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In Re the Marlborough Sounds foreshore and seabed: *The effects of the Maori Land Court Decision on the Crown, Maori and the Public of New Zealand.*

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In Re the Marlborough Sounds foreshore and seabed: *The Effects of the Maori Land Court Decision on the Crown, Maori and the Public of New Zealand.* [1]

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I INTRODUCTION

The foreshore is a precious part of the identity of each New Zealander. Most New Zealanders have grown up and lived by or near the coast and have experienced its prestine beauty and invigorating character. To various extents, each New Zealander has a highly treasured relationship with the coast and few would care to find themselves suddenly unable to access the beaches and sea that surrounds them. However, the current situation of open access to the coastline is in serious danger as a result of the recent Maori Land Court decision *In re Marlborough Sounds foreshore and seabed* (1997) 22A Nelson, Minute Book 1. The ground-breaking ruling of the court has raised the possibility that large areas of the foreshore and seabed of the Marlborough Sounds, and indeed the rest of the New Zealand coastline, may be subject to unextinguished Maori customary title. The decision has shaken the general presumption in New Zealand that the foreshore is vested in the Crown for the benefit of the public.[2] Furthermore, it has questioned the Crown's legal title to the foreshore which currently rests in *In re the Ninety Mile Beach* [1963] 1 NZLR 461. As a result, the Crown's territorial claim to the foreshore stands on very unstable grounds. The potential ramifications of this situation are far-reaching, not only for the public and their current rights to the foreshore, but for the Crown and Maori alike. This paper will identify the consequences of this potential transfer in ownership of the foreshore and suggest that, whilst the case is a positive step fowards in terms of the recognition of Maori customary rights, the potential adverse effects for the Crown and the New Zealand public should not be underestimated or ignored.

II DEFINITION OF THE 'FORESHORE'

The definition of the foreshore has been the subject of much judicial consideration.[3] According to Richard Boast in *The Foreshore*, the 'foreshore' has a distinct meaning in English and New Zealand law: "it is a piece of land, the intertidal zone, the area between high water and low water mark."[4]

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1 Although the case deals with the ownership of the seabed , this paper is confined to the decisions made by Hingston J regarding the ownership of the foreshore.

2 "Foreshore Appeal disturbs law experts" *The Dominion,* Wellington, New Zealand, 23 March 1998, 9 ["*Foreshore appeal disturbs*"]. The article notes that until the *Marlborough Sounds* case, "most had presumed the land had been well and truly vested in the Crown".

3 See for example *Attorney general v Findlay* [1919] NZLR 513, 518 and the cases cited therein.

4 Richard P Boast *The Foreshore.* Rangahaua Whanui National Theme Q, (First Release, Waitangi Tribunal, Rangahaua Whanui Series, November 1996, 6.["*The Foreshore"*]

The definition adopted in the proceedings of the *Marlborough Sounds* case was as follows:

"Foreshore: such parts of the bed, shore, or banks of the sea or a river as are covered or uncovered by the flow and ebb of the tide at mean spring tides" [5]

III OWNERSHIP OF THE FORESHORE: EVOLUTION OF NEW ZEALAND LAW

Before advancing into a discussion of the facts of *Marlborough Sounds* and the implications thereof, it is essential to clarify the current legal position of the foreshore in order to fully appreciate the impact *Marlborough Sounds* will have on both existing law and circumstances pertaining to the foreshore.

A Foreshore ownership: the common law and its application in New Zealand

1 The common law position

The general principle at common law is that the Crown is *prima facie* the presumptive owner of the foreshore by prerogative right.[6] The first conception of the *prima facie* title of the Crown arose in the tenth or eleventh year of Queen Elizabeth 1568-9, when Mr Thomas Digges wrote a treatise entitled "*Proofs of the Queen's interest in Lands left by the sea and the salt shores thereof*". This treatise first invented and set up the claim of the Crown to the foreshore [7] and was adopted by Lord Hale in 1667 in his "*Treatise de jure maris et brachiorum ejusdem*". Lord Hale concluded:

"The shore is that ground that is between the ordinary high water and low water mark. This doth prima facie and of common right belong to the King, both in the shore of the sea and the shore of the arms of the sea".[8]

More recently, the common law position became a well-established rule, well supported by authority such as the decision of the House of Lords in *Attorney-General v Emerson*[9] where Lord Herschell said:

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[5] *Submissions of the Crown in the Maori Land Court of New Zealand,* Te Waipounamu District, Appln No 17249, in the matter of Te Hau Ihu o Te Waka A Maui Region. Crown law Office (HM Aikman, N J Baird),4.[*"Submissions of the Crown"*] This was the definition proposed by the Crown, taken from s 2 Foreshore and Seabed Endowment Revesting Act 1991. There do exist other definitions which set the high water mark at the mean high water mark (see for instance Halsbury vol 49(2) para 4, "high water mark of medium tides" and the definition in s 35 of the Crown Grants Act 1908 which fixes the boundary at "high water mark at ordinary tides". S 2 of the Resource Management Act 1991 defines the foreshore as "any land covered and uncovered by the flow and ebb of the tide at mean spring tides..". The practical effect of such differences is not significant.

[6] This is a presumptive title which can be displaced by proof of a Crown grant or continuous occupation.

[7] Moore, Stuart A, *A History of the Foreshore and Law Relating Thereto*. London, Steven & Haynes, Law Publishers, Bell Yard, Temple Bar, 1888,182. ["*A History of the Foreshore"*]

[8] *A History of the Foreshore* above n 7, 378.

[9] *Attorney General v Emerson* [1891] AC 646.

> "It is beyond dispute that the Crown is prima facie entitled to every part of the foreshore between high and low water mark, and that a subject can only establish a title to any given part of the foreshore, either by proving an express grant thereof from the Crown, or by giving evidence from which such grant, though not capable of being produced will be presumed."

2 The New Zealand position

The question is, whether these common law principles have been carried through into New Zealand. In the *Kauwaerenga*[10] case in 1870 the Crown submitted that on establishment of British rule in New Zealand in 1840, the common law presumption of *prima facie* ownership of the foreshore took effect in New Zealand. Fenton CJ rejected this proposition and rendered the argument "entirely inconsistent with and destructive of all claims of this character."[11] The Crown has nevertheless continued to rely on this common law position and in *In re the Ninety Mile Beach* case in 1963, the Crown followed the same argument they submitted in *Kauwaerenga.* However, the Court of Appeal doubted the validity of the Crown position suggesting it would amount to depriving the Maoris of their customary rights over the foreshore by a "side wind."[12]

Thus, whatever the basis for the Crown's claim to the foreshore, it cannot rest merely on the adoption of the common law. The Court of Appeal in *In re the Ninety Mile Beach*, devised other rationales for the Crown's title to the foreshore which constitute the legal base of the Crown's claim today. However, as suggested by Hingston J in *Marlborough Sounds,* these rationales are arguably "insufficient" [13]and unlikely to withstand close scrutiny. Furthermore, no statute in New Zealand explicitly vests the foreshore in the Crown. The Crown's title to the foreshore thus rests on very unstable legal foundations. This is not only a matter of concern for the Crown, but as will be suggested, for the general public of New Zealand.

3 Conflict with Maori customary title

The reason the foreshore is a particular issue in New Zealand law is because the relevant rules of the common law (as they have been applied and developed in New Zealand) have effectively vested this significant area in the Crown. This position arguably infringes upon Maori customary rights to the foreshore, which Maori firmly believe exist by virtue of continuous occupation of the foreshore areas.[14] The foreshore was, and is, of vital importance to Maori. The position taken by Maori is that Maori society possessed its own body of law relating to 'ownership' of the foreshore and to this day they remain the

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[10] *Kauwaerenga* [1870] 4 Hauraki MB, 236

[11] *Kauwaerenga* above n 10,236 per Fenton CJ, cited in *In re the NinetyBeach* [1963] NZLR 461, 471, per North J

[12] *In re the Ninety Mile Beach*[1963} 1 NZLR 416, 478 ,per Gresson J.

[13] *In re The Marlborough Sounds foreshore and seabed* (December 1997) 22A Nelson, Minute Book 1, 5.

[14] This statement is supported by the mere existence of claims to the foreshore such as the case at point, *Marlborough Sounds.*

owners of those parts of the foreshore which they are entitled to under the Treaty of Waitangi 1840.[15] It is this conflict of ownership rights which has been the foundation of legal issues arising between the Crown and Maori in the course of New Zealand legal history.

IV IN RE MARLBOROUGH SOUNDS FORESHORE AND SEABED

A The importance of the case

The *Marlborough Sounds* case has shocked most New Zealanders who assume that the beaches and foreshore of New Zealand are public property- or in legal terms, Crown land. Those who are aware of the precarious legal position of the Crown's title to the foreshore have also been somewhat disturbed. [16]

The Maori Land Court decision is the first judgement to doubt the legal basis of the Crown's title which rests in *In re the Ninety Mile Beach.* The decision criticises the reasoning of the Court of Appeal and restores jurisdiction to the Maori Land Court to investigate titles to areas of the foreshore which have not previously been the subject of an investigation. Thus the whole legal status of the foreshore is effectively brought into question. It is possible that the Crown may no longer be the rightful owner of our coast, and instead the foreshore may well be the property of private individuals who prove to be legally entitled by way of customary right. Needless to say, as a result of the *Marlborough Sounds* decision, the Crown's title to the foreshore is by no means secure, and as will be discussed, the implications of the case for the Crown, Maori and the New Zealand public are, without doubt, substantial.[17]

B The decision by Hingston J

In April 1997, Te Tau Ihu Iwi (the eight iwi of the northern part of the South Island) applied to the Maori Land Court to determine whether they had and continue to have customary rights over the foreshore and seabed in and around the Marlborough Sounds in New Zealand.[18] The interim decision by Hingston J dealt with the preliminary issue of whether since the signing of the Treaty of Waitangi in 1840 any such Maori Customary rights might have been already extinguished either by the operation of common law or

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[15] Article two of the Treaty of Waitangi 1840 offers protection to Maori 'lands, estates, forests, and fisheries, which they may collectively and individually possess, so long as it is their wish to retain the same in their possession'.

[16] "*Foreshore appeal disturbs*", above n 2. The article by Alison Tocker discusses legal, political and academic reaction to the implications of the Maori Land Court decision. The decision is said to have "startled legal, political and academic circles".

[17] The potential ramifications of the case are discussed in *"Foreshore appeal disturbs"*, above n 2, 9. "Ramifications could cover coastal structures and coastal users throughout New Zealand, including ports, marine farmers, fish catchers and wharf owners. The decision could see coastal users having to pay rent to the Maoris ruled to be owners."

[18] The application by Te Tau Ihu Iwi was precipitated by the Crown's declared intention to invoke the coastal tendering provisions of the Resource Management Act 1991 in the Marlborough Sounds. The tendering of coastal space was arguably in direct conflict with the customary ownership rights of Te Tau Ihu Iwi.

legislation. For the purposes of this decision it was assumed that there were Maori customary rights prior to 1840 both over the foreshore and the seabed.

In respect of the foreshore, the Crown argued that the Court of Appeal decision in *In re the Ninety Mile Beach* ruled out the Maori claim. The applicants argued that the decision could be restricted to its facts, was flawed, or had been overruled. Hingston J stated that *In re the Ninety Mile Beach* case would decide the question at hand and should the case apply he would be bound by that decision.

C Hingston J's analysis of In re the Ninety Mile Beach

Hingston J found that in *In re the Ninety Mile Beach* it was determined that:

(a) The mere assumption of sovereignty by the Crown over the country did not thereby deprive the Maori Land Court of jurisdiction to investigate title to land below high water mark.

(b) Once an application for the investigation of title to land having the sea as its boundary was determined by the Maori Land Court, the customary title right of the Maori was wholly extinguished to low water mark and replaced by Maori ownership or forfeited to the Crown- depending on where the boundary was fixed.

(c) Section 147 Harbours Act (and its successor 150 Harbours Act 1950), in providing that the foreshore around New Zealand could only be disposed of by a special Act of Parliament, unless there had been express authority to the contrary, effectively deprived the Maori Land Court of jurisdiction to investigate customary rights in the foreshore.

In light of this analysis, Hingston J concluded he was not bound by *In re the Ninety Mile Beach* "because it applies only where the Maori Land Court *had* investigated the adjoining lands above high water mark prior to any disposition of the land"[19]. He felt *In re the Ninety Mile beach* should be limited to this essential finding, and the ratio should not be extended to encompass lands purchased before the Land court came into being. [20]

Hingston J's reasoning to not extend *In re the Ninety Mile Beach* were based on his feeling that the case was decided on insufficient grounds[21] which should not now extend to determine this matter which "has such important consequences for Maori". Hingston J criticised the "difficulty in ascertaining the rationale behind the learned Judge" and noted that the "North J proposition had not been tested by the Privy Council, and the current New Zealand Court of Appeal could well have differing views even if the result for the

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[19] *In re the Marlborough Sounds and Seabed* above, n 1, 5.

[20] This includes most of the South Island which has not been the subject of an investigation. Purchases made by Commissioner Donald McLean 1853-56 and the Kemp purchase of 1848 account for the sale of the majority of the South Island from Ngati Toa and Ngati Tahu.

[21] North J's explanation in *In re the Ninety Mile Beach,* above n 12, for his finding that the Maori Land Court did not have jurisdiction to investigate the foreshore was that a finding against the Crown would "have a startling and inconvenient result". This is the reasoning Hingston J is referring to as "insufficient".

Crown was inconvenient". He drew attention to the direction Treaty jurisprudence has taken in the last decade towards regarding the interests of the Maori and clarified that the Court is now enjoined by statute to promote the retention of Maori land in the hands of Maori. [22] With these guidelines, Hingston J believed following *In re the Ninety Mile Beach* would be seen to be acting "contrary to both this statutory directive and Treaty principles". Hingston J suggested *In re the Ninety Mile Beach* "should be revisited by higher authority". [23].

The decision is a preliminary determination. Leave to appeal to the Maori Appellate Court was given by Judge Hingston.[24] The case was presented to the Maori Appellate Court on 11 May 1998. At present, the case is still with the Maori Appellate Court which is dealing with the preliminary question of whether or not the case will be referred to the High Court or be considered by the Maori Appellate Court itself. [25]

V EFFECTS OF THE MARLBOROUGH SOUNDS DECISION

Should *Marlborough Sounds* survive appeal, the Maori Land Court will not only be in the position to investigate claims to those parts of the foreshore which have not been subject to prior investigation, but be will empowered to issue freehold titles where evidence of customary rights can be established. The case not only raises the question of who in fact is the legal 'owner' of the foreshore, but it is suggested the decision has significant implications for the legal assumption upon which the government, regional councils and the general public rely, that assumption being that the foreshore is public property for the use and enjoyment of all.[26] Thus, the decision will send vibrations throughout New Zealand and touch directly upon the Crown, Maori and the general public of New Zealand.

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[22] Te Ture Whenua Maori Land Act 1993, Preamble and s 17. Both refer to the desire to "promote and assist in the retention of Maori Land and General Land owned by the Maori in the hands of its owners."
[23] *In re the Marlborough Foreshore and Seabed,* above n 13,5.
[24] The Crown and six other bodies have appealed to the Maori Appellate Court against Judge Hingston's decision: the Port of Marlborough New Zealand, the Marlborough District Council, Te Ati Awa Manawhenua ki te Tau Ihu Trust, Te Runanga o Muriwhenua, the New Zealand Aquaculture Council and the New Zealand Marine Farming Association.
[25] The Crown indicated a preference for a case to be stated to the High Court or the Court of Appeal. They argued the matter in issue is 'general law' and thus outside the specialist jurisdiction of the Maori Appellate Court. According to "*Foreshore appeal disturbs*", above n 2, 9, "there has been much debate over the decision by Doug Graham (the previous Attorney-General) to take the decision to the Maori Appellate Court". It has raised questions about whether a specialist Maori body can make impartial decisions and, by extension, about the ability of the High Court and Court of Appeal, (seen by some Maoris as 'Eurocentric'), to make unbiased decisions. Furthermore, the article cites Dr Williams (Treaty of Waitangi Law researcher and acting associate professor at Auckland University Law School) who "is surprised the Crown did not seek Judicial Review of Judge Hingston's decision in the High Court." Dr Williams also noted that "because the Maori Appellate Court is made up of 3 or more Maori Land Court judges it is likely that all will be achieved is another opinion from a group of Maori Land Court judges. My suspicion is it won't resolve the issue".
[26] *The Foreshore,* above n 4,4.

A Implications for the Maori Land Court

The most obvious consequence of Hingston J's judgement is the potential change to the jurisdiction of the Maori Land Court. Subject to the possibility of an appeal of the preliminary decision, the *Marlborough Sounds* case will widen the jurisdiction of the Maori Land Court. Where North and Gresson J[27] stripped the Maori Land court of jurisdiction to investigate title to the foreshore, the *Marlborough Sounds* decision restores the Land Court with jurisdiction to investigate title to those parts of the foreshore which have *not* previously been the subject of an investigation.

Although *Marlborough Sounds* does not override the *In re the Ninety Mile Beach* decision, Hingston J distinguished the case on its facts and took the opportunity to criticise the judgement. This effectively has meant *In re the Ninety Mile Beach* will most probably be revisited and possibly overturned. Hingston J's decision effectively side steps the Court of Appeal decision by pointing out that the *ratio decidendi* is limited to areas where the Land Court had undertaken an investigation of customary title prior to the time any land was purchased. Hence, the *Marlborough Sounds* case could open up parts of the foreshore to investigation which the Maori Land Court has previously been barred from undertaking and gives rise to the possibility that areas will be returned to Maori ownership. Where the Crown, or its agents, purchased direct from Maori before the Land Court came into existence in 1862[28], an investigation to determine Maori interests may now be possible and such areas could be returned to Maori. It has been suggested "that it can be plausibly argued that the entire foreshore at the present time is still Maori customary land".[29]

B Implications on the existing law relating to ownership of the foreshore: In re the Ninety Mile Beach

Should *Marlborough Sounds* survive appeal, the decision will change the existing law relating to ownership of the foreshore contained in *In re the Ninety Mile Beach.* This in itself is of great concern for the Crown whose legal title to the foreshore rests upon the reasoning in *In re the Ninety Mile Beach.* For this reason, it is essential to ascertain the likelihood of *In re the Ninety Mile Beach* remaining a binding precedent and the source of the Crown's title to the foreshore.

(a) criticisms of the Court of Appeal judgement

The Maori Land Court decision in *Marlborough Sounds* does not override *In re the Ninety Mile Beach*, yet the harsh criticisms of the 1963 judgement made by Hingston J

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[27] *In re the Ninety Mile Beach,* above n 12, 416.

[28] The Native Land Court was established under the Native Land Act 1862.

[29] *The Foreshore.* above, n 4, 27. As well as most of the South Island, coastal areas around the old New Zealand company settlements at New Plymouth, Wanganui, Wellington, and parts of Northland and Auckland may be affected.

have sent poisoned arrows to the heart of the Court of Appeal decision and have cast serious doubt over the sustainability of *In re Ninety Mile Beach* as a binding precedent.

But are Hingston J's criticisms warranted? To decide this it is valuable to analyse the Court of Appeal decision in order to conclude the likelihood of *In re the Ninety Mile Beach* remaining valid law.

C Critical Analysis of In re the Ninety Mile Beach Case- will it remain a binding precedent?

(a) the rationale of the Court of Appeal

(i) the prima facie ownership of the foreshore argument

The Court of Appeal is well supported in contending that the Crown cannot claim to 'own' the foreshore by mere operation of the common law in New Zealand. The common law gives the Crown a *prima facie* territorial right to the foreshore. In *Nireaha v Baker*[30] the Privy council considered s 2 Land Claims Ordinance Act 1841 and found that that provision did not confer title to New Zealand lands on the Crown, but made the Crown's rights subject to "the rightful and necessary occupation of the aboriginal inhabitants" and to an extent was a "legislative recognition of the rights confirmed and guaranteed by the Treaty of Waitangi". Furthermore, as far back as 1870, the Maori Land Court in *Kauwaerenga* held the Crown's argument, that the Land Court had no jurisdiction to investigate title to the foreshore based on the Crown's *prima facie* title, to be wrong.[31] Accordingly, Hingston J supported the Court of Appeal's conclusion. The Court of Appeal is unlikely to be overruled on this point.

However, it is the remaining reasoning of the Court of Appeal which Hingston J criticised and which arguably would not stand up to serious scrutiny.

(ii) the statutory argument

The Court of Appeal held that section 147 Harbours Act 1878[32] operates as an effective restriction upon the jurisdiction of the Maori Land Court to investigate and grant title to land below high water mark. The Court of Appeal's statutory basis for denying the land Court jurisdiction 'is unlikely to be accepted by a modern Court.'[33] Firstly, the Harbours Act has been repealed by section 362 Resource Management Act 1991 without a replacement provision.[34] Furthermore, the Crown in the proceedings of the *Marlborough Sounds* openly admitted, that since the recent appeal of section 150 Harbours Act 1950,

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[30] *Nireaha Tamaki v Baker* [1901] NZPCC 371
[31] *In re the Ninety Mile Beach case,*above n 3, per North J, cited in *Marlborough Sounds*, above n, 3.
[32] Now s 150 Harbours Act 1950.
[33] *The Foreshore*, above n 4, 69.
[34] *In re the Marlborough Sounds,* above n 13,4. Hingston J saw this subsequent repeal as "effectively taking away that prohibition against the Court entering into an inquiry as to whether customary rights still exist".

the jurisdiction to determine title has been restored to the Land Court.[35] However, it has been suggested[36] that although section 150 Harbours Act 1950 has been repealed by the Resource Management Act 1991, section 354 of that Act provides that any rights to land which accrued prior to the repeal are retained.[37]

This Acts Interpretation Act 1924 section 20(e) and (f) further supports this: "the repeal of any Act shall not affect existing statutes and not revive anything not in force at the time of the repeal". It was the Crown's submission in the *Marlborough Sounds* litigation that it is 'therefore clear that customary title to any foreshore would not be revived by the repeal of this Act, as it is clear that customary title, once extinguished cannot be revived'.[38] However, this argument loses its simplicity when one examines the Harbours Act 1950 in detail and finds that it is not a vesting act. There is no provision in the Act which explicitly vests ownership of the foreshore in the Crown, thus section 354 arguably does not refer to section 150 Harbours Act 1950.

However, whether section 150 exists or not, it is in any case doubtful whether the Harbours Act 1950 could meet the current stringent standards relating to valid statutory extinguishments of Aboriginal title. The High Court of Australia has held that for extinguishment of aboriginal title by executive or legislative action, there must be a 'clear and plain intention to do so'[39]. This has been followed by the New Zealand Courts in *Faulkner v Tauranga District Council.* [40]Wherein, Blanchard J stated:

"Customary title can only be extinguished by the Crown by means of a deliberate Act authorised by law and unambiguously directed towards that end…customary title does not disappear by a side wind."

Section 150 is only a restriction on the prerogative rights of the Crown and does not on the face of it meet the *Faulkner* test. It provides that 'no part of the shore of the sea'

[35] "In re Marlborough Sounds foreshore and seabed." Maori Law Review, December 1997/January 1998, Editor: Tom Bennion, Published by Esoteric Publications, Wellington, New Zealand.

[36] *Submissions of the Crown*, above n 5, 24.

[37] Section 354 Resource Management Act 1991 provides:"354. Crown's existing rights to resources to continue-

(1) Without limiting the Acts Interpretation Act 1924 but subject to subsection (2), it is hereby declared that the repeal by this Act or the Crown Minerals Act 1991 of any enactment, including in particular-

(a) Section 3 of the Geothermal Energy Act 1953; and

(b) Section 21 of the Water and Soil Conservation Act 1967; and

(c) Section 261 of the Coal Mines Act 1979,-

Shall not affect any right, interest, or title, to any land or water acquired, accrued,, established by, or vested in, the Crown before the date on which this Act came into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

[38] Authority for this proposition is sought from *Mabo v Queensland* (No 2)[1992] 175 CLR 1 ["*Mabo (no 2)*"] where Brennan J held at page 29: "A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title …if a lease be granted, the lessee acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium."

[39] *Mabo (no 2),*above n 38, 64 per Brennan J

[40] *Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 363. ["*Faulkner*"]

could be conveyed or granted in any way to any body or person 'without the special sanction of an Act of the General Assembly'. Furthermore the Parliamentary debates do not illustrate that the provision was intended to cancel Maori claims to the foreshore. This matter was not debated at all. [41] Whatever Parliament's intentions were, the Harbours Act 1878 and its successors failed to clarify the Land Court's jurisdiction over the foreshore. By invoking the Harbours Act, the Court of Appeal effectively extinguished Native title to the foreshore by a 'side wind'. Although this may be easy to contend in the wisdom of hindsight, the Court of Appeal possibly knew the vagueness of the provision but thought it did not matter. North J himself stated:

"It might be said that it is a little curious that so sweeping a provision is to be found in the Harbours Act."[42]

However, the learned Judge left it at that.

Furthermore, it has also been suggested that s 150 Harbours Act 1950 does not possess the confiscatory effect the judges in *In re the Ninety Mile Beach* attributed to it. Although the Act did not allow the Crown to grant an area of foreshore, this arguably "did not prevent the Maori Land Court from conducting the preliminary steps to a grant, that is to say an investigation of title in the Court and the issuing of a title from the Court."[43]

It appears the weight the judges placed on the Harbours Act 1950 was too heavy and that under scrutiny the Act would not amount to a "plain intention" to extinguish customary title. Hence the Court of Appeal's reasoning to bar jurisdiction appears to deserve the criticism Hingston J afforded it.

(iii) the Maori Land Court argument

The Court of Appeal's further reasoning was based on the consequences of an investigation of title to adjoining coastal blocks. The judges decided that the process of investigation of title by the Native Land Court cancelled Maori title to the foreshore in all instances where foreshore areas adjacent to coastal blocks were not specifically included in the certificate of title and the Crown grant. As Hingston J suggests, it is argued the reasoning of the Court of Appeal is "insufficient".

The suggestion advanced by the Court of Appeal is arguably wrong. It seems wholly illogical to purport that the process of investigation of title to a coastal block operates in this manner. If the area of foreshore is left out of the title, the most natural conclusion is

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[41] 1869 Vol VI NZPD 196 Thames Beach Bill, Mr Fox.

[42] *In re the Ninety Mile Beach,* above n 12, 474, per North J. North J pointed out that the submission in the case that the words of exception in s 150 namely 'except as may already have been authorised by or 'under any Act or ordinance' have the effect of preserving the original jurisdiction of the Maori Land Court, had 'some force'.

[43] Richard Boast "In re the Ninety Mile Beach Revisited: The Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 VUWLR, 153. [*"In re the Ninety Mile Beach Revisited"*] This argument regards the Land Court title as 'a special sanction of an Act of the General Assembly", namely the Native Lands Act 1862.

not that the land remains in the Crown, but that it was uninvestigated and remains customary land.[44] The Court of Appeal is in some way suggesting that the Crown somehow 'owned' the foreshore to begin with and in doing so is basing their analysis on a view at "variance with contemporary understanding".[45] It is highly unlikely a modern Court would agree with this approach, as it would amount to an extinguishment of Native title by a side wind.

Furthermore the Court arrived at this strong assertion by virtue of a set of false assumptions. The Court of Appeal proceeded on the basis that the Native Land Court in 'all probabilities' must have investigated all of the land in New Zealand adjoining the beach (and perhaps all land in New Zealand). North J said:

> "I find it quite impossible to accept the proposition that there is still a block of land lying between high water mark and low water mark which has never been investigated." [46]

However, this is not correct. The Court failed to consider the legal history of the Ninety Mile Beach. The Court of Appeal judges could not even have seen the transcript of the proceedings in *In re the Ninety Mile Beach* in the Maori Land Court[47], which include a reasonably detailed statement of evidence on the legal history of the coastal area given by an officer of the Department of Lands and Survey.[48] Thus the Court of Appeal judges "should have known"[49] that the land had passed to the Crown (thereby extinguishing Native Title) by means of pre-emption deeds of cession. These were:

(i) The *Muriwhenua South* deed of 3 February 1858
(ii) The *Ahipara deed* of 13 December 1859

These deeds accounted for a substantial amount of Ninety Mile Beach frontage.

Although neither purchase explicitly vests any of the foreshore in the Crown, the Crown Land Purchase Commissioners arguably acted on the assumption that a pre-emption era deed extinguished Maori title over the foreshore.[50] Additionally a purchase was followed by a proclamation in the *Gazette* describing the area over which the Native title has been extinguished. It is beyond doubt that a Maori could legally sell the foreshore to the Crown and the Crown could legally purchase it. Furthermore it is likely that the deed may

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44 *The Foreshore,* above, n 4, 69.
45 *The Foreshore.* above, n 4, 70.
46 *In re the Ninety Mile Beach,* above n 12, 473, per North J.
47 *In re the Ninety Mile Beach* (1957) 85 Northern MB 126, per Morison J.
48 According to affidavits provided by the Lands Survey office Ninety Mile Beach had been alienated by pre-emption deeds of cession which extinguished Native title well before the establishment of the Native Land Court in 1862.
49 Interview with Richard P Boast, 22 May 1998.[*"Interview"*]
50 Select Committee on the Thames Sea Beach Bill 1869 AJHR F-7, 6 . James Mackay 1869 said to the Select Committee: "the general custom of the Native Lands Purchase Department, respecting lands between high and low water mark, has been to consider that when Native title is extinguished over the main land, then any rights the Natives have over tidal lands have ceased."

well meet the "deliberate Act authorised by law and unambiguously directed towards that end" test in *Faulkner*. This appears to be the most natural and sensible way of regarding foreshore acquisition rather than the convoluted analysis of the Court of Appeal, and would alleviate the Crown's concern as to the lack of statutory extinguishment of native title. [51] The Court of Appeal decision is somewhat flawed in failing to give attention to the outcome of title to the foreshore where coastal lands were sold to the Crown by pre 1862 deed of cession. This has been considered a "negligent remiss" by the Court of Appeal.[52] Hingston J's criticisms of the Court's analysis of the investigation process of the Maori Land Court appears valid.

(iv) the rationale in light of modern legal developments

Furthermore, it would seem that the rationale devised by the Court of Appeal is contrary to modern legal developments and attitudes towards Maori rights, which in themselves throw a dark shadow over the value of *In re the Ninety Mile Beach* as a binding precedent.

Arguably, the reasoning in *In re the Ninety Mile Beach* infringes upon the rights of Maori under the Treaty of Waitangi. Article two of the Treaty offers protection to Maori "lands and estates, forests and fisheries, which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession." Denying the Maori Land Court jurisdiction to investigate claims to the foreshore effectively strips the Crown's obligation to recognise the wishes of Maori, namely to possess the foreshore. [53]

Furthermore *In re the Ninety Mile Beach* is arguably inconsistent with the principles of the Treaty of Waitangi. Since the Court of Appeal decision in 1963, New Zealand has seen a resurgence of the importance of the Treaty of Waitangi in both legislation[54] and case law.[55] The *New Zealand Maori Council* case in 1987 brought life to the principles of the Treaty of Waitangi and acknowledged the partnership between the Crown and Maori. Within this partnership the Crown has a duty to provide "active protection" of Maori people in the use of their lands to the fullest extent possible.[56] According to Richardson J in the same case, this includes a duty on the Crown to make informed decisions with regard to Maori taonga. Arguably the Court of Appeal's failure to inform itself of the

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[51] *The Foreshore,* above n 4, 70.
[52] *Interview*, above n 49.
[53] PG Hugh "The legal basis for Maori claims against the Crown" (1988) VUWLR 18, 5 ["*The legal basis for Maori claims"*] views *In re the Ninety Mile Beach* as effectively "offending the land guarantee of the Treaty of Waitangi" and "preventing a class of British subjects commencing litigation in Her Majesty's courts to obtain the legal protection of their property and rights."
[54] For example, the principles of the Treaty of Waitangi have been included in the following Acts: Treaty of Waitangi Act 1985, Te Ture Whenua Maori land Act 1993, Resource Management Act 1991, Conservation Act 1987, State-owned Enterprises Act 1986. Those empowered to make decisions under these Acts must take into account the principles of the Treaty of Waitangi when exercising their discretion.
[55] See for example *The New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA). This case is known as a landmark case wherein Cooke P and Richardson J brought back life to the principles of the Treaty of Waitangi.
[56] *The New Zealand Maori Council v Attorney General,* above n 55, per Cooke P.

legal history of Ninety Mile Beach and its consequent decision based on a factual mistake, amounts to a breach of the Treaty principles.

Furthermore the enactment of Te Ture Whenua Maori Land Act 1993 arguably casts doubt over the value of *In re the Ninety Mile Beach*. To follow the case and continue to deny the Maori Land Court jurisdiction would encroach upon the objectives of the Act, being to promote and assist in:

(i) the retention of Maori Land and General Land owned by the Maori in the hands of its owners, and
(ii) the effective use, management and development by or on behalf of the owners, of Maori Land and General land owned by the Maori. [57]

(v) summary of the analysis of *In re the Ninety Mile Beach*

The above analysis of the rationale of the Court of Appeal appears to be "insufficient" as Hingston J suggests, and unlikely to succeed close scrutiny by the courts of today.[58] By implication, Hingston J's harsh criticisms of *In re the Ninety Mile Beach* in *Marlborough Sounds* are warranted and have exposed the weakness of the Court of Appeal decision. Even if *In re the Ninety Mile Beach* does survive an appeal, *Marlborough Sounds* has proved *In re the Ninety Mile Beach* can be distinguished on facts.

VI IMPLICATIONS OF THE LIKELY OVERRULING OF IN RE THE NINETY MILE BEACH

Hingston J's criticisms of *In re Ninety Mile Beach* have cast a blinding spotlight on the case. Hingston J has effectively forced the judgement into possible scrutiny and has potentially brought about the high possibility of it being overturned. Should *Marlborough Sounds* survive appeal and *In re the Ninety Mile Beach* be overturned, the consequences for the Crown are significant.

A Implications on the Crown's title to the foreshore

Currently, the Crown's claim to the foreshore rests within the Court of Appeal decision in *In re the Ninety Mile Beach.* With the possibility of higher authority revisiting *In re the Ninety Mile Beach* and the likelihood that the Court of Appeal decision will be overruled in the near future, the Crown will be left with next to nothing to base its title to the foreshore upon. This is of concern to the Crown and, as will be demonstrated, to the public of New Zealand in general.

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[57] Te Ture Whenua Maori Land Act 1993, s 17 (1)(a) & (b).
[58] In "*Foreshore appeal disturbs*", above, n 2, 9, Alison Tocker notes that *In re the Ninety Mile Beach* has been regarded as an example of the bias of the British legal system against various ethnic groups, and Maori law commentators suggest with the passing of time the decision will no longer be good.

1 Background: The Crown's title to the foreshore

Up until *In re the Ninety Mile Beach* in 1963, the Crown based its claim to the foreshore upon the common law assumption that the Crown is *prima facie* the presumptive owner of the foreshore by prerogative right. As has been discussed above,[59] the first conception of the *prima facie* title of the Crown to the foreshore was as far back as 1568-9 when Mr Thomas Digges wrote his Treatise which set up the claim of the Crown to the foreshore. The *prima facie* title of the Crown to the foreshore has survived throughout the centuries, but it is worth noting that the theory has not been free of criticism. In the late nineteenth century Stuart A. Moore wrote his "*History and Law of the foreshore and Seashore*",[60] wherein he rebuked the theory of the *prima facie* title of the Crown as:

> "a mere theory of abstract law, a theory of law taken for granted, based upon an untrue assumption of a state of facts which might possibly have existed, but which is not really in accordance with the true state of facts relating to the matter……as it was clearly before the time of Queen Elizabeth in England, and down to 1849 in Scotland, that *prima facie* the manors and estates of the subjects extend to the low-water mark and include the foreshore. This, of course, is precisely the reverse of the presumption which is asked for by the theory which is vouched as undoubted law"

However, such criticism did not carry the strength to dispel the accepted presumption of the Crown's title to the foreshore.[61]

The foreshore and the seabed have undoubtedly been regarded by the common law as exceptional. The accepted principle at common law is that the Crown is, by grace of prerogative right, the presumptive owner of the foreshore, the beds of tidal rivers, the seabed, and coastal waters. Such a title can of course be displaced by proof of a title adverse to the Crown by means of either a Crown grant or "continuous occupation for a sufficient duration for a grant to be presumed or a title by limitation acquired."[62] Effectively, the Crown is "presumed to have been the owner of the foreshore all along…and no record of the Crown's title is necessary."[63] In New Zealand the Crown has persistently maintained that these common law principles apply in New Zealand as a result the transfer of sovereignty by Her Majesty Queen Victoria in 1840 which introduced the common law of England as the Law of the Colony until abrogated or modified by statute[64]. The Crown has argued that it naturally follows that in New Zealand

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[59] See discussion under *III A: Foreshore Ownership: the common law and its application in New Zealand.*

[60] *History and Law of the Foreshore* above n 7.

[61] ."*The legal basis for Maori Claim,* above n 53, 5. PG McHugh has also criticised the *prima facie* theory as "a crude blend of feudal and Austinian thoughts.

[62] McNeil, *Common Law Aboriginal Title,* Claredon, Oxford, 1989, 105.[*"Common Law Aboriginal Title"*]

[63] *Common Law Aboriginal Title*, above n 62.

[64] See for example the English Laws Act 1858, Imperial Laws Act 1988 and other cases such as *Cooper v* Stuart (1889) 14 App. Cas. 286, 291. *R. v Joyce* (1906) 25 NZLR 78,79,80,112, *In re the Bed of Wanganui*[1962] NZLR 600, 624, (cases cited in *In re the Ninety Mile Beach* , above n 12, 76.

it is 'beyond dispute that the Crown is prima facie entitled to every part of the foreshore between high and low water mark.'[65] In 1881 the Native Minister, Rolleston, exclaimed:

> "The foreshore is reserved for the use of the whole. Without a special vote of Parliament the foreshore belongs to the sovereign for the use of both Maori and pakeha." [66]

However, over time the Crown has acknowledged the flimsy assumptions upon which the *prima facie* theory is based and has taken various measures to preserve its ownership and control of the foreshore. During the 1870's a large number of claims to the foreshore were coming before the Court and began causing concern to the government who knew that in strict law the Crown's title to the foreshore was weak. The government eventually took action to prevent the Land Court from embarking on further investigations to the foreshore by issuing a Proclamation[67] which suspended the operation of the Native Land Court below high water mark.[68]

2 The Crown's title in modern times

More recently the Crown's position has been said to be "based on a misconception" [69] and was also criticised by Fenton CJ in the *Kauwaeranga* judgement of 1870.[70] In *In re the Ninety Mile Beach* the *prima facie* theory was finally repudiated, with North J regarding the argument as simplistic:

"I cannot escape the conclusion that in advancing this argument the Crown is endeavouring to assert a pre-existing right.'[71]

Thus, as a result of the 1963 decision, the Crown lost its ability to base a claim to the foreshore on this ground. The rationale devised by the Court of Appeal to secure the Crown's title to the foreshore now constitutes the legal basis of the Crown's claim.

3 The Crown's title without In re the Ninety Mile Beach

In re the Ninety Mile Beach is of great importance to the Crown as it acts to ensure the Crown remains 'owner' or 'trustee' of the foreshore. The judgement denies the Maori

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[65] Authority found in *Attorney General v Emerson* [1891] AC 649, at 653, cited in *In re the Ninety Mile Beach,*above, no 2, at 475, per Gresson J.
[66] Richard Boast and D Edmunds, *The Treaty of Waitangi and Resource Management Law,* in Brooker's *Resource Management* (Brooker's, Wellington). Vol 1A, TW 112.
[67] S 4 of the Native Lands Act 1867 allowed the Governor to suspend the operation of the Land Court in any districts.

[68] The Proclamation prevented the Native Land Court from undertaking an investigation almost identical to that of the *Marlborough Sounds* claim, in 1872 in the Thames district. However, the Proclamation was rendered ineffective in 1873 when its empowering provision was replaced by the Native Lands Act 1873.
[69] *The Treaty of Waitangi and Resource Management Law,* above, n 66, TW 112.
[70] *In re the Ninety Mile Beach,* above n 12, 471 wherein North J summarizes Fenton CJ's opinion in *Kauwaerenga,* above n 10, that the common law presumption of prima facie ownership of the foreshore was 'entirely inconsistent with and destructive of all claims of this character."
[71] *In re the Ninety Mile Beach,* Above n 12, 468.

Land Court jurisdiction to investigate titles in coastal blocks fronting the sea. This has effectively prevented the Court from issuing freehold titles to the foreshore.[72] Until now, the Crown has presumed the Court of Appeal decision would prevent all Maori claims to the foreshore from coming to the Court and ensure freehold titles would not be issued to Maori. However as discussed, the decision is not as confiscatory as the Crown has presumed and effectively still allows claims to land fronting the foreshore to be considered as long as they have *not* been subject to an investigation by the Land Court.

(a) the Crown loses its primary legal claim to the foreshore

Nevertheless, should *In re the Ninety Mile Beach* be revisited by higher authority and subsequently overturned, the Crown will lose yet another means of securing title to the foreshore. The Crown cannot argue it is *prima facie* entitled to the foreshore, nor can the Crown contend that the process of investigation of title by the Native Land court extinguished Maori customary title to the foreshore.[73] Furthermore, s 150 Harbours Act 1950 can no longer be said to vest the foreshore in the Crown and it is unlikely any other statutes in New Zealand at the present day would amount to a deliberate extinguishment of Native title over the foreshore. There does not appear to be any statutory provision which explicitly vests ownership of the foreshore in the Crown. Although there are a number of statues which *refer* to the foreshore[74] and some which appear to based on an assumption that the foreshore belongs to the Crown,[75] a mere assumption is not enough. When it comes to statutory extinguishment of customary title, the extinguishment must be clear and plain. Arguably none of the current law relating to the foreshore would meet the *Faulkner* test of extinguishment of aboriginal title.

(b) pre-emptive purchase

Arguably, the only remaining avenue for the Crown to claim ownership and control of the foreshore is via pre-emptive purchases[76]. However, onerous and costly surveys to find

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[72] The case has effectively left the Crown title to the foreshore free from challenge by Maori claimants. The only claims touching on the foreshore have been in relation to fishery rights. For example see *Keepa v Inspector of Fisheries* [1965] NZLR 322 (SC), *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC), *Green v Ministry of Fisheries* [1990] 1 NZLR 411).

[73] These conclusions are based on the critical analysis of the reasoning of the Court of Appeal and the criticisms afforded by Hingston J in the *Marlborough Sounds* case.

[74] The Conservation Act 1987, The Conservation Law Reform Act 1990, the Foreshore and Seabed Endowment Revesting Act 1991, the Resource Management Act 1991 all refer to the foreshore and give extensive definitions of the coastal area.

[75] See for example the Resource Management Act 1991, and *The foreshore* ,above n 4 wherein Richard Boast suggests The Foreshore and Seabed Endowment Revesting Act 1991, and, perhaps, the Conservation Act 1987 are based on the same assumption.

[76] There is a high possibility that deeds of pre-emptive purchase cover almost the whole area of the Marlborough Sounds which is subject to this claim. The *Submissions of the Crown* , above n 5, 9 gives a detailed history of the sale of the Marlborough Sounds taken from *Phillipson Northers South Island District Report* (Rangahaua Whanui Series 1995). The Crown made a number of purchases of the Nelson-Marlborough Area between 1847 and 1856. Those are: The Wairau Purchase 1847, The Waitohi Purchase 1847-50, and purchases by Commissioner D McLean 1853-36 (Ngati Toa Deed 1853, Te Atiawa Deed 1854, Ngati Tama 1855, Te Atiawa Deed 1856, Ngati Kuia Deed 1856, Ngati Koata Deed 1856.) The

out the limits of old pre-emptive purchases and an analysis of their provisions would have to be undertaken. Each pre-emptive purchase that took place in New Zealand would have to be looked at individually in order to establish whether the purchase extinguished Native title to the foreshore. This would be made even more difficult as each pre-emptive purchase deed is unique in content. Furthermore, it is likely that many deeds would not have mentioned anything regarding the foreshore based on the assumption that it was, and would remain, Crown land. In short, it would in all accounts be a highly elaborate and cumbersome exercise to establish what happened with each part of the foreshore around New Zealand.

(c) is there a need for executive action to secure the Crown's title?

In any case, *Marlborough Sounds* has weakened the Crowns already faltering claim to the foreshore. Furthermore it has exposed the confusion of the law in New Zealand relating to the foreshore and forced Parliament to recognise that "the law governing the foreshore in this country remains profoundly unsatisfactory and needs to be considered afresh."[77]

There are strong similarities to the uncertain situation concerning the ownership of riverbeds. This is another area where the Crown has historically assumed ownership rights without fully considering Maori interests. Litigation in the 1950s and 1960s over the ownership of the beds[78] has failed to lay those issues at rest. The Waitangi Tribunal in its 1993 *Pouakani Report* urged the Crown in the national interest to give urgent attention to the question of ownership and use rights in rivers. It seems that similar 'urgent attention' is now required for the foreshore and the seabed.[79]

VII IMPLICATIONS OF MARLBOROUGH SOUNDS ON PUBLIC RIGHTS

A The public right to the foreshore

At present in New Zealand we enjoy, for the most part, free and uninhibited access to use and enjoy our beaches and sea. The public right of access to the foreshore has been retained through Crown ownership "with the Crown viewing itself as a type of trustee for the general public in respect of the foreshore and public access thereto."[80] Additionally, the government, regional councils and most individuals in New Zealand rely on the assumption that the foreshore is public property, or to put it into legal terms, that the foreshore belongs to the Crown.[81] Parliament has recently recognised the public right of

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Submission of the Crown refers to "*Papers and Documents relative to the Purchases effected in the Middle Island by Mr Commissioner McLean*-documents 7-17 and 21."

[77] *In re The Ninety Mile Beach revisited*", above 43, 170

[78] See in particular *In re the Wanganui River* [1962] NZLR, 600, 624

[79] It has been suggested by Doug Graham in "*Foreshore appeal disturbs",* above, n 2, that should Parliament or the government dislike the Maori Appellate Court decision, they will "simply change the law, as they have in the past". Doug Graham proposes that changing the law is an option, "if the decision is unclear, unjust or unacceptable in the national interest".

[80] Richard Boast, "Report on the Queens Chain", Draft, 1996, 22. ["*Report on the Queen's Chain"*]

[81] *The Foreshore*, above n 4, 4.

access to the foreshore and has selected "maintenance and enhancement of public access to and along the coastal marine area" as "a matter of national importance". [82]

It has been suggested Crown ownership is an awkward method of securing the public right of access to an important natural resource.[83] However, despite the reality that there are major weaknesses in the Crown's supposed territorial claim to the foreshore, Crown ownership has over time preserved the right of the public to access and use the foreshore at their leisure.

B Danger to the public right of access to the foreshore

With the uncertainty surrounding the Crown's title to the foreshore resulting from the *Marlborough Sounds* judgement,[84] it is quite possible that our cherished access to the foreshore may not always be guaranteed in the future.[85] Effectively, the *Marlborough Sounds* decision places the current situation of open access to the coastline in serious danger and proves we should no longer take these rights for granted. [86] Fenton CJ, in *Kauwaerenga*, acknowledged the unattractiveness of this potential situation over a century ago, in 1870. The learned judge saw the potential threat to the public right to the foreshore as one of the "evil consequences of judicially declaring the soil of the foreshore will be vested in the Natives."[87]

The possibility of a privatised coastline is something the present author finds difficult to stomach. It is proposed that the majority of New Zealanders would feel the same way, and in doing so would firmly oppose any diminution of their rights of access to the beaches and sea by alienation of the foreshore to private individuals. Consequently, this nationwide concern needs to be recognised and addressed by those who have the required authority to avoid such an infringement upon public rights to the foreshore. [88]

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[82] S 6(d) Resource Management Act 1991.

[83] "*Report on the Queen's Chain*", Above no 80,p 8.

[84] The uncertainty is due to the possibity that *In re the Ninety Mile Beach* could be overturned in the near future.

[85] *"Foreshore appeal disturbs".* Above n 2, 9 suggests that "coastal users may have to pay" those Maoris ruled to be owners.

[86] It is not unlikely that individual owners of foreshore blocks would seek to prevent a mass of sun seekers, beach goers and surfers by fencing off the beach in order to preserve their privacy. Should this occur, one of our greatest and dearest natural resources would no longer be accessible to us all.

[87] *Kauwaerenga* above n 11.

[88] It is suggested that Parliament has not taken the appropriate measures to adequately protect the public right to the foreshore and guard against the type of circumstances that may arise as a result of Marlborough Sounds. Arguably legislation should have been passed a long time ago in order to secure the Crown's territorial claim to the foreshore and ensure it remains a natural resource accessible to all New Zealanders. Legislative action would have proved a lot more effective than 'apparently' resolving the issue of the Crown's shaky legal title to the foreshore in the Court of Appeal in *In re the Ninety Mile Beach*.

C The value New Zealander's attach to their public right of access to use and enjoy the foreshore

The coast is an important part of the identity of New Zealanders. Most New Zealanders have grown up and lived by or near the coast and value the ability to freely use the foreshore at our leisure. Few New Zealanders would care to find themselves suddenly unable to access the beaches and sea that surrounds us.

D Historical and statutory recognition of the importance of public access to the foreshore

The importance and value of public access to the foreshore is not only evident in the hearts of each New Zealander, but is reflected to a large extent in both the history and the laws of New Zealand.

1 Historical recognition

From the outset of the Colony's history, the government has recognised it was desirable policy for land to be kept in Crown ownership in order to provide not only areas for landing places and quays, but access to and use of the foreshore.

Hobson's instructions from Lord John Russell on 9 December 1840 required Hobson to

"direct the Surveyor General to report..what particular lands it may be…desirable to reserve for any other purpose of public convenience, utility, health or enjoyement"

Russell further directed Hobson to not 'permit or suffer such lands to be occupied by any private person for any private purposes."[89]

2 Statutory recognition- marginal strips

The value of public access to the foreshore is reflected in the extensive legislation relating to marginal strips, or the "Queen's chain". In 1990 in Parliament, Anderton summarized accurately how many New Zealanders feel about the subject of access to the foreshore, "the Queen's chain is part of the country's heritage." [90] Richard P Boast suggests, the marginal strip is 'the prime means of ensuring public access to the coast.'[91]

(a) the Land Claims Ordinance Act 1841

As early as 1841, Parliament introduced the concept of retaining the foreshore in the Crown. The Land Claims Ordinance Act 1841 provided that any person entitled to a

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[89] *Report on the Queen's Chain.* Above, n 80, 23.
[90] 1990 NZPD 518.
[91] .*Report on the Queen's chain* Above n 80, 3.

Crown grant of land, by virtue of proving a purchase of land from Maori prior to 1840, had the following lands excluded from their grant:

"any headland promontory bay or island that may hereafter be required for any purpose of defence or for the site of any town or village reserve *or for an purpose of public utility, nor of any land situate on the sea-shore within one hundred feet of high water-mark.*"

The Land Claims Ordinance Act 1841 is effectively a recognition of the "Queen's chain" and is evidence that it has long been the intention of the legislature that the Crown control an area of both dry land and foreshore to enable public access to the sea. [92]

(b) the Land Act 1892

Following this lead, the Land Act 1892 was enacted which made provision for reserves of land along the seashore and banks of rivers, creeks etc in order to retain Crown ownership of these areas for the public benefit. Section 110 of the Land Act 1892 formally introduced the 'marginal strip' whereby:

"there shall be *reserved from sale or any other disposition a strip of land not less then sixty-six feet in width along all high-water lines of the sea, and of its bays, inlets, or creeks"* [93]

This statutory requirement for marginal strips has continued in Land legislation until the whole subject became regulated afresh with the Conservation Law Reform Act 1990. Thus, it is not only a public assumption that there exists along the coastline a strip of land providing access to our foreshore, but a legal requirement.

(c) the Conservation Act 1987/ The Conservation Law Reform Act 1990

The special significance attached to the foreshore as a public resource is reflected in the Conservation legislation of the last decade.[94] Part IVA of the Act[95] forms a comprehensive code which provides for the continuation of the marginal strip.[96] The

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[92] Submissions of the Crown, Above n 5, 21 wherein it was suggested that it would be anomalous, if the Crown having reserved a marginal strip for this purpose after the issue of a grant, the foreshore remained as unextinguished customary title.

[93] S 110 Lands Act 1892 continues as follows: "and along the margins of all lakes exceeding fifty acres in area, and along the banks of all rivers and streams of an average width exceeding thrity-three feet, and, in the discretion of the Commissioner, along the bank of any river or stream of less width than thirty- three feet."

[94] Section 2 of the Conservation Act 1987 deems the foreshore a 'conservation area' for 'conservation purposes'; that being the "preservation and protection of natural resouces for the purpose of", among others, "providing for their appreciation and recreational enjoyment by the public."

[95] Part VIA was inserted by the Conservation Law Reform Act 1990.

[96] The provision for marginal strips is as follows:

24 Marginal Strips reserved - "There shall be deemed to be reserved from sale or any disposition of any land by the Crown a strip of land twenty metres wide extending along and abutting the landward margin of-

(a) any foreshore

purposes of marginal strips include enabling "public access to any adjacent watercourses and bodies of water"and providing for "public recreational use of the marginal strip and adjacent watercourses or bodies of water"[97] . In fact the whole pretence behind marginal strips is public access past private lands and onto public lands, including the foreshore.

Evidence of the importance attached to the existance of marginal strips is reflected in section 24G Conservation Law Reform Act 1990.[98] This section makes provision for the continuation of the marginal strip even when the boundary of the sea changes due to erosion or aggregation.[99] One of the main objectives of the changes to the law in 1990 was to ensure, that the strip will move when the water boundary moves so that there will always exist an access way to the foreshore no matter what changes to the land occur.

Furthermore, whilst the Minister of Conservation is empowered to exempt dispositions of land abutting rivers and streams under s 24B,[100] the Minister can never exempt the foreshore. This provision demonstrates the primary importance Parliament attaches to ensuring public access to the foreshore.

(d) the Reserves Act 1977

The Reserves Act 1977 is a further statutory recognition of the value of public access to the foreshore. The Act implements management plans for the coastal region and one of the general purposes of the Act is "ensuring as far as possible, the preservation of access for the public to and along the sea coast."[101] Coastal reserves can be created under the Reserves Act 1977 to fulfil this aim.

(e) the Resource Management Act 1991

The most recent recognition Parliament has given to the importance of providing public access to the foreshore is found within the Resource Management Act 1991. Section 6 (d) of that Act states that the "maintenance and enhancement of public access to and along the coastal marine area is a matter of national importance".[102] Provisions relating to

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(b) The normal level of the bed of any lake not subject to control by artificial means; or
(c) The bed of any river or any stream (not being a canal under the control of the Electricity Corporation of New Zealand Limited used by the Corporation for, or as part of any scheme for, the generation of electricity), being a bed that has an average of 3 metres or more.

[97] S 24C(a) and (b) of the Conservation Law Reform Act 1990.

[98] and as amended by s 7 of the Conservation Amendment Act 1996.

[99] It is a fact of life in New Zealand that the shoreline changes shape, especially in today's climate of global warming which has caused the level of the sea worldwide to rise (see p 4 *Dominion* newspaper, 13 August 1998.)

[100] The Minister can exempt land abutting river or streams under s 24B *"if satisfied" that the land has little or no value in terms of conservation, public access and public recreational use"*.

[101] s 3(c) Reserves Act 1977.

[102] s 6(d) Resource Management Act 1991. It is significant that Parliament has selected the foreshore as a public resource of special national value.

access strips and esplanade reserves or strips in the Resource Management Act are the means by which Parliament addresses this matter of national importance. [103]

(f) esplanade reserves or strips

Esplanade reserves or strips are required to be set aside on the subdivision of land as follows:

> **230. Requirement for esplanade reserves or esplanade strips-**
> (3) "…..where any block of land of less than 4 hectares is created when land is subdivided, an esplanade reserve 20 metres in width shall be set aside from that allotment along the mean high water springs of the sea, and along the bank of any river or along the margin of any lake…"

The "purposes" of esplanade strips and esplanade reserves are set out in section 229. Such reserves have three main purposes, these being the "protection of conservation values", "to enable public access to or along any sea" and "to enable public recreational use of the esplanade reserve or esplanade and adjacent sea, river, or lake". [104]

(g) access strips

Under section 237B Access strips can be created on agreement between a "local authority and the registered proprietor of any land to acquire an easement over the land". An "access strip" is defined under section 2 as:

"a strip of land created by the registration of an easement in accordance with section 237B for the purpose of allowing public access to or along any river, or lake, *or the coast*."[105]

It is important to be aware of the purposes behind the provisions providing public access to the foreshore, as it becomes evident that the law relating to marginal strips and esplanade reserves was not designed to protect Maori interests specifically, but the objective was rather to facilitate the access rights of the public.

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[103] The creation of these reserves and strips is a mechanism whereby a council can satisfy public demand for access to and recreational use of the foreshore.

[104] These are the same purposes for which marginal strips are created under s24C Conservation Law Reform Act 1990.

[105] Both the access strip and the esplanade strip must be created in accordance with the Tenth Schedule- "Requirements For Instruments Creating Esplanade Strips and Access Strips". The Tenth Schedule provides: "where an easement for an access strip or an esplanade strip for access purposes is created, the easement or instrument, creating the strip shall specify that any person shall have the right, at any time, to pass and repass over and along the land over which the strip has been created, subject to any other provisions of the easement or instrument." This requirement is further recognition by the Resource Management Act 1991of the value of providing unlimited access to the coastline.

3 *Public and Judicial recognition*

The importance of public rights of access to the foreshore is not only reflected in New Zealand legislation, but in both public and judicial opinion. The Queen's chain for example has come to play an important role for the New Zealand public and "any attempt to modify the law in the direction of what is perceived by the public- rightly or wrongly- as restricting access rights is greatly resented".[106] Judgements touching on issues relating to the foreshore have been willing to acknowledge the value of public rights of access to the foreshore. In *Bayly v Bay of Islands County*[107] it was recognised by the Court that "the coastal environment is there to be enjoyed and appreciated and that cannot occur unless the community is given access to it." Moreover, in 1881, Rolleston, the Native Minister, who stated "the foreshore is reserved for the use of the whole", expressed the importance of the public right to the foreshore.[108]

4 *Summary*

The above statutory provisions and opinions relating to the foreshore are significant in that they all formally recognise the importance of public access to the New Zealand foreshore. In particular the long history of Crown ownership of the foreshore and legislation providing public access to the coast, demonstrates that public enjoyment of the coastline has always been a part of our nation's heritage and should not be left to dwindle away.

However, the decision in *Marlborough Sounds* appears to overlook the value the New Zealand public, judiciary and legislature attaches to the use and enjoyment of the foreshore. Arguably the foreshore should remain in Crown ownership to ensure the continuation of public rights, and it is encouraged that *Marlborough Sounds* is a step away from this end. However it has been suggested that Crown ownership is itself an awkward method of retaining public access and simpler methods which are not linked to the Crown's property rights could well exist. Other options to retain the availability of the foreshore as a natural resource for all New Zealanders include placing the Crown in a trustee position whereby the Crown holds the foreshore for the benefit of all, Maori and non-Maori alike. This is not a suggestion that should be dismissed as 'self-serving'. It is a time honoured justification for the special legal position of the foreshore that the ownership of the Crown is for the benefit of the subject. [109]

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[106] *Report on the Queen's Chain,* above, n 80, 6.
[107] *Bayly v Bay of Islands County* A88/81 (PT) .*Brooker's Resource Management,*, above n 66, vol 1, A2 44.
[108] *Brooker's Resource Management*, Above, n 66, vol 1A. Rolleston was challenged on the basis of the Crown's claim to the foreshore at an important conference of northern chiefs held at Waitangi, whereby he responded with the above statement.
[109] *The Foreshore* above, n 4, p 4 quoting from Lord Westbury in *Gann v Free Fishers of Whitstable* (1865) 11 HLC 192, 207, cited in *Common Law Aboriginal title,* above n 62, 105.

VIII IMPLICATIONS OF MARLBOROUGH SOUNDS ON EXISTING LAW PERTAINING TO THE FORESHORE

It is suggested Hingston J in *Marlborough Sounds* failed to consider the possibility of a privitised coastline and the effects this may have on the various statutory enactments which relate to the foreshore. Potential privitisation of the foreshore could effectively render illogical a great deal of the statutory law which is premised on the assumption that the Crown is the owner of the foreshore. Not only will provisions in various enactments providing public access to the foreshore become redundant, but other Acts relating to the foreshore will possibly be greatly effected. Section 12 of the Resource Management Act 1991, which relates to occupation of coastal space, will be analysed in order to provide a case study of the type of consequences the Maori Land Court decision could have on existing law.

A Implications on provisions providing access to the foreshore

The Resource Management Act 1991, the Conservation Act 1987, the Conservation Law Reform Act 1990, and the Reserves Act 1977 appear to be premised on the assumption that the foreshore is somehow 'owned' by the Crown.[110] Understanding that the main purpose of laws relating to marginal and access strips, and esplanade reserves is providing public access past private lands onto *public* lands, it is difficult to ignore that they become illogical should the foreshore be deemed private land.

What is the point of having elaborate laws providing access to the foreshore if the foreshore is privately owned and not even open to the enjoyment and use of the public? Furthermore, if Parliament did not consider the foreshore to be public property and available to the general public, why would Parliament have spent such a great deal of energy enacting laws which provide access to the foreshore?

B Implications on other laws pertaining to the foreshore

The significance of the *Marlborough Sounds* decision, if correct, is that where there is found to be unextinguished customary title, the status of the coastal region will change into individual freehold titles. This could effectively render existing laws that relate to the foreshore illogical. In order to demonstrate the type of effects this transfer of ownership could have upon such laws relating to the foreshore, the coastal permit provisions under section 12 of the Resource Management Act 1991 is analysed.

[110] Although none of these Acts explicitly vest the foreshore in the Crown, the proposition advanced by the present author (that the Acts are premised on an assumption that the Crown is the owner of the foreshore), is devised from a belief that Parliament would not waste their time enacting elaborate laws providing access to the coast, if the coast was private property and not available to the public in the first place.

1 *Section 12- Restriction on the use of the coastal marine area.*[111]

Unextinguished customary title could fundamentally affect the coastal permit provisions of the Resource Management Act 1991 in their present form, and raise issues as to whether the structure of the Act will be able to accommodate the recognition of customary title, and if so, how. The allocation of coastal permits under the Resource Management Act might be affected as at present the provisions under the Act as they relate to occupation of coastal space, are based on a presumption (but not a declaration) of Crown ownership. If proved that Maori Customary title to the foreshore has not been extinguished, then this presumption is incorrect. Moreover, section 12 may no longer be applicable to areas of the foreshore where customary title is found to exist.

Section 12(1) provides for the carrying out of certain activities on the foreshore or seabed. Significantly this subsection applies to "*any foreshore or seabed"*. Section 12(2) provides for the occupation of coastal space[112]. Unless there is an express rule in a regional coastal plan or proposed plan allowing occupation, an application must be made to the consent authority for a coastal permit to "occupy" space in the coastal marine area.[113] The effect of these sections is that compliance with the provisions of the Act is, in itself, sufficient to acquire rights to both carry out the activity and to occupy the coastal space concerned.[114] Unlike occupation rights issued to land, there is no additional need for private negotiations outside of the Act. [115]

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[111] The following arguments relating to s 12 and the problems therein as a result of the *Marlborough Sounds* case are based on an article by Fiona McLeod, "Maori Customary title to the foreshore and seabed and the allocation of coastal permits under the Act", Resource Management Bulletin, 2 (9) Feb 1998:101-103.

[112] Section 354(3) is also relevant which provides: "Any person may use or occupy any land and any related part of the coastal marine area in which the Crown has a right, interest, or title without obtaining the consent of the Crown under the Land Act 1948 [or the Foreshore and Seabed Endowment Revesting Act 1991], if the use or occupation by that person does not contravene this Act or regulations".

[113] "occupy" carries an extensive definition in s 12(4) Resource Management Act 1991. S 12(4) provides (a) "occupy" means occupy the land and any related part of the coastal marine area necessary for the activity, -(i) to the exclusion of other persons who do not have a right of occupation to the space by a resource consent or under a rule in a regional coastal plan; and (ii) For a period of time and in a way that, but for the rule in the regional coastal plan or the holding of a resource consent under this Act, a lease or licence to occupy that part of the coastal marine area would be necessary;- and "occupation" has a corresponding meaning.

[114] Notwithstanding s 122 RMA ("Consents not real or personal property"), this right is in the nature of a lease or a license. It is not necessary to gain the further consent of the Crown (presumably the land owner) for the use of the consent.

[115] The procedure involved in obtaining occupation rights to coastal space can be compared against the provisions of the Act relating to land. To carry out a restricted activity on land, an application under s 88 to the consent authority for a resource consent must be made. The consent authority then decides under ss 105 and 106 whether to grant or decline consent after considering the effect of the activity on the environment. The resource consent does not confer upon the consent holder access or occupation rights to the land. Unlike consents given in the coastal marine area, it only establishes that the proposed activity is consistent with the sustainable management of the land. The consent authority can grant a resource consent irrespective of ownership as the right to undertake the activity is not dependent on a right to occupy the land.

It is the premise of Crown ownership that enables the consent authority to grant rights of this scope. Crown ownership is evident in section 12(2). Unlike section 12(1), section 12(2) applies only to *"land of the Crown"* or *"land vested in the regional council"*. Hence, if *Marlborough Sounds* is correct and, after hearing the evidence, the Maori land Court declares that an area of the foreshore is Maori customary land for which a freehold title should be issued, this area could be outside the perimeters of section 12(2). The land would no longer be land of the Crown nor land vested in a regional council. This could mean the consent authority would lose its jurisdiction to allocate rights of exclusive occupation to any third party.

Section 12(2) could effectively be rendered useless. The Crown would no longer be in a position to authorise the grant of exclusive occupation to a third party where customary title is found to exist, and as has been suggested above, this could theoretically involve the entire foreshore of New Zealand. Even if it is considered that the subject area is land of the Crown by virtue of the common law doctrine that aboriginal title is a burden on the Crown's radical title, the Crown would still lose its position as sole issuer of exclusive occupation rights. The foreshore would still be land of the Crown within the meaning of section 12(2), but subject to customary title and the consent holder could well require the additional permission of the customary owner before the consent could be exercised.[116]

With the prospect of s 12(2) becoming obsolete, the provisions relating to coastal permits may well have to be amended. A scheme akin to that relating to land could be substituted, whereby the right to carry out a particular activity could be obtained by the consent authority and the right to occupy the coastal space in question could only be obtained through negotiation with the customary owner.[117]

2 *Further implications of Marlborough Sounds on the Resource Management Act 1991*

Should Maori customary title to the foreshore be found to exist in the future as a result of *Marlborough Sounds*, the title will effect the operation of the Resource Management Act 1991. Customary title would become relevant under Part II of the Act and decisions to allocate coastal permits by the consent authority will be weighted with additional considerations.

Part II sets out the principles and purposes of the Resource Management Act. Customary ownership is an important aspect of "cultural well being" and is relevant to the purpose of promoting the "sustainable management of natural and physical resources" under section

[116] This is the case with land on terra firma, where the beneficial title is vested in someone other than the Crown.

[117] An alternative to this could be placing the Crown in a trustee or fiduciary position when administering the foreshore and seabed..This has been adopted in Canada with respect to Native Reserves, see *R v Guerin* [1984] 2 SCR 335 This title could arguably be accommodated within the existing framework of the RMA. It may, for example, be possible to place the consent authority in the Crown's shoes as a fiduciary when s 12(2) is exercised.

5. Where the relationship between Maori and their ancestral lands and waters amounts to customary ownership, this is a matter of national importance under section 6 (e) and must be recognised and provided for by "all persons exercising functions and powers" under the Act. Additionally, s 8 requires decision makers under the Act to take into account the principles of the Treaty of Waitangi which in themselves affirm the customary title right of Maori.[118] Thus, with the possible recognition of customary title to the foreshore, Part II affirms that customary ownership would become important matter to be considered and accorded due weight in the final balancing exercise by the consent authority when deciding to grant coastal permits. If a grant of an occupation right under s 12(2) would, in effect, negate the continued exercise of customary rights, the consent authority may be forced to decline consent.

3 Summary

It would appear the decision in the Maori Land Court has not attempted to consider the extent to which the Crown's presumptive title to the foreshore is reflected in legislation. Furthermore, the possible effects on statutory provisions relating to the foreshore as a result of changing the status of the foreshore form Crown land to private land appear to have been ignored by Hingston J. Such disruptive consequences [119]should arguably not have been disregarded, especially when the result for Parliament could involve the need to make time consuming amendments to existing legislation.[120]

IX IMPLICATIONS OF MARLBOROUGH SOUNDS FOR MAORI

Having spent a great deal of time focusing on the negative consequences of Hingston J's interim decision in *Marlborough Sounds* for the Crown and the public, it would be unfair not to draw attention to the positive implications for Maori in particular. The decision raises the possibility that the foreshore of New Zealand may be subject to unextinguished Maori customary title and the added possibility that the Maori Land court will be restored with jurisdiction to investigate and recognise customary title to the foreshore. The implications of this for Maori are extensive and predominately positive.

A The return of ancestral lands

Where claims to the foreshore have previously been considered "novel" and "far-reaching"[121] by the Courts of New Zealand, *Marlborough Sounds* has proved such claims are now taken seriously. This means there is an increased possibility that Maori ancestral lands situated on the foreshore will be returned to respective Iwi. This will not only restore mana to Iwi, and the spiritual and physical relationship Maori have with their

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[118] *Te Runanganui o Te Ika Incorporated v Attorney General* [1994] 2 NZLR 20, 24.
[119] These consequences are demonstrated by the discussion on s 12 Resource Management Act 1991.
[120] Arguably Hingston J was not required to consider these issues as the decision was an interim determination to ascertain whether since the Treaty of Waitangi in 1840 Maori customary rights to the foreshore and seabed in and around the Marlborough Sounds in New Zealand have been extinguished.
[121] *In re the Ninety Mile Beach,*above, no 12, 466, per North J.

ancestral lands, but will help secure the exercise of kaitiakitanga[122] by Iwi and access to those traditional resources cherished by Maori.

B Recognition of Maori values

On a broader scale, Hingston J's judgement in favour of Te Ihu Iwi provides a recent recognition of the current trend towards acknowledgement of Maori values by the legislature, the judiciary and the Treaty of Waitangi. [123]

1 Te Ture Whenua Maori Land Act 1993

The recent enactment of Te Ture Whenua Maori Land Act 1993 demonstrates Parliament's concern to preserve Maori values. The Act recognises the possibility of customary title to land and the importance of restoring the relationship between Maori people and their ancestral lands. The purpose of the Act is to promote the "retention of Maori land and General Land owned by the Maori in the hands of its owners."[124] The decision in favour of restoring jurisdiction to the Maori Land Court to investigate title to the foreshore in *Marlborough Sounds* supports the protection extended to Maori interests in the Act.

2 The Resource Management Act 1991

The decision in *Marlborough Sounds* supports the statutory protection and promotion of Maori values found in the Maori provisions of the Resource Management Act 1991. [125] A number of recent cases which have dealt with Maori issues and the manner in which Maori interests are considered under the Resource Management Act 1991, illustrate the trend towards recognition of the spiritual and physical relationship Maori has with land in Aotearoa New Zealand. The cases illuminate the mechanisms in the Act for the

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[122] S 2 Resource Management defines "Kaitiakitanga" as the "exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself". However, this definition is regarded by Maori as a mistranslation. Kirsten Maynard (Guest speaker at a Maori Customary Law lecture, Victoria University Law School, 18 August 1998) suggests the term can be defined as "respect for who you are". Kirsten quoted a comment made by Tau Henare that the Resource Management definition was incorrect, as kaitiakitanga was " not stewardship, since this means in English 'to guard someone elses property' with overtones of a master-servant relationship."

[123] *New Zealand Maori Council v Attorney General*, above n 55, brought life to the Treaty principles. Statutory inclusion of the Treaty of Waitangi is extensive. See *Brooker's Resource Management Law* above n 66, TW 11 for a table of the Acts incorporating the Treaty, for example: Treaty of Waitangi Act 1975 established the Waitangi Tribunal the Treaty is referred to throughout the Act, Te Ture Whenua Maori Land Act 1993 provides for the return of Maori land to Maori, ss 9 and 27 of the State-owned Enterprises Act 1986, s 4 Conservation Act 1987, s 8 Resource Management Act 1991, s 4 Crown Minerals Act 1991. Hingston J himself made note of the direction Treaty jurisprudence has taken in the last decade which has paid regard to the interest of Maori.

[124] Te Ture Whenua Maori Land Act 1993, Preamble.

[125] These include s8 which provides: "Treaty of Waitangi- In achieving the purpose of this Act, all persons exercising functions and powers under it, inrelation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Teriti O Waitangi). S 6(e) provides that "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" is a matter of national importance.

protection of Maori values and the extent to which these have been employed, proving that New Zealand Courts are taking a robust approach to interpreting the Act to ensure that these Maori provisions are given some real effect.[126]

In *Aqua King (Anakoha Bay) v Marlbrough District Council*[127] the Environmental Court refused to validate an application for a coastal permit for marine farming in Anakoha Bay, the traditional home of the Ngati Kuia. Judge Kenderdine J identified the duty to avoid, remedy or mitigate any adverse effects on the cultural conditions pertaining to iwi[128] under s 5 RMA and held that restrictions on the ability of Ngati Kuia to exercise kaitiakitanga would constitute such an effect. Kenderdine J decided in favour of the foreseeable needs of iwi.

Minhinnick v Watercare Services Ltd [129]involved an appeal to the High Court challenging an Environmental Court decision declining to grant an interim enforcement order halting works relating to a proposed sewer pipeline through the Matukuturua Stonefields.[130] Salmon J decided to refer the matter back to the Environmental Court in order to ensure the proposed sewer pipeline was not offensive or objectionable in Maori terms under s 314 of the Act. The case is significant in that it provides an example of the High Court placing great importance on the protection of Maori cultural well being. [131]

TV3 Network Services Ltd v Waikato District Council [132] resulted in a refusal by the High Court to reverse a decision by the Environment Court that a resource consent [133]would offend Maori heritage and waahi tapu. The case is another example of the growing recognition given to Maori values. Hammond J supported the conclusion made by the Environmental Court that any proposal must accord with the strong direction of s 6(e)[134] and enable the tangata whenua to provide for their social and cultural well being. [135]

The above cases all give strong contemporary authority for the current proactive stance in the protection of Maori interests. *Marlborough Sounds* can be seen as a continuation of this growing trend, with the effect of instilling further confidence in Maori that their culture and traditions will continue to be recognised and provided for as a matter of national importance.

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[126] The following analysis is based on an article by Beverley, Paul. "The RMA and the Protection of Maori Interests- Recent Developments." Resource Management Bulletin, Issue 7 ,2 BRMB,76.
[127] Environmental Court, W 71/97, 30 June 1997.
[128] Cultural conditions pertaining to Iwi are encompassed by the definition of 'environment' in s 5(2) of the Resource Management Act 1991.
[129] High Court, Auckland HC 86/97, 3 September 1997, Salmon J.
[130] The Stonefields area is regarded as waahi tapu by iwi and there is liklihood that the land contains bones and other remains of Maori interred there many generations ago.
[131] Protection of Maori well being is provided for in Part II of the Resource Management Act 1991 and is a valuable demonstration of the variety of mechanisms in the Act which are applicable to Maori.
[132] High Court, Hamilton AP 55/97, 5 September 1997, Hammond J.
[133] The consent was granted to TV 3 to instill a television translator on Horea Hill.
[134] s 6 (e) Resource Management Act 1991.
[135] The High Court noted Tainui's metaphysical and spiritual approach to the land, the loss of which would be 'culturally debilitating' and 'could never be justified on the basis of economic advancement.

C Recognition of customary title

Marlborough Sounds is also significant for Maori in that it provides domestic recognition of the international trend towards acknowledgement of customary aboriginal title.[136] Hingston J supported the high thresholds which are required to extinguish Native title by legislative or executive action set out in *Mabo v Queensland*[137] and *The Wik People v The State of Queensland and Others etc*[138] and warned against the extinguishment of customary rights by a 'side wind'. He commented that recourse to the reasoning in these cases was both 'desirable and helpful'[139] in coming to his conclusions. Furthermore, Hingston J took time to encourage Parliament to secure the recognition of customary title by legislative action:

> "recent authorities both in other jurisdictions and New Zealand spell out the need that confiscatory legislation in this field must clearly and unequivocally deal with extinguishment; it must be part of or one of the purposes of an enactment that extinguishment is intended; significantly *Faulkner* suggests that where there is extinguishment without consent of Maori (in time of peace) compensation should be paid." [140]

With these comments Hingston J offers Maori a certain confidence that their customary rights will not be lightly disregarded in the future.

X CONCLUSION

The potentially explosive Maori Land Court decision in *Marlborough Sounds* has sent disturbing ripples throughout New Zealand. The decision has startled the public of New Zealand, and raised eyebrows and tempers in legal, political and academic circles. The importance of the case for all New Zealanders, Maori and non- Maori alike, should not be underestimated or ignored. Whilst the decision by Hingston J reflects the current trend towards recognition of customary rights of Maori to their ancestral lands, all the potential outcomes for the Crown are undesirable. The Crown is possibly left stripped of all legal claims to the foreshore and left with the prospect of making time-consuming amendments to those statutes premised on the assumption that the foreshore is public property vested in the Crown. Likewise the implications for the New Zealand public are equally unattractive. The coastline is an important part of New Zealand life. To see the foreshore barricaded off would be intolerable and a diminution of valuable rights which all New Zealanders have long taken for granted.

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[136] In "*Foreshore appeal disturbs*" ,above n 2, 9, Dr Williams commented that "Customary land rights are becoming increasingly important in a number of countries, including New Zealand, and should be resolved." It was also noted that "In Australia, the hugely important *Mabo* and *Wik* High Court cases found that native Aborigine title could exist on vacant Crown land and on occupied pastoral lease land. In Canada last year, the Supreme Court issued a landmark decision that native Indian rights to a resource-rich land were not invalidated by European settlement".

[137] *Mabo(no 2)* above n 38.

[138] *The Wik People v State of Queensland and Others etc.*[1996] 187 CLR 1.

[139] *In re the Marlborough Sounds foreshore and Seabed,* above, n 13, 11.

[140] *In re the Marlborough Sounds foreshore and Seabed,* above, no 13, 11.

Although the case is currently on appeal, it is suggested an overruling of Hingston J's decision could not in itself resolve these concerns and preserve the Crown's title and public rights to the foreshore. Arguably, Parliament should have acted a long time ago in order to avoid the current confusion and uncertainty of the law relating to the foreshore. The present author wishes to see respect afforded to the sacred nature of the coastline. Furthermore, those who have the required authority need to take on the responsibility to avoid further threats to the foreshore and public rights in order to change this state of affairs which is unacceptable in the national interest.

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