panel's view there would in fact have been few applications of this kind, given that Māori would also have had the option of bringing proceedings in the Māori Land Court.

It is significant that following *Ngāti Apa* no applications for Native Title were made in the High Court, whereas a number of applications were made in the Māori Land Court. Only the Māori Land Court could have had power to make freehold orders. The High Court could only make a declaration that an area of foreshore and seabed was affected by the Native Title of a particular group, and the content of that title would be governed by indigenous customary law. Exactly what the effect of such a declaration would be on such statutory regimes as the Resource Management Act 1991 or the Crown Minerals Act 1991 is difficult to predict.

The Waitangi Tribunal noted in its 2004 *Report on the Crown's Foreshore and Seabed Policy* that "the Common Law doctrine of Native Title has not been much applied in New Zealand".[135] The Tribunal continued:

> This means that no one – neither Crown, claimants, nor this Tribunal – can predict with certainty how the New Zealand High Court would respond to applications to declare the existence, nature and holders of any customary rights in foreshore and seabed areas.

We agree. Of course this does not mean that the New Zealand Courts would reject any suggestion of Native Title in the foreshore and seabed, as *Ngāti Apa* itself made it clear that such a claim was certainly possible. But much remained uncertain.

In any Native Title case the key issues confronting the Courts are whether the Native Title exists and, if it does exist, whether or not it has been extinguished in some manner. The real uncertainties after *Ngāti Apa* revolved around these two components. What would need to be shown before the High Court could find that Native Title existed? The New Zealand Courts could have been guided by Australian precedent on this, in particular the High Court of Australia decision in *Mabo v Queensland*. This held that the crucial test was the continued exercise of customary law with respect to a particular place. But this is only a guess: the New Zealand Courts might possibly have preferred somewhat different approaches to this key question developed in the Canadian Courts. There was also the issue as to whether the Common Law could recognise an exclusive Native Title to the foreshore and seabed. It is very possible that the New Zealand Courts may have been influenced to a significant extent by the majority in the High Court of Australia in *Commonwealth v Yarmirr*, which took a restricted approach towards the scope of Native Title that could be recognised in

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[134] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy,* Wai 1071 (Legislation Direct, Wellington, 2004), 75.

[135] Ibid, 4.

coastal waters.[136] Alternatively, they might have preferred Justice Kirby's dissenting judgment in *Yarmirr*.[137] There is just not enough New Zealand case law in existence to allow us to make a reliable prediction.[138]

The other uncertainty lies in the area of extinguishment. The actual test for extinguishment is not in doubt: it is that the instrument, whether it be a statute or some other kind of official statement such as a proclamation, must be sufficiently "clear and plain" for the Courts to draw the inference that the Crown intended to extinguish Native Title. There is a legal presumption against extinguishment. The Court of Appeal in *Ngāti Apa* held only that there had been no general extinguishment of the customary title to the foreshore and seabed, but left open the possibility that particular enactments may have extinguished Native Title locally. Harbour boards legislation is one possibility. Or possibly pre-Land Court pre-emptive purchase deeds might have had the effect of extinguishing Native Title in some instances but not in others (depending on the wording). All this would have had to have been worked out on a case-by-case basis.

In pointing this out the Panel does not mean to suggest that the option of a High Court action would have been pointless; nor would we feel confident in predicting that no Māori groups would have opted to take this path. We do believe that the High Court would have been a less popular option than the Māori Land Court. However, had such cases developed in New Zealand, the Courts would have developed and refined the Native Title jurisdiction locally in the same way that the Canadian and Australian Courts have done. A distinctively New Zealand approach to deciding foreshore and seabed Native Title cases could well have developed. However this possibility was also precluded by the enactment of the Foreshore and Seabed Act. The legislation retained the option of bringing proceedings in the High Court, but within statutory parameters prescribed by the Act.

5.4.2 The Waitangi Tribunal inquiry in 2004

We turn now to the Waitangi Tribunal to consider in greater depth its own position in the wake of *Ngāti Apa*. As the Government prepared its policy documents for public discussion in the latter months of 2003, some 150 claims were lodged with the Waitangi Tribunal arguing that the Government's approach to the issue had breached, or was likely to breach, the Treaty of Waitangi. By agreement, the Tribunal launched an urgent inquiry into the issue of the foreshore and seabed, delivering its report to Government on 4 March 2004.[139] In the introduction to that report the Tribunal drew attention to the context in which the inquiry was held. That statement continues to resonate today, containing a salutary warning in the context of the present review:[140]

> The Government's resolve to step in as soon as the Court of Appeal's decision was released to implement another regime very quickly, combined with the apparently widespread fear that Māori will control access to the beach, has led to an emotional response across the whole country. It is necessary to have an understanding of complex legal issues to discuss foreshore and seabed in any informed way. Perhaps that is why the public discourse has generally been

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[136] *Commonwealth v Yarmirr* (2001) 184 ALR 113 (HCA). In *Yarmirr* the majority in the High Court of Australia concluded that Native Title in coastal waters could not extend to a right of exclusive possession, as this would be inconsistent with public rights of fishery and navigation: "the two sets of rights cannot stand together": 184 ALR 113, 145.

[137] Kirby J held in *Yarmirr* that public rights and international law rights related to navigation qualify, but do not preclude, exclusive Native Title in coastal waters: see 184 ALR 113, 193-4. See also S Dorsett, "Aboriginal Rights in the Offshore: Māori Customary Rights under the Foreshore and Seabed Act 2004 (NZ)", (2006) 15 *Griffith Law Review* 74. Dorsett argues that "it is likely that the New Zealand approach would have more in common with the judgment of Kirby J than with the majority in *Yarmirr* 184 ALR, 84.

[138] The Foreshore and Seabed Act itself in fact does recognise the existence of exclusive customary titles, as Dr McHugh notes: "the statute (…) supposes in plentiful detail that qualified exclusivity of the Kirby sort can exist at law": P G McHugh, "From Common Law to codification: the Foreshore and Seabed Act 2004", in New Zealand Law Society, *Foreshore and Seabed, the RMA and Aquaculture*, New Zealand Law Society, Wellington, 2005, p 13.

[139] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy:* Wai 1071 (Legislation Direct, Wellington, 2004). We note that the Tribunal had before it the Government's various policy papers – there was not yet a Bill prepared for introduction to the House.

[140] Ibid, xii.

> so unsatisfying, oversimplifying the issues and thereby distorting them. It appears to us that polarised positions (not necessarily underpinned by good information) have quickly been adopted, and real understanding and communication have been largely absent.

A mere six days were available to the Tribunal to hear submissions from claimants and Crown counsel. With this in mind, another statement made early in the Tribunal's report bears close examination for its continuing significance for our own consultations and review. It acknowledges the fundamental importance, from a Māori perspective, of the relationship between tikanga and any matter to do with the foreshore and seabed:[141]

> (…) we were persuaded that we should devote part of the urgent hearing to evidence on tikanga associated with the foreshore and seabed. The first two of six hearing days were set aside for this purpose (…) We heard from a selection of extremely knowledgeable and articulate people whose insights contributed immeasurably not only to the intellectual content of our hearing, but also to its wairua (…) it was impossible to forget, after hearing such memorable stories, and such profound beliefs, that what is at stake for Māori goes far beyond arguments about the abrogation of property rights.

The Tribunal was "unconvinced" by the Crown's submissions on the foreshore and seabed and its report was highly critical of the Crown's approach.[142] It was most critical of the discriminatory aspects of the Crown's framework policy, noting that it provided legal certainty for non-Māori only, breaching the constitutional principle of equal treatment under the law. While the Government acknowledged that it would take into account some parts of the Tribunal's report, in the event it essentially rejected the Tribunal's findings and recommendations.

However, given the course of events since 2004, the impact of the Act on both Māori customary rights and public interests in the coastal marine area (see 5.5), and continuing evidence of ill-informed public discourse on these matters, we have found it particularly useful to revisit the Tribunal's report and reconsider how and why it came to the findings and recommendations it did, and with such confidence. Our concern to do so has been reinforced by the fact that a significant proportion of submissions to this review consider the Act to be fundamentally in breach of the Treaty, in particular Articles 2 and 3 (see 2.4.1). Furthermore, in the words of one submitter:

> One of the best Waitangi Tribunal reports ever written, and written within desperately short timeframes, was the Foreshore and Seabed Report. That report offered a number of options for the Government to consider. All of them were feasible and none of them [was] unreasonable. All of them were rejected. In theory, all of them are still available (…) (7-27-1 Professor David Williams)

In revisiting the Tribunal's report we have also taken cognisance of key commentators' interpretations of the report and Government's response to it.

The Tribunal faced the following three key questions which reduced, essentially, to legal argument: 1. What were the legal options post-*Ngāti Apa*? 2. How were those options constrained by the Crown's proposed policy? 3. Was the policy in breach of the principles of the Treaty?[143] But it began its inquiry with the "need to ask as a foundation question: What did the Treaty guarantee and protect for Māori, in terms of the foreshore and sea, as at 1840?"[144] Its key finding was that, "in

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[141] Ibid, 3. Chapter 1 of the Tribunal's report, "Tikanga", when read alongside this report, both reflects and further enriches recent submissions on tikanga made to the Review Panel.

[142] Tom Bennion, Malcolm Birdling and Rebecca Paton *Making Sense of the Foreshore and Seabed: A Special Edition of the Māori Law Review* (Wellington, 2004) 3

[143] Boast, Richard: *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) 90.

[144] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy:* Wai 1071 (Legislation Direct, Wellington, 2004) 15

their relationship with the coastal land and waters, iwi Māori exercised the authority of te tino rangatiratanga, under tikanga Māori".[145] Furthermore, it found that:[146]

> (…) 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 (…) In addition to rights and authority over whenua, Māori had a relationship with their taonga which involved guardianship, protection, and mutual nurturing. This is not a liberal sentiment of the 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.

The Tribunal noted, too, that other private rights had been created in the foreshore and seabed since 1840 and that these had had an uneven impact on Māori interests.[147]

Having first expressed its view that "it is incumbent on both Treaty partners to manage this intersection [between the Māori worldview and the Pākehā worldview] in the interests of all" the Tribunal was:[148]

> (…) satisfied that the Māori claim to ownership, in the Pākehā sense, of the foreshore and seabed is not a new one. The evidence available to us suggests that it is a claim sourced in tikanga Māori and brought to the attention of the Crown in various ways during the past 164 years.

The avalanche of claims to the Tribunal in late 2003, post-*Ngāti Apa*, thus represented only the most recent attempts under the law by whānau, hapū and iwi to claim, have acknowledged, and assert their rights under the Treaty, in an essentially unbroken pattern since 1840 (see Volume 2, Appendix 1). Further to its two-pronged finding – that the Māori claim to the foreshore and seabed is not new, and that the Crown has both been alert to it and consistently overridden it (since 1963 in the mistaken assumption that legal ownership was vested in the Crown)[149] – the Tribunal did not find that Government policy in 2003 met acknowledged criteria that would allow the Crown to justify breaches of the Treaty in the national interest. In other words, Government policy was untenable at law. Furthermore, and of considerable significance to the present review, other options were available to Government to meet its policy goals (which were articulated as being in the national interest and ultimately enshrined in sections 3 and 4 of the Act).

Overall, the Tribunal's conclusions can be generalised thus:

- The Māori worldview was "still fundamentally intact" in 1840 when Māori exercised tino rangatiratanga over coastal land and waters, "has been very slow to change and is still intact today"[150]
- These Māori rights were "at the very least"[151] property rights, and they included development rights;
- Foreshore and seabed were, and are, taonga;
- The Crown has a duty to protect those rights;

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[145] Ibid, 25

[146] Ibid, 28

[147] Ibid, 31-32

[148] Ibid, 28, 37

[149] Ibid, 128

[150] Ibid, 24

[151] Ibid, 26

- The Crown breached Articles 2 and 3, and the principles, of the Treaty of Waitangi, consistently and in multiple respects since 1840;
- The Crown's policy in 2003 (subsequently enacted in all its essential aspects) was expropriatory, and without justification; it violated the Rule of Law and was discriminatory against Māori; and
- Māori have suffered immense prejudice and loss including in respect of their mana, property rights, human rights, other legal rights, extant resources and unrealised resources and development.[152]

In respect of its findings regarding prejudice and loss, the Tribunal noted pragmatically:[153]

> (…) the degree to which Māori have lost ownership of land and resources, often in breach of the principles of the Treaty, must be a factor in the Crown's Treaty duty with regard to surviving assets today.

In 2004 Richard Boast drew attention to one aspect of the Tribunal's approach:[154]

> (…) that is [and, we add, remains] of particular jurisprudential interest [and that] is the emphasis placed in the report on the concept of fairness, now of course pervasive in administrative law. The Tribunal stressed that it was proceeding on (the surely correct) assumption 'that governments in New Zealand are good governments, whose actions although carried by power are mitigated by fairness'.

In this context we find it useful to reproduce here an extract from the Tribunal's report, principally because its sentiments have been clearly echoed in the Review Panel's consultations with both Māori and the general public in 2009:[155]

> Fairness is the value that underlies the norms of conduct with which good governments conform – legal norms, international human rights norms, and, in the New Zealand context, Treaty norms. We think that even though governments are driven by the need to make decisions that (ultimately) are popular, New Zealand governments certainly want their decisions to be coloured by fairness. In fact, we think that New Zealanders generally have an instinct for fairness, and that a policy that is intrinsically fair will, when properly explained, ultimately find favour.

The Tribunal's findings, multiply grounded as they are in tikanga Māori, the coexisting worldviews represented and enshrined in the Treaty, sustained historical inquiry and contemporary legal argument, are of singular significance, and indeed assistance, in our present environment. In alerting us to the historical record in the context of two intersecting views as represented by the Treaty itself, the Tribunal's findings and recommendations open the way for government today to provide a "circuit-breaker" of historic proportions in reviewing the Act and taking action on the options available to it within present circumstances (see Chapter 7).

5.4.3 Options available to the government

> If it was possible to find anything worse than the choice they made, I cannot think of any. (4-136-1, Greg White on behalf of Te Rūnanga o Ngāti Tama and Ngāti Mutunga)

We now revisit the options available to government in the immediate aftermath of the *Ngāti Apa* decision. Putting the 2004 Act aside, the options that were available then are similar to the options available to the government now, and can be considered under the separate standpoints of substantive outcomes and process. What the previous government actually did, of course, was to

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[152] Ibid, 127-138

[153] Ibid, 32

[154] Boast, Richard: *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) 91, citing Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy:* Wai 1071 (Legislation Direct, Wellington, 2004) xiii

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

proceed with the enactment of the new Foreshore and Seabed Act. What else might it have done? There are a number of possibilities.

Proceed with appeal to the Privy Council

The government could have appealed the decision in *Ngāti Apa* to the Privy Council. This was not an unrealistic option. In fact, one of the other respondents to the case did just this (the appeal was withdrawn after London solicitors had been instructed by some of the parties), but the government did not. Some of those who have made submissions to us feel very strongly that the proper course would have been for the government to appeal. Presumably the government did not appeal because it perceived there was no point in doing so. We believe that in a matter as important as *Ngāti Apa* the argument that the Crown should have appealed certainly has merit. An appeal would also have allowed for more time to consider the issues carefully. At the time of *Ngāti Apa* the government was, however, proceeding with a policy of abolishing appeals to the Privy Council – but whether this influenced its decision not to appeal is unclear. Of course an appeal would not have been any kind of solution in itself in the long term, and a policy on the foreshore and seabed would still have had to be formulated.

Do nothing

The government could have done nothing. That would have meant that actions seeking title to the foreshore and seabed would have been heard in the Courts. After *Ngāti Apa* a number of cases were filed in the Māori Land Court. If the government had not intervened the Court would have been under a legal duty to hear and adjudicate on them, given that the Court of Appeal had decided that the Māori Land Court had jurisdiction to do so. Of course, decisions of the Māori Land Court could have been appealed to the Māori Appellate Court and the Court of Appeal. A body of precedent could probably have been worked out. At the same time, cases could have proceeded in the High Court, which would have applied and developed the Common Law relating to Native Title.

Make amendments to Te Ture Whenua Māori/Māori Land Act

The government could have amended the TTWM. The amendments could have been either to give the Māori Land Court fewer options with respect to foreshore and seabed applications (ie to allow it to make status declarations but not vesting orders), or, alternatively, to give it a wider range of options specifically tailored to the particular circumstances of the foreshore and seabed.

Treaty settlement process

The government could have included foreshore and seabed settlements in Treaty settlements, revisiting those settlements already completed. This approach is more sensitive to different regional circumstances but would have been time consuming and expensive. Further, rights in respect of the coast would have been uncertain until all settlements had been completed, and there would have been little or no room to engage with the general public, notwithstanding the general public interest in access to and exploitation of the coastal marine area.

Nationwide settlement with hapū and iwi

The government could have negotiated a nationwide settlement with hapū and iwi, perhaps following the precedents set by the Māori fisheries and aquaculture settlements. But this option may not have allowed for adequate public engagement.

Develop new legislation

The government could have enacted new legislation to deal with the matter. This is what the government actually did. However, in the public mind at least, there remain significant questions about what sort of legislation should have been enacted, what principles it should have been based on, and the processes by which policy should have been formulated and legislation drafted.

As we see it, in the wake of *Ngāti Apa* these were the possible substantive outcomes for the government (ie an appeal, letting the cases run their course under existing law, amending the Māori Land Act, or crafting a new Act). There were also options in terms of process to consider. The actual legislative process that underpinned the 2004 Act will be described briefly below. The process that was implemented was highly accelerated, and was proceeded with despite widespread Māori opposition (as well as that of many other people and interest groups).

As we are in effect proposing a specially-tailored legislative regime ourselves, it can certainly be said that in principle the best solution for the previous government would have been to draft special legislation, as was in fact done. However, we do not think that the legislation that actually was enacted struck an appropriate balance between competing interests in the foreshore and seabed. Emeritus Professor F M (Jock) Brookfield (3-1-1) submitted that the option chosen by the government addressed the concerns that had been identified by the government post-*Ngāti Apa*, but that it did so "at the unnecessary and quite unjustifiable cost of extinguishing all customary title and rights in sea land."

It probably would have been better if, in the aftermath of *Ngāti Apa*, the government of the day had met with Māori and other interested parties to discuss in an open-ended way the practical problems that needed to be dealt with, and to have proceeded step by step, taking public opinion into account as policy was formulated.

5.4.4 Submissions to the Fisheries and Other Sea-related Legislation Select Committee

The Review Panel has also considered the submissions by the public and other publicly available reports made to the Fisheries and Other Sea-related Legislation Select Committee on the Foreshore and Seabed Bill.[156]

The Select Committee received 3,946 written submissions and heard 244 oral presentations. Nearly 60 percent of submissions were presented on behalf of Māori interests (47% from Māori individuals, 10% in the name of iwi, hapū or whānau, and 2% from other Māori groups). More than one-third (35%) were from individuals of unspecified ethnicity or cultural heritage. The remaining submissions were from community groups (2%), companies, local authorities, professional groups and non-government organisations (each of these accounting for 1%).[157]

Approximately 94 percent of the 3,946 written submissions opposed the Bill in general terms. The general themes of these submissions were:

Opposition to Crown ownership

Submissions provided that Crown ownership is equivalent to extinguishment, that the Bill amounted to confiscation and stripped Māori of legal standing.

Opposition to the Crown's ability to alienate foreshore and seabed

Submissions provided that the Bill provided the Crown with power to alienate the public foreshore and seabed by passing subsequent legislation and restricting access without public consultation.

Opposition to loss of the right to due legal process

Submissions expressed concerns about denying Māori the right to pursue claims under TTWM or under Common Law, and that this was a loss of the right to due legal process in respect of determining property/customary interests.

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[156] *Foreshore and Seabed Bill* 129-1: *Report of the Fisheries and Other Sea-related Legislation Committee*, 2003.

[157] Department of the Prime Minister and Cabinet *Foreshore and Seabed Bill: Departmental Report 8 October 2004*, Introduction, 4

Opposition to the processes for the recognition of customary rights

Submissions opposed the process for ascertaining territorial customary rights, and expressed concern that the court processes would be expensive, unfair and the customary rights orders and territorial customary rights provisions would not be a substitute for lost rights; furthermore, the task of proving claims would be onerous and unjust.

Opposition to the proposed amendments to the Resource Management Act

Submissions provided that the proposed amendments to the Resource Management Act 1991 to provide for customary rights would undermine sustainable management and frustrate development, and that costs under the Resource Management Act would increase.

That there were more appropriate alternatives to the Bill

Submissions questioned whether the Bill was necessary to achieve the government's objectives, and proposed other alternatives.

Opposition to the process of developing the Bill

The main criticisms concerned the speed of the process and the limited extent of genuine consultation.

That the Bill was a breach of the Treaty of Waitangi

Some submissions supported the Waitangi Tribunal's Report on the Crown's Foreshore and Seabed Policy[158]; others specifically considered that the Bill breached the Treaty of Waitangi, in particular te tino rangitiratanga as guaranteed under Article II.

Opposition to defining and limiting rights not derived from the Crown

Several submissions challenged the Bill as defining and limiting Māori customary rights in the foreshore and seabed.

That the Bill was a breach of human rights

Specific human rights issues were raised, as follows:

- The differential treatment in the Bill of Māori customary title relative to other forms of title amounted to racial discrimination, contrary to section 19 of the New Zealand Bill of Rights Act 1990 (BORA), the Human Rights Act 1993, article 7 of the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR);
- That the Bill breached:
  - the rights of indigenous peoples recognised under the CERD, the Draft Declaration on the Rights of Indigenous Peoples or otherwise;
  - the right of self-determination as recognised by article 1 of the ICCPR or otherwise;
  - the right of access to / equality before the Courts under article 10 of the UDHR and article 14 of the ICCPR;
  - the right to development as asserted by International Labour Organisation (ILO) Convention 169 on the Rights of Indigenous Peoples, the Declaration on the Right to Development or otherwise;
  - the right of Māori as a minority group to enjoyment of their culture, contrary to section 20 of BORA and article 27 of the ICCPR;

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

- That the Bill deprived Māori of property rights and/or the right to fair value compensation, contrary to article 17 of the UDHR, the CERD or otherwise.

Concern that the Bill accorded preferential treatment to Māori

Some submissions opposed the Bill on the grounds that it accorded preferential treatment to Māori.

In 2004, the submissions in support of the Bill centred on three core issues:

- public ownership
- the access and navigation provisions
- the protections in the Bill for Māori customary interests.

The main themes to emerge from analysis of the 2004 submissions on a sectoral basis[159] were:

Sector	Key themes
Māori	Opposition to Crown ownership; opposition to the process for finding territorial customary rights and the lack of guarantees on redress; opposition to ancestral connection orders (dropped from the Act) as having little effect or disrupting existing consultation processes; and opposition to the test for and limits on customary rights orders.
Local authorities	Concern over: the vesting of local authority land, particularly where that land is subject to leasehold interests; the lack of public participation in decisions on customary rights orders; amendments to the RMA to provide for customary rights as undermining sustainable management and frustrating development; the absence of criteria for restricting access rights; and the governance and cost implications of the Bill.
Port companies	Support for Crown ownership of all foreshore and seabed for which there is no clear title, but opposition to the Bill going further until after the (putative) Appeal to the Privy Council; opposition to ancestral connection orders; opposition to reclamation provisions, especially the effect on existing reclamation agreements, on future reclamations, and on dredging activities.
Network utility operators	General support for Crown ownership, public access and navigation though some clarification sought on particular elements; concern at proposed changes to the RMA as potentially affecting significant infrastructure investments; opposition to reclamation provisions.
Recreational groups	Concern at inclusion of air and water space in public foreshore and seabed combined with ability to restrict access without public consultation; concern at alienation provision; varying views on RMA amendment.

Having examined the Foreshore and Seabed Bill the Select Committee made a single recommendation to the House of Representatives, namely that it "is unable to reach agreement on whether the Bill should be passed. The Bill is being reported to the House with no amendments."

[159] Department of the Prime Minister and Cabinet *Foreshore and Seabed Bill: Departmental Report 8 October 2004*, Introduction, 4

It is clearly evident to the Review Panel that, in an overarching sense, the three core issues identified above (public ownership, access and navigation, and protection of Māori customary interests) remain at the very heart of concerns about the current legislation. They are fundamental to the vast majority of submissions made during our consultation with Māori and the general public in April and May 2009, irrespective of whether those submissions generally supported or opposed (or proposed amendment of) the current legislation (see 2.4).

Various submitters (in the main, Māori) have explicitly reiterated to the Panel their previous submissions to the Select Committee, considering that they were unheeded in 2004. It is especially pertinent to this review that the particular issue of protecting Māori customary interests (more specifically, the effect of the Foreshore and Seabed Act in abrogating customary rights) remains the paramount issue for today's submitters.

5.5 Effects of the Foreshore and Seabed Act 2004

5.5.1 Introduction

This report is not the place for a full technical analysis of the Act.[160] However it is important to explain the main features of the Act, not only for the sake of completeness, but also as a necessary background to our critical analysis of the legislation developed in Chapter 6.

The first point to make is that the Act was part of a complicated legislative package enacted in 2004. The Act itself was the principal part of the package, but at the same time the government made a number of important changes to the Resource Management Act 1991. These changes included an amendment to one of the most important provisions of the Resource Management Act, section 6, by adding to the list of "matters of national importance" a new one ("the protection of recognised activities"). The changes made to the Resource Management Act, which are summarised in more detail below, are vital to the operation of the new system of customary rights orders, one of the most important aspects of the Act.

What does the Act actually do? Put very simply, the legislation has two main aspects. It vests all public foreshore and seabed – that is, the area between the mean high water springs and the outer limits of the territorial sea – in the Crown absolutely, and it provides for public rights of access and navigation in this area. In this respect, the Act is a nationalisation or expropriation of property rights, having some affinities with other nationalisation statutes such as the Petroleum Act 1937, the Geothermal Energy Act 1953, or aspects of the Water and Soil Conservation Act 1967. (The difference with the Act, though, is that until the *Ngāti Apa* decision the government had been acting on the assumption that it already had a secure proprietary title to the foreshore and seabed already.)

However, the legislation also attempts to provide for the recognition of Māori customary rights in the foreshore and seabed. It does this by remodelling the existing jurisdiction of the High Court and the Māori Land Court, and by providing for two new kinds of orders, territorial customary rights orders and customary rights orders. While these orders were mainly devised to give specifically Māori customary rights recognition, theoretically the new procedures are open to all. Non-Māori are also able to obtain territorial customary rights orders and customary rights orders. As it happens, at the time of this report, no territorial customary rights orders or customary rights orders have actually been made, and as far as we are aware only Māori have applied for either.

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[160] For a full analysis see Boast, Richard: *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) 113-181.

Structure of the Foreshore and Seabed Act 2004

The Act is structured as follows:

- Firstly there are the "preliminary provisions" of the Act, which deal with the object and purposes of the legislation and related matters (ss 1-2 and Part I, ss 3-6);
- Next is the vesting part of the Act (ss 7-31, the first half of Part II) dealing with "public foreshore and seabed". The core provision is section 13, which vests all public foreshore and seabed in the Crown;
- Next there are those provisions that deal with territorial customary rights orders in the High Court (second part of Part II, ss 32-45);
- Next comes that part of the Act (Part III, ss 46-45) dealing with customary rights orders in the Māori Land Court. This part of the Act relates only to applications for customary rights orders brought by whānau, hapū , or iwi (s 48);
- Next there are the provisions relating to customary rights orders in the High Court (Part IV, ss 66-91). These relate to applications for customary rights orders by groups other than hapū , whānau, or iwi.
- Lastly, there is a group of miscellaneous provisions contained in Part V (ss 92-103) which deal with the public foreshore and seabed register, recognition agreements – which are very important – and some other matters.

The Act is a complex piece of legislation, and some of its provisions (especially section 32, the principal provision relating to territorial customary rights orders), are very intricate and not easy to analyse. In the rest of this section we will consider some of the more important features of the Act in more detail. The new territorial customary rights order and customary rights order processes, however, will be postponed for discussion a little further on. A key question for this Panel is whether these procedures form adequate recompense for the property rights that were taken away by the Act.

5.5.2 Jurisdictional effects of the Act

The *Ngāti Apa* decision was concerned with the jurisdiction of the Māori Land Court, and (to a lesser extent) of the High Court. One key effect of the Act is to remove the existing jurisdiction – as stated in *Ngāti Apa* – that both Courts had before the enactment of the Act.

Māori Land Court

The Labour-led Government's position with respect to the Māori Land Court was that Te Ture Whenua Māori Act / Māori Land Act 1993 (TTWM) was never intended to deal with the foreshore and seabed, notwithstanding the Court of Appeal's conclusions in *Ngāti Apa*. In its Framework released in December 2003 the Government stated this explicitly.[161] Consistently with this, the Act completely remodelled the Māori Land Court's jurisdiction over the foreshore and seabed. Section 12 of the Act removed the Court's jurisdiction to consider applications for status to land or for vesting orders under TTWM sections 18, 131 and 132, or for an amendment of a title under TTWM section 138, where such applications related to areas of foreshore and seabed. In other words, section 12 cancelled the jurisdiction that the Court of Appeal in *Ngāti Apa* found the Māori Land Court to possess. However, as will be described below, the Act gives to the Māori Land Court a new jurisdiction, provided for by the Act itself, over customary rights orders.

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[161] *Foreshore and Seabed: A Framework:* December 2003, p 1: "Te Ture Whenua Māori Act was not intended to be the legal framework that applied to land in the foreshore and seabed."

High Court

The legislation also impacts significantly on the ordinary Common Law jurisdiction of the High Court. When the government first considered its policy options in the wake of *Ngāti Apa* its initial inclination was simply to entirely abolish any jurisdiction of the High Court to consider Common Law claims relating to the foreshore and seabed.[162] But, in fact, policy evolved from August 2003 until the Act was passed. So, while the High Court's former Native Title jurisdiction was indeed abolished, it was given in exchange a new and self-contained jurisdiction over territorial customary rights orders and customary rights orders which retained aspects of the former Common Law rules. Thus section 10(1) of the Act, in accordance with an "abolish and replace" approach, states:

> On and from the commencement of this section, the jurisdiction of the High Court to hear and determine, whether under an enactment or any rule of law or by virtue of its inherent jurisdiction, any customary rights claim is replaced fully by the jurisdiction of the High Court under section 33 and Part 4, and the jurisdiction of the Māori Land Court under Part 4.

The Act cut a large swathe through the Common Law. "Customary rights claim" was defined very widely, going so far as to make Common Law claims based on the fiduciary duties of the Crown impossible:

> [C]ustomary rights claim means any claim in respect of the public foreshore and seabed that is based on, or relies on, customary rights, customary title, aboriginal rights, aboriginal title, the fiduciary duty of the Crown, or any rights, titles, or duties of a similar nature, whether arising before, on, or after the commencement of this section and whether or not the claim is based on, or relies on, any 1 or more of the following:
>
> a a rule, principle, or practice of the common law or equity;
>
> b the Treaty of Waitangi;
>
> c the existence of a trust;
>
> d an obligation of any kind.

The legislation thus did not only prevent the High Court from conducting cases relating to Native Title over the foreshore and seabed. It went further to expressly prevent the ordinary Courts from hearing cases relating to such questions as to whether Crown management of particular areas of foreshore and seabed amounted to a breach of the Crown's fiduciary duties.

5.5.3 Crown ownership and management

The core provision of the Foreshore and Seabed Act is section 13, which vests all "public foreshore and seabed" in the Crown (note that it does not vest all "foreshore and seabed" in the Crown: areas of foreshore and seabed in private ownership, including any foreshore and seabed that is Māori freehold land, remains in private title). Section 13 is important enough to be cited in full:

> **13 Public foreshore and seabed vested in the Crown**
>
> 1 On and from the commencement of this section, the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown, so that the public foreshore and seabed is held by the Crown as its absolute property.
>
> 2 Subsection (1) replaces all previous statutory vestings in, and acquisitions of title by, the Crown in respect of any area of the foreshore and seabed.

[162] The August 2003 Government Proposals discussion document stated that "the new Māori Land Court process will be the only process for investigating customary interests in the foreshore and seabed".

3 Subsection (1) does not affect customary rights that are able to be recognised and protected under Part 3 or Part 4 [i.e. customary rights orders].

4 The Crown does not owe any fiduciary obligation, or any obligation of a fiduciary nature, to any person in respect of the public foreshore or seabed.

5 The Land Act 1948 does not apply to the public foreshore and seabed.

The Common Law requires that any statutory provision that extinguishes Native Title has to be "clear and plain", or, to put it another way, there is a legal presumption against extinguishment.[163] But there can be no doubt that this provision was specifically designed to meet this test. The statutory language is both clear and explicit, especially the reference to vesting the land in the Crown "as its absolute property". Section 13 needs also to be read alongside sections 3 and 4 of the Act. Section 4(a) states that the Act gives effect to the object of the Act (as stated in section 3) by "vesting the full legal and beneficial ownership of the public foreshore and seabed in the Crown".

Definition of foreshore and seabed

What, then, is the extent of the area that is vested, in this absolute sense, in the Crown? Section 5 of the Act defines "foreshore and seabed" to mean, first, the "marine area" that is bounded "on the landward side by the line of mean high water springs"[164] and "on the seaward side, by the outer limits of the territorial sea". "Territorial sea" has the same meaning as in section 3 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 – that is, 12 nautical miles. Prior to the enactment of the Act the "foreshore" and the "seabed" were legally distinct areas, but after its enactment the two are now legally coalesced into a single area.

The seafloor beyond the 12 nautical mile limit is thus not "foreshore and seabed" and is not vested absolutely in the Crown. Nor does the vesting impact on foreshore and seabed in private title, or on any land inland of the line of mean high water springs. What the extent of the vested area actually is, is unknown – at least to this Panel – but given the length of the New Zealand coastline it must certainly be vast.

The Act has to be the single biggest land nationalisation statute enacted in New Zealand history. Defenders of the legislation could maintain, however, that the government was under the impression that the area belonged to the Crown absolutely in any case, and that the legislation was not so much an expropriation as the correction of an anomaly. We will return to this point in the next section of our report.

Estuaries, lagoons and the like

The New Zealand coastline, as is well known, contains many large river estuaries and coastal lagoons. What is the effect of the Act on these areas? The Act's definition of "foreshore and seabed" includes the beds of all rivers that are part of the coastal marine area – an area which is defined not in the Act itself, but in the Resource Management Act 1991. Prior to the Act, the coastal marine area was an area which had a special management regime which was applied to it irrespective of legal ownership. But with the Act this definition now has significant implications for property rights.

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[163] In *Ngāti Apa* itself, [2003] 3 NZLR 643, at 684 Keith and Anderson JJ in their joint judgment stated: The protective approach adopted in the earlier American and Privy Council authorities is to be seen in more recent rulings of the Supreme Court of Canada, the High Court of Australia, and this Court: the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain.

[164] Tides are a complex phenomenon and there are a number of ways to define the intertidal zone. The Foreshore and Seabed Act employs a definition which takes the line relatively far up the beach – further, for instance, than does the Crown Grants Act 1908, which uses the standard Common Law definition, "the line of high-water mark at ordinary tides". In some parts of the New Zealand coast the difference between the two lines (mean high water springs, the Foreshore and Seabed Act definition, and high water mark at ordinary tides) can be very substantial. The Act does not actually define "mean high water springs" (MHWS). However the Australian and New Zealand Intergovernmental Committee on Surveying and Mapping Tidal Interface Working Group has defined MHWS as "the average of all high water observations at the time of spring tide over a period of time (preferably 19 years)".

The Resource Management Act includes within the definition of coastal marine area all riverbeds, the landward boundary being whichever is the lesser of "(i) either one kilometre upstream from the mouth of the river; or (ii) the point upstream that is calculated the width of the river mouth by 5". This means that, for example, the beds of the Waikato and Whānganui rivers up to one kilometre inland are also foreshore and seabed under the Act.[165] Coastal lagoons, on the other hand, are not "foreshore and seabed" unless they are open to the sea and affected by the tides. An exception to this is Te Whaanga Lagoon in the Chatham Islands, the only water body identified by name in the Act, which is specifically included within the definition of foreshore and seabed and is thus vested absolutely in the Crown.[166] The matter of Te Whaanga lagoon was the subject of a presentation to the Panel by Ngāti Mutunga o Wharekauri Iwi Trust and Moriori groups in the Chatham Islands, as well as by the Chatham Islands Council[167]. They have informed us that the vesting of Te Whaanga lagoon was done without consultation and that all parties in the Chathams wish to see the lagoon revert to its former status.

Minerals

Some other effects of section 13 need to be noted. As the Crown is now the absolute owner of all public foreshore and seabed, it now owns absolutely all minerals on or beneath the foreshore and seabed as well (based on the Common Law rule that the owner of the surface title also owns all minerals beneath the land down to the centre of the earth[168]). However, this has no effect on ownership of petroleum and natural gas, for the reason that all petroleum and natural gas was vested in the Crown as long ago as 1937.[169] Ownership of petroleum and natural gas is outside our Terms of Reference. It is important to emphasise, however, that the vesting of the foreshore and seabed could have important implications for mineral ownership in the case of those minerals not vested already in the Crown by separate legislation.

Effects on other Acts

The Act also has important consequential effects for some other Acts. Perhaps most importantly, section 12 of the Resource Management Act, the very provision that was in issue in *Ngāti Apa*, deals with the allocation of coastal space "in relation to land of the Crown in the coastal marine area". One of the most significant and far-reaching consequences of *Ngāti Apa* was that the effect of section 12 of the Resource Management Act became greatly restricted should it be found that any of foreshore and seabed were not "land of the Crown". Section 12 of the Resource Management Act was presumably drafted as it was because the drafters were under the impression – erroneously – that nearly all of the coastal marine area was Crown land already. However, section 13 of the Act now carries the further consequence that all public foreshore and seabed undoubtedly is Crown land, meaning that occupation of the foreshore and seabed or removal of sand, shingle and so on are forbidden unless permitted by a rule in a plan or a resource consent.

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[165] Without wishing to burden this report with unnecessary technicalities, it is also the case that the beds of "navigable" rivers are Crown land in any case (Resource Management Act 1991 s 354).

[166] See definition of "foreshore and seabed" in Foreshore and Seabed Act s 5, (c), including "the bed of Te Whaanga Lagoon in the Chatham Islands".

[167] Including NgātiMutunga o Wharekauri Iwi Trust (7-214-2); Moriori groups in the Chatham Islands (sub numbers and names?); Chatham Islands Council (7-86-1)

[168] For the avoidance of doubt the Foreshore and Seabed Act states this explicitly in any event: the definition of "foreshore and seabed" includes also "the subsoil, bedrock and other matters below the areas described" as well as "the air space and the water space above": FSA s 5.

[169] Section 3, Petroleum Act 1937. Interestingly the confiscation of petroleum royalties by statute in 1937 was objected to by Sir Apirana Ngata on the grounds that this was contrary to the Treaty of Waitangi (members of the National Party, in opposition at the time, agreed with Ngata). The effect of the 1937 Act is maintained by s 10 of the Crown Minerals Act 1991. Other minerals which have been expropriated nationally (and thus Crown title to which is independent of the Foreshore and Seabed Act with respect to the foreshore and seabed) are gold and silver, and uranium (Mining Act 1971, s 6; Atomic Energy Act 1945; and now Crown Minerals Act 1991 s 10). The law of mineral ownership in New Zealand is an intricate patchwork. Whether the Foreshore and Seabed Act amounts to an expropriation of minerals within the foreshore and seabed depends on the view taken of the Act overall: if the Act is in fact expropriatory of private property rights, then it has expropriated minerals as well.

Implications of environmental change

The "foreshore", finally, is not a fixed area. The area where land and sea meet is a highly dynamic environment which is in constant state of legal change, usually gradual, but sometimes sudden and dramatic. If it is indeed the case that New Zealand, like all other coastal countries, will be affected by rising sea levels caused by climate change then the volatility of the coastal environment can be expected to increase.[170]

For the Act to make any sense, it has to be assumed that the "foreshore" is moveable (i.e. the area that was vested in the Crown was not the area that happened to be foreshore and seabed on the date when the Act became operative on 25 November 2004). Thus, if the sea advances inland, areas that are now dry land may well become "public foreshore and seabed" and will thus vest absolutely in the Crown. Correspondingly, should the sea retreat, newly-exposed areas of dry land will vest in coastal landowners under the ordinary law of accretion. If the more dire predictions are correct, however, then it is advance of the sea inland which will be the more significant problem. (Whether or not New Zealand has an adequate legal infrastructure in place to deal with the threat of rising sea levels is a matter we will discuss briefly in our final chapter).

5.5.4 Public rights of access and navigation

Under the Act the Crown now owns the public foreshore and seabed absolutely, but this is subject to a number of statutorily defined rights.[171] One of the four purposes of the Act, as set out in section 4, is that of "providing for general rights of public access in, on, over and across the public foreshore and seabed and general rights of navigation within the foreshore and seabed".

Rights of access

Section 7 of the Act deals specifically with rights of access. Section 7(2) states specifically that "every natural person has rights in, on, over, or across the foreshore and seabed". The Act contains no reference, however, to access to the foreshore and seabed – a significant omission. The Act does not disturb the private property rights of coastal landowners. In fact, it can be said that the right of "access" established and protected by the Act essentially means access for beach walkers and boat owners. This is because much of our coastline is inaccessible from the landward side except by crossing private land. This is another point to which we will return.

In any case, the right of access is not unfettered. Section 7(3) provides that access rights may be subjected to "authorised limits", including restrictions on access imposed under any other enactment. That would include legislation relating to marine reserves, for example (where access is allowed but subject to certain restrictions), mātaitai reserves (closed to commercial fishing), port companies and so on. Section 7(4) allows such restrictions to take the form, amongst other things, of applying "to any method or methods of exercising access rights" (for example, on horses or vehicles).

We have no issue with any of these restrictions. But it is important to note that the Act itself has to recognise that public access across the foreshore and seabed cannot be wholly unfettered in the sense that anyone can go to any part of the foreshore and seabed and do whatever they want there. Most people would accept that the public should not be able to wander at will around port installations, for reasons of security and public safety, or that there is anything problematic about fishing being prohibited within a marine reserve (although that could certainly be said to be a restriction on "access").

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[170] A point made to the panel by former Chief Planning Judge Shonagh Kenderdine.

[171] A number of commentators have made the point to us that the ordinary public already had various rights of access and navigation protected by the Common Law, and that they preferred Common Law protection to the vagaries of a statutory regime.

What, exactly, is involved in the concept of a right of "access"? The Act attempts to define this. "Access rights" are defined in section 7(1) to mean, essentially, the rights to:

a be "in or on";

b "enter, remain in, and leave";

c "pass and repass in, on, over, and across"; and

d "engage in recreational activities in or on" the public foreshore and seabed.

Once something as apparently straightforward as "access" is defined in a meticulous manner such as this, new problems arise with the scope of the definition. One commentator, for example, has raised the issue as to whether removing driftwood from the beach is a "recreational activity".[172] The right of public access excludes access to wāhi tapu and sites of significance in certain circumstances. Such a restriction arises out of the customary rights order process, whether in the Māori Land Court (iwi, hapū and whānau applications) or in the High Court (other applications). To establish such a restriction is an involved process which need not be described in detail here.[173]

Rights of navigation

The Act also provides for public rights of navigation. By section 8(1) "every person has rights of navigation within the foreshore and seabed" (i.e. not only the "public" foreshore and seabed). Thus, it is not a trespass to sail a boat across areas of foreshore and seabed currently in freehold title. Navigation rights are deemed to "include" (i.e. are not restricted to) rights to pass and repass, temporarily anchor a boat, load and unload, remain in place "for a convenient time", and "remain temporarily in place until wind or weather permits departure or until cargo has been obtained or repairs completed".[174] What is noteworthy in this section of the Act is the attempt to give the right of navigation as much detailed content as possible.

5.5.5 Territorial customary rights orders

Section 33 of the Act allows the High Court to find that a "group" – which does not necessarily need to be a Māori group – holds "territorial customary rights". The High Court may make a finding that the group (or any members of that group) would have – but for the vesting of the public foreshore and seabed in the Act by the Crown by section 13(1) – held territorial customary rights to a particular area of the public foreshore and seabed at common law. Territorial customary rights, then, are a kind of group right as formerly existed at Common Law – although the Act does not define what "groups" are eligible, or indeed attempt to define groups at all.

Entitlement to a territorial customary rights order

The principal provision relating to territorial customary rights is, however, so complex that it is virtually impossible to describe and analyse it concisely for the purposes of this report.[175] At the risk of over-simplification, to obtain such an order in the High Court it has to be shown not only that the group would have had a customary title at Common Law, but that a number of additional requirements are also met, including that:

- the pre-existing Common Law title is "founded on exclusive use and occupation of a particular area"[176];

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[172] Bronwyn Arthur, ""Rights-Bearers" and "Right-Integration"" in New Zealand Law Society, *Foreshore and Seabed Act, the RMA and Aquaculture*, New Zealand Law Society, 2005, 37 at 39.

[173] See Foreshore and Seabed Act 2004, ss 54 and 78; Boast, Richard: *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005), 137-8.

[174] Foreshore and Seabed Act 2004, s 8(2).

[175] For a full analysis see Boast, Richard: *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005), 143-163.

[176] Foreshore and Seabed Act 2004, s 32(1)(a) ("is founded on the exclusive use and occupation of particular area of the public foreshore and seabed by the group").

- it separately entitles the group to exclusive use and occupation[177];
- the area has been used to the "exclusion of all persons who did not belong to the group" without "substantial interruption" since 1840[178]; and that
- the group possesses "continuous title to contiguous land".[179]

With respect to the last of these, the Act thus links entitlement to territorial customary rights orders to continued ownership of coastal land (although the Court of Appeal in *Ngāti Apa* indicated that this was not actually necessary). Moreover, it makes no distinction between loss of title to adjacent coastal land by willing sales (as opposed to confiscation) on the one hand, and public works takings or other forms of coercive acquisition on the other.

Customary title at Common Law

As noted above, the Act does not stipulate that the "group" seeking a territorial customary rights order has to be a Māori group. Non-Māori can apply, but the question is whether non-Māori applicants could conceivably cross the first hurdle of having to show that they had a customary title recognised at Common Law. The Common Law recognises and protects Native or Aboriginal Title – a customary title – but it is not easy to see what customary titles at Common Law are held by non-Māori.

Titles to private land in New Zealand law arise invariably by Crown grant. Emeritus Professor F M (Jock) Brookfield is firmly of the view that no such non-Māori customary titles exist, and doubts in fact whether there could even have been any such titles in England following the Norman Conquest in 1066: "[t]heir revival today in England, let alone New Zealand, would be judicial activism indeed".[180] Assuming Professor Brookfield is right, and we are confident that he is, the effect is that the statutory right non-Māori have to apply for territorial customary rights orders is actually meaningless.

In this respect the Foreshore and Seabed Act is meaningless law. That Parliament would ever enact statutory provisions that cannot be given legal effect to is perhaps surprising. However, in this case it seems clear that the provisions allowing non-Māori to apply for territorial customary rights orders were put in the Act as a result of a political trade-off that reflected political party alignments as they stood in 2004.

Outcome of attaining a territorial customary rights order

Should a "group" manage to obtain a territorial customary rights order from the High Court, what, in practical terms, will be the outcome? Essentially, the successful group gains the right to enter into negotiations with the Crown, or, alternatively, is able to apply for an order under section 43 of the Act for the establishment of a foreshore and seabed reserve.

Negotiations with the Crown

Michael Doogan, a barrister, described the Act to us as a "low trust" model – and we certainly agree with him. There can be no clearer illustration of this than the provisions relating to Crown redress for a territorial customary rights order finding. If a group has obtained a territorial customary rights order it can seek an additional order from the High Court referring the finding to the Attorney-

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[177] Foreshore and Seabed Act 2004, s 32 (1)(b) ("entitled the group, until the commencement of this Part, to exclusive use and occupation of the area").

[178] Foreshore and Seabed Act 2004, s 32 (2) (a).

[179] Foreshore and Seabed Act 2004, s 32(2)(b).

[180] F M (Jock) Brookfield, "The Sea Land Controversy and the Foreshore and Seabed Act", [2006] NZLJ 362,363. The panel met with Professor Brookfield on Friday 8 May 2009. During our discussions he repeated his view that there were no non-Māori customary titles to which s 32 could apply.

General and the Minister of Māori Affairs. If there is such a referral, the Ministers "must enter into negotiations".[181] However, section 38 provides that there shall be "no redress other than that given by the Crown". The Act is also drafted in such a way as to prevent the applicant group from returning to the High Court should negotiations fail. Nor may the nature or extent of the Crown's redress be reviewed by the Courts.[182] Rights of appeal are also very limited.[183]

Given that the principal outcome of a territorial customary rights order is a right to negotiate with the Crown, it is not surprising that a number of groups, including Te Rūnanga o Ngāti Porou (on behalf of Ngā Hapū o Ngāti Porou), have operated in reverse order, entering directly into negotiation with the Crown, the outcome of which will then by ratified by the High Court. It is easy enough to understand why they have done so.

Foreshore and seabed reserve

The other option is that a foreshore and seabed reserve will be set up under section 40. However, such a reserve must still allow for public access and public rights of navigation. Such reserves are to be established under the supervision of the High Court – a most unusual function to be given to it. The Act pays a great deal of attention to foreshore and seabed reserve boards, charters and so on. It is not necessary to go into the details here.

Developing local jurisprudence

In essence, territorial customary rights orders are very difficult to obtain and can fairly be said to offer very little that is tempting in terms of practical outcomes. No such orders have been made to date, and it seems a fair inference that, on the whole, Māori groups see little point in applying for them, except as part of a negotiated settlement process.

The territorial customary rights order provisions of the Act are in effect an attempt to codify and restate Native or Aboriginal or customary Title law. We do not intend to deal comprehensively with such complex issues as the extent to which section 32 ("The meaning of territorial customary rights orders") and its ancillary provisions accurately reflect the development of Native or Aboriginal or Customary Title law, whether in its Canadian or Australian variants, or to identify precisely the juristic sources of the various aspects of the provisions. This can be left to academic specialists. We do observe, however, that any attempt to restate and codify such a complex and dynamic part of the Common Law, especially given the comparative lack of New Zealand case law, can only be a difficult enterprise. That section 32 has ended up as a very complicated statement is not surprising.

However, while it is true that Native or Aboriginal or customary Title cases would be time-consuming and could introduce a certain amount of uncertainty to the law, section 32 especially has created new uncertainties of its own. Groups seeking territorial customary rights orders still need to show that they could have obtained recognition of customary rights at Common Law but they are also required to meet a number of additional thresholds (some of which derive from Common Law cases in various countries) which are themselves very difficult to interpret. To clarify the precise effect of section 32 would require a body of case law in its own right.

Generally, our view is that litigation over the meaning of an intricate statute is something that should be avoided. Rather, our feeling is that the Common Law should simply be left alone to develop in accordance with New Zealand conditions. And if there are non-Māori collective property rights still in existence – which we doubt – then it seems that the proper approach is simply to allow

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[181] Foreshore and Seabed Act 2004, s 37(1).

[182] Foreshore and Seabed Act 2004, s 38(3).

[183] Orders made by the High Court under s 36 referring a finding under s 33 to Ministers and orders under s 43 relating to foreshore and seabed reserves may not be appealed (Foreshore and Seabed Act s 36(3)). Orders made under s 45 also may not be appealed. However the Act is silent as to whether findings under s 33 itself can be appealed. Arguably here ordinary rights of appeal ought to apply.

parties to assert them in the Courts and allow the Courts to give such recognition to them, if any, in whatever manner the Courts believe to be appropriate. We will return to the possible restoration of the High Court's ordinary jurisdiction in Chapters 6 and 7.

5.5.6 Customary rights orders

Customary rights orders, which can be made by either the Māori Land Court[184] or by the High Court,[185] are focused not on territorial rights but on activities. The key phrase used repeatedly in the legislation is "activity, use, or practice". As has already been explained, the Māori Land Court deals with applications made by whānau, hapū and iwi, and the High Court deals with all other applications.

Unlike territorial customary rights orders, customary rights orders are non-exclusive. The Māori Land Court is empowered to grant customary rights orders to more than one hapū , iwi or whānau or to any combination of one or more with respect to the same area of foreshore and seabed.[186] Likewise, the High Court may "grant customary rights to more than one group in respect of the whole or part of the same area of the public foreshore and seabed".[187] A customary rights order can be "exclusive", but is not required to be.

Customary rights orders in the Māori Land Court

Section 46 of the Act gives to the Māori Land Court power to inquire into and determine applications for customary rights relating to "a specified area of the public foreshore and seabed". This is an exception to the general abolition of its jurisdiction to make orders relating to the foreshore and seabed under its ordinary powers.

Certain types of activity, use or practice may not form the subject of an application for a customary rights order.[188] These are Māori commercial fishing rights, non-commercial Māori fishing rights, any activity regulated under the Fisheries Act 1996, and any application whose subject is protected wildlife or marine mammals. Thus, it is not possible to obtain a customary rights order relating to practically any kind of fish – except whitebait, where a customary rights order is possible[189] – or protected wildlife. Fisheries legislation has its own elaborate systems, including provision for customary fishing and maitaitai reserves, which arguably make customary rights orders unnecessary with respect to fishing, and of course customary rights orders should not extend to protected species. But these exclusions do not leave a great deal remaining. A favourite example mentioned by politicians and others is collecting hāngi stones from the beach – although we feel that, irrespective of the Act, those who need hāngi stones from the beach will simply continue to go to the beach and collect them.

Tikanga Māori threshold

In the Māori Land Court the applicant has to show that the activity, use or practice for which a customary rights order is being sought is "integral" to "tikanga Māori".[190] The meaning of "integral" here is another difficulty in respect of interpretation of the legislation. How high should the threshold be set? In the well-known decision of the Supreme Court of Canada in Van der Peet, Chief Justice

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[184] Foreshore and Seabed Act 2004, Part 3 Subpart 2 and 3 (ss 48-65).

[185] Ibid, Part 4 (ss 66-91).

[186] Ibid, s 50(3).

[187] Ibid, s 74(3).

[188] Ibid, s 49.

[189] This is because taking of whitebait is controlled not under the Fisheries Act 1996 but by means of regulations made pursuant to ss 48 and 48A of the Conservation Act 1987. Under the regulations there are no restrictions on the taking of whitebait for hui or tangi provided that certain restrictions are met.

[190] On the "integral" requirement see Shaunnagh Dorsett and Lee Godden, "Interpreting customary rights orders", 36 *Victoria University of Wellington Law Review* 299; Boast, Richard: *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) 173-4. The "integral" requirement most likely derives from the Supreme Court of Canada's decision in Van der Peet, [1996] 2 SCR 507.

Lamer indicated that "integral" implies high levels of centrality, significance and distinctiveness. According to the Chief Justice:[191]

> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central or significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive – that it was one of the things that truly made the society what it was.

Commentators on the Act, however, have argued that the Chief Justice Lamer test is to set the threshold at far too high a level.[192] Is taking whitebait, for instance, something that made Māori society – or the claimant hapū – what it was?[193] There are no answers, for the reason that, as with territorial customary rights orders, no customary rights orders have actually been made, and no body of precedent on the interpretation of the Act exists.

There are other requirements that have to be satisfied before a customary rights order can be made. The activity has to be "carried on, exercised or followed in accordance with tikanga Māori".[194] This means that not only does the activity have to be "integral" to tikanga Māori in an analytical sense, it has to have been carried out in a manner that is in accordance with tikanga Māori. Activities that are "integral" to, but not "carried on" in accordance with, tikanga Māori are not very easy to imagine.[195] Moreover, the activity has to be carried on "in a substantially uninterrupted manner since 1840", which is a counterpart to the equivalent provision in section 32(2) relating to territorial customary rights orders that the use and occupation be without "substantial interruption".[196] The activity must be carried on "in" the area of public foreshore and seabed (that is, not regarding it, or with respect to it); it must continue to be exercised; cannot be prohibited by any enactment or rule of law; and has to have "not been extinguished".[197]

Customary rights orders in the High Court

As well as the Māori Land Court, the High Court has power to make customary rights orders. The High Court provisions are essentially the same as those relating to the Māori Land Court, except for one. In the High Court applications are to be made not by whānau, hapū or iwi but by "the authorised representative of a group of natural persons with a distinctive community of interest".[198] In other words, non-Māori groups can apply for customary rights orders, theoretically, as can Māori "groups" other than whānau, hapū or iwi (e.g. a coastal community inhabited by a number of descent groups). The practical significance of the High Court provisions is probably slight. According to Professor Brookfield:[199]

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[191] Van der Peet, para 55.

[192] See Boast, Richard: *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) 174.

[193] To which the answer is, perhaps not: but then it depends on what the "activity" is: maybe taking whitebait did not make Māori society what it was, but fishing more broadly defined certainly did.

[194] Foreshore and Seabed Act 2004, s 50(1)(b)(ii).

[195] See Boast, Richard: *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) 175 where the facetious suggestion is made that one example might be artificially constructing hāngi stones on the foreshore using gravel and a concrete mixer, but even this is uncertain.

[196] Foreshore and Seabed Act 2004, s 50(1)(b)(ii); s 51(1).

[197] Ibid, s 50(1)(b)(ii); s 50(1)(b)(iv); s 50(1)(c); s 51(2).

[198] Ibid, s 68(1).

[199] F M (Jock) Brookfield, "The Sea Land Controversy and the Foreshore and Seabed Act" [2006] NZLJ 362, 363.

> Here new rights are created by the statute and the Court orders, in respect of the "activities, uses or practices" proved to have been carried on by the group since 1840. There is no suggestion, as with territorial customary rights, that the rights existed at common law. In effect they correspond to the rights of common recognised in England, such as grazing rights, and still of some importance there. That there is any group in existence to apply for such rights is highly unlikely, as the government is clearly aware.

The scope of the non-Māori statutory rights created by the Act is thus highly uncertain. What exactly is meant by a "distinct community of interest" is hard to say. Would it be possible to apply for territorial customary rights with respect to the activity of whitebaiting for the entire coastline on behalf of "all New Zealanders", for instance? This is presumably not what the drafters of the legislation had in mind.

Effect of customary rights orders

Customary rights orders, whether made by the Māori Land Court or by the High Court, are given effect to by the RMA. The Resource Management (Foreshore and Seabed) Amendment Act 2004 made a number of important alterations to the RMA. The amending Act added "the protection of recognised customary activities" to the matters of national importance set out in section 6 of the RMA, and and also added a number of new sections relating to recognised customary activities. The most important of these are the new sections 17A, 17B, Schedule 12 and section 107A.

The irony with respect to customary rights orders is that, while their scope is actually very limited under the Act, once obtained customary rights orders are very strictly protected under the RMA. Essentially, the activity is privileged and is exempted from the standard RMA controls. The holder of a customary rights order is, in effect, able to veto any resource consent on the grounds that it will have a significant adverse effect on the protected activity.[200] Māori groups are unhappy with some aspects of the customary rights order provisions, such as the difficulty of obtaining them and their unrealistically high thresholds. On the other hand, some local government agencies advised us that the protections given to customary rights orders under the RMA are too stringent and could create problems with the ordinary operation of RMA planning controls. With no customary rights orders actually in existence it is difficult to assess this latter point.

5.5.7 Recognition Agreements

As has been described above, the principal outcome of obtaining a territorial customary rights order in the High Court is the right to negotiate with the Crown in order to give effect to the content of the protected right. But the Act also allows the Crown and claimant groups to proceed in the reverse order, that is, to proceed directly to a negotiated recognition of territorial customary rights and thereafter to have the agreement ratified by the High Court. This is precisely what Te Rūnanga o Ngāti Porou (on behalf of Ngā Hapū o Ngāti Porou), for example, have elected to do (although nothing has as yet been submitted to the High Court for ratification).

Section 96 (1) allows the parties to negotiate. Section 96 (2), however, stipulates that any foreshore and seabed agreement negotiation is of no effect until:

a an application has been made to the High Court;

b the application is supported by the Attorney-General and the Minister of Māori Affairs; and

c "the High Court confirms by order that the requirements of sections 32 to 34 [i.e. the core territorial customary rights order provisions] are satisfied".

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[200] This is achieved mainly by s 17A, which states that a recognised customary activity can be carried out notwithstanding the requirements of ss 9-17 of the Resource Management Act (which deal with land use, subdivisions, the coastal marine area, aquaculture activities, lake and river beds, water restrictions, the discharge of contaminants, noise control and mitigation of adverse environmental effects by enforcement orders or abatement notices) and "a rule in a plan or a proposed plan".

It is unclear what, exactly, the High Court's responsibilities are in this eventuality, and whether other groups can appear to oppose the application being made. What should happen, for example, in the event that other Māori groups seek to appear in the High Court and attempt to challenge the mandate of the principal negotiating group to conclude an agreement with the Crown?

5.5.8. General analysis and commentary

There are two key questions to be asked about the Act. The first has to do with the balance between what the Act gives and takes away: Are the rights and opportunities that the Act gives to Māori through the territorial customary rights order and customary rights order procedures equivalent to, or an acceptable substitute for, what Māori lost with the vesting of "public" foreshore and seabed in the Crown and the changes made to the jurisdiction of the Māori Land Court and the High Court? The second key question is: Has the Act succeeded in achieving its goal of simplifying and clarifying the law?

5.6 Overseas parallels and precedents

This section is in two parts. The first canvasses overseas parallels and precedents and the second provides a brief review of international law and jurisprudence.

We first consider some Pacific and Commonwealth jurisdictions: Australia, Canada, Fiji, Papua New Guinea, Samoa, Tonga and the United Kingdom. Customary rights are recognised in five of these (they are not, in the United Kingdom and Tonga). These five countries differ in their treatment of customary rights. These differences are a natural result of their diverse cultures and statutory, constitutional, jurisprudential and historical frameworks.

Perhaps the most important analysis, not undertaken here, is whether any particular framework of rights recognition works in practice. For example, one recent study has observed that despite public rights of access to and use of the foreshore and seabed area in Samoa, in practice the village fono retains a large degree of control and the permission of the matai is necessary to undertake activities.[201]

We then consider international law. In regards to international law, New Zealand has ratified and is bound by the International Covenant on Civil and Political Rights and the International Covenant on the Elimination of Racial Discrimination. The Declaration on the Rights of Indigenous Peoples, and the International Labour Organisation Convention 169 are relevant but are not binding.

5.6.1 Some Pacific and Commonwealth jurisdictions

Recognition of customary rights generally

Governments have recognised customary rights in varying degrees, from no recognition at all (in Tonga) to elevating the status of customary law over and above other sources of law with some limitations (in Fiji and Samoa). The latter countries tend to have recognised customary law at the highest constitutional level, for example, in a written constitution.

Overview of selected countries

In Australia, the foreshore and seabed is owned by the Crown. Non-exclusive customary rights in the foreshore and seabed are recognised. The public has general rights of navigation and fishing.

In Canada, the foreshore and seabed is owned by the Crown. Customary use rights are recognised. It has not been conclusively settled whether customary rights in the foreshore and seabed area extend to possessory rights. The public has general rights of navigation and fishing.

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[201] MacKay, K.T. "Managing Fisheries for Biodiversity: Case Studies of Community Approaches to Fish Reserves among the Small Island States of the Pacific 18" (2001): http://www.unep.org/bpsp/Fisheries/Fisheries%20Case%20Studies/MACKAY.pdf (accessed 22 June 2009).

In Fiji, the foreshore and seabed is owned by the Crown. While leases of foreshore and seabed may be granted, they must not create a substantial infringement of public rights. Otherwise, the public has a right to the quiet enjoyment of the foreshore for recreational purposes. Fiji recognises customary fishing rights including exclusive fishing rights in certain areas. A Native Fisheries Commission decides which groups hold such rights and what the boundaries of those rights are.

In Papua New Guinea the Crown owns the foreshore and seabed. Non-exclusive customary rights in the foreshore and seabed are recognised. In regards to customary laws generally, Papua New Guinea's legal framework is heavily weighted towards not only recognising and providing for customary laws but also elevating those laws within its legal framework.[202]

In Samoa, the State owns the foreshore and seabed and the public have a general right of access, navigation and fishing. Non-exclusive customary rights in the foreshore and seabed are regulated through traditional village structures and applicable statutes.

In Tonga, the foreshore and seabed is owned by the Crown. Customary rights are not recognised.

In the United Kingdom, the foreshore and seabed is owned by the Crown. The public has general rights of fishing and navigation.

Institutional structures that reflect unique indigenous culture

In countries that recognise customary rights, indigenous cultural laws, practices and norms have informed and influenced the development of those institutions that deal with customary rights. Two examples are set out below.

Fiji has a parallel administration called the Fijian Administration based on the idea of "Fiji for Fijians". The Administration is the head of indigenous Fijian society and has roles in determining customary law matters, advising government and appointing members to provincial and central government.[203] Fiji also has an indigenous court system with a Fijian Magistrate that deals in both civil and criminal matters.

In Samoa, the Village Fono Act 1990 recognises the hierarchical structure of traditional Samoan society and gives fonos the authority to deal exclusively with village matters including culture, custom, traditions, hygiene, economic development and all matters relating to customary land including activities in the foreshore and seabed area.[204] Fonos can also impose a punitive regime for breaches of customary laws (often referred to as by-laws). The authority of a fono must be exercised in accordance with the customs and practices of that particular village.[205]

5.6.2 International law and jurisprudence[206]

International law becomes a formal part of New Zealand's domestic law when an international treaty has been ratified.[207] If a treaty has been ratified, New Zealand is legally bound by its terms. International treaties that have not been ratified are still influential in New Zealand's domestic law because of the common law doctrine that domestic law should be interpreted consistently with international law.[208]

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[202] For example, Goal Five of the Constitution of the Independent State of Papua New Guinea "Pāpua New Guinea ways" and the Underlying Law Act 2000 which directs courts to apply law in the following order: written law, underlying law, customary law and lastly the (English) common law as it existed at independence.

[203] See Fijian Affairs Act.

[204] Section 5 Village Fono Act 1990.

[205] Subsection 3(2) Village Fono Act 1990.

[206] This section is principally drawn from Claire Charters and Andrew Erueti "International Law on Indigenous Peoples' Rights and the Foreshore and Seabed" (memorandum of advice to the Foreshore and Seabed Review Panel 11 June 2009) which is in Volume2, Appendix 3 of this report.

[207] The sources of international law include treaties, international custom, judicial decisions and academic writings.

[208] See for example *New Zealand Airline Pilots Association Inc v Attorney-General* [1997] 3 NZLR 269, 289 (CA).

New Zealand's international legal obligations

In this context, the relevant (ratified) treaties include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on the Elimination of Racial Discrimination (ICERD). These treaties have been incorporated into domestic law principally through the New Zealand Bill of Rights Act 1990 (BORA). The relevant BORA sections are 19 and 20, the right to freedom from discrimination and the right to culture. The latter reflects Article 27 of the ICCPR and the former ICERD.

The Human Rights Committee (HRC) is the international body responsible for interpreting the ICCPR. In regards to Article 27 HRC has said that culture "manifests itself in many forms, including a particular way of life associated with the use of land resources".[209] More recently, HRC has indicated a move towards taking into account the ICCPR's guarantee of a peoples' right to self-determination (Article 1) when interpreting Article 27.[210] This approach will support the protection of Indigenous peoples' rights to land under the ICCPR as the right to self-determination includes the right of peoples to "freely dispose of their natural wealth and resources" as well as land.[211]

The Committee on the Elimination of Racial Discrimination (CERD Committee) is responsible for interpreting ICERD. The CERD Committee has interpreted the right to freedom from racial discrimination as positively requiring states to protect Indigenous peoples' land rights.[212]

Non-binding but relevant international law

Non-binding but relevant international law includes the Declaration on the Rights of Indigenous Peoples, conventions of the International Labour Organisation (ILO), in particular ILO Convention 169, and international custom and jurisprudence.

The Foreshore and Seabed Act 2004 and international law

In advice to the Panel (see Volume 2, Appendix 3), Claire Charters and Andrew Erueti consider that the Act does not comply with relevant international law. In support of their advice, they cite the findings of the CERD Committee and the United Nations Special Rapporteur on Indigenous Peoples in relation to the Foreshore and Seabed Act 2004.

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[209] UN Human Rights Committee, "General Comment 23: The Rights of Minorities" (8 April 1994) paras 3.2 and 7.

[210] *Apirana Mahuika et al v New Zealand Communication No 547/1993*; Report of the Human Rights Committee (15 November 2000) CCPR/C/70/D/547/1993, para 9.2.

[211] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, Art 1(2).

[212] International Convention on the Elimination of All Forms of Racial Discrimination (4 January 1969) 660 UNTS 195.

Chapter 6
What is wrong with the Act?

This chapter contains our conclusions on the Foreshore and Seabed Act 2004 (the Act). We base those conclusions on the evidence we have received, researched and considered, and on our own analysis and discussion. Our conclusion is straightforward. The Act should be repealed, and the process of balancing Māori property rights in the foreshore and seabed with public rights and public expectations must be started again.

6.1 Assessment of public opinion

The Panel has received the benefit of a very substantial amount of input from many groups and individuals, as described in Chapter 2. As well as the 21 public hui and meetings held all over the country, we heard from 30 nationally significant interest groups, and all the parties involved in applications under the Act. We also met with a number of key commentators, including academics, judges, and lawyers with specialist expertise in Waitangi Tribunal practice and in conducting negotiations and settlements with the Crown on behalf of iwi. As is noted in 2.2 above, we received 580 submissions, 236 oral and the rest in writing.

We are very confident that, notwithstanding the short time frame, we have been able to reliably assess Māori opinion on the legislation, which is almost universal opposition. We heard too many forceful and articulate expressions of opinion on marae all over the country for us to be in any doubt. We noted that some Māori (a very few) were willing to settle for substantial amendment of the current Act. However, none favoured its continuation unchanged. Even those hapū and iwi groups which have been more easily able to meet the statutory thresholds and to achieve solid progress in their negotiations with the Crown would prefer to see the Act repealed. The legislation is widely resented and disliked by Māori. Arguably that is sufficient reason in itself for repealing it and beginning over again.

On the basis of our impressions, having analysed the submissions (see 2.2), while Māori are solidly opposed to the Act, non-Māori do not appear to be strongly supporting it. Many of those who spoke most forcefully to us in opposition to the Act were non-Māori, across a very wide spectrum ranging from those who spoke to us on behalf of the New Zealand Business Roundtable to members of the Religious Society of Friends (Quakers). Public entities such as the Human Rights Commission were opposed to the legislation. In fact, the Commission had opposed the Act in 2004, and had at that time disputed the interpretation of the New Zealand Bill of Rights Act 1990 by the government of the day. The Commission has informed us it has not seen any reason to shift its ground since then.

Eighty-five percent of those who commented on what should happen to the Act favoured repeal of the Act. Of the remaining 15 percent, many favoured substantial amendment but would be just as happy to have the Act repealed. Only 5 percent of submitters wanted to see the Act remain unchanged. The Act appears to be unpopular with most New Zealanders.

This pattern is not dissimilar to what took place in 2004, yet at that time there were even more submissions received. The Fisheries and Other Sea-related Legislation Select Committee received no fewer than 3946 written submissions on the Foreshore and Seabed Bill. Ninety-four percent of those opposed the Bill. Given that 85 percent of submissions now oppose the Act and 10 percent favour either extensive amendment or repeal, public opinion has remained remarkably consistent.

We feel it is important to state this as it is sometimes said that reopening the foreshore and seabed issue would be “divisive”. But there is little real evidence of that, at least in the sense we have explained (see Chapter 3). Of course there are complex and important issues to be addressed and no doubt there will be disagreement and debate. But, as far as we can tell, with respect to the 2004 Act the position is that it remains strongly opposed by Māori and not strongly supported – indeed, often actively opposed – by non-Māori. Had there been powerful public support for the Act we would have expected to have encountered it, but we did not. Some individuals and groups did strongly support the existing legislation.

6.2 Who is affected by the Act?

The Act impacts most significantly on hapū and iwi with customary interests in the foreshore and seabed who, following *Ngāti Apa*, would have been able to proceed to obtain declarations of Native or Aboriginal or Customary Title in the High Court, or status and/or vesting orders in the Māori Land Court. It is important to stress that the rights in issue do not attach to "Māori" as a whole, defined by ethnicity. Property and customary rights are not argued by hapū and iwi on the basis that they are ethnically Māori, but because they have historically inherited rights to specific areas and resources (just as others do).

6.3 Our analysis of the Act

The Act is a very complex piece of legislation, as we have explained in 5.5. Informed by that discussion, we now reduce the issue to its essentials in order to provide an answer. And this of itself is not especially difficult, as we will explain.

Our starting point here must be the Court of Appeal's *Ngāti Apa* decision. We believe that the only proper course to take, not only for ourselves, but also for the government, is to work from the assumption that *Ngāti Apa* is a correct statement of the law. It is for the Courts to state what the law is, in all cases, but perhaps most importantly of all in areas which affect the rights of the public, including valuable property rights. Whether we, the Panel, agree or disagree with the Court's statement of the law (in fact, we agree with it strongly) is irrelevant, and should be irrelevant for the government as well. The former government took part in the case, made its submissions, declined the option of appealing to the Privy Council, and must abide by the result in terms of the Court's conclusions on what the law is. It is not open to the government to take issue with the Court of Appeal's decision in terms of its legal correctness. In the areas of Native or Aboriginal or Customary Title and the interpretation of the jurisdiction of important Courts in this country, the law of the land – we are not talking here about Māori custom law – is what the Courts say it is. This is a basic aspect of the doctrine of the separation of powers.

It is, of course, open to the government to legislate in order to deal with the difficult outcomes of the decision. But this is something that should be done with great care.

In *Ngāti Apa* the Court of Appeal found that the Māori customary title to the foreshore and seabed had not been extinguished. Thus, the Courts had jurisdiction to hear cases relating to it. As we have already discussed (see 5.4.1), while it is impossible to say exactly how the law would have evolved from then on, at least it is clear that those wanting to bring cases could have done so, under the then-existing law. In many (perhaps most) cases, they would have been able to secure valuable outcomes – in all senses of the word "valuable".

That is the effect of *Ngāti Apa* in a nutshell: Māori, as citizens, had won a right to bring a certain category of cases, to be determined by due process of law, and to secure important and valuable substantive outcomes. In all probability such cases would have translated into freehold grants, at least in some situations. It can certainly be argued that all of the foreshore and seabed was open for inquiry and investigation; whether the entire foreshore and seabed in fact would have been inquired into is impossible to predict, but it could have been. The decision conferred a potential for rights to be granted.

The Act had substantive and important jurisdictional effects. To reduce it, too, to a nutshell, the Act took away from Māori the options that the Court of Appeal said that they had. But the Act was not simply a taking. It took, and it gave. Instead of what was available post *Ngāti Apa*, Māori were given new statutory options, the customary rights order and territorial customary rights order processes (we have discussed these in 5.5 and 5.6).

The core issue to consider with respect to the Act is simply this: does what the Act gave to Māori equate with what it took away? We do not think so.

In considering this question we have tried to avoid the pitfalls of emphasising too heavily the significance of the findings in *Ngāti Apa* (as we have observed repeatedly in this report, the *Ngāti Apa* decision did not say that Māori owned all of the foreshore and seabed in freehold title). We have also been careful not to diminish unduly the value and effectiveness of the new processes for obtaining customary rights orders or territorial customary rights orders. As yet, no orders have been made under the Act and no case law has been built up with respect to it, which does not make it any easier to sit in judgment on the legislation. Nevertheless, it is our view that what is provided for Māori in the Act is not an adequate recompense and a fair exchange for what the Act extinguished. We have five reasons for reaching this conclusion:

a the Act is obviously discriminatory;

b there are new thresholds that are not part of our law;

c the thresholds are much too high;

d the Act produces for Māori an inadequate result; and

e the Act creates significant uncertainty.

We will discuss these briefly in turn. These are matters of substantive analysis. The process by which the Act was implemented is a different question, and this will be discussed separately at the end of this chapter (see 6.4.5).

6.3.1 The Act is discriminatory

The Act is discriminatory as – by definition – it affects only Māori rights. While it grants to all the opportunity to bring cases, the titles that the legislation extinguishes are, exclusively, customary titles held by Māori. The legislation thus discriminates on the ground of race. When the legislation was admitted into parliament in 2004 the Attorney-General agreed that it was discriminatory and was therefore a prima facie breach of the New Zealand Bill of Rights Act 1990 (BORA).[213] We believe that, had the Act been enacted in either Australia or the United States, it would not have been able to withstand scrutiny in the Courts; in Australia it could well have been struck down as discriminatory and in the United States as an unconstitutional taking of private property rights contrary to the Fifth Amendment to the United States Constitution.

6.3.2 Foreign thresholds are introduced that are not part of our legal experience

As we considered in Chapter 3, our law developed on the basis that all of New Zealand was Māori customary land and remained so until the customary title was extinguished by some government act, such as a purchase. It was an approach that fitted with the principles of the Treaty of Waitangi. Generally, the reason why so much dry land is no longer in Māori hands is due to some act of extinguishment.

For most of the foreshore and seabed it is likely that no extinguishment can be shown.

So the land is treated as customary land and the Māori Land Court determines entitlement to it on the basis of Māori custom. The Court has been doing that since 1862. As we have noted, although the Court did consider some foreshore and seabed claims, Māori have been deterred from bringing such cases.

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[213] Attorney-General (Margaret Wilson), Report on the Foreshore and Seabed Bill, 6 May 2004, para 76, and?

On the dry land, the Court's tests were simple. Has there been an extinguishment? If not, it is Māori land and the Court simply looked to evidence of who used or controlled it at 1840, and whether it had been freely alienated since then. That rule was also applied to the foreshore and seabed but in some cases the Court would recognise only a fishing right rather than a land right.

The threshold tests in the Act came from countries that had not had our experience. In those countries, unlike ours, there was no policy to recognise native land rights until the 1980s, there was never a system of regular extinguishment and there had been no Courts to determine native entitlements. And by the 1980s, all sorts of arrangements had been made for the native lands of those countries and the Courts had necessarily to devise rules that would restrict the native claims.

Courts strive to maintain a consistent jurisprudence and there would be a wide departure from the New Zealand jurisprudence if the overseas tests were applied here. There was no proper basis on which the government in 2004 could assume that the rules made there should apply here.

Moreover, from the various tests on offer overseas, government chose, or devised, only the most restrictive, those most unfavourable to Māori. As one submitter put it, all the thorns got plucked but not the petals.[214]

6.3.3 The thresholds are too high

Even were it appropriate to borrow from overseas, our conclusion is that the Act is far too prescriptive and makes territorial customary rights orders and customary rights orders extremely difficult to obtain. Territorial customary rights orders are significantly more difficult to obtain than customary rights orders, but the latter are not easy to obtain either.

Obtaining a territorial customary rights order under the Act requires more than is necessary at Common Law; this is obvious from section 32. As a starting point – but only as a starting point – the applicant must prove that the group would have had a customary title at Common Law. However, in addition, other requirements must be met: "exclusive use and occupation"; no "substantial interruption" since 1840; and "continuous title to contiguous land". There are other restrictions in section 32, including that "spiritual or cultural association" is not sufficient (s 32(3)). These requirements would probably disbar Tauranga Māori (for instance) from obtaining a territorial customary rights order over parts of Tauranga Harbour. At Common law the requirements would not be so stringent, in all probability.

Further, under Te Ture Whenua Māori/Māori Land Act 1993, Tauranga Māori would certainly have been able to obtain status orders for most of the harbour, and maybe vesting orders for parts of it, without being required to demonstrate exclusivity as required by section 32 or continuous title to contiguous land.

Customary rights orders are not quite as difficult to obtain but are still far from easy. In particular, the applicant must prove that the activity in respect of which the territorial customary rights order is being sought is "integral" to "tikanga Māori". The activity must also be carried on "in accordance with tikanga Māori" and without "substantial interruption". Many submissions to this review stated that the thresholds are set at far too high a level (see 2.4.9).

The Act was enacted in 2004. Four and a half years later, no orders have been made under it (neither customary rights orders nor territorial customary rights orders). In practical terms the Act has been spectacularly unsuccessful.

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[214] 4-15-1, Te Rūnanga o Ngāi Tahu.

6.3.4 The substantive outcomes are inadequate

Should an applicant group overcome all the hurdles that the legislation puts in its way and successfully obtain a territorial customary rights order, there are only two possible outcomes: either negotiations with the government can take place, or a foreshore and seabed reserve (which must remain open to the public) can be set up under the supervision of the High Court. We consider these outcomes to be more or less pointless. Why go to the lengths of obtaining a territorial customary rights order in order to have a negotiation with the Crown? It makes more sense to simply go ahead with a negotiation and not bother with the Act at all. However, a foreshore and seabed negotiation is now constrained by the requirement that whatever is agreed has to be taken to the High Court for approval. There is no such requirement for other types of negotiations (over historic grievances, for example).

Customary rights orders can only be obtained for a very restricted and limited range of activities. However, once they are obtained protection of the activity is comparatively stringent. One of the better features of the legislation is the way in which customary rights orders are protected via the Resource Management Act 1991. Nevertheless, a customary rights order does not in any way equate to a freehold vesting order in the Māori Land Court. Again, many submitters to this review took this view (see 2.4.9). Strict protection of customary activities under the Resource Management Act means little in reality if no customary rights orders are actually being made.

6.3.5 The Act creates significant uncertainty

When the Foreshore and Seabed Bill was introduced into the House on 6 May 2004 the then Attorney-General reported, as required (and as noted above), as to whether the legislation was consistent with the BORA. As BORA contains no protections for property rights, the principal question was whether the Act was discriminatory, and the Attorney-General agreed that it was. She stated that "for one group to be deprived of a (potentially significant) existing source of rights or title, yet another not to be similarly deprived, reaches the threshold of prima facie infringement of section 19, BORA".[215] However, she also stated that the legislation was justified under BORA section 5, in that the infringement was "demonstrably justifiable in a free and democratic society". (We note that the Human Rights Commission agreed, and still agrees, with the first part of the Attorney-General's analysis, but not the second).

One of the main reasons why, in the Attorney-General's view, the Act was necessary was because of the risk of legal uncertainty. The statute was intended to clarify the law. So, although discriminatory, the Act needed to be passed to clarify the law for the good of all. But has it clarified the law? In our view the Act does not so much clarify the issue of foreshore and seabed rights than bury it under a mass of statutory complexities. Section 32, in particular, defies understanding. This is the key section dealing with territorial customary rights orders which (after s 13) is arguably the most important provision in the Act. Other parts of the Act are also difficult to understand. We have mentioned earlier how difficult it is to understand what the Act might possibly be referring to in respect of customary rights potentially held by non-Māori. Aspects of the customary rights order processes are also difficult to interpret. The Act is certainly clear in one sense: that it extinguishes Māori customary title to the foreshore and seabed. We find it hard to see why the "saving grace" of a clearly discriminatory statutory provision should be simply that it is clear.

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[215] Attorney-General (Margaret Wilson), Report on the Foreshore and Seabed Bill, 6 May 2004, para 76.

There are other problems which have been drawn to our attention.[216] While the Act vests title to the foreshore and seabed absolutely in the Crown, there are significant uncertainties as to who is now responsible for wharfs, jetties and other structures – many of which are in need of repair – in and on the foreshore and seabed. On one view, as the Crown is now the absolute owner of the foreshore and seabed such structures are now fixtures and belong to the Crown – and thus the Crown is responsible for them. We do not express an opinion here, but only point out that this is an unresolved difficulty that the Act fails to clarify. The law relating to reclamations has become very complex. At a different level, many groups have made the point to us that the whole of the law relating to ownership and management of seabed, foreshore and the territorial sea is in a state of confusion and complexity and needs to be reconsidered afresh. The Act itself did not tackle the overarching problem of the complexity of the law relating to the coast; rather, it just added another layer or level of complexity to be fitted into the jigsaw puzzle.

6.3.6 Procedural aspects

Many of those who spoke to us, or who made written submissions, were just as critical of the way in which the Act was introduced and implemented as they were of its substantive outcomes (see 2.4). We agree that the process of legislative change in 2003–4 left much to be desired. The overwhelming weight of opposition to the legislation from all quarters should have given the government pause. Both Māori and non-Māori who spoke to us repeatedly stated that there should have been a "longer conversation" at the time, as had been advocated by the Waitangi Tribunal in early 2004. We agree, and also believe that there should be a suitably lengthy conversation this time around, provided that the needs of legal certainty are met in those areas where it is important in practical terms that they should be.

[216] See for example 7-179-1, Wanganui District Council; 7-231-1, Eastland Port; 7-279-1, Tauranga City Council.

Chapter 7 What should be done?

7.1 Introduction

We began this report by observing that the fundamental issue which remains undetermined is essentially whether the government unjustly expropriated Māori customary interests in the foreshore and seabed through the Foreshore and Seabed Act 2004 (the Act), and by imposing restrictive rules on the circumstances in which a customary interest in the foreshore or seabed might now be recognised. In addressing our Terms of Reference we have been drawn to consider that underlying issue.

Our Terms of Reference require that if we have "reservations" that the Act does not properly accommodate both "customary or Aboriginal Title and public interests" we are to "outline options on what could be the most workable and efficient methods by which both customary and public interests in the coastal marine area could be recognised and provided for; and in particular, how processes of recognising and providing for such interests could be streamlined".

We plainly have such reservations. Accordingly this chapter is concerned with what should be done in terms of the above direction

We are asked to give "independent advice", but even so, we must (obviously) have full regard to the arguments, positions and discussions from the hui, public meetings, visits from nationally significant group, written submissions, academic and professional literature and from conversations with key commentators.

We observe at the outset however that those who spoke with us were so focused on establishing that the Act should be repealed that there was comparatively little debate on what should be done if it were.

That places a heavy caveat on our advice. We are very concerned that for lack of submissions on how the issue should be taken forward the options were not publicly traversed. We therefore think that our proposals should not be progressed without the opportunity for further input from Māori leaders or their advisors, as Māori are principally affected, as well as other interested groups.

We believe also that this Review provides an ideal opportunity for reflection on how to better develop policy in areas where significant Māori interests are concerned. That could be one positive and fruitful outcome of a reconsideration of foreshore and seabed policy. By initiating this review process the government has already indicated a willingness to revise processes of policy formation in order to ensure that issues such as that which arose over the foreshore and seabed in 2003–4 do not recur.

First however, we give our formal answers to each of the preceding questions posed in the Terms of Reference. We note that in some cases we found that the questions did not quite capture the key issue which needed to be answered; in such cases we have clarified this.

7.2 Question 1 – on the prior interests in the coast

What were the nature and extent of mana whenua and public interests in the coastal marine area before the Ngāti Apa case?

The answer, with reasons, was considered in 5.1. We took the reference to "mana whenua" interests in the question to mean "tribal or customary interests". We also noted, initially in Chapter 2, that the customary interests were expressed in two ways, one by long term use of specific resources and the other by the assertion of a right of control or authority over a certain area. The recognition of both use rights and rights to control and manage becomes important in the later discussion in the chapter.

Further, by contrasting customary and public interests and by referring to *Ngāti Apa*, we assumed the question concerned, or mainly concerned the respective *legal* interests of Māori and the general public. However, since that was not said explicitly, we have also considered the question of the *public interest* as popularly understood in terms of the general welfare of a society.

In considering the nature and extent of customary interests at law, immediately prior to the *Ngāti Apa* case, we are conscious that normally, the only way of predicting the answer with some certainty is to examine the case law to see how the Māori Land Court would have determined the answer, given that that Court had traditionally undertaken that task. The trouble is that the Māori Land Court, before Māori were finally dissuaded from continuing with claims to the foreshore and seabed, with the *Ninety Mile Beach* decision of the Court of Appeal in 1963, had said one thing some occasions and something else on others. There was no settled rule. The evolution of the earlier case law is considered in detail in Volume 2, Appendix 1. Some judges considered that the rights translated to ownership of the foreshore. Others considered that the customary evidence gave only a use right for the purposes of a fishery.

Accordingly, we considered what the Court *ought* to have done having regard to such legal principles and practices as were established in New Zealand law. The most relevant of those is a distinctive principle established from the founding of the state, and regularly applied in practice, that the whole country was Māori customary land and that the Crown had to point to some lawful extinguishment of the customary title to some part of the country, by purchase or statute for example, before that area might be free for European settlement.

For a rational and consistent jurisprudence it is logical to apply the same principle to the coastal marine area, given the extensive use and allocation of that area by the tribes and given European awareness of that fact from and before the proclamation of British sovereignty.

However, while that approach can work to provide for customary rights and interests throughout the coastal marine area, unless they have been extinguished, it does not follow that in every case those same rights and interests should translate to full ownership of the whole of the associated foreshore and seabed. That was done with regard to the dry land; but it is not realistic to treat most of the seabed in the same way. For example it is easier for a hapū to enforce its authority over the dry land and, the further from the shore the less likely it is that a hapū could prevent use by strangers. Moreover, the Treaty of Waitangi must be taken to have contemplated use of the coastal marine area by traders and settlers.

There seems to be no valid reason for denying Māori customary interests in the whole coastal marine area but unlike the position pertaining to the land, there are strong arguments for and against the translation of those interests into full ownership of the seabed.

On the other hand, while it was never part of New Zealand law that the Crown is the beneficial owner of the foreshore and seabed through some prerogative (or sovereign) right, there are good reasons for the Crown to have an interest in the same to protect national interests and the interests of the general public.

We think the more realistic option, in terms of legal principle, is to recognise a form of shared ownership of the foreshore and seabed between hapū and iwi on one hand, on account of customary interests, and the Crown on the other, for the nation.

Our advice on legal interests, in terms of Question 1, is therefore as follows:

The lawful customary interest

Prior to the *Ngāti Apa* case, the whole of the coastal marine area to the outer limits of the territorial sea, or to such outer limit as customarily could be controlled, was subject to the Native or Aboriginal or customary Title; unless it could be shown that the Native or Aboriginal or customary Title to any specified part had been clearly and plainly extinguished.

However, there remains an open question of whether the customary interests should be treated as amounting to exclusive ownership rights in the foreshore and seabed.

Our advice here gives the legal position. We have said the native or aboriginal or customary Title remains unless it has been clearly and plainly extinguished. We add that, in settling matters for the future under a new statutory regime, it would need to be shown that the Native or Aboriginal or customary Title was also "fairly extinguished having regard to the principles of the Treaty of Waitangi."

The lawful public interest

Prior to the *Ngāti Apa* case, and indeed until the enactment of the Act, the legal rights of the general public in the coastal marine area were confined to rights of navigation and fishery (where not in conflict with customary fishing rights not covered by the Māori fisheries settlements).

In Chapter 3 we considered the non-legal interests as well. For Māori customary societies most coastal marine areas are apportioned according to the private, use and control rights of definable groups, subject to respecting certain ethical rules of spiritual and environmental significance. Today however, the predominant view, at least amongst participants in the consultation, is that reasonable access should be available to the general public as well (or that reasonable access cannot in practice be denied).

For the general public, as a result of practices and assumptions over the last 100 years, the coastal marine area is a public recreation ground that is the birthright of every New Zealander.

Accordingly, we perceive that customary and public interests – in the popular sense – are, respectively, as follows:

The cultural dimension of the customary interest

The (non-legal) interest of customary societies in the coastal marine area immediately prior to the *Ngāti Apa* case (and still today), is in the maintenance of customary usages, management and control in order to provide for personal sustenance, tribal culture, identity and autonomy and respect for and the health of the natural order.

The cultural dimension of the public interest

The (non-legal) public interest in the coastal marine area immediately prior to the *Ngāti Apa* case (and still today) is in maintaining it as a natural environment that is a public recreation ground, the birthright of every New Zealander. (That is in addition to the usual rights of navigation and fishery and, where not inconsistent with existing private property rights, free access for commercial purposes.) The popular perception is that there is free access for all.

7.3 Question 2 – on the options that could have been pursued

What options were available to the government to respond to the Ngāti Apa case?

Our advice, as considered in 5.4.3, is as follows:

The realistic options available to government to respond to the Ngāti Apa case were:

- **To appeal the decision to the Privy Council.** Given the importance of the topic we think an appeal should have been prosecuted to clarify or confirm the legal position.
- **To do nothing, leaving the courts to decide.** This option was appropriate insofar as the existence and scope of property rights is quintessentially a Court matter.
- **To amend the statute based Māori land law.** If the concern was that the foreshore and seabed could be sold if it was converted to Māori land in individual ownership it was feasible to restrict alienations. That would be consistent with the customary ethic and also with a dominant policy in current Māori land law. However, since restrictions

on alienation constrain development rights, any such new law required significant hapū and iwi support. Many other changes could have been made to the relevant law as well, for a better fit with Māori culture, but again, as a matter of principle, not without Māori support.

- **To include foreshore and seabed settlements in Treaty settlements, revisiting those settlements already completed.** This approach is more sensitive to different regional circumstances but would have been time consuming and expensive. Also, rights in respect of the coast would have been uncertain until all settlements had been completed, and there would have been little or no room to engage with the general public, notwithstanding the general public interest in access and resource exploitation.
- **To negotiate a nationwide settlement with hapū and iwi.** This could perhaps have followed the precedents set by the Māori fisheries and aquaculture settlements. This option, also, may not have allowed for adequate public engagement.
- **To substitute a special statute to govern customary and public interests in the coastal marine area.** This was the option that was chosen. Here there were several factors which, when combined, could have justified the approach, provided always that there was reasonable hapū and iwi support. The main factors to justify such an approach, assuming hapū and iwi support, arise from the uncertainty about what the Māori Land Court might have done (to the possible detriment of either or both of Māori and the general public) and the likely time and cost to settle entitlements for the entire coast. A further factor was that legislation would have been necessary in any event to provide for public use consistent with the popular perception of the public interest. However, the option taken in the present case, of proceeding with legislation despite widespread Māori opposition, and of proceeding with legislation that reduced Māori property rights dramatically and which, for several reasons, was contrary to human rights and Treaty principles, was not a realistic option in ethical terms.

In 2009 we note that the majority of submitters, whether Māori or non-Māori, also seek a legislated outcome. Provided the outcome is fair and principled, that is plainly what most people prefer.

7.4 Question 3 – on the legal integrity of the Act

This question is in three parts:

a did the legislation that was in fact passed, namely the Act, effectively recognise and provide for customary or Aboriginal Title interests in the coastal marine area;

b did the Act effectively recognise and provide for public interests (including Māori, local government and business) in the coastal marine area; and

c did the Act allow for the enhancement of mana whenua?

Our advice is as follows:

a The Foreshore and Seabed Act 2004 did not effectively recognise and provide for customary or Aboriginal Title. The reasons are given in Chapters 5 and 6. Broadly the reasons are, that the Act takes away the legal rights of Māori to have the nature and extent of their customary or Aboriginal Title interests determined by the Courts in accordance with established principles of New Zealand law. Instead, the Act imposes restrictive criteria that have no application to the New Zealand jurisprudence. Those criteria especially penalise those hapū and iwi, who are by far the majority of the hapū and iwi, who suffered extensive land losses in history by confiscations, excessive or questionable alienations with inadequate reserves, and through tenure reform.

The Act also severely reduces the nature and extent of customary rights as we see them, according to New Zealand Common Law. This is discussed in Chapter 6.

b The Act did not effectively recognise and provide for Aboriginal Title and public interests (including Māori, local government and business) because it failed to balance those interests properly. More particularly, general public interests were advanced at the considerable expense of Māori interests. We discuss business and local government interests at 7.3.3.

c For the same reason that the Act reduces the customary rights, and because it does not directly acknowledge the respective elements of use, management and control, the Act fails to enhance the status of the mana whenua (which we take to mean, in present context, that it failed to recognise the mana, or the authority and rights, of the hapū and iwi).

7.5 Question 4 – on moving forward

7.5.1 Framing the question

Having reached the conclusion that change is needed we come back to the issue in the Terms of Reference:

> What, in outline, are the options on the most workable and efficient methods by which both customary and public interests in the coastal marine area can be recognised and provided for; and in particular, how can processes of recognising and providing for such interests be streamlined.

A full answer is needed as, so far, we have not broached the question in this report.

7.5.2 Overview of the options

To some degree the options now available reflect the options available in 2003 immediately after the *Ngāti Apa* decision, although there is now the further element that we must consider the future of the Act. Although no legal orders have as yet been made under the Act, a number of groups have entered into negotiations with the Crown in good faith relying to some extent on the Act as a framework for negotiations in various ways.

One possibility, obviously, is that the government does nothing and leaves the Act in place. The status quo is an "option". As is explained later in this chapter, however, it is not an option that we favour. We believe that the Act should be repealed.

Assuming repeal as a starting point, in this part of the Report we now consider in broad terms the range of options that become possible in the event of repeal. In our view, in general terms, there are four main approaches that could be adopted. We do have a preference in terms of these options, but repeat that in terms of developing these options it is important that the government consult further.

Option 1: The Judicial model

Simply put, matters could be left to the Courts. This option has attracted some public support from submitters. This option consists of returning to the status quo immediately after the Court of Appeal's *Ngāti Apa* decision in 2003. That would mean, in effect, that the Māori Land Court and the High Court could proceed to exercise the powers that the Court of Appeal concluded that the Māori Land Court and the High Court possessed. The Māori Land Court could be allowed to make status orders and vesting orders relating to the foreshore and seabed, and the High Court to make declarations of Native title relating to it.

This option has the advantage of comparative simplicity. But there would be disadvantages. It would mean that rights in the foreshore and seabed would have to be litigated on a case by case

basis over a long period of time. Such a process is likely to be protracted, laborious and expensive and could result in an unmanageable patchwork of litigation. There is also the question of what legal rules should govern this process. We do not see that having rights in the foreshore and seabed decided by the Common Law rules of Native or Aboriginal or customary Title or by the precedents and approaches of the Māori Land Court would facilitate our overall goal of seeking a reconciliation between competing approaches to the foreshore and seabed.

Options 2 and 3, at the other extreme, are two variants of an open-ended settlement model, which we call "staged settlement" and "national settlement" models.

Option 2: The "staged settlement" model

A staged settlement model is based on negotiations between hapū and iwi and the Crown, as part of the settlement of historic Treaty claims or, as at present, independent of that process.

This model, too, has its attractions. The existing settlement system is already in place and could be easily adjusted to deal with foreshore and seabed issues. But there are problems with this model as well. It could mean that the period of uncertainty would last even longer than under the judicial model. While the negotiations process can be streamlined, and later we make suggestions on how that might be done, settlement negotiations to date have been slow and expensive.

It is also necessary to consider how the public interest is safeguarded in iwi-Crown negotiations. One option might be to legislate negotiation parameters that include provision for public input.

Option 3: The "national settlement" model

The third option is a "national settlement" model. Instead of linking foreshore and seabed redress to staged settlements, there could instead be a single, nation-wide settlement of foreshore and seabed issues, similar perhaps to the existing fisheries or aquaculture settlement models, by which the affected hapū and iwi may share in income accruing from the foreshore and seabed. This model could be implemented reasonably easily.

Such a model however, would not address foreshore and seabed management at the local level. At the various hui we attended it was very often local areas that were brought to our attention: Te Whaanga Lagoon in the Chatham Islands, Wakapuaka, Tauranga Harbour and the Hokianga or Kaipara Harbours. Also, it could prejudice those iwi who lack the resources to participate and, like the staged settlement model, may foreclose on access to the Courts. Again, consideration would need to be given to representation for the public interest in negotiations.

Option 4: the "mixed" model

A fourth option, which we favour, is a mixed model. This involves a number of discrete components at several levels and would have to be provided for by special legislation. In this sense there would still have to be an Act, but a new one, rather than an amendment of the existing statute.

It takes as its starting point that entitled Māori do have some form of customary or tikanga title to all of the foreshore and seabed and that the public also have interests in access and navigation over this key area.

Because we favour this option it is described in greater detail below. A "mixed" model of this kind, which would require new legislation, appears to be the preferred option of those who made submissions to the Panel.

The mixed model combines a national settlement, mechanisms for allocating rights and interests to groups who would then be entitled to particular rights of consultation and input into coastal management, provision for co-management at a local level, and ability to gain more specific access and use rights. This however is the end-point of the process. To get to this point, which would require new legislation, requires a process and principles within which the new framework or model is to be developed.

We observe that the support shown for a new statutory regime implies general agreement with the government's decision made in 2004 to introduce a new statutory regime. One key problem in 2003–4, however, was not the concept of a new model as such but rather the timing and process chosen to implement it. To us the process of how a final settlement of this matter might be achieved from now on is almost as important as the substantive shape and content of that settlement.

7.6 Preferred options

7.6.1 Introduction

We read our Terms of Reference as inviting us to outline the most workable and efficient options and methods and to consider in particular how processes can be streamlined. There are a number of options. However, we propose to focus on two mixed models that present quite different ways of achieving the expeditious resolution that is sought. These, in our view, are the two most likely to succeed.

The first model focuses on a national resolution, utilising a bicultural body with ongoing oversight of the whole coastal marine area and proposing at a national level, a legislative framework by which national and local solutions may be found to accommodate customary ownership, use and control, respectively.

The second model focuses on achieving the same objective by regional and national negotiations directly between Crown and Iwi. To speed the process there are provisions for early district identification, early entity formation and direct reference of particular issues to the Māori Land Court (or to arbitration) if the parties so elect.

We do not suggest one model is superior to the other. There are advantages and disadvantages in each. Moreover, both are mixed models and as such, both have national and regional elements. As a result it is entirely feasible to adjust the mix, picking parts out of one and parts out of the other.

In addition, both models have some things in common. They both assume the Act will be repealed, which we will consider further below. They are also based on the same conceptual, Treaty framework, and on the same set of principles. These are described below. And both require some legislative support. An outline of the legislation will follow.

We will then describe the two models: the national policy proposal, and the regional iwi proposal.

However, we do stress again that these proposals are our own and should not be seen as a reflection or a combination of ideas put to us during the consultation round. As indicated, most submitters and commentators focused on what was wrong with the existing Act rather than on what a new regime might look like.

As a result we urge that our proposals not be progressed without the opportunity for further input from Māori, being those most affected, and the general public.

7.6.2 Repeal the Act

First of all, the Act should be repealed.

That Act is built on such shaky foundations that it should be repealed rather than amended. It is necessary to start again.

It also gave Māori such umbrage that many will not buy into an alternative statutory regime unless the old Act is seen to be repealed.

The sentiments in that respect were so strong that we considered the propriety of government delivering some form of apology or recognition of wrong; but such a suggestion is not within our Terms of Reference.

Though the Act must be repealed, in the two proposals considered below other legislation must be put in its place. Most of those who made submissions supported repeal and replacement with something else (although most were not specific on precisely what). Accordingly, what is proposed is an Act that establishes an alternative regime, makes transitional provisions and repeals the former Act.

But we have first to consider the foundation for this new Act. It must be something that goes to the core of the issue in this case, the conflict between two world views, between customary and public interests, and how both can be respected.

7.6.3 The Treaty framework

The answer to the reconciliation of cultural difference, we suggest, is to build upon the framework of the Treaty of Waitangi, and its kindred spirit, international human rights.

The Treaty is important in reconciling Māori customary rights and the national culture of access across the foreshore and to the sea. It compels respect for the legitimate, cultural expectations of both of the two founding peoples of the state.[217]

Māori customary interests must be respected. There must also be respect for the strong national ethic that developed over the last 100 years, that the coastal marine area should be available for public use and enjoyment.

On the question of human rights, the United Nations Declaration on the Rights of Indigenous Peoples has moral force. It is an important source of principle given that the relevant principles are not in conflict with the reasons New Zealand gave for not subscribing to the Declaration.

But the important lesson in human rights law is that rights conflict and a balancing of rights is required. The same is implicit in the Treaty. Together they require that the Māori rights and general public interests should both be respected. However each may need to be limited to the extent that is reasonably necessary to accommodate the other.

We propose that the principles should be stated in the new legislation, as we discuss below. The need for balance is the critical issue in the foreshore and seabed debate. This we discussed in Chapter 3 and, in terms of an alternative framework, in Chapter 4.

We conclude that a solution is needed based upon our own historical experience and our own legal development. It should not be governed by legal solutions from other jurisdictions, such as Canada and Australia, whose experience and legal development has not been the same as ours.

7.6.4 Core principles

The new legislation should also contain a core set of fundamental principles to govern the resolution of foreshore and seabed issues. These are:

- ***The principle of recognition of customary rights***
  Customary interests in the foreshore and seabed represent property rights. They should not lightly be taken away or compromised.[218] The proper starting point for developing foreshore and seabed policy is that the whole of the coastal marine area to the outer limits of the territorial sea, or to such outer limit as customarily could be controlled, was subject to the Native or customary Title; unless it could clearly be shown that that to any specified part had been not wrongfully extinguished.[219]

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[217] See Chapter 3.

[218] See Volume 2, Appendix 3, Claire Charters and Andrew Erueti "International Law on Indigenous People's Rights and the Foreshore and Seabed" (memorandum to the Ministerial Review Panel, 11 June 2009).

[219] See 7.1

- ***The principle that customary rights attach to hapū and iwi (as defined by hapū and iwi themselves) and not to Māori in general***
  Customary property rights are the property rights of specific hapū and iwi with traditional interests in the coastal marine area.

- ***The principle of reasonable public access***
  Public access should be defined and provided for by statute. The public access to be defined is "reasonable" public access. The exclusion of the general public may be reasonable in some circumstances, for example, from port operational areas and reserves for customary harvesting.

- ***The principle of equal treatment***
  There should be equal and consistent treatment for similar cases. The Act took away Māori property rights but not the private property rights of others in the foreshore and seabed. Similarly, there should be equal and consistent treatment between hapū and iwi, for example, where one has secured real engagement and influence over policy making at the national level (for instance, in the New Zealand Coastal Policy Statement).

- ***The principle of due process***
  Access to due process should not be removed or unduly constrained.

- ***The principle of good faith***
  Good faith requires that negotiations substantially completed with hapū and iwi should be respected.

- ***The principle of restricting alienation***
  Whether the foreshore and seabed is ultimately held by Māori, the Crown or non-Māori private interests there should be restrictions on alienation. Where some form of alienation is justified it should take the most restricted form practical as upon an easement for a limited term. Several hapū and iwi claim a particular interest in restricting alienation upon the ground that they claim the right to the whole of the foreshore and seabed in their customary territories.

- ***The principle of compensation***
  Where private property rights, of any kind, need to be extinguished in the foreshore and seabed, such extinguishment or taking should in principle be compensated.[220]

- ***The principle of the right to development***
  Customary rights and interests in the foreshore and seabed should not be frozen in time as at 1840 but have the right to develop.[221]

7.6.5 Interim Act

We recommend that an interim Act be now enacted.

The interim Act would:

- repeal the Act;
- recognise as the primary norm of the interim Act, made in accordance with the Treaty of Waitangi, that:
  - entitled hapū and iwi have customary rights in the coastal marine area including the foreshore and seabed;

[220] The right of redress for the appropriation of property is enshrined in international treaties, for example Article 17 of the Universal Declaration of Human Rights and Articles 8(2) and 28 of the United Nations Declaration on the Rights of Indigenous Peoples.

[221] See the United Nations Declaration on the Rights of Indigenous Peoples.

- the general public have rights of use and enjoyment of the coastal marine area;
- both rights must be respected and provided for;
- both rights must be limited by that reasonably necessary to accommodate the other,

and provide that the purpose of the interim Act is to promote processes to establish the necessary balance, and that all decisions must be taken on the principle of that balance;

- provide for the principles to govern the settlement of customary interests in the coastal marine area, and the administration of the area, as set out above;
- provide for such particular mechanisms as may be determined having regard to the specific proposals made below and the Māori and public responses to them;
- provide that, until the question of who would hold title to specific areas of the foreshore and seabed is resolved, the legal title be held by the Crown in trust for those later determined as entitled (As we see it, once the respective rights have been resolved in any particular area of the foreshore and seabed, the beneficial and perhaps the legal title for that area would be held by the entitled hapū or iwi, or the Crown, or both jointly, depending on the outcome);
- promote the expeditious determination of customary rights in the coastal marine area and provide for them to be given practical effect; and
- contain transitional provisions which would retain the Act in operation insofar as is necessary to continue and advance to finality negotiations begun under the Act, having regard to the extent to which those negotiations are advanced (however the parties should have the option of proceeding under whatever new proposals are developed).

At 7.5.2 we consider the four broad options to moving forward and disclosed our preference for a "mixed model" with local and national components. We come now to describe two types of mixed model that may be drawn on. Either, or a combination of both, fits with the framework, the primary norm and the principles above.

The first has a formal, national structure as its main focus. The second focuses on more informal negotiations by regions. The final answer could draw on aspects of both.

We refer now to the first proposal. It involves the establishment of a foreshore and seabed oversight body representing government, entitled Māori and nationally significant groups. It would be responsible for developing the details of the staged development of policy, leading to the enactment of more detailed legislation.

7.6.6 National Policy Proposal

It is important that whatever option, or model, or combination that is ultimately adopted by the government, that the development of policy occurs within a structured framework and in a principled manner. As has been explained, whatever process, is finally determined, we consider that it should operate within a set of parameters set out in statute.

As noted we advocate a "mixed" model. This model involves a number of discrete components at several levels and would have to be provided for by special legislation. In this sense there would still have to be an Act, but a new Act rather than an amendment of the existing statute.

This model has several elements:

- new legislation to provide a framework for a "longer conversation" with stakeholders based upon the core principles at 7.6.4;
- establishment of a new body to oversee that "longer conversation" and develop details of its framework; and/or

- provide for a process to determine who holds customary rights in the coastal marine area.

Also, at the national level there could be a one-off national settlement between entitled Māori (meaning hapū and iwi with traditional interests in the coastal marine area) and the Crown, this settlement would provide for a percentage of income streams from the foreshore and seabed to be set aside for the benefit of entitled hapū and iwi.

At a more mid-range level mechanisms should be put in place which allow for more specific rights to be sought and implemented. The outcomes of such a process would be something between the existing territorial customary rights and customary rights orders processes (but with very different thresholds) which would entitle those groups holding such rights to particular rights of consultation and input into coastal management. As with the existing system of customary rights orders such rights could be linked to the Resource Management Act 1991. The addition of "the recognition of recognised customary activities" as an additional matter of national importance under section 6 of the Resource Management Act should be retained, but the definition of "recognised customary activity" will have to be changed. Should a judicial approach be preferred, the appropriate forum for determining these rights could be the Māori Land Court or the Waitangi Tribunal, or perhaps the two in some kind of combination.

As well as this we consider that there should be mechanisms to provide for interests at the local level. This has two aspects:

- co-management between Māori and local government of particular areas of foreshore and seabed, especially of estuaries and harbours such as Tauranga Harbour, Manukau Harbour, or Te Whaanga Lagoon; and
- the Māori Land Court could be given a range of special functions and powers at this level, to make orders recognising both customary interests in the foreshore and seabed and specific access relating to tauranga waka and other areas.

The legislation could therefore make provision for the establishment of an oversight body, possibly a Working Group or Commission (the precise title is immaterial). We have in mind a reasonably high-level body made up of representatives of central and local government, Māori with traditional interests in the foreshore and seabed, and public interest groups.

This body could be connected to the existing Foreshore and Seabed Unit within the Ministry of Justice, who can provide a supporting secretariat role. Working within the framework of principles we have proposed, the body would have a number of specific responsibilities (perhaps to be defined in the interim agreement we have suggested). Some of the tasks of such a Commission would be to:

- develop proposals for a national settlement;
- develop proposals on the allocation of rights held by iwi and hapū in the foreshore and seabed, and the methods by which such rights might be implemented, recognised and enforced;
- develop proposals for co-management at a local level, taking account of co-management programmes implemented in New Zealand and overseas.

7.6.7 Regional Iwi Proposal

Another proposal is to continue (immediately) with regional hapū and/or iwi negotiations, but having regard to the principles already expressed, and the fundamental norm of balancing customary and public interests.

It is entirely feasible to combine aspect of both proposals.

The Regional Iwi Proposal focuses upon settlements for the customary interests in the coastal marine area of a given region, by direct negotiations between hapū and/or iwi and the Crown. It substantially follows the form of negotiations currently in train, except there would no longer be a need for references to the High Court or the Māori Land Court to approve settlements. There would be no more territorial customary rights orders or customary rights orders. They were inventions of the Act using tests that had no known application in New Zealand jurisprudence. The only test, for a settlement under the new Act would be the Treaty test, earlier described, of the appropriate balance. There is room for further specificity in the factors to be considered, as settled between entitled Māori and the Crown, but a balancing must be the broad principle. One needs mainly a picture of the size and extent of the traditional interests before European settlement, the size and extent of that now sought, and the impact on the public interest.

Presumably as templates develop, the task will be easier for the remaining districts.

In these negotiations, the Crown represents the public interest. However, the responsible Minister may of course, arrange for public responses, although the public might well respond in any event once enabling legislation is introduced to Parliament.

In addition, it is proposed that the responsible Minister may refer matters to the Māori Land Court for an opinion and to hear both Māori and the public. There are precedents for this in relation to Taiāpure Reserves.[222]

What we propose to do now, in the quest for streamlining, is to look at how to remove some of the blocks to early settlements by regions; and then to look at the matters that need to be dealt with and how they can be dealt with promptly.

Districts and Representation

A potential block to early settlements, in our view, is the determination of appropriate regions and representation for entitled hapū and iwi.

First, for effective administration, the regions need to be large. With modern resource management laws and other statutes there is quite a task that hapū must undertake in caring for those customary interests provided for in settlements. Next, there should be a good match between the district and traditional tribal groupings. Research amongst Native American tribes of North America has shown that structures work best when they match with traditional formations and local culture.[223]

Regard must also be had to local authority and other administrative boundaries, and to iwi districts already in place for other purposes, like those relating to the Treaty of Waitangi Fisheries Commission/Te Ohu Kaimoana or for Treaty claim settlements.

Looking at all these factors we think iwi and the responsible Minister should be able to determine appropriate districts. Failing agreement, or in the event of serious objections, it is proposed that the matter may be referred to mediation, to arbitration, or for the Māori Land Court's adjudication or opinion. The provision for arbitration creates a contestable situation for the Māori Land Court and enables experts, including tikanga experts, to offer competitive services.

The last proposal, for adjudication (or even opinion) of the Māori Land Court, draws upon quite old provisions in Māori land law for Ministers to refer matters for the advice, or determination of that

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[222] s 180 (1) Fisheries Act 1996.

[223] See Stephen Cornell, Miriam Jorgensen and Joseph P Kalt The First Nations Governance Act: Implications of Research Findings From the United States and Canada (Native Nations Institute, Udall Centre for Studies in Public Policy, The University of Arizona, Tuscon, 2002).

Court.[224] It could be done very simply by a case stated process, where agreed matters are recorded and where discrete questions for answer are proposed. This would reduce the length of hearings.

Representation for the various hapū and iwi has long been a vexed issue, but only for the lack of a proper process, in our view. Where entities do not already exist to represent the affected hapū of a district, we consider the critical step is to promote the early formation of entities for that purpose and then to elect representatives in accordance with the entity charter. As long as the process is fair and democratic, that should put paid to any question of who can speak.

That also fits with government responsibilities when treating with indigenous peoples in terms of the United Nations Declaration on the Rights of Indigenous Peoples.[225] And it fits with the principle of rangatiratanga in the Treaty of Waitangi. In terms of the Treaty principle of kāwanatanga, however, we think government is entitled to be satisfied that the charter is fair, democratic, and sensitive to minorities and that elections have been proper. After all, governments are not obliged to deal with rogue governments, as we know from Pacific experiences. Once more however, issues about the Charter and elections and so on can be referred to the Māori Land Court for independent advice. The Court is used to these questions through its experience with incorporations and trusts. Where several iwi entities already exist in a region, some form of coalition will be needed.

Another question concerns which hapū and iwi have customary interests in a region and of what kind. Again, where the parties cannot agree or cannot agree to mediate or arbitrate it can be referred to the Court.

The matters requiring settlement

We have already introduced the customary interests in the coastal marine area that may need to be covered in settlements. Broadly, they are customary usages. Some examples are traditional harvesting and the use of areas as tauranga waka, and customary authority, like the traditional role of regulating conduct in an area and ownership of the seabed.

Customary usages can be provided for by exclusive reserves under hapū control, for example, or by provisions prescribing general harvesting rights by regulations, Orders in Council or Māori Land Court orders. Just how effective are the present reserve provisions and whether the statute needs changing may need to be examined. Again, the question of whether an activity is customary, and the extent to which it might reasonably be maintained today, could be referred to the Māori Land Court if the parties agree, or to mediation or arbitration.

Customary authority may be supported by the full right to manage reserves and regulate customary activities; and the right to be fully engaged in the management of coastal marine areas in partnership with other controlling authorities. The full engagement of hapū and iwi in co-management and other arrangements was a matter stressed in many submissions and is a matter which we consider deserves priority attention.

Ownership of the foreshore and seabed requires a national negotiated solution, in our view. We are here referring not to the coastal marine area but specifically to the seabed, foreshore and substratum and with that, the income streams resulting from resource exploitation and use licences.

As we considered, there remains an open question of whether the customary interests should be treated as amounting to exclusive ownership rights in the foreshore and seabed. We consider this matter can only be dealt with by negotiation at a national level. Negotiations should be with the

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[224] See Part IX Fisheries Act 1996 in relation to Taiapure and sections 27 and 29 Ture Whenua Māori Act 1993. Any such referral provisions would have to be drafted very carefully to ensure that some of the problems that have occurred with other types of statutory referrals do not recur.

[225] See in particular Articles 19 and 32, and 26 and 28.

representatives appointed by the hapū and iwi entities for those with major interests in the seabed substratum. We also consider that issues about the alienation of the foreshore and seabed should also form part of the national negotiations.

We do not propose references to the Māori Land Court because the issue goes beyond custom. Fundamentally, a political solution is required based upon Treaty principles of good faith. There are existing provisions for reference to the Waitangi Tribunal in the event that the process is not reflective of good faith.

Comments on the judicial role

No one should be denied the opportunity to have their full customary rights determined by legal process. Findings in that respect could be very important in negotiations and, once more, we think the parties should be able to state a case. The gloss, however, is that the rights must still be balanced with the public interest, as we described earlier.

Where proceedings are taken, the first port of call should be the Māori Land Court. The High Court is primarily the custodian of the law, not the keeper of fact, and customary issues are primarily issues of fact, not law. The High Court should be primarily concerned with appeals and review.

7.7 Matters for separate treatment

7.7.1 Coastal marine law

We are also asked to consider how any processes we recommend "will integrate with legislation that regulates the coastal marine area".

We have observed elsewhere in this report, and the point has been made repeatedly to us in submissions, that the existing law relating to the coastal marine area is too complex. We believe that coastal marine law needs to be reconsidered as a whole, and that the development of final legislation on the foreshore and seabed should be integrated into such a review process.

7.7.2 Access to the coast

The real concern in many submissions, and in many popular articles and media statements, is not in fact about access over the foreshore and seabed but the difficulties experienced in getting there.

Many urged strongly that government should embark on a concerted effort to improve and secure public access to and along the coast. We are sympathetic to that view. However, we think it is a separate issue outside our terms of reference.

7.7.3 Local authority interests

One effect of the Act was to vest all "foreshore and seabed" formerly belonging to local authorities in the Crown.[226] In fact the only compensation provisions in the Act relate to this taking of local authority foreshore and seabed. Section 25 of the Act made provision for local authorities to apply to the Minister for redress for loss of divested areas.[227]

We have not been able in this report to analyse the complex legal issues that have arisen between the Crown and local authorities over the effects of the Act. In particular there are issues as to who is now liable for jetties, wharves, harbour works and other such structures formerly belonging to local bodies but which are now located on land which has been vested in the Crown. We suspect that this problem was not fully appreciated when the Act was originally drafted. Questions of title

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[226] This was a consequence of the definition of "specified freehold interest" in the Foreshore and Seabed Act 2004 s 5, which excluded from the definition of a "specified freehold interest" all interests held by persons "other than the Crown or a local authority" [emphasis added].

[227] As far as we are aware no compensation was actually paid to local authorities under this provision.

and liability now involve difficult problems of interpreting the combined effect of the Common Law, earlier legislation relating to Harbour Boards, the Foreshore and Seabed Endowment Revesting Acts of 1991 and 1994 and the Act itself. One outcome of a repeal of the Act and the implementation of new legislation could be the revesting of the areas taken in 2004 back to local authorities, but we are not sure if this is necessarily the most desirable course or whether it would be an outcome that local authorities would particularly desire.

We did not have the benefit of a great deal of input to our review process from local authorities during our review process (although we have had the benefit of written submissions from some). For this reason we do not feel confident about recommending a particular path forward as to how the Crown and local authorities should now deal with the owner and management of structures attached to the foreshore and seabed. But we are aware that this is an important issue in some areas. It is the our view that it would certainly be desirable for the Crown and local authorities to enter into discussions as soon as possible as to how this problem should best be dealt with in the public interest, free from complex legal technicalities.

7.7.4 Te Whaanga Lagoon

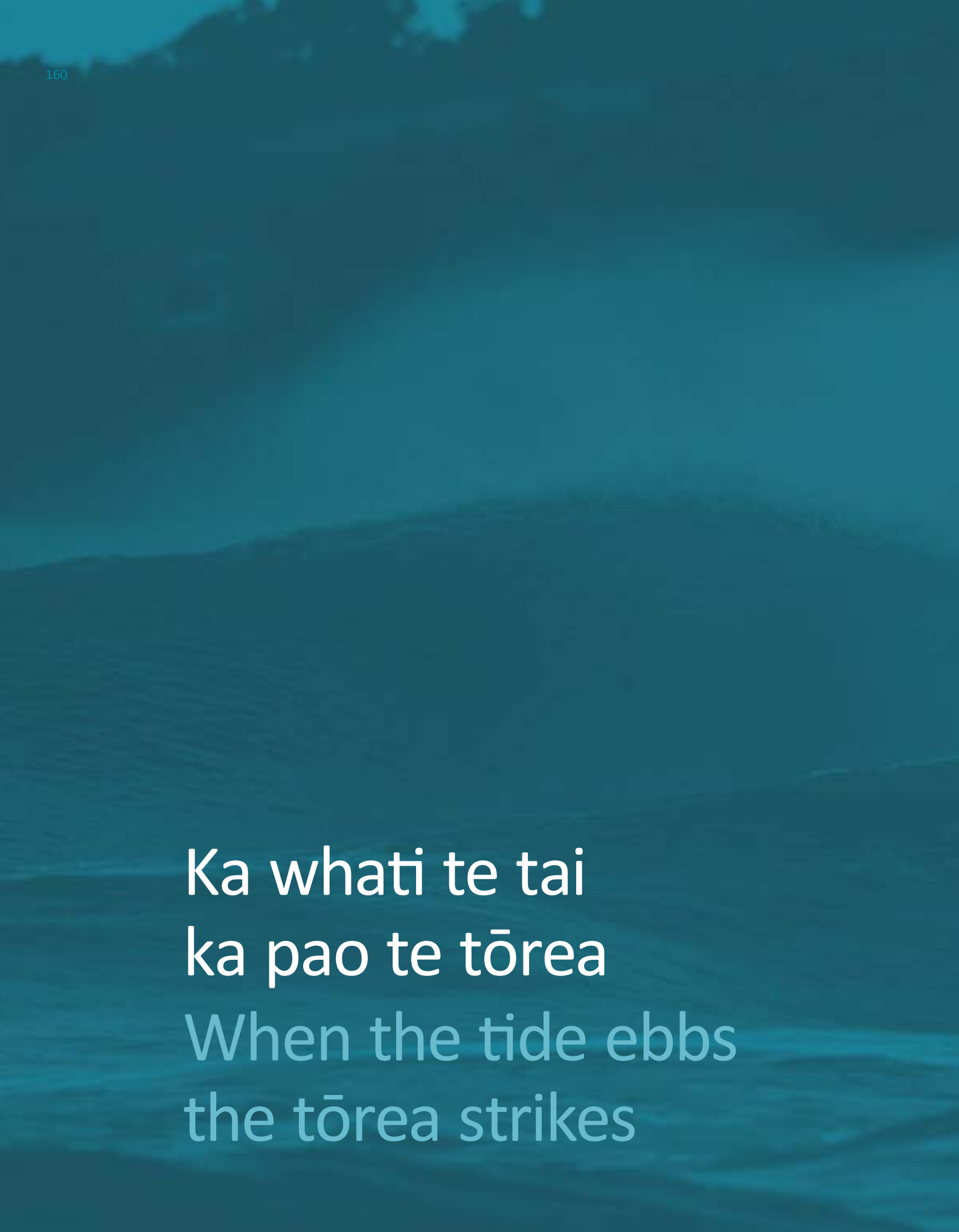
The only water body named specifically in the Act is Te Whaanga Lagoon in the Chatham Islands, vested in the Crown absolutely as a consequence of the combined effects of the definition of "foreshore and seabed" in section 5 and section 13. What the legal status of the lagoon was prior to the Act has not been clarified but in all probability it had the status of Māori customary land as a lakebed title which had never been investigated by the Māori Land Court. The general law in New Zealand is that lakebeds are simply ordinary land covered by water and the Crown has no particular rights to them. Had the Act not specifically identified Te Whaanga Lagoon it is our view that the Act would not have affected its ownership.

We have discussed this issue with representatives of the Ngāti Mutunga and Moriori communities of Rekohu/Te Wharekauri and with the Chatham Islands Council, all of whom agree that the lake – for it seems to be such – be returned to its former legal status. According to the Council the vesting of Te Whaanga Lagoon took place without any consultation between the Crown and the local authority. We have also been informed that notwithstanding the vesting in the Act the actual management of the lake in day-to-day terms has remained the same, and that the responsible government agency, the Department of Conservation, has not taken any steps towards managing the lagoon. The issue is obviously an important one to the people of the Chatham Islands.

7.8 In conclusion

As the Waitangi Tribunal noted in 2004, the issues underlying the Act required "a longer conversation" than that which had previously occurred. We had hoped that our inquiry would have provided for that longer conversation, especially on what should be done if the Act is properly to be repealed. That necessary conversation did not fully occur. For the most part the consultation round did not move beyond "what was wrong".

As a result our proposals have not been properly discussed with the people who will be affected by them. In addition, many possible amendments and alternatives presented themselves as our thoughts were developing. We therefore trust that our proposals will not be reported as the final word but as a catalyst for further discussion.



Ka whati te tai
ka pao te tōrea
When the tide ebbs
the tōrea strikes

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