

**ASK THAT TANIWHA**  
**Who Owns the Foreshore and Seabed of Aotearoa?**

*One day a taniwha  
Went swimming in the moana  
She whispered in my taringa (ear)  
“Oh won’t you come with me  
There’s such a lot to see  
Undeneath the deep blue sea”<sup>1</sup>*

## **Introduction**

One wonders just what that taniwha, lying beneath the surface of her watery world, thinks as her obsidian gaze fixes on her fishy cousin, hauled up unceremoniously by Maui and carved up by his greedy brothers. Does she see us in all our human glory, strutting and fretting our rights and obligations at each other, and marvel at our ingenuity and perseverance? Or does she see us as a lice infestation, scrambling over each other to get the last fleshy morsels on the carcass of her mutilated relation, and weep? And has she herself felt the first tentative scrapings that signal the imminent invasion of her own, secret hiding places.

In law, as with anything else, perspective counts. Most tangata whenua have greeted the unanimous decision of the Court of Appeal in *Ngati Apa v Attorney General*, (CA 173/01 CA75/02, 19 June 2003) (*Marlborough*) with a relieved sigh of “at last”. Every case that Maori have brought before the New Zealand courts asserting tangata whenua property rights has been with the sure knowledge that the reasoning in *Wi Parata v Bishop of Wellington* (1877) 3NZ Jur (NS) SC 72 (*Wi Parata*) was morally and legally wrong. For Maori, *Marlborough* represents an unusual alignment of law, morality, justice and equality. Most Pakeha, if the media is to be believed, have reacted with an incredulous “how could they”, believing that their “right” of recreational access to the foreshore, once unencumbered, is now under threat. A sense of betrayal by the Court of Appeal, together with the fear of imminent loss of a public treasure to private tangata whenua ownership has resulted in a call for government action to prevent it happening.

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This case is not that far reaching. The issue was a narrow one - does the Maori Land Court have jurisdiction to investigate title to the foreshore and seabed of the Marlborough Sounds? The answer was an equally brief "yes". The public outrage that the Maori Land Court should be allowed to even enter into such an inquiry is unwarranted. There is no guarantee that the court will recognise Maori customary ownership. Even if it does, the real difficulty then lies in working out the incidents of that ownership. A great injustice will occur if tangata whenua groups, having followed the processes set out under Pakeha law for over a hundred years, have their property rights unilaterally extinguished by legislation because others fear that Maori will succeed in the Courts.

Our taniwha may well wonder why all the fuss. Coastal tangata whenua have always asserted their "rangatiratanga" (to use a Tiriti o Waitangi term) and their "mana rangatira" (to use a pre-Tiriti northern term) over the coast and surrounding seas. In the Tai Tokerau (Northland), areas of sea have been jealously guarded mai raano (since time immemorial), with pou (sign-posts) being erected and rahui (restrictions) being set up to notify group territoriality. In pre-European times wars were fought between rival groups to protect rights to the sea and the foreshore and to oust interlopers. Taniwha often acted as guardians of those rights. Knowledge of their presence throughout the area and their association with specific human whakapapa (ancestral lines), identified rights to the area as being vested in particular groups. These particular tikanga were an accepted part of Maori custom law. Local variation notwithstanding, groups from other areas, including around Marlborough, probably acted in a similar fashion.

With colonisation the outboard motor has replaced the hoe (paddle) in propelling a speedy get-away, and fines imposed by the state have replaced the death penalty when trespassers are caught. But the nature of the sea as a taonga (prized possession) and battles over entitlements to the booty held within the domain of Tangaroa (god of the sea) continue.

The strong public reaction to *Marlborough* illustrates a lack of knowledge and acceptance of tikanga (Maori custom law) within New Zealand. It also presents New Zealanders with the difficult task of having to recognise territorial rights that do not coincide with, and are not derived from, the English common law.

This article highlights some of the fundamental issues to which the *Marlborough* decision gives rise and the legal, political and social tensions it has unearthed within New Zealand society. These tensions are focussed in this article, around a single issue, customary ownership of foreshore and seabed. However,

underneath lies a deeper concern about the constitutional relationship between tangata whenua and the Crown. This article investigates the development of that relationship through the courts and legislature.

## **Early Court Decisions dealing with Maori Customary Land**

### **A *The Foreshore***

The Maori Land Court and its predecessor the Native Land Court, has adjudicated the issue of Maori customary ownership of the foreshore a number of times.

In *Kauwaeranga* (1884) (reported in 14 VUWLR 227), Chief Judge Fenton, following his prior decision of *Whakaharatau* HMB 4 (1870) 202, held that Maori ownership of the foreshore was a matter of fact, reliant only on sufficient proof of ongoing usage in accordance with custom. Although he was sure that tangata whenua could easily establish that proof, he was uncomfortable with the negative impact this could have on the interests of others. At page 244:

I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of the foreshore of the colony will be vested in the natives, if they can prove certain acts of ownership, especially when I consider how readily they may prove such, and how impossible it is to contradict them if they only agree amongst themselves.

In accommodation of those fears, the ownership he recognised was limited. It can best be described as a type of easement over Crown land, which enabled members of the local hapu to gather seafood inside the claimed area. At page 245:

It appears to me that there can be no failure of justice if the natives have secured to them the full, exclusive, and undisturbed possession of all the rights and privileges over the locus in quo which they or their ancestors have ever exercised; and the Court so determines, declining to make an order for the absolute propriety of the soil, at least below the surface.

Prior to *Marlborough, In Re Ninety-Mile Beach* [1963] NZLR 461 (*Ninety-Mile Beach*) was the leading modern case concerning foreshore ownership. Both the High Court and the Court of Appeal held that Maori ownership of the foreshore had been extinguished through application of the English common law. Despite mounting a Tai Tokerau wide appeal, the claimants were unable to raise the funds required to appeal the case to the Privy Council. In the Maori Land Court however, Judge Morison had made a

preliminary determination that the two local iwi of Te Aupouri and Te Rarawa had adduced sufficient evidence to conclusively prove ownership. Judge Morison said at pages 127-128:

These two tribes respectively had complete dominion over the dry land within their territories, over this foreshore, and over such part of the area as they could effectively control. It is well known that the Maoris had their fishing grounds at sea and that these were jealously guarded against intrusion by outsiders.

As a matter of jurisprudence the ownership of territory was not restricted to what is termed the civilized world; the other races of the world also owned their territories.

The Maori Tribes must be regarded as states capable of owning territory just so much as any other peoples whether civilized or not: 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 territories over which Te Aupouri and Te Rarawa respectively exercised exclusive dominion and control and the Court therefore determines that they were owned and occupied by these two tribes respectively according to their customs and usages. (NMB 1957 127-128).

In reaching this decision, Judge Morison reinforced Chief Judge Fenton's broader views in *Kauwaeranga* regarding tangata whenua ownership of the foreshore. With the overruling of the higher Court decisions in *Ninety-Mile Beach* by *Marlborough*, the earlier Maori Land Court decision emerges intact as the leading judicial pronouncement on foreshore ownership.

## ***B Offshore Islands***

Two more recent Maori Land Court investigations into Maori customary land have focused on the islands and rocky outcrops located in the coastal sea area of Tai Tokerau. In 1994, Judge Spencer declared the twenty-five islands off the coast of Takou that comprise the Cavally group to be Maori customary land (*Application by Dover Samuels, (Cavally)* 22 KH 198-208). Following that, in 1998 the outlying islands and rocky outcrops of Aotea (Great Barrier Island) were also declared to be

customary Maori land (*Application by John Di Silva*, MLC, Taitokerau District, 23 February 1998, Judge Spencer). In accordance with Maori custom law, the cases did not distinguish between land above and below the waterline.

**(a) The Cavally Islands Decision**

In the *Cavally* hearing the applicant did not seek an order vesting ownership. He was more concerned with establishing his hapu's right to "...speak for the Islands" on issues that affected them. In his evidence, Mr Dover Samuels highlighted the importance of the coastal fisheries as an integral part of the tikanga attaching to the status of the land. At page 200 of his evidence:

Tikanga includes the fisheries; to take away the fisheries from the tikanga is to disembowel the tikanga. The land is the matenga (head) and the fishery is the tinana (body). They are inseparable. The reason why those islands were occupied was for the sustenance the surrounding sea shores provided. We seek recognition of that tikanga. We are not contesting the Crown's ownership of the seabed at this time – that is a matter for another jurisdiction.

In declaring the status of the land to be "Maori customary land" under s131 (1) of the Te Ture Whenua Maori Act 1993, the Court stated at pages 206-207:

The evidence is clear and not contested. These islands, by their use and tradition, are customary land which have not only been used as a place for gathering mutton birds, but fishing, habitation and all the traditional uses attaching to their occupation.

The unease by some arises as to what the Maori customary land status includes. It is not a question of any claim but rather what is inherently Maori customary land. It is not a question of rights that attach. It is a question whether the fishery is intrinsic, within tikanga Maori with the customary status. There is no separate claim or appendage, but rather an inseparable belonging to that customary status. The Court is of the view that the land is Maori customary land and that all the taonga tuku iho within tikanga Maori of land of that status is inherent to these 25 islands.

In this case the Maori Land Court did not make an order vesting ownership of the islands as they had already been set aside as a Maori Reservation in 1948. However,

the four additional hapu of Ngati Rehia ki Takou, Ngati Whakaeke ki Takou, Ngati Torehina ki Takou and Ngati Kaitangata ki Takou were added to the list of trustees set up for the islands at the earlier hearing.

**(b) The Aotea Decision**

In the *Aotea* decision, the Maori Land Court declared the outlying islands and rocky outcrops surrounding Great Barrier Island to be Maori customary land. The court issued an order vesting ownership in accordance with Maori custom law, in:

Ngati Rehua, to hold the same as kaitiaki for themselves and, in accordance with the tikanga of whanaungatanga, for Ngati Wai ki Aotea and Marutuahu ki Aotea. (p30)

Little fanfare or public outcry followed either the *Cavally* or *Aotea* decisions. This may have been because the size, remoteness and lack of development of the islands and surrounding sea meant there were few other interested parties. Also, in neither case was any attempt made to define the incidents of tangata whenua customary ownership in accordance with English common law concepts of property.

It is clear then, that the finding of the Court of Appeal in *Marlborough* that the Maori Land Court has jurisdiction to hear a claim to customary ownership is not a novel one. It is in line with established practice of that court when applying Te Ture Whenua Maori Act 1993 and its predecessors.

**The Extent of Tangata Whenua Interests in the Sea – The Te Tai Tokerau Claim**

An interesting feature of the foreshore cases to date is that evidence of “ownership” under Maori custom law has never been restricted simply to the foreshore. It has always extended into the surrounding seas. However, as tangata whenua were generally not seeking recognition of their customary ownership of the seabed under the common law at the time of investigation, broader findings were unnecessary and these discussions were treated as obiter.

Generally, the cases indicate that tangata whenua claiming interests in sea areas accepted that the courts were bound by the limits of their own geographical jurisdictional boundaries. A notable exception to this was an application made to the Maori Land Court in 1955 by eight members of the Taumata Kaumatua o Ngapuhi

(Speaking Elders for Ngapuhi) (*Tai Tokerau* case) (MLC Taitokerau, NMB 1955 306). The applicants were Tamaiti Peehikura, Hohepa Heperi, Rawari Anihana, Toki Pangari, Te Awe Peehikura, Paua Witehira, Hori Hemara and Tuhi Maihi.

These kaumatua asked the Court to appoint them trustees for Te Moana Nui A Kiwa (the Pacific Ocean). The hearing was only partially recorded and, although the transcript is difficult to decipher in places, it provides valuable guidance as to what constitutes Maori custom law, in Te Taitokerau, with respect to the sea.

In his address to the Court, Tuhi Maihi, as the main spokesperson, clarified that the area being claimed was "...the ocean around New Zealand..."(p 306) which included the routes traversed across Te Moana nui a Kiwa, by Maori travelling back and forth between Aotearoa and Hawaiki.

The kaumatua stated that the water surrounding New Zealand should be held in trust for all Maori, because their ancient canoes had crossed and re-crossed the Pacific Ocean long before Europeans discovered Moana (the ocean). The kaumatua stated that they had a duty to their ancient tupuna (ancestors) to ask the Court to recognise their interests in the ocean, as a mark of respect to Moana's wisdom "...in making this part of the world so extensive that New Zealand could be fished from the sea far away from lands involved in troublesome conditions".

Relying on tikanga such as pou (symbolic and physical markers), the kaumatua provided evidence of "Tika Mana Rua" (rights derived from the gods or a higher authority) to explain the significance of Pouahi (pillars of fire) and Poukapua (pillars of cloud) (p306-307). Although these references may appear obscure to the modern mind, under Maori custom law they were considered by these kaumatua to be permanent indicators of the extent of tangata whenua rights and responsibilities over the sea.

The Court dismissed the *Tai Tokerau* case for lack of jurisdiction, but the record illustrates that the kaumatua who took the case appreciated its significance for tangata whenua in the future:

The reason we apply for our rights to be determined [is] so that it can go down in record so that the people would know our rights under the rights of our ancestors spoken above. (page 308)

The *Tai Tokerau* case is significant for a number of reasons. It reinforces the importance of tangata whenua territorial possession of the sea. Under custom law,

tangata whenua were exerting their authority over the sea to a much greater extent than that recognised or understood by the English common law, and at a time when rights to the ocean and seabed had yet to enter the mainframe of established western legal thinking. Furthermore, the case illustrates that the tangata whenua obligation to protect taonga tuku iho (prized possessions passed down) which is commonly associated with land, also applies to the sea. The importance of recognising and protecting these tupuna rights is emphasised in the case at p308:

We apply to the Court in respecting what we have said so that our ancestors Tangaroa, Maui, Kupe, Nukutawhiti will take note that we their descendants have not forgotten their wisdom in providing us with Te Moana Nui a Kiwa.

### **The Marlborough Decision**

By way of contrast, *Marlborough* identifies two distinct lines of precedent produced by application of the English common law in the general courts of New Zealand, to tangata whenua property entitlements.

One line follows *Wi Parata* in holding that Maori land entitlements are reliant solely on Crown benevolence for recognition. Fuelled by notions of western cultural supremacy, proponents of this line of reasoning believed that Maori did not possess a cognisable system of law. On this basis, legislation was considered to be the principal source of law and rights relating to Maori and their property. The other line of precedent was based on an acknowledgement that pre-existing tangata whenua property entitlements continued after the establishment of English common law in the new colony and until extinguished by law. Although the extent of these entitlements was unknown to Pakeha, they were nevertheless to be respected. (*R v Symonds* (1847) NZPCC 387 (*Symonds*)).

For over a hundred years judges have shifted back and forth between the two lines of authority when considering cases involving Maori customary land and the foreshore or seabed. Maori Land Court judges, using their investigatory powers under successive Maori land legislation have generally leaned toward recognition of tangata whenua customary title but without stating the incidents of ownership in common law terms. The general courts have leaned in the other direction, supporting the extinguishment of customary Maori title through sale or by legislation, which thus precluded the need for investigation in the first place. The difference is a matter of judicial orientation born of legislation and jurisdictional parameters. The Maori Land

Court judges have tended to treat customary ownership as a matter of provable fact and left it at that: the higher courts have tended to view it as a matter of law, irrespective of the facts. *Marlborough* does not alter that approach.

It will be of some relief to lawyers that the Court of Appeal has removed the difficulties associated with having two conflicting streams of precedent. A single guideline for future decision-making ought to make for a less complicated process. Maori, as the apparent victims of the *Wi Parata* line of reasoning, will be pleased that the Court has finally risen to the occasion, albeit it over 100 years in the ascension. The definitive statement of Elias CJ, set out at para 14 of *Marlborough*, that *Wi Parata* and the cases that relied on it are wrong in law is worth quoting here:

I agree with Keith and Anderson JJ and Tipping J that *In Re the Ninety-Mile Beach* was wrong in law and should not be followed. *In Re the Ninety-Mile Beach* followed the discredited authority of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, which was rejected by the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561. This is not a modern revision, based on developing insights since 1963. The reasoning the Court applied in *In Re the Ninety-Mile Beach* was contrary to other and higher authority and indeed was described at the time as “revolutionary”.

The older and higher authority to which the Chief Judge refers is the line of precedent beginning with the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 and *Nireaha Tamaki* [1901] AC 561 and culminating with the *Marlborough* case.

In brief then, *Marlborough* affirms that tangata whenua held existing customary property rights to land at the time of Pakeha settlement. It confirms that those rights were not dependent on or derived from the Treaty of Waitangi or Crown recognition. These customary property rights continued to exist after the Crown assumed sovereignty, and they can only be extinguished in accordance with law. Furthermore, for extinguishment by statute to be effective it must be “...plain and clear” and cannot occur by a sidewind or as a necessary implication drawn from inconsistent legislation. Therefore customary title had survived the enactment of several statutes affecting the foreshore and seabed area.

The Court of Appeal’s approach is consistent with that of the highest courts from other Commonwealth jurisdictions, notably the Australian High Court in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and *Wik v Queensland* (1996) 187 CLR 1 and

the Supreme Court of Canada in *Delgamuukw v British Columbia* (1993) 104 DLR (4<sup>th</sup>) 470.

### **Issues Arising from the Marlborough Case**

The *Marlborough* case raises a number of fundamental issues of importance for Maori, and for the development of the common law of Aotearoa generally.

#### ***A Legislation as a Political Tool in the Contest between “Maori” and the “Crown”***

*Marlborough* does not guarantee that there will be a successful outcome for tangata whenua following an investigation into foreshore and seabed ownership. However, by allowing an investigation to take place, the Court of Appeal has created a space within which dialogue can take place between “Maori” as a collective of hapu and iwi, and the “Crown” representing other New Zealanders’ interests, over a major resource of common concern.

Notionally, the Crown is symbolic of the unity of all New Zealanders’ interests, including Maori. However, *Marlborough* forces abstraction to confront reality by placing the relationship between “Maori” as a collective of whanau, hapu and iwi, and the “Crown” as representing other group interests in New Zealand, directly under the spotlight.

In the “push-me pull-you” relationship between tangata whenua and the Crown (in Parliament), the latter, as the possessor of “sovereignty” controls the legal and political higher ground. In its tangible manifestation as the governing body of the day, the Crown has not hesitated to initiate and use legislation as a political weapon against tangata whenua in order to appease the fears of the non-Maori voting public. In 1993, for example, Parliament amended the Treaty of Waitangi Act 1975, by inserting section 6(4A) which prevents the Waitangi Tribunal recommending the government purchase private land for return to tangata whenua in order to settle Treaty claims. This statutory amendment was designed to quiet the public’s fear that the Tribunal might confiscate privately owned land after the Tribunal had recommended in the *Te Roroa Report* (WAI 38, 1992) at para 8.2:

[T]hat the Crown take all steps to acquire these [privately owned] lands...which should not have been included in its [earlier] purchases, and to return the same to tangata whenua as hapu estates.

The 1993 amendment was unnecessary and little more than a political flexing of muscle aimed at soothing rather than educating, a misinformed voting public. The Waitangi Tribunal's recommendations are not, except in certain limited circumstances that did not apply in *Te Roroa*, binding on the Crown. The Crown implements Waitangi Tribunal recommendations as a matter of choice rather than course. The reality is that, to date, a significant number of Waitangi Tribunal recommendations have been ignored.

The *Marlborough* decision has prompted a similar type, knee-jerk reaction from the government. Following a public outcry from those who fear their recreational interests in the sea will be interfered with or undermined by recognition of tangata whenua customary claims, the Attorney-General issued a statement that legislation would be passed to prevent Maori gaining exclusive ownership of the foreshore and seabed. But recreational access to the sea was not the concern behind the *Marlborough* claim. As Fiona McLeod (1998 BRMB 101) points out, it was the Crown's intention to invoke the coastal tendering provisions in section 12 (1) and (2) of the Resource Management Act 1991 in the area of the Marlborough Sounds that precipitated the case. As the (apparently) unencumbered holder of radical title the Crown is able to grant rights of exclusive occupation of seabed space to third party private owners. The *Marlborough* decision that Maori *may* hold customary title to the foreshore and seabed, has thrown a spanner in the works. As a potential future co-owner, the Crown's power to grant rights to third-party owners could be circumscribed by Maori custom law interests.

Following strong objections from the Maori caucus of the Labour Party which labeled the intended extinguishments by statute "confiscation" the government has modified its approach somewhat to allow for a six week period of "consultation" with Maori and Pakeha throughout Aotearoa to take place. It has produced a consultation document that sets out four principles as the basis of the legislation it intends to pass at the end of the consultation period. They are:

1. Principle of access  
The foreshore and seabed should be public domain, with open access and use for all New Zealanders.
2. Principle of regulation  
The Crown is responsible for regulating the use of the foreshore and seabed on behalf of all present and future generations of New Zealanders

3. Principle of protection

Processes should exist to enable the customary interests of whanau, hapu and iwi in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected.

4. Principle of certainty

There should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their action.

The response stated by 10 mandated tangata whenua representative bodies at a Tai Tokerau wide hui held at Whitiara Marae, Te Tii on 23 August 2003, was reaffirmed by the hui as a whole:

- Whanau and hapu hold the mana whenua/mana moana for all our lands, seas, foreshore and the seabed.
- They belong to us having been passed down to us as whenua tuku iho according to the tikanga of our ancestors.
- We are responsible for controlling, using and managing our lands in a manner that ensures that they can be passed on to following generations with their life-sustaining powers in tact (kaitiakitanga).
- No Pakeha law can ever change that. It can only ever either assist us, or make it very much harder for us, to carry out our responsibilities.

The hui re-iterated that to legislate in order to extinguish the property rights of a competing owner would be viewed as confiscation. It encouraged hapu and iwi to register their claims with the Maori Land Court so that if such legislation is passed, future generations of tangata whenua will know that this generation held its ground.

The hui examined each of the four Crown principles for its likely effect on tangata whenua. With regard to Principle 1, "Access", hui noted that access to the foreshore is already available to the public and that this position is unlikely to change if customary ownership is given legal recognition. Where public access is not currently available, it is the Crown that has allowed private ownership to individuals. Making the foreshore "public domain" was viewed as a back-handed way of extinguishing Maori customary title so that the Crown becomes the unencumbered owner, devoid of any responsibility to Maori either at common law or under the Treaty of Waitangi. Principle 2, "Regulation". Was also seen as a means of the Crown confiscating Maori customary property and attempting to extinguish traditional tangata whenua rights and responsibilities within their rohe, and at the same time replacing it with their own, unencumbered Crown authority. Having achieved this, Principle 3, "Protection" would then come into play. *Wi Parata* would reassert itself in that both the decision as to what

is protected, and the source and degree of recognition would rest with Parliament. Maori authority would be reduced to having their sacred sites protected and minor use rights. Principle 4, “Certainty” would complete the Crown’s victory over tangata whenua. It would provide certainty to local government bodies acting as Crown agents that their actions would no longer be unduly hindered by troublesome Maori, as well as to those individuals to whom the Crown had granted private foreshore rights. The only certainty for Maori is that they would continue to be excluded from administrative processes.

A further national hui held at Omaka in Blenheim, 29-31 August 2003, affirmed the decision of an earlier national hui held in Hauraki to reject the Crown’s foreshore and seabed proposals. It is a measure of the distrust that tangata whenua have of the Crown that the Hauraki hui was held and the decision to reject made *before* the Crown’s proposals were formulated and in anticipation of them!

### ***B English Common Law and Foreshore and Seabed Ownership Rights***

The concern that “rights” presently available to “all New Zealanders” will be curtailed if tangata whenua customary ownership of the foreshore and seabed is established is ill founded for a number of reasons.

First, it is based on the fallacy that there is a legally enforceable public right to the foreshore and seabed under the English common law. According to *Halsburys Laws of England* (Vol 49(2)) 4<sup>th</sup> Edition at para 18:

The public has no right of passing along or across the foreshore, except in the exercise of the rights of navigation or fishery, or in respect of a lawfully dedicated right of way from one place to another over the foreshore; there is no right of stray or of recreation there, and no right to go across the foreshore for the purpose of getting to or from boats, except by such places only as usage or necessity has appropriated for that purpose, and no right to wander about at will, because a public right to wander is a right unknown to English common law.

In England, the rationale that underpins Crown ownership of the foreshore and territorial waters was reinforced by the need to protect the extensive canal system of travel and trade routes throughout England before the advent of the railways, and to control smuggling off the English coast. A loose analogy can be made with Maori custom law in that areas of sea and foreshore in Aotearoa were controlled and monitored

by whanau and hapu living in their various territories, who also used the waters as a food basket and a means of travel. However, the tangata whenua relationship with the sea also took into account additional factors such as whakapapa relationships, that were not part of English common law.

Even if a general right of public passage and recreation had existed, the entire foreshore of Aotearoa is not now physically accessible to the public. Areas of foreshore are landlocked, the land being held in private ownership and therefore not accessible to the general public.

Secondly, the widely held belief that the foreshore and seabed of Aotearoa cannot be vested in private ownership is incorrect. Under English common law:

The soil of the seashore, and of the bed of estuaries and arms of the sea and of tidal rivers, so far as the tide ebbs and flows, is prima facie vested of common right in the Crown, *unless it has passed to a subject by grant or by possessory title. (italics added)* (*Halsburys Laws of England (Vol 49(2) at para 9)* 4<sup>th</sup> Edition

Private companies and port authorities, as well as an assortment of commercial operators hold private rights to coastal and sea-farming ventures off the coast of Aotearoa. This has further diminished the foreshore and seabed area available for general public use.

Third, the concern about public access to the sea overlooks the legislative regime that currently regulates use of and access to foreshore and seabed areas that are currently available to the public. A successful tangata whenua customary claim would not invalidate other legislation enacted to regulate human activity in foreshore and seabed areas.

The basis of the fear that the recognition of tangata whenua customary claims may restrict access and use rights to some sea areas, stems from the “exclusivity” criterion that the common law requires be met in order to prove Maori customary ownership. This criterion superimposes the quasi-legal ideas of vacant possession and exclusion on to Maori custom law. “Vacant possession” is a type of inchoate right that gives the possessor more privileges than others over a resource, while “exclusion” is the power to lock others out. While tangata whenua would obviously possess the former, it does not follow as a matter of course that they would automatically gain, or even desire, the latter.

### ***C Maori Custom Law relating to the Foreshore and Seabed***

Mana rangatira (Maori authority) over traditional sea territories, the boundaries of which are still maintained by whanau, hapu and iwi, has never been ceded by Maori. Nor can it be. Mana rangatira is a taonga tuku iho passed to successive generations. Without it tangata whenua would cease to exist as a people.

Under Maori custom law, mana rangatira has never been dependent on private “ownership” of the land abutting the foreshore/seacoast area. It is based on ancestral connection, entitlement and responsibility. Mana rangatira in relation to the sea is determined according to the same whakapapa process that underpins all Maori custom law. From a tangata whenua perspective, and consistent with te Tiriti o Waitangi, mana rangatira sits alongside and sometimes above, but never beneath, the authority of the Crown.

Raymond Firth recognised the difficulty Pakeha have dealing with mana as a jural principle:

The native conception of mana in connection to land is thus most nearly akin to the idea of sovereignty. It is in reality very vague, and the attempt made by some Europeans to formulate this use of mana as a clear-cut legal concept has not met with success. (*Economics of the New Zealand Maori*, Wellington, Govt Printer, 1959 at page 392)

The application to the Maori Land Court by Ngapuhi kaumatua in the *Taitokerau* case is evidence that tangata whenua claims to the sea extend far beyond the Crown’s incremental definitions of its sea territory. Nevertheless, the Crown has continued to extend its jurisdiction unilaterally over the seabed without taking into account the Maori custom law interests in the sea.

In relation to foreshore and seabed areas, a major concern for tangata whenua today is that they are being excluded from accessing, protecting and developing their traditional resources through the ongoing implementation of Crown policies and practices. The impact of the crown’s policies and practices together with the granting of private interests in the foreshore and seabed has diminished the tangata whenua estate considerably since 1840.

Many tangata whenua groups see themselves as having been excluded from developments that are taking place within their territorial sea boundaries. These groups are often powerless to prevent exploitation of their takiwa (sea area) by others. Local authorities operating under the Resource Management Act 1991 are not, for example, required under the Act to recognise tangata whenua ownership rights in relation to the sea, customary or otherwise.

The positive outcome of *Marlborough* for Maori is that once customary ownership is proven, it will strengthen tangata whenua claims to a greater share of the economic benefits derived from foreshore and seabed areas. This could be by way of guaranteed inclusion in the development of a resource, or indirectly, through the charging of rentals to other developers.

This is especially important given the recent introduction of sea farming, which, like the introduction of the fisheries quota, means that legally recognised property rights now extend into a resource that has, until recently, been free from regulation. Although a concerted effort is being made by influential lobby groups to protect the boating fraternity from having their previously unencumbered recreational water space diminished by sea farms, the exploitation of the seabed by private interests is likely to increase.

#### ***D Recognition of Maori Custom Law within the English Common Law system***

In *Marlborough* Elias CJ restates a “vital rule” about the intended application of the common law to Aotearoa and the tangata whenua who live within its geographical confines:

This “vital rule” of the common law (earlier applied in *R v Symonds*) was made explicit in New Zealand by the English Laws Act 1858. By it, English law was part of the law of New Zealand with effect from 1840 only “so far as applicable to the circumstances of New Zealand” (para 28).

In practice, the application of the English common law in Aotearoa has been based on the opposite presumption, that is, the courts have tended to marginalise Maori custom law by relegating it to the realm of “lore”. While English common law principles are continually being modified in accordance with developments in other common law jurisdictions, recognition of Maori custom law to the extent necessary for the development of an autochthonous law within Aotearoa, is yet to be achieved.

In the past, courts have been hesitant to articulate the incidents of Maori ownership of land in English common law terms, let alone tangata whenua terms. Tangata whenua principles were initially expedient in identifying Maori land entitlements for the purpose of transforming title from customary to English common law holdings in the early years of our history. However, since then, and until very recently, Maori custom law has not held much sway with either the general courts or the legislature. To the extent that there has been “clear” recognition, it is generally in order to clearly articulate the extent of rights that are to be extinguished or made unenforceable by legislation. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 provides a “clear and plain” example of this.

In the earlier case of *Symonds*, although Chapman J stated that native title could not be extinguished in times of peace without consent, and that Maori title was entitled to be respected, he did not specify what the incidents of tangata whenua ownership might be. He did say however, that the “peculiar relationship between Maori and the Crown” meant that the title Maori held and passed to each other:

[i]s no doubt incompatible with that full and absolute dominion over the lands which they occupy, which we call an estate in fee. ...

The existing rule then contemplates the native race as under a species of guardianship. Technically, it contemplates the Native dominion over the soil as inferior to what we call an estate in fee: practically, it secures to them all the enjoyments from the land which they had before our intercourse, and as much more as the opportunity of selling portions, useless to themselves, affords. From the protective character of the rule, then, it is entitled to respect on moral grounds, no less than to judicial support on strictly legal grounds. (page 391)

In *Te Runanganui o Te Ika Whenua Inc. Society v Attorney General* [1994] 2 NZLR 20, although Maori interests were identified as “...usually, although not invariably, communal or collective” (p24) they were, ultimately, left undefined. In this case, Cooke P reiterated the point made by Chapman J in *Symonds* regarding extinguishment of title, at page 24:

It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes.

Some judges view the difficulty of reconciling tangata whenua land interests with fee simple title, and the principle of indefeasibility under the Torrens system, as an insurmountable barrier preventing the recognition of Maori title. In his reserved judgment in *Registrar-General of Land v Edward Marshall* (HC Hamilton, AP 30/94), Justice Hammond restated the paramountcy of the principle of indefeasibility under the Land Transfer Act 1952 (*Torrens system*) over the notification requirements contained in the Te Ture Whenua Maori Act 1993. After comparing the title notification provisions under both Acts he concluded at pages 17-18:

In short, on this sort of question of primacy, the Land Transfer Act trumps the Maori Affairs legislation. At the end of the day, as a matter of high principle, that must be so: if there is any area of the law in which absolute security is required – without any equivocation – it must be in the area of security of title to real property. I completely agree with the premise that, with respect, lies behind much of McGechan J's reasoning that any watering down of the primacy of indefeasibility of title through failure to carry out collateral notifications to other Registries ought to be resisted strenuously.

The Maori Land Court is an important institution in New Zealand. It is an institution to which many Maori in fact look before turning their attention to the Land Transfer Office. Maori rightly regard the Court as an important guardian of their interests. But, at the end of the day, as I have said, there can be no equivocation on a matter of such importance as where paramountcy of title lies. To say that non-compliance with other reporting requirements can or might somehow affect indefeasibility of title is simply untenable. McGechan J rejected such a proposition. So did Judge Carter. So do I.

In *Marlborough*, Gault P doubts that Parliament ever intended to extend to owners of Maori customary land the same level of protection provided to other landowners under the Torrens system. Justice Gault says at paras 105 and 106:

By s41 Te Ture Whenua Maori Act a vesting order made by the Maori Land Court under s132 in favour of the "owners of the land" as determined according to tikanga Maori (or trustees therefor) and transmitted to the District Land Registrar (s139), upon registration has the effect of vesting

the land in the persons named in the order “for a legal estate in fee simple in the same manner as if the land had been granted to those persons by the Crown”.

That consequence necessarily informs the interpretation of the words “land” and “owners” in the preceding sections. Under this Part of the Act we are concerned with land capable of supporting an estate in fee simple and ownership interests capable of conversion to registered estates under the Land Transfer Act. Interests in land in the nature of usufructuary rights or reflecting mana, though they may be capable of recognition both in tikanga Maori and in a developed common law informed by tikanga Maori, are not interests with which the provisions of Part VI are concerned. The requirements of the statute must be met before the point is reached that calls for consideration of tikanga *Maori*. It is for this reason that, even if we hold that the Maori Land Court has the jurisdiction contended for, I have real reservations about the ability for the appellants to establish that which they claim. But that, of course, would be for the Maori Land Court.

Justice Gault’s concern illustrates that the legislation as it currently stands may need to be amended in order to recognise tangata whenua customary ownership. To hold that tangata whenua property rights should not be recognised simply because the indefeasibility principle provides too great a protection is an argument with human rights implications.

This case also illustrates, albeit indirectly, the difficulty of reconciling national laws of general application with hapu and iwi custom law that reflects localised practice. As the law currently stands, for a Maori customary title claim to succeed in the courts, each tangata whenua group must provide evidence of customary usage in relation to the area affected by the claim. The evidence will differ according to the particular resources in an area and the historic relationship of the group to those resources. But in many cases, the burden of proof will not to be difficult to satisfy. The sea has always been an important resource to Maori, and as the *Tai Tokerau* case illustrates, Maori rights and responsibilities with respect to the sea are extensive. The Crown, by way of the 1992 Fisheries settlement, has already accepted the existence of Maori property interests in fisheries. Similar recognition ought to apply to the seabed, but without accompanying extinguishment legislation. Given the long running educative experiences of tangata whenua as participants in court, legislation and hui processes regarding fisheries allocations, it is unlikely that there will be widespread agreement to anything that might approximate extinguishment of customary foreshore and seabed entitlements. Without

consent, extinguishment by legislation is likely to be regarded by tangata whenua as a form of unjustified confiscation of tangata whenua property rights, and a deliberate act of aggression, against hapu and iwi Maori.

In some cases, such as *Ninety-Mile Beach*, upholding a tangata whenua customary claim may simply be a matter of accepting the findings of earlier Maori Land Court cases that were rejected at High Court level. But in any case, the evidence required to satisfy a tangata whenua customary claim, although based on established usage and access rights in 1840, should take account of the impact of colonisation on the ability of tangata whenua to exercise usage rights, and the degree to which Crown actions, policies and legislation have prevented tangata whenua from exercising or developing rights and interests in the seabed.

Once tangata whenua customary ownership has been established, the main impact will be felt at local government level where whanau, hapu and iwi groups are required to work with local bodies to manage the resource. Whether this partnership is successful will depend on establishing and developing good relationships between tangata whenua groups and a particular territorial authority. In some areas, where local authorities are already engaged in fostering good working relationships with tangata whenua, the transition may be relatively smooth.

### **What about Te Tiriti o Waitangi?**

At the heart of the Crown/Maori relationship in Aotearoa/New Zealand lies te Tiriti o Waitangi/the Treaty of Waitangi. The dual language used to convey its meaning and the practical application of concepts whose core meanings are hard to define even within their own cultural contexts, exacerbates the difficulty of cross cultural dialogue ever producing an outcome that everyone agrees with. The trick may well be to “keep on keeping on” in the hope of remaining somewhere in the ballpark, rather than hoping for a successful conclusion ad idem.

Sadly for Maori, neither the *Wi Parata* nor the *Symonds* line of precedent views te Tiriti o Waitangi as anything more than peripheral to New Zealand’s legal processes. This reduces the distance that Maori may otherwise have perceived as existing between *Wi Parata* and *Symonds*. Despite the racism for which Prendergast CJ has become notorious, te Tiriti was never disembowelled to the point of becoming the complete “nullity” he may have hoped for, by future cases. It was simply treated as non-justiciable, except to the extent recognised by statute. Conversely, in the “good” line of precedent beginning with *Symonds*, Martin CJ and Symonds J both stated that the

Treaty of Waitangi as confirmed in the Charter for the Colony asserted nothing new in terms of the English common law. All the early cases affirmed the doctrine of parliamentary sovereignty in the new colony. Thus, the need to enter into a serious inquiry into how “sovereignty” and “tino rangatiratanga” might form the basis of a new system of law combining the best of the English common law and Maori custom law was avoided.

Although *Marlborough* steers clear of a discussion of te Tiriti o Waitangi, the fact that it discusses “sovereignty” brings te Tiriti into frame. Use of the term “sovereignty”, despite its continued popularity in international law, has limited use in the domestic arena of Aotearoa. It is most often used as a trump card by the Government of the day wearing its “Crown” hat, to trounce tangata whenua assertions of a competing and continuing territorial authority within various rohe (area).

The basic ideology underpinning “sovereignty” is derived from a European history of events at a time when monarchs ruled absolutely and were sovereign “in fact”. Yet despite the erosion of that power and its transference into a variety of governing institutions, the term is still used. Ironically, domestically “sovereignty” now probably holds greater significance for tangata whenua than for other New Zealanders because of its inclusion in the English text of the Treaty.

Both “sovereignty” and “ownership” are terms that denote ideas of relative authority, and the incidents and recognisable interests that will be protected under those rubrics. In this context, terms such as “title” and “property” serve in a relational sense to link people to a resource, as well as to determine the relative authority over whatever is owned and in what capacity. Likewise, any discussion of Maori custom law also invokes “mana rangatira” and its very close relation “tino rangatiratanga” as included in te Tiriti. Certainly, in any case which involves Maori custom law, Maori customary title and the relationship between tangata whenua and the Crown, the Treaty of Waitangi and Te Tiriti o Waitangi are always relevant considerations.

Despite the clear statement that the *Wi Parata* line of precedent was wrong, none of the five Judges in the *Marlborough* case was willing to revisit the long-established rule from *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] 2 All ER 93 (PC) (*Te Heuheu*) that:

“...[i]t is well settled that any rights purporting to be conferred by [the Treaty of Waitangi] cannot be enforced in the courts, except in so far as they have been incorporated into municipal law” (p98) and “[i]t is clear that [Te Heu Heu] cannot rest his claim on the Treaty

of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him” (p98).

There have, however, been rare occasions in our legal history when judges have challenged this rule. In *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) (*Huakina*), Chilwell J took the Treaty into account when deciding whether to grant a water right under the Water and Soil Conservation Act 1967, even though the Treaty was not specifically provided for in that legislation. Justice Chilwell reasoned that the Treaty is a part of the “fabric of New Zealand society” and as such:

[i]t follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material. (p210)

In the same year as *Huakina*, the Court of Appeal in *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, (*Lands case*) acknowledged the developing social contract between Maori and the Crown (Bisson J at 715 and Casey J at 702) but avoided discussing the crucial issue of the relationship between tino rangatiratanga and sovereignty.

The Court, did however, take the opportunity to reassert Parliament’s supremacy (Cooke P at 668) and by doing so left intact the view that the approach taken in *Te Heuheu* was correct. Given this, tangata whenua excitement about the broader legal significance of the case was overstated. The Court was working within the confines of a precedent that has been significantly undermined by the statutory recognition of the principles of the Treaty of Waitangi. As Lord Cooke stated in explaining his view of the *Lands* case in a recent submission to a Parliamentary Select Committee on the Supreme Court Bill (reported in Young, A, “Maori Judge vital in Treaty cases: Cooke” *The New Zealand Herald*, 8 May 2003, section A6):

... In regard to the Treaty of Waitangi in particular, the court was activist or active only in the sense that it gave effect to what Parliament had enacted in the [State-Owned Enterprises] legislation.

Thus the Court of Appeal was doing no more to improve the status of the Treaty than it had been prepared to do in 1941.

Unlike the Court of Appeal, the Waitangi Tribunal has been willing to seriously examine the relationship between tino rangatiratanga and sovereignty, by accepting that

the Crown's exercise of power is limited by te Tiriti and in particular the guarantee of tino rangatiratanga. At page 269 of the *Ngai Tahu Sea Fisheries Report* (WAI 27, 1992):

The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. This principle is fundamental to the compact or accord embodied in the Treaty and is of paramount importance... The Crown in obtaining the cession of sovereignty under the treaty therefore obtained it subject to important limitations on its exercise.

Statements such as this, as well as a number of statutes that include references to the principles of the Treaty of Waitangi, support the view that the constitutional and legal status of the Treaty has improved since *Te Heuheu*. However, *Marlborough* makes no reference to that change having occurred. Given this, some tangata whenua will, uncharitably perhaps, view *Marlborough* as little more than the Court of Appeal purging New Zealand law of its racist past while ensuring that the status quo is preserved.

### **Judging the Judges – the Importance of Understanding Tangata Whenua Issues**

Black-letter lawyers would argue that provided a judge is well-trained in the common law, then a “fair” and “just” result will be obtained, according to the law, in every case. But a quick perusal of cases involving tikanga Maori indicates that tangata whenua claimants are more likely to succeed in cases where judges understand tikanga Maori *as well as* the common law. At the very least, tangata whenua claimants involved in cases concerning tikanga Maori concepts (such as kaitiakitanga and whanaungatanga) are more likely to accept the outcome of the case provided they feel the hearing body has understood and considered seriously the tikanga of the tangata whenua claimant group.

In *Marlborough*, Elias CJ (at para 9) refers to Maori Parliament debates at Orakei, according precedent value to fora such as hui where Maori custom law is developed. While this type of evidence has, in the past, influenced Waitangi Tribunal and Maori Land Court hearings, it has been less influential on the reasoning processes and outcomes in the general courts, where judges generally apply the common law untainted by Maori custom law.

Judges, lawyers and legal academics are more comfortable using the language and concepts of the English common law, even when discussing tikanga mo te whenua

(Maori custom law relating to land). As Justice Durie acknowledged in his address to the New Zealand Society of Legal and Social Authority:

Even for a judge of the Maori Land Court it is not a simple task to introduce Maori Custom law. As a Judge of that court for the last 20 years, I can say that in that time there has been no course of instructional training for the judges on customary tenure and ancestral law ((1994) 24 VUWLR 325).

Notwithstanding the need for objectivity, judges with a knowledge and understanding of Maori custom law can and do make a significant difference to the outcome in cases concerning tikanga. It is not a mere co-incidence that in *Marlborough* the leading judgment comes from a judge whose work as a lawyer involved difficult cases brought by tangata whenua, often drawing on aspects of custom law, against the Crown and its statutory agents.

## **Conclusion**

Slowly and incrementally, tangata whenua are pushing to have recognition of their authority over their traditional resources recognised in law, and where possible, for tangata whenua principles to be properly included in decision-making.

Although Maori custom law has played an essential role in fora such as the Waitangi Tribunal and Maori Land Court, it is less influential in the general New Zealand courts. The *Marlborough* decision promises a new direction for Maori customary law and the recognition and development of Maori custom law in the courts generally. The challenge now, is for the judges, assisted by advocates, to begin to seriously consider the place of Maori custom law, how it differs from restrictive aboriginal or customary title rights, and how this fits with the common law of Aotearoa and te Tiriti o Waitangi. This surely, is the proper approach for New Zealand judges operating in a twenty-first century environment, where Maori custom law, te Tiriti o Waitangi, Maori customary title and common law rules and precedents all come into play.

There are some critical issues to consider. The extinguishment of Maori customary rights without tangata whenua agreement raises serious doubts about the ability of the Crown in Parliament to govern in the interests of tangata whenua, and all other people in Aotearoa. If tangata whenua consent to the extinguishment of customary rights is not required before it occurs, then how far has the law progressed towards recognising

Maori? Can Parliament do whatever it likes, unfettered by the guarantees in Te Tiriti o Waitangi? And if so, what does this mean for the constitutional and legal status of te Tiriti o Waitangi?

### **Last Words to the Taniwha**

Just off the shore of Karirikura at Ahipara in the Far North, the taniwha Paraweta has lain, mai raano, bobbing in the tide, watching the passage of our tupuna as they make their way along the beach to Te Rerenga Wairua.<sup>2</sup> She has seen the rapid increase in public traffic on the foreshore of Te Wharo One Roa A Tohe (Ninety Mile Beach). It is, after all, also a dedicated roadway. She watches as the children of Tangaroa and Papatuanuku are crushed by technology wielding humans enjoying their recreational rights at the beach. Does she giggle as the wairua (spirits) of our recently departed dodge being side-swiped by buses laden with tourists, four wheel drive vehicles, land yachts and the rusting imitations of all three driven by local Maori? And does it matter whether the perpetrator is white, brown, red or yellow, or is our human activity in her lifescape equally offensive in its intrusiveness?

One day we may work out the answers – together.

**9648 words**

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<sup>2</sup> The use of Taniwha as entities possessing legal personality is part of the lore underpinning Maori custom law.