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**MAKING WAVES: CONCEPTIONS OF ABORIGINAL  
TITLE IN THE MARLBOROUGH SOUNDS  
FORESHORE AND SEABED**

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*Te Whare Wananga  
o te Upoko o te Ika a Maui*



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The text of this paper (excluding contents page, footnotes, and bibliography) comprises approximately 15,800 words.

**Abstract** INTRODUCTION

This paper examines the various conceptions of aboriginal title and the way in which they could influence a finding of Maori proprietary rights in the foreshore and seabed. The paper argues that the conception taken will have an important bearing on the effects of such a finding. Hingston J's decision in the 1997 *Marlborough Sounds* case (presently awaiting a decision from the Maori Appellate Court) is used as a recent instance of discussion on the doctrine of aboriginal title. With respect to the foreshore, the case represents a significant restriction on *Re the Ninety Mile Beach*. It also suggests that a re-examination of the Crown's unburdened ownership of the foreshore is now necessary. With respect to the seabed, the case prompts discussion on the sort of indigenous proprietary rights which may exist in it. The paper argues that the source of the Crown's territorial sovereignty over the seabed, may be an important factor in determining this. Finally, the paper outlines some possible impacts of Hingston J's finding on the coastal permitting regime in the Resource Management Act 1991. The potential effects of other conceptions of aboriginal title are also introduced.

The text of this paper (excluding contents page, footnotes, and bibliography) comprises approximately 15, 800 words.

This paper argues that the resolution of these issues may depend on the conception of aboriginal title which is taken. The post *Mabo* era has raised a number of different ways in which aboriginal title may be analysed. These are introduced in Part III of this paper. Parts IV and V examine the results of previous Maori claims in foreshores and the seabed and how these may also influence the outcome in the *Marlborough Sounds* case. The ultimate outcome will set a precedent which may impact on many New Zealanders. The assumptions that the beaches and coastal waters of New Zealand are publicly owned and ultimately controlled by the Crown, are being challenged. New Zealanders have an interest in why this challenge is occurring and how it could affect their use of the waterfront.

<sup>1</sup>The first case which recognised aboriginal title was *R v Symonds* (1847) [1840-1912] NZPCC 387.

<sup>2</sup>*Mabo v State of Queensland* (1992) 107 ALR 1 [Mabo].

## I INTRODUCTION OUGH SOUNDS FORESHORE AND SEABED?

The doctrine of aboriginal title has always been recognised in New Zealand.<sup>1</sup> Unlike their Australian counterparts, New Zealand Maori were regarded as having some property rights in the land they occupied. It was not until the watershed case of *Mabo* in 1992 that Australian Aborigines and Torres Strait Islanders were recognised as having similar property rights.<sup>2</sup> Most of the controversy surrounding the doctrine in New Zealand has centred on the modes of extinguishing aboriginal title and the nature and incidents that any unextinguished title could possess.

This paper examines the possibility that aboriginal title remains unextinguished in New Zealand's foreshores and seabed. This is an especially contentious issue for Maori who have consistently maintained that foreshores and the seabed are just as important to their customary way of life as any portion of terra firma. A case before Hingston J in the Maori Land Court in October 1997 reflects this concern and provides the focus for this paper's discussion of aboriginal title. The case centres on marine farms in the Marlborough Sounds whose businesses are based on coastal permits issued under the Resource Management Act 1991 (RMA). Important issues arise from the possibility of unextinguished aboriginal title. The extent to which the validity of these permits may be affected by unextinguished title is traversed in Part VI of the paper.

This paper argues that the resolution of these issues may depend on the conception of aboriginal title which is taken. The post *Mabo* era has raised a number of different ways in which aboriginal title may be analysed. These are introduced in Part III of this paper. Parts IV and V examine the results of previous Maori claims in foreshores and the seabed and how these may also influence the outcome in the *Marlborough Sounds* case. The ultimate outcome will set a precedent which may impact on many New Zealanders. The assumptions that the beaches and coastal waters of New Zealand are publicly owned and ultimately controlled by the Crown, are being challenged. New Zealanders have an interest in why this challenge is occurring and how it could affect their use of the waterfront.

<sup>1</sup>The first case which recognised aboriginal title was *R v Symonds* (1847) [1840-1932] NZPCC 387.

<sup>2</sup>*Mabo v State of Queensland* (1992) 107 ALR 1 [*Mabo*].

## II *IN RE MARLBOROUGH SOUNDS FORESHORE AND SEABED*<sup>3</sup>

This case concerns an application from Te Tau Ihu a Maui, a confederation of eight iwi from the north of the South Island, for a determination that large parts of the Marlborough Sounds foreshore and seabed remain burdened by aboriginal title. Declarations were sought from Hingston J in the Maori Land Court under sections 18(1)(h) and 131 of the Te Ture Whenua Maori Act that the land was Maori customary land, or alternatively under section 18(1)(i), that the land was held by the Crown in a fiduciary capacity for the applicant iwi. The Te Tau Ihu iwi were especially concerned that the issue of coastal permits under the RMA for the purpose of marine farming fundamentally affected their customary property rights over the foreshore and seabed.

The Crown objected on the basis that the Maori Land Court lacked the jurisdiction to make these orders because aboriginal title to the foreshore and seabed had already been extinguished. The Crown argued that the New Zealand Court of Appeal's decision in *In Re the Ninety Mile Beach* was authority for this proposition with regard to the foreshore and was binding on the court.<sup>4</sup> In relation to the seabed, the Crown argued that section 7 of the Territorial Sea and Exclusive Economic Zone Act 1977 effectively extinguished any customary rights which may have existed in it.<sup>5</sup>

An interim decision was made on 22 December 1997 regarding these preliminary questions of law. Evidential issues such as whether the applicant iwi in fact exercised customary rights over the foreshore and seabed, were not addressed by the court. Hingston J's findings on the law will be examined later in the paper, although, at this stage, it is worth noting that his decision has since been appealed to the Maori Appellate Court.<sup>6</sup>

<sup>3</sup>*In Re Marlborough Sounds Foreshore and Seabed* (1997) 22A Nelson MB 1 [*Marlborough Sounds*].

<sup>4</sup>*Marlborough Sounds* (1997) 22A Nelson MB 2.

<sup>5</sup>*Marlborough Sounds* (1997) 22A Nelson MB 5.

<sup>6</sup>"Appeal May Change Courts" *The Dominion*, Wellington, New Zealand, 25 April 1998, 1.

### III THE DOCTRINE OF ABORIGINAL TITLE

#### A General

In *Ika Whenua* Cooke P defined aboriginal title as "...a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation."<sup>7</sup> The doctrine arises independently of the Treaty of Waitangi and especially its land guarantee in Article II. This gives the doctrine greater enforceability in New Zealand courts because the Treaty can only be enforced when it is specifically incorporated into a statute.<sup>8</sup> The doctrine of aboriginal title however is sourced in the common law. It is part of New Zealand law today and continues until validly extinguished.<sup>9</sup>

The extent of aboriginal title has also been considered by New Zealand courts. The most recent analysis was made by the Wellington High Court on 14 May 1998 in *Taranaki Fish and Game Council v McRitchie*.<sup>10</sup> This case concerned an appeal of Becroft J's decision in the Wanganui District Court that Maori could take trout without a licence because they had aboriginal title in it. The appeal was made on the basis that trout were an introduced species rather than indigenous and that therefore no customary rights could exist. The High Court upheld the appeal, reasoning that the taking of trout has always been regulated by legislation and this precluded any indigenous rights in them.<sup>11</sup> The decision however did not rule out the possibility of aboriginal title to introduced species of fish.<sup>12</sup> The Maori respondents have also indicated an intention to appeal.<sup>13</sup>

<sup>7</sup>*Te Runanganui o Te Ika Whenua Inc Soc v Attorney General* [1994] 2 NZLR 20, 23-24 [*Ika Whenua*].

<sup>8</sup>*New Zealand Maori Council v Attorney General* [1992] 2 NZLR 576, 603.

<sup>9</sup>*Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 [*Te Weehi*].

<sup>10</sup>(14 May 1998) unreported, High Court, Wellington Registry, AP 19/97.

<sup>11</sup>*Taranaki Fish* above n10, 24.

<sup>12</sup>*Taranaki Fish* above n10, 22.

<sup>13</sup>Benjamin Richardson "Maori Customary Rights and Trout Fishing" (1998) 2 BRMB 139.



As well as this decision, claims to aboriginal title over other activities have been rejected. In *Ngai Tahu Maori Trust Board v Director General of Conservation*, a claim to title over commercial whale watching permits was rejected because it was "founded on the modern tourist trade and distinct from anything envisaged in or any rights exercised before the treaty."<sup>14</sup> In *Ika Whenua*, the Court of Appeal rejected aboriginal claims to the generation of electricity because they too could not have been envisaged in pre-colonial times.<sup>15</sup> Aboriginal title claims over the foreshores however are not so novel and can be traced back to the *Kauwaeranga* decision in 1870.<sup>16</sup> This history of grievance suggests foreshore claims are likely to be more persuasive in modern courts than claims over trout, whale watching, or electricity generation.

The methods of extinguishing aboriginal title and the nature and incidents of unextinguished aboriginal title probably depend on which conception of the doctrine is taken. All conceptions have played an important role in the analysis of aboriginal proprietary rights overseas. Their influence is also visible in New Zealand's legal history, and the preference of one conception over the others may have an important bearing on the outcome in the *Marlborough Sounds* case. In particular, the conception used may be important in determining the extent to which coastal management under the RMA must take into account any unextinguished title.

### **B The Conception of Common Law Aboriginal Title**

This conception is based on the thesis of Kent McNeil in his book *Common Law Aboriginal Title*, and was influential in Toohey J's judgment in *Mabo*.<sup>17</sup> McNeil argued that his conception only applied to colonies of settlement. His conception is applicable to New Zealand whose legal history has proceeded on the assumption it was settled.<sup>18</sup> While some legal historians challenge this assumption, the content of these challenges is worthy of analysis in itself and will not be considered by this paper.

<sup>14</sup>[1995] 3 NZLR 553, 559.

<sup>15</sup>*Ika Whenua* above n7, 25.

<sup>16</sup>Judgment reprinted in (1984) 14 VUWLR 227.

<sup>17</sup>Kent McNeil *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989) [*Common Law Aboriginal Title*].

<sup>18</sup>Philip A Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Company, Sydney, 1993) 32-33.

The distinction between settled territories and territories that had been either conquered or ceded is important in colonial law. In a settled territory, British law applies as soon as settlement occurs, while in a conquered or ceded territory, local customary laws remain in place until explicitly changed by the Crown.<sup>19</sup>

McNeil argued that the reception of British common law in settled territories meant that the common law should establish a "presumptive title" for indigenous inhabitants in their lands. Such a presumptive title arises out of prior occupation and would protect the private property rights of the indigenous people in a British legal system. McNeil called this presumptive title, "common law aboriginal title".<sup>20</sup>

In applying McNeil's analysis in *Mabo*, Toohey J equated aboriginal title with a fee simple one. This meant that the indigenous people's prior occupation was enforceable against the whole world because nobody (including the Crown), could show a better claim to possession.<sup>21</sup> This would also mean that unextinguished aboriginal title includes title to the subsurface and any minerals which lie within.<sup>22</sup> The Native Land Court process in New Zealand where aboriginal title was converted into a fee simple title, suggests New Zealand has been influenced significantly by this conception.

### C *Brennan J's Conception of Aboriginal Title*

In *Mabo*, Brennan J conceived of the doctrine as being the same in settled, ceded, and conquered territories. McNeil's presumption that customary laws are inapplicable after settlement and British law must be imported to fill the legal vacuum, was not made by Brennan J.<sup>23</sup>

<sup>19</sup>*Blankard v Galdy* (1693) 2 Salk 411; 91 ER 356 and *Kielly v Carson* (1842) 4 Moo PC 63; 13 ER 225.

<sup>20</sup>*Common Law Aboriginal Title* above n17.

<sup>21</sup>*Mabo* above n2, 162-167.

<sup>22</sup>*Common Law Aboriginal Title* above n17, 208.

<sup>23</sup>*Mabo* above n2, 41. Brennan J stated that it made no difference to the rights of indigenous inhabitants whether the colony was settled or conquered.

Brennan J did not think aboriginal title bore any resemblance to a fee simple one. Instead, aboriginal title was regarded as a burden on the Crown's radical title with its nature and incidents determined by the customary law which existed in pre-colonial times.<sup>24</sup> This would deny title to oil and gas for instance since they were not a part of the customary economy. This is probably not the situation in New Zealand. Although petroleum, gold, silver and uranium were nationalised by section 10 of the Crown Minerals Act 1991, many minerals are owned either by those who hold the fee simple title to the land in which they lie, or by those who hold fee simple titles to the minerals themselves.<sup>25</sup>

Brennan J also thought that aboriginal title could only be recognised where indigenous people continued to occupy the land and use it in a way which was consistent with the traditional uses. There would probably be no such requirement of continuity and use in McNeil's conception because there is no similar requirement in holding fee simple title. Michael Mansell also criticised this portion of Brennan J's judgment on the basis it essentially limited the scope of aboriginal title to a small proportion of Aborigines in Australia. Many Aborigines were forcibly removed from their lands by the Crown. Their loss of occupation and use was certainly involuntary.<sup>26</sup>

#### *D Modes of Extinguishment*

The methods of extinguishing aboriginal title also depend on whether McNeil's or Brennan J's conception is used. For instance, Brennan J held that aboriginal title could be extinguished either by statute or by a Crown grant of the freehold or leasehold title which was inconsistent with continued use of the aboriginal title.<sup>27</sup> This mode of extinguishment illustrates Brennan J's conception of aboriginal title as an interest which is less than a freehold or a leasehold one. Michael Mansell argues that this view is racist because it reinforces the view that indigenous people's interests in land are something less than the interests of Europeans.<sup>28</sup>

<sup>24</sup>Brennan J's approach was approved in *Wik v State of Queensland* (1996) 187 CLR 1 [*Wik*].

<sup>25</sup>However this does not apply to fee simple titles which are traceable to a Crown grant under the Lands Act 1948. Section 59 of this Act reserved minerals to the Crown.

<sup>26</sup>Michael Mansell "The Court Gives An Inch But Takes Another Mile" (1992) vol 2, no 57 ALB 6 ["The Court Gives An Inch"].

<sup>27</sup>Since section 238 of the Native Title Act was passed in Australia in 1993, the Crown grant must now be statutory for extinguishment to occur.

<sup>28</sup>"The Court Gives An Inch" above n26, 6.

Toohy J suggested (although did not decide) that aboriginal title could not be extinguished by statute even where the legislation was clear and plain.<sup>29</sup> This is probably because the common law seeks to protect lawful fee simple owners. In New Zealand there is also authority to suggest that aboriginal title cannot be extinguished by an inconsistent Crown grant unless there is legislative authority to do so. The grantee's interest in such a case would be taken subject to the aboriginal title.<sup>30</sup>

Statutory extinguishment however has occurred in New Zealand. The most important statutory provision for this purpose was section 84 of the Native Lands Act 1909 which became section 155 of the Maori Affairs Act 1953 (since repealed by the Te Ture Whenua Maori Act). Section 155 stated:

Except so far as may be otherwise *expressly provided* in any other Act, the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any other manner as against Her Majesty the Queen or against any Minister of the Crown or any person employed in any Department of State acting in the execution of his office. (emphasis added)

This provision effectively prevented Maori from asserting customary rights over the foreshore in the ordinary court process. This is because there was no express statutory enactment which would have enabled Maori to do so. Although most aboriginal proprietary rights had already been converted into freehold title when section 155 was enacted, it was this provision which resulted in Maori taking their foreshore claims to the Native Land Court.<sup>31</sup> The Native Land Court became the only avenue through which their proprietary claims to the foreshore could be recognised and enforced.

The most important modes of extinguishment in New Zealand were purchase and, in exceptional circumstances, confiscation under the New Zealand Settlements Act 1863. Prior to 1862 the Crown's right of pre-emption meant it was the only party capable of purchasing land from Maori.

<sup>29</sup>*Mabo* above n2, 162.

<sup>30</sup>*Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 363 in approving *Nireaha Tamaki v Baker* (1901) NZPCC 371 [*Faulkner*].

<sup>31</sup>Richard Boast "In Re Ninety Mile Beach Revisited: The Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 VUWLR 145, 154 ["In Re Ninety Mile Beach Revisited"].

After the 1862 and 1865 Native Lands Acts however, purchase could occur on the open market once aboriginal title had been converted into a certificate of title from the Native Land Court.<sup>32</sup> Extinguishment through purchase was based on the presumption that Maori possession of their lands was akin to fee simple ownership. This is of course consistent with McNeil's conception of aboriginal title.

The purchase of Maori freehold land however has been altered in New Zealand by the Te Ture Whenua Maori Act 1993. The High Court in *Mangatu Incorporation v Valuer General* recognised this statute as an attempt to "close the gate" on sales of Maori freehold land.<sup>33</sup> Sections 146 and 147(2) of the statute show how this is done. Section 146 provides that no Maori freehold land may be alienated unless in accordance with this Act. Section 147(2) ensures that alienating owners must give the right of first refusal to those within the preferred classes of alienees. These preferred classes are defined in section 4 and include: the children of the owner, whanaunga of the owner, and other members of the hapu who are associated with the land.

The Te Ture Whenua Maori Act also includes other restrictions on alienability. For instance, although the Maori Land Court has the ability to convert Maori freehold land into General land, sections 135-137 place restrictions on their ability to do so, and decisions by them since 1993 reflect a reluctance to convert.<sup>34</sup> The 1993 Act certainly strikes a balance between McNeil's conception based on fee simple title and Brennan J's conception based on occupancy. While alienation to members of the public has been recognised as an important (and valuable) incident of Maori proprietary rights, the danger inherent in allowing indigenous people to lose connection with their land forever has also been addressed.

Regardless of which mode is used to extinguish aboriginal title, modern authority suggests there is still a presumption against it and any purported extinguishment must show a "clear and plain intention" to do so.<sup>35</sup> With regard to statutory extinguishment it is unclear whether an intention to extinguish must be explicit in the legislation.

<sup>32</sup>Peter Spiller, Jeremy Finn, Richard Boast *A New Zealand Legal History* (Brookers, Wellington, 1995) 135-153.

<sup>33</sup>[1996] 2 NZLR 683, 694.

<sup>34</sup>*Mangatu Incorporation* above n33.

<sup>35</sup>*Te Weehi* above n9, 691 in approving *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513.

Mahoney J in *Hamlet of Baker Lake* held that if a statute's "necessary effect" was to abridge or abrogate a common law right then this should be enforced by the courts. Mahoney J thought this was as true of an aboriginal title as any other common law right.<sup>36</sup> New Zealand courts however regard aboriginal title as being too important to disappear by a "side wind".<sup>37</sup> The burden on the Crown in proving statutory extinguishment may indeed be higher in New Zealand than Canada. *Faulknor v Tauranga District Council* for instance held that statutory extinguishment could only occur by means of deliberate legislation which was unambiguously directed towards that end.<sup>38</sup> With regard to Crown purchase, any purchase which is less than fair or which is undertaken without the free consent of the indigenous people is a breach of the Crown's fiduciary obligation. Such an action may even result in a requirement by the Crown to pay compensation.<sup>39</sup>

### *E The Canadian Conception*

In *Delgamuukw v The Queen*, chiefs of the Gilksan and Wet'suwet'en (numbering between 5,500 and 7,000 people), claimed aboriginal title over 58,000 square kilometres of British Columbia.<sup>40</sup> The Canadian Supreme Court overruled the British Columbia Court of Appeal's decision that there was insufficient evidence to prove aboriginal title. Dicta was also important in determining a Canadian conception of aboriginal title. The Canadian conception probably lies somewhere between McNeil's notion which rests solely on the common law imported into settled colonies, and Brennan J's notion which examines aboriginal title with reference to the customary law.<sup>41</sup>

This conception has an important impact on the nature of aboriginal title. *Delgamuukw* held that fee simple ownership should not be recognised (unlike McNeil) because lands held under aboriginal title cannot be used in a manner that is "irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to aboriginal title."

<sup>36</sup>(1979) 107 DLR (3d) 513, 551.

<sup>37</sup>*Faulknor* above n30.

<sup>38</sup>*Faulknor* above n30.

<sup>39</sup>*Te Runanga o Muriwhenua Inc v Attorney General* [1990] 2 NZLR 641, 655; *Te Runanga o Wharekauri Rekohu Inc v Attorney General* [1993] 2 NZLR 301, 306; *Ika Whenua* above n7, 23-24.

<sup>40</sup>(1998) 153 DLR (4th) 193 [*Delgamuukw*].

<sup>41</sup>Maori LR Dec 1997/Jan 1998 6.

Fee simple ownership would threaten the continuity of the relationship that indigenous people should have with their land.<sup>42</sup> However the conception is also different to Brennan J's notion where the nature and incidents of aboriginal title are determined solely by customary law. For instance, *Delgamuukw* held that land occupied under aboriginal title could be used for purposes unconnected with former practices or customs.<sup>43</sup> This meant indigenous people could exploit oil reserves for example. Presumably this would only be the case where such a purpose would not prevent the indigenous people from using the land in a way they have customarily used it. As noted on page 10, this reasoning has been followed to a certain extent in New Zealand.

*Delgamuukw* held that evidence of both prior and present occupation was required to establish aboriginal title. However the Court held that this evidence did not require "an unbroken chain of continuity" (Brennan J's conception would require this). Indeed the Court thought this requirement would be unfair especially where indigenous occupation was disrupted simply because European colonisers were unwilling to recognise aboriginal title.<sup>44</sup> The nature of occupation was also discussed. As long as a substantial connection between the people and the land was maintained it was not regarded as important if the precise nature of occupation had changed.<sup>45</sup> This is consistent with the observations of all the *Mabo* judges.

The Canadian conception also makes interesting observations regarding extinguishment. *Delgamuukw* held that aboriginal title was alienable only to the Crown.<sup>46</sup> This is of course different to McNeil's conception which would enable aboriginal title (being similar to a fee simple) to be alienable to anyone. It is also different to the statutory regime historically enacted in New Zealand. Once aboriginal title had been through the Native Land Court process, it too was alienable to anyone.<sup>47</sup>

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<sup>42</sup>Maori LR, above n41, 7.

<sup>43</sup>*Delgamuukw* above n40, 243-246.

<sup>44</sup>*Delgamuukw* above n40, 257.

<sup>45</sup>*Delgamuukw* above n40, 258.

<sup>46</sup>*Delgamuukw* above n40, 241.

<sup>47</sup>Although, as noted on page 12, the Te Ture Whenua Maori Act 1993 has placed restrictions on this.

*Delgamuukw* is authority for the proposition that alienation of aboriginal title to the Crown could only occur where there was some consideration for it.<sup>48</sup> This would appear to exclude extinguishment by either the simple passage of a statute or making an inconsistent Crown grant. These of course were two legitimate modes of extinguishment in Brennan J's opinion. The finding is also consistent with the earlier Canadian case of *Guerin v The Queen*.<sup>49</sup> In *Guerin*, Dickson J held that alienation of aboriginal title imposed an obligation on the Crown to only deal with the land in the future for the indigenous people's benefit.<sup>50</sup> Canadian authority therefore supports Cooke P's observations in *Ika Whenua* that the extinguishment of aboriginal title requires proper compensation to be paid by the Crown.<sup>51</sup>

The compensation requirement arose from characterising the relationship between Indian and the Crown as fiduciary or trustlike in nature. Both *Guerin* and *Delgamuukw* made observations to this effect.<sup>52</sup> The fiduciary concept has been approved in New Zealand and is particularly relevant to the *Marlborough Sounds* case.<sup>53</sup> As noted on page 6, section 18(1)(i) of the Te Ture Whenua Maori Act provides for land being held by the Crown as fiduciary for Maori. As well as the compensation requirement, a further ancillary of a fiduciary relationship is the emphasis on consultation. In *Delgamuukw*, Lamer CJC stressed that the Indian people were an important participant in the development and management of resources on their lands.<sup>54</sup> The extent of this consultation requirement will be explored later in this paper.

<sup>48</sup> Note that in his analysis McHugh appears to have been primarily influenced by McNeil's conception of aboriginal title.

<sup>49</sup> Paul McHugh "The Legal Status of Native Fishing Rights in Tidal Waters" (1984) 14 VUWLR 247 ("The Legal Status of Native Fishing Rights").

<sup>50</sup> *Delgamuukw* above n40, 265. See also *Guerin v The Queen*, [1984] 1 SCR 349, 360 (CJC). See also *Canada v. New Zealand Law and the Treaty of Waitangi* (Oxford University Press, 1985) 13 DLR (4th) 321.

<sup>51</sup> *Guerin* above n49, 339.

<sup>52</sup> *Ika Whenua* above n7.

<sup>53</sup> *Guerin* above n49, 334; *Delgamuukw* above n40, 264-265.

<sup>54</sup> *Ika Whenua* above n7, 24.

<sup>55</sup> *Delgamuukw* above n40, 264. See also *Report (Vol 2)* 916-919.



*F McHugh's Non-Territorial Aboriginal Title*<sup>55</sup>

In a 1984 article Paul McHugh conceived of unextinguished aboriginal title as being non-territorial in nature.<sup>56</sup> This meant that while aboriginal title to land may have been legitimately extinguished using one of the modes examined on pages 10 to 13, this did not necessarily extinguish other indigenous rights connected with the land. McHugh in *The Maori Magna Carta*, used the hunting and fishing rights of Canadian Indians over Crown land, as an example of aboriginal title, non-territorial in nature, which remained unextinguished.<sup>57</sup>

McHugh regarded non-territorial title as being similar to profits-a-prendre, which is a third party's right to go onto another party's land and remove some of the fruits of the land (such as water or fish).<sup>58</sup> One New Zealand case has described non-territorial title as being similar to an easement, which is governed by similar common law rules as profits-a-prendre.<sup>59</sup> McHugh has also used the term "aboriginal servitudes" to describe this form of aboriginal title.<sup>60</sup>

As McHugh has acknowledged however, the main problem with this conception is the "indefeasibility of title" rule inherent in New Zealand's Torrens system of land transfer.<sup>61</sup> That is, fee simple owners take title subject only to the interests noted on their certificate. Indeed in its Ngai Tahu report, the Waitangi Tribunal declined to recommend that certificates of title should be encumbered with any aboriginal title.<sup>62</sup> However the argument for recognising non-territorial aboriginal title may be stronger with regard to New Zealand's foreshores and seabed. In general these pieces of land have not been Crown granted. There is no fee simple title to them, which a non-territorial title would encumber.

<sup>55</sup>Note that in his analysis McHugh appears to have been primarily influenced by McNeil's conception of aboriginal title.

<sup>56</sup>Paul McHugh "The Legal Status of Maori Fishing Rights in Tidal Waters" (1984) 14 VUWLR 247 ["The Legal Status of Maori Fishing Rights"].

<sup>57</sup>Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 138 [*The Maori Magna Carta*].

<sup>58</sup>*The Maori Magna Carta* above n57.

<sup>59</sup>*Kauwaeranga* above n16.

<sup>60</sup>Paul McHugh "Aboriginal Servitudes and the Land Transfer Act" (1986) 16 VUWLR 313.

<sup>61</sup>*The Maori Magna Carta* above n57, 140.

<sup>62</sup>Waitangi Tribunal, *Ngai Tahu Report* (Wai 27) 916-919.

#### IV FORESHORES

##### A General Principle

For the purposes of the *Marlborough Sounds* case, the relevant definition of the foreshore is contained in section 2 of the RMA: "Any land covered and uncovered by the flow and ebb of the tide at mean spring tides." The general common law presumption is that the foreshore is owned by the Crown by prerogative.<sup>63</sup> Neither McNeil nor Brennan J made this presumption with regard to terra firma. Indeed the general presumption was in favour of aboriginal title as long as certain evidential requirements were met. McNeil thought foreshores were an exception. In McNeil's opinion this was because foreshores have always been unoccupied and are therefore analogous to waste lands which belong presumptively to the Crown rather than presumptively to the occupier.<sup>64</sup>

It is questionable however whether this analogy should be persuasive. Regarding coastlines as being similar to waste lands appears inaccurate given the various activities and ways in which the coastal area has been utilised by all cultures throughout history. Certainly in New Zealand, Maori have never regarded the foreshore in this way. The foreshore has always been a vital source of fish, shellfish and seabirds and in pre-colonial times was also an important right of passage around the coastline. Indeed it is unlikely that the presumption of Crown ownership is part of New Zealand law. In *Re the Ninety Mile Beach* TA Gresson J stated that the acceptance of this rule "would involve a serious infringement of the spirit of the Treaty of Waitangi and would in effect amount to depriving the Maoris of their customary rights over the foreshore by a side wind rather than an express enactment."<sup>65</sup>

Even if the presumption of Crown ownership had been accepted in *Re the Ninety Mile Beach* it would still be rebuttable by subjects who can show continuous occupation of sufficient duration for a Crown grant to be presumed.<sup>66</sup> This is known as the doctrine of adverse possession.

<sup>63</sup> *Halsbury's Laws of England* (4ed, Butterworths, London, 1980) vol 18, para 1418.

<sup>64</sup> *Common Law Aboriginal Title* above n17, 104.

<sup>65</sup> [1963] NZLR 461, 477.

<sup>66</sup> *AG v Portsmouth* (1877) 25 WR 559.

The doctrine involves Real Property Law principles rather than recourse to aboriginal title and remains an interesting avenue through which Maori could claim title to the foreshore. Adverse possession is based on the premise that possession (both factual and an intention to possess) remains the root of title.<sup>67</sup> Adverse possessors can dispossess the true owner and claim title to the land they possess when certain requirements are satisfied. Cooper J in *McDonnell v Giblin* held that the possession relied upon must be "actual, open and manifest, exclusive and continuous."<sup>68</sup> This means that the possession must be sufficiently obvious to give the true owner the means of knowledge that some person has entered into possession adversely to her title. It also means that a person, living in the locality and passing the allotment from time to time, would be able to observe that some person had taken possession of the land. As well as these requirements, it is likely that an adverse possessor must also have the intention of excluding the true owner as well as other persons.<sup>69</sup>

The possibility of adverse possession claims to some portions of the foreshore, such as creek beds or tidal streams, has already been raised.<sup>70</sup> These claims would probably be made by those who hold title to adjoining properties. There appears no reason in principle why a claim of adverse possession over an entire foreshore could not be made as long as the *McDonnell* requirements were met. *McDonnell's* exclusivity requirement may be particularly difficult to satisfy. However, apart from this, provided Maori, for the requisite period of 60 years (required by section 7(1) of the Limitation Act 1950) have both maintained their claim to a particular foreshore and continued the series of possessory acts in respect of it, and no claim by the Crown has interrupted the period, an adequate claim to adverse possessory title may be made out.<sup>71</sup>

While adverse possession provides an interesting possibility for Maori claimants, this part of the paper discusses the claims of aboriginal title which have been made over New Zealand foreshores. The impact of the conceptions discussed in the previous section will be considered in relation to two important cases: *Kauwaeranga* and *Re the Ninety Mile Beach*.

<sup>67</sup>Frederick Pollock and Robert Wright *An Essay on Possession in the Common Law* (Clarendon Press, Oxford, 1888) 94-95.

<sup>68</sup>(1904) 23 NZLR 660 at 662-663 applied in *Cotton v Keogh* [1996] 3 NZLR 1, 7.

<sup>69</sup>Hinde, McMoreland and Sim *Butterworths Land Law in New Zealand* (Butterworths, Wellington, 1997) paras 2.182, 2.187.

<sup>70</sup>FM Brookfield "Prescription and Adverse Possession" in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 162.

<sup>71</sup>"Prescription and Adverse Possession" above n70, 204.

Although *Kauwaeranga* was concerned with the initial recognition of aboriginal title while *Re the Ninety Mile Beach* was concerned with extinguishment, both decisions provide insights into how aboriginal title has been perceived in New Zealand and how it may be perceived in the *Marlborough Sounds* case.

### **B *Kauwaeranga***<sup>72</sup>

This was a judgment by Fenton CJ in the Native Land Court in December 1870. It was referred to in the judgments in *Re the Ninety Mile Beach* although little comment was passed on its persuasiveness. The issue was whether Maori inhabitants could claim a certificate of title (by converting their aboriginal title into a Crown derived freehold one) to a piece of Shortland foreshore. Fenton CJ initially held as a matter of fact, that the foreshore had been occupied by the Maori claimants according to their customs and usages. In particular, the foreshore had been used for generations for fishing with stake nets and as a private ground for gathering pipis.<sup>73</sup>

Fenton CJ recognised aboriginal title as a legitimate burden on the Crown's right to govern. He thought the Treaty of Waitangi itself provided ample evidence of this.<sup>74</sup> The exact nature of the aboriginal title caused greater difficulties. Fenton CJ refused to issue a certificate of title to the fee simple in the soil because he was concerned that such an award could preclude the public from passing over the beach to the sea.<sup>75</sup> His concern therefore was a public policy one.

Instead Fenton CJ awarded to the claimants "the full, exclusive, and undisturbed possession of all the rights and privileges over the locus in quo (the foreshore) which they or their ancestors have ever exercised."<sup>76</sup> The effect of categorising aboriginal title in this way was, in Fenton CJ's opinion, to create a privilege or easement over the foreshore in favour of the claimants. Since easements are now a registrable interest under the Land Transfer Act 1952, they themselves create a type of fee simple estate. It is unlikely however that Fenton CJ was referring to an easement in this strict sense.

<sup>72</sup>Judgment reprinted in (1984) 14 VUWLR 227 [*Kauwaeranga*].

<sup>73</sup>*Kauwaeranga* above n72, 229.

<sup>74</sup>*Kauwaeranga* above n72, 240.

<sup>75</sup>*Kauwaeranga* above n72, 244. Fenton CJ agrees with Best J in *Blundell v Catterall* (1821) 106 ER 1190.

<sup>76</sup>*Kauwaeranga* above n72, 245.

Fenton CJ was mainly concerned with preserving the claimant's right to take shellfish from the foreshore.<sup>77</sup> Section 23 of the Native Lands Act 1865 enabled him to do this. This section provides:

...shall order a certificate of title to be made and issued which certificate shall specify the names of the persons or of the tribe who *own* or are *interested* in the land describing the nature of such estate or interest and describing the land comprised in such certificate or the Court may in its discretion refuse to order a certificate to issue to the claimant or any other person. (emphasis added)

Section 23 allowed Fenton CJ to recognise an aboriginal interest in the foreshore which was less than a fee simple one. This is inconsistent with McNeil's conception, at least in relation to terra firma. McNeil thought that the first possessors of land, determined by the fact of occupation, had a fee simple title.<sup>78</sup> "Ownership" is provided for in section 23 above and considering the evidence Fenton CJ heard in relation to Maori use of the foreshore, there are strong arguments for suggesting that their rights as first occupiers required a fee simple title.

Fenton CJ's decision was probably more consistent with Brennan J's reasoning in *Mabo*. Brennan J also refused to recognise aboriginal title as being similar to a fee simple and regarded it as more of an occupation right instead. The right of Maori to take fish from the foreshore appears more consistent with a right to occupy that location in order to fish rather than a right to own the foreshore itself. The disadvantage for Maori with this conception is that Crown actions involving the foreshore, such as grants of a freehold or leasehold title in it, would extinguish the aboriginal title.<sup>79</sup> Of greater persuasion is the Canadian approach which requires some form of consideration from the Crown for any extinguishment. Customary easements are also consistent with McHugh's approach. McHugh insisted that actions by the Crown over the foreshore which were inconsistent with customary ownership, extinguished Maori territorial title only.

<sup>77</sup>*Kauwaeranga* above n72, 244.

<sup>78</sup>*Common Law Aboriginal Title* above n17, 298-299.

<sup>79</sup>*Mabo* above n2, 51.

Crown actions did not extinguish their non-territorial right to occupy the foreshore and exercise fishing and hunting rights over it.<sup>80</sup> In this respect at least, McHugh's conception of aboriginal title appears to acknowledge aboriginal rights which other conceptions would not.

*C Re the Ninety Mile Beach*<sup>81</sup>

In this case the Court of Appeal held that the Native Land Court lacked jurisdiction to investigate title into foreshore (that is, the process under the Native Lands Acts of 1862 and 1865 where aboriginal title is converted into a fee simple one). There were two reasons for this. Firstly, the Court of Appeal agreed with Turner J in the Supreme Court that section 147 of the Harbours Act 1878 (succeeded by section 150 of the Harbours Act 1950) deprived the Maori Land Court of jurisdiction to issue a fee simple order. Section 147 provided that: "no part of the foreshore was to be granted or given away other than with the authority of a special Act of Parliament."

It is questionable however whether this provision necessarily extinguishes aboriginal title. Indeed Turner J in the High Court expressed concern that "so sweeping a provision" should be found in this Act.<sup>82</sup> Certainly the provision does not mention extinguishment. It is also important to note that under all the conceptions of aboriginal title none require a conveyance nor a grant from Parliament to be valid. Indeed McNeil outlined other instances where title does not have to be derived from a Crown grant to be valid.<sup>83</sup> The status of section 147 as an extinguishment provision therefore is highly dubious.

Secondly, the Court of Appeal held that when coastal blocks adjoining the foreshore had been through the Maori Land Court process, aboriginal title to the foreshore itself was necessarily extinguished.<sup>84</sup> Thus, where a Crown grant was made to a coastal block specifying the sea as the boundary (no specific allowance for foreshores appear to have been made in Crown grants), the foreshore would either vest with the holder of the grant, or "remain" with the Crown itself.<sup>85</sup>

<sup>80</sup>Paul McHugh "The Legal Status of Maori Fishing Rights in Tidal Waters" (1984) 14 VUWLR 247, 267.

<sup>81</sup>*Re the Ninety Mile Beach* [1963] NZLR 461 (CA) [*Re the Ninety Mile Beach*].

<sup>82</sup>[1960] NZLR 673, 677.

<sup>83</sup>*Common Law Aboriginal Title* above n17, 300.

<sup>84</sup>*Re the Ninety Mile Beach* above n81, 473.

<sup>85</sup>*Re the Ninety Mile Beach* above n81, 473.

This second finding by the Court of Appeal has also been widely criticised. The notion that aboriginal title to one piece of land is extinguishable by a Native Land Court investigation into another, adjoining piece of land, is surely an unfair one. One author has suggested that the notion is unlikely to be accepted by contemporary courts.<sup>86</sup>

As with Fenton CJ in *Kauwaeranga*, public policy concerns were foremost in the reasoning. North J stated that recognising a fee simple title in the foreshore would have "startling" and "inconvenient" results. However, while Fenton CJ recognised a customary easement despite this, no aboriginal rights over the foreshore at all were acknowledged by the Court of Appeal. This could be because the applicable legislation had changed since *Kauwaeranga*. Section 161 of the Maori Affairs Act 1953 was now in force and this provided:

- (1) The Court shall have exclusive jurisdiction to investigate the title to customary land, and to determine the relative interests of the owners thereof.
- (2) Every title to and interest in customary land shall be determined according to the ancient customs and usages of the Maori people, as far as the same can be ascertained.
- (3) On any investigation of title and determination of relative interests under this section the Court shall make an order (*in this Act called a freehold order*) defining the area so dealt with, naming the persons found entitled thereto, and specifying their relative interests in the land. (emphasis added)

Section 162 provided:

Every freehold order shall on the making thereof have the effect of vesting the land therein referred to in the persons therein named for a *legal estate in fee simple* in possession, in the same manner as if the land had been then granted to those persons by the Crown, and the land shall be deemed to have been so granted accordingly, and shall thereupon cease to be customary land and shall become Maori freehold land. (emphasis added)

<sup>87</sup>"The Legal Status of Maori Fishing Rights" above n26, 260.

<sup>88</sup>Paul McHugh "The Legal Basis for Maori Claims Against the Crown" (1985) 18 YUWLR 1, 7.

<sup>89</sup>Section 301 of the Limitation Amendment Act 1981 imposes a limitation of 12 years from the date the

<sup>86</sup>"In Re Ninety Mile Beach Revisited" above n31, 169.

Therefore the option for the Maori Land Court to award an aboriginal title which was less than a fee simple one had been taken away by the legislation.<sup>87</sup> Because of the public policy concerns in awarding a fee simple title to the foreshore, the Court of Appeal decided that Maori could not be awarded anything at all. This was because, as noted on page 11, section 155 of the 1953 Act also prevented Maori from asserting customary title independently of the Maori Land Court process. The inability of the Maori Land Court to award anything less than a fee simple title probably continues today. According to section 129 of the Te Ture Whenua Maori Act 1993, the Maori Land Court can only recognise land as having one of the statuses listed. In section 129(1) these statuses include: Maori customary land, Maori freehold land, General land owned by Maori, General land, Crown land, and Crown land reserved for Maori. Section 129(2)(c)-(f) indicates that it is the estate in fee simple which must be recognised by the Court once the conversion from Maori customary land has occurred.

The restriction of the Maori Land Court's jurisdiction since *Kauwaeranga* means that it is only McNeil's conception of aboriginal title which can be recognised by this forum. While this conception probably entails more legal rights for Maori than any other, it also means that higher courts may be reluctant to allow it. The public policy concerns with freehold ownership of the foreshore were traversed both in *Kauwaeranga* and *Re the Ninety Mile Beach* and may provide the basis for denying the Maori Land Court jurisdiction in this area, even today.

The other avenue through which a McNeil type aboriginal title could be enforced is through a declaratory judgment by the High Court. As noted earlier, section 155 of the Maori Affairs Act 1953 effectively closed this avenue also. Section 155 was subsequently repealed by the Te Ture Whenua Maori Act 1993. This raised the possibility that civil actions against the Crown for this form of aboriginal title could once more be brought through the ordinary court process.<sup>88</sup> This possibility has since been removed however by amendments to the Limitation Act 1950.<sup>89</sup>

<sup>87</sup>"The Legal Status of Maori Fishing Rights" above n56, 260.

<sup>88</sup>Paul McHugh "The Legal Basis for Maori Claims Against the Crown" (1988) 18 VUWLR 1, 7.

<sup>89</sup>Section 361 of the Limitation Amendment Act 1993 imposes a limitation of 12 years from the date the action accrued to recover possession of Maori customary land.



## D Post *Re the Ninety Mile Beach*

### 1 The fisheries cases

Two High Court cases concerning customary fishing rights over the foreshore provide useful indications of how *Re the Ninety Mile Beach* has been applied in New Zealand. *Te Weehi v Regional Fisheries Officer* was the first of these cases. It centred on aboriginal title being used as a defence to a charge of possessing undersized paua contrary to regulation 8(1)(b) of the Fisheries (Amateur Fishing) Regulations 1983.<sup>90</sup>

The case concerned a claim of aboriginal title to the soil of the foreshore.<sup>91</sup> Because the case The defendant, of Ngati Porou descent, argued that he had an aboriginal right to take shellfish for his own personal use. The defence was successful. Williamson J was careful to highlight that the claim was not based on any rights to the soil of the foreshore itself.<sup>91</sup> *Re the Ninety Mile Beach* was therefore distinguishable on this basis. Instead Williamson J based his decision on McHugh's notion of a non-territorial title to the shellfish which remained unextinguished.<sup>92</sup> It was acknowledged therefore that the aboriginal right to take shellfish was severable from the ownership of the foreshore from which they were taken.

*Te Weehi* may be compared with the later case of *Green v Ministry of Agriculture and Fisheries*.<sup>93</sup> This case was concerned with a charge of possessing undersized toheroa in breach of regulation 22 of the Fisheries (Amateur Fishing) Regulations 1986. Once again the defendants claimed aboriginal property rights in the shellfish they had taken. However in this instance, the claim to aboriginal title was an exclusive one, exclusive to the defendant's tribe, and based on ownership or control of the foreshore. *Te Weehi*, which decided a claim to non-territorial title, was distinguishable because of this. The defence was unsuccessful on the basis of the *Re the Ninety Mile Beach* principle which Greig J applied.<sup>94</sup> That is, Native Land Court investigation into the adjoining coastal blocks automatically extinguished Maori customary rights to the foreshore. Greig J assumed that such investigation had occurred in the case before him.<sup>95</sup>

<sup>90</sup>[1986] 1 NZLR 680 [*Te Weehi*].

<sup>91</sup>*Te Weehi* above n90, 696.

<sup>92</sup>*Te Weehi* above n90, 692.

<sup>93</sup>[1990] 1 NZLR 411.

<sup>94</sup>*Green* above n93, 414.

<sup>95</sup>*Green* above n93, 414.

These cases are undoubtedly correct on the scope of the *Re the Ninety Mile Beach* principle, even though little comment was passed on the persuasiveness of the principle itself. Williamson J's judgment in *Te Weehi* is of particular interest because it suggests that aboriginal title of some sort, remains in the foreshores. Although McNeil's fee simple conception is inapplicable to a *Re the Ninety Mile Beach* situation, the other conceptions are not.

## 2 *Hingston J's reasoning on foreshores in the Marlborough Sounds case*

The case concerned a claim of aboriginal title to the soil of the foreshore.<sup>96</sup> Because the case was heard before the Maori Land Court, the title claimed could only be converted into a fee simple one. As noted on page 23, according to the Te Ture Whenua Maori Act, this was the only determination which the Maori Land Court could make. Hingston J accepted initially that the ratio in *Re the Ninety Mile Beach* was binding on him.<sup>97</sup> This is simply because the Court of Appeal is of higher authority than the Maori Land Court. Hingston J accepted that he was bound by the finding that once the Maori Land Court had determined title to the coastal blocks then aboriginal title to the foreshore was extinguished also.<sup>98</sup>

*Re the Ninety Mile Beach* was ultimately distinguished by Hingston J on the basis that the coastal blocks in the Marlborough Sounds had not been through the Maori Land Court process. Instead, they had been purchased by the Crown. He refused to extend the Court of Appeal's principle to the present case because this would allow aboriginal title to be extinguished by a "side wind" and also because he thought New Zealand jurisprudence in the past decade had paid greater regard to Maori interests.<sup>99</sup> These concerns also led Hingston J to question the reasoning behind the *Re the Ninety Mile Beach* principle itself. He suggested that a modern Court of Appeal may well change their conclusion on this matter.<sup>100</sup>

<sup>96</sup>The full nature of the claim may be found on page 6 of the paper.

<sup>97</sup>*Marlborough Sounds* (1997) 22A Nelson MB 2.

<sup>98</sup>*Marlborough Sounds* (1997) 22A Nelson MB 3.

<sup>99</sup>*Marlborough Sounds* (1997) 22A Nelson MB 4.

<sup>100</sup>*Marlborough Sounds* above n99.

### 3 Summary of aboriginal title in the foreshore

At the present time, *Re the Ninety Mile Beach* remains good law. The Maori Land Court investigation of adjoining coastal blocks necessarily extinguished aboriginal title to the foreshores. Recent New Zealand cases however which stress that any extinguishment must show a clear and plain intention to do so means that the Court of Appeal today may well overturn the decision. Certainly Hingston J's decision in the *Marlborough Sounds* case is indicative of this.

Even if the public policy concerns of private foreshore ownership, evident in *Kauwaeranga* and *Re the Ninety Mile Beach*, prevented this from happening, an obligation upon the Crown to pay compensation to dispossessed iwi, is more likely than ever before.<sup>101</sup> Also more likely is the obligation to confer with Maori before decisions are taken which affect the foreshore. These obligations arise from the unique fiduciary relationship between the Crown and Maori as discussed on page 15.

The *Marlborough Sounds* decision that the purchase of coastal blocks do not extinguish aboriginal foreshore rights, could result in similar successful claims around New Zealand. Indeed most of the South Island was Crown purchased. Also, coastal areas around New Zealand Company settlements at New Plymouth, Wanganui, Wellington, and parts of Northland and Auckland, may be affected.<sup>102</sup>

The nature of unextinguished aboriginal title in the foreshores will also be interesting, and will probably depend on which of the conceptions examined in this paper, proves persuasive. McHugh's notion of non-territorial title was accepted in *Te Weehi*. Although the Maori Land Court does not have jurisdiction to recognise this title, it is still a title which could be pursued through the ordinary court process. While *Te Weehi* did not involve a claim to the foreshore as such, the right of Maori to occupy the foreshore to collect shellfish has been confirmed. McHugh thought this right was similar to an easement or profit-a-prendre. Whether this Maori right could be protected and alienated in the same way as these Real Property Law concepts would allow, remains a ground for future analysis. A McNeil approach would suggest they should. A Brennan J approach would suggest they should not.

<sup>101</sup>*Te Runanga o Muriwhenua Inc v Attorney General* [1990] 2 NZLR 641, 655.

<sup>102</sup>Maori LR Dec 1997/Jan 1998 5.

There are also strong arguments to suggest that the amendment to the Limitation Act alluded to on page 23, would not affect the recovery of this sort of title in the ordinary courts. The amendment only affects Maori customary land as defined by the Te Ture Whenua Maori Act.<sup>103</sup> The Te Ture Whenua Maori Act is concerned with converting customary land into freehold land. McHugh argues that because non-territorial title is not a title for which a freehold order can be issued, it cannot be regarded as customary land either.<sup>104</sup> Certainly this appears to be a persuasive approach. Non-territorial title relates to certain occupation and usage rights in the land rather than a claim to the land itself. Brennan J's conception which centred on occupation rights would probably also be outside the ambit of the Limitation Act for this reason.

The *Marlborough Sounds* case indicates that aboriginal proprietary claims, territorial in nature, are also possible. The ability of the Maori Land Court to investigate and convert customary title in foreshores into freehold means the foreshores also become alienable to others (subject to the restrictions in the Te Ture Whenua Maori Act). This is consistent with McNeil's conception and Michael Mansell's argument that aboriginal title should be given the same legal status as a fee simple. Indeed the prospects of alienating customary rights to non-Maori were illustrated recently by the granting of a customary fishing permit to a Pakeha by South Island Maori. Maori Affairs Minister the Hon Tau Henare conceded that this sort of practice was likely to continue.<sup>105</sup>

It is questionable however whether, apart from the public policy concerns, Maori freehold title should be granted in the foreshores. Both the Brennan J and the *Delgamuukw* approaches suggest that aboriginal title cannot be characterised in this way. Brennan J conceived of aboriginal title as being the customary way in which land was used. While *Delgamuukw* was not so inflexible in its conception, it too stressed the importance of the traditional relationship with the land. *Delgamuukw* was concerned that a fee simple title could too easily be alienated to others, in which case it would be lost forever to the indigenous people. Maori are well aware of the distress of this, given the aftermath of the 1862 and 1865 Native Lands Acts.

<sup>103</sup>Section 360(1) of the Limitation Amendment Act 1993.

<sup>104</sup>*The Maori Magna Carta* above n57, 140.

<sup>105</sup>"Fishing Rules Good For All" *The Dominion*, Wellington, New Zealand, 25 July 1998, 2.

Although the additional protections of the Te Ture Whenua Maori Act safeguard against alienation to some extent, any alienation process would require careful consideration on the implications for future Maori.

The public policy concerns of private foreshore ownership would also have to be addressed by the Crown if grants of freehold title were to occur. New Zealanders have generally regarded unrestricted access to the coastline as a right of citizenship. The granting of Maori freehold title would probably require negotiation and compromise between coastal iwi and the Crown, particularly in relation to the most popular beaches, if the general public's use of them is to be assured.

## V SEABED

### A General Principle

For the purposes of the *Marlborough Sounds* case, the relevant definition of the territorial seabed is contained in section 7 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 (the 1977 Act): "...bounded on the landward side by the low water mark along the coast of New Zealand...and on the seaward side by the outer limits of the territorial sea of New Zealand." The territorial seabed stretches 12 nautical miles out from New Zealand's coastline and its legal status, at international law in particular, is very uncertain. This means that the possibility of aboriginal title in it is unclear also.

All of the conceptions of aboriginal title discussed throughout this paper make the presumption that the Crown acquires territorial sovereignty to the land within its dominions. It is this territorial sovereignty which is burdened by aboriginal title.<sup>106</sup> The conceptions of aboriginal title only differ on how this burden may be extinguished and on the nature of any unextinguished title. In relation to the territorial seabed, the initial issue in any aboriginal title debate is whether the Crown has actually acquired territorial sovereignty over it. Until this occurs, the doctrine of aboriginal title, being a proprietary right, cannot be enforced.<sup>107</sup>

<sup>106</sup>Michael Mansell did argue that Brennan J's conception, if taken to its logical conclusion, would amount to Aboriginal sovereignty rather than Crown sovereignty. "The Court Gives An Inch" above n26, 5. This does not appear to have been asserted elsewhere however.

<sup>107</sup>*Mary Yarmirr v The Northern Territory of Australia* [1998] FCA (6 July 1998) para 129 at <[http://www.austlii.edu.au/au/cases/cth/federal\\_ct/1998/771.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/771.html)> (last modified 6 July 1998) [*Yarmirr*].

There are also suggestions that the Crown, while acquiring territorial sovereignty in the seabed, only acquires a limited form of sovereignty from which no proprietary rights, including aboriginal title, can be recognised. The determination of these issues will depend on the source of any Crown title to the seabed. There are three possible sources: section 7 of the 1977 Act, the common law, and international law. Each of these sources will be examined in this section in turn.

## **B Possible Sources of Territorial Sovereignty**

### **1 The nature of section 7 of the 1977 Act**

Section 7 reads:

*Subject to the grant of any estate or interest therein (whether by or pursuant to the provisions of any enactment or otherwise, and whether made before or after the commencement of this Act), the seabed and subsoil of submarine areas bounded on the landward side by the low-water mark along the coast of New Zealand (including the coast of all islands) and on the seaward side by the outer limits of the territorial sea of New Zealand shall be deemed to be and always to have been vested in the Crown.* (emphasis added)

If section 7 is regarded as the ultimate source of the Crown's territorial sovereignty over the seabed, then it is likely that aboriginal claims to the seabed will be limited to claims of adverse possession. This is because adverse possession results in a presumed Crown grant and "grants of estates or interest" are the only qualification in section 7 to the Crown's title. The requirements for adverse possession in relation to foreshores were discussed on page 18. The same requirements, elucidated by *McDonnell v Giblin*, would have to be satisfied to show adverse possession in the seabed. Although there is little authority on this, the case of *Fowley Marine v Gafford* raised the possibility (although the case was not decided on this point), that adverse possession could be a basis for proving good title for certain mooring rights in the seabed.<sup>108</sup> As with the foreshores however, there are likely to be major evidential obstacles for Maori in proving adverse possession. The *McDonnell* requirement of exclusivity in particular could be difficult to satisfy.

<sup>108</sup>[1968] 2 QB 618; [1968] 1 All ER 979.

Apart from adverse possession, if the Crown's sovereignty was sourced in the 1977 Act then Maori would probably have no claim because title would be statutorily "vested" in the Crown.

However, it is unlikely section 7 would be viewed by the courts as a vesting provision. Observations of FB Adams J in *AG ex rel Hutt River Board v Leighton* are especially relevant.<sup>109</sup> This case concerned the interpretation of section 261 of the Coal Mines Act 1979 which was worded in a very similar way to section 7 of the 1977 Act above. Section 261 provided:

Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown. (emphasis added)

FB Adams J reconsidered the assumption made in *Re Bed of the Wanganui River* that this provision vested title in the navigable river to the Crown.<sup>110</sup>

The operative words are "shall remain and shall be deemed to have always been vested in the Crown." These are not words purporting to vest or divest anything. The words "shall remain" look to the future, and the other words look back to the past, and there are no words operative *in praesenti* such as one would expect to find if the purpose were to divest interests already alienated from the Crown and to re-vest them in the Crown. This is the sort of thing one expects in a declaratory enactment; and in my opinion, the wording tells strongly against the theory that any divesting of private rights already acquired was intended.

In essence therefore, the provision was regarded as merely declaratory of the state of affairs which already existed. It is likely that section 7 of the 1977 Act would be viewed in the same way. That is, it could not be viewed as divesting any proprietary rights which already existed.

<sup>109</sup>[1955] NZLR 750, 789-790.

<sup>110</sup>[1955] NZLR 419.

This view would also be consistent with the New Zealand judiciary's opinion in recent years that indigenous rights should not be extinguished by a "side wind".<sup>111</sup> There is nothing in the language of section 7 which purports to extinguish. This view would also mean that Crown title over the seabed could only be sourced in the common law or international law.

The statute is clearly distinguishable from the statutory provision in Australia which does vest title in the seabed to the Crown. Section 4(1) of the Coastal Waters (State Title) Act 1990 (Cth) provides:

...vests in each State the same rights and title to property in the seabed beneath the coastal waters of the State, and the same rights in respect of the space above the seabed, as would belong to the State if that seabed were within the limits of the State.

Since *Mabo*, the State's radical title within the limits of the State is burdened by aboriginal title. The nature of this burden is similar to Brennan J's conception discussed above. This conception is good law in Australia according to the *Wik* case.<sup>112</sup> That is, aboriginal title in Australia is analogous to an occupation right rather than a fee simple. Section 4(1) provides for the State's title over their seabeds to be burdened in the same way. Although New Zealand courts could not interpret section 7 of the 1977 Act in a similar manner, as noted earlier, it is unlikely they would interpret it as explicit enough to extinguish any possible aboriginal title in the seabed.<sup>113</sup>

## 2 *Applicability of the common law to the seabed*

If Crown title to the New Zealand seabed is sourced in the common law then important consequences for aboriginal title result from this. This is because the New Zealand common law recognises aboriginal title as a legitimate burden on the Crown's territorial sovereignty.

<sup>111</sup> *Faulknor* above n30, 363.

<sup>112</sup> *Wik* above n24.

<sup>113</sup> *Butterworths Land Law in New Zealand* above n69, para 2.235.



However authority is unclear as to whether the Crown acquired sovereignty over the territorial seabed for the common law and its accompanying recognition of proprietary rights, to apply. The influential case of *R v Keyn* held that the Crown's sovereignty ends at the low water mark and that it only has jurisdiction in certain respects beyond this.<sup>114</sup> For instance, the court in *R v Keyn* decided that jurisdiction over criminal acts by foreigners applied to the territorial seabed. Also, it is likely New Zealand courts would exercise their jurisdiction to uphold a general right to fish over the seabed subject to Maori customary fishing rights.<sup>115</sup> Likewise, New Zealand courts would probably uphold a general right to anchor in the seabed.<sup>116</sup> None of these actions however are dependent on the Crown having actual proprietary interests in the seabed.

Although no New Zealand case has required express acceptance of the *R v Keyn* ratio it has been cited with approval in the Australian High Court in *NSW v The Commonwealth (the Seas and Submerged Lands Case)* and the Supreme Court of Canada in *Re Offshore Mineral Rights of British Columbia*.<sup>117</sup>

One reason in *R v Keyn* for refusing to recognise Crown sovereignty in the territorial seas and seabed, was given by Sir R Phillimore who represented the majority in that case:<sup>118</sup>

...the passage of two or three vessels or of a fleet over external waters may be neither felt nor perceived. For this reason, the act of inoffensively passing over such portions of water, without any violence committed there, is not considered as any violation of territory belonging to a neutral state; permission is not usually required; *such waters are considered as the common thoroughfare of nations*, though they may be so far territory as that any actual exercise of hostility is prohibited therein. (emphasis added)

<sup>114</sup>[1876] 2 Ex D 63 [*Keyn*].

<sup>115</sup>*Te Weehi* above n90.

<sup>116</sup>Canadian authority certainly supports this. *Attorney General for British Columbia v Attorney General for Canada* [1914] AC 153, 169.

<sup>117</sup>(1975) 135 CLR 337 and [1967] SCR 792.

<sup>118</sup>*Keyn* above n114, 77. Sir R Phillimore cites with approval an observation by Lord Stowell in *The Twee Gebroeders* 3 C Rob 352.

The "common thoroughfare of nations" has since become a customary international law right for foreign ships to enjoy innocent passage around the territorial seas.<sup>119</sup> *R v Keyn* also held that the territorial sea, while outside the realm, could be brought within the territory of England by an Act of the Imperial Parliament.<sup>120</sup> Although New Zealand legislation was passed to extend jurisdiction over territorial seas in certain matters, it is unlikely that any legislation prior to the 1958 Geneva Convention, actually extended territorial sovereignty as such.<sup>121</sup>

Another mode of Crown acquisition of the territorial seabed would be through exercise of its prerogative.<sup>122</sup> McNeil held that Crown acquisition in this way automatically excluded any aboriginal claims.<sup>123</sup> Given the *Re the Ninety Mile Beach's* rejection of the Crown's argument that the foreshores were acquired by prerogative, it is unlikely similar claims could be made to the territorial seabed.<sup>124</sup>

Since *R v Keyn* there has been confusion amongst the authorities as to whether the Imperial Crown acquired sovereignty over the territorial seabed. If it did then such sovereignty would probably be vested in the Crown in right of New Zealand since the Statute of Westminster was adopted in 1947.<sup>125</sup> However it is unclear whether the Imperial Crown ever did acquire title to the seabeds either through legislation or exercise of its prerogative. The High Court of Australia in *Bonser v La Macchia* held as a fact, that at some date after *R v Keyn* in 1876 the Imperial Crown had appropriated the territorial sea.<sup>126</sup> Earlier cases were used to affirm this.<sup>127</sup> However there was no act of appropriation which was specifically identified. Although customary international law was expanding at this time to recognise territorial sovereignty in the seabed the better view is probably that no actual appropriation took place at all.

<sup>119</sup>United Nations Convention on the Law of the Sea (Montego Bay, Jamaica, 10 Dec 1982) Articles 17-19.

<sup>120</sup>*Keyn* above n114, 239.

<sup>121</sup>*The Laws of New Zealand* (Butterworths, Wellington, 1992) vol 2, Water, para 2.

<sup>122</sup>*Post Office v Estuary Radio* [1968] 2 QB 740, 753.

<sup>123</sup>*Common Law Aboriginal Title* above n17, 103-105.

<sup>124</sup>*Re the Ninety Mile Beach* above n81, 477.

<sup>125</sup>"The Legal Status of Maori Fishing Rights" above n56, 252.

<sup>126</sup>(1969) 122 CLR 177, 187 and 223.

<sup>127</sup>See for example, *Secretary of State for India v Chelikani Rama Rao* (1916) 85 LJPC 222.

### 3 Territorial sovereignty since the Geneva Convention 1958

The uncertain nature of the Crown's sovereign rights over its territorial seabed at common law was illustrated in the previous section. This uncertainty means the status of aboriginal title in the seabed is also uncertain. The Convention on the Territorial Sea and the Contiguous Zone 1958 attempted to clarify the situation at international law. Article 1(1) held: "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." According to Article 1(2) this sovereignty is subject to other provisions in the Convention. The most significant provision is Section 3 which allows the innocent passage of foreign ships in territorial waters. The Convention was implemented in New Zealand firstly by the Territorial Sea and Fishing Zone Act 1965 and then by the 1977 Act alluded to above.<sup>128</sup> There is no qualitative difference in the wording of both statutes with regard to the territorial seabed. Implementation in this way raises issues as to whether the territorial sovereignty recognised by international law is the same as the territorial sovereignty and its accompanying proprietary rights recognised by the common law. If it is, then under any conception of aboriginal title, the Crown's sovereignty will be burdened by indigenous rights.

Once again however the nature of the sovereignty which was conceded by Article 1 of the Geneva Convention is uncertain. One view appears to be that once sovereignty over the territorial seabed has been appropriated by the adjoining state, it is the state which defines the extent of that sovereignty.<sup>129</sup> This is a persuasive approach since the negotiations surrounding the Geneva Convention showed that all signatory states had a very different notion of what sovereignty was.<sup>130</sup> The question as to whether sovereignty in the seabed includes the ability of the Crown to either grant or recognise full proprietary rights in it is an especially contentious one. This problem is particularly important in a common law country such as New Zealand which distinguishes between the *imperium*, or sovereignty of the Crown, and *dominium* (proprietary rights).

<sup>128</sup>G Marston, P Skegg "The Boundaries of New Zealand in Constitutional Law" (1988) 13 NZULR 1, 48.

<sup>129</sup>DP O'Connell *International Law of the Sea* (Clarendon Press, Oxford, 1982) 80.

<sup>130</sup>*International Law of the Sea* above n129, 82-83.

Where the type of *imperium* acknowledged by international law over the seabed is more limited than the type of *imperium* over terra firma then it is likely that *dominium* over the seabed will be limited in a similar way. This is simply because *dominium*, while clearly severable from *imperium*, still requires the presumption of Crown sovereignty over that area in the first place.

In New Zealand's case, the words "subject to the grant of any estate or interest" in section 7 of the 1977 Act suggests that the ability to grant full proprietary rights in the territorial seabed was at least contemplated by the legislators. This is important in relation to the international law question because it suggests that the New Zealand Parliament thought their position at international law allowed it full *imperium* in the seabed. This interpretation of international law also suggests therefore that full proprietary rights in the seabed, whether indigenous or otherwise, are capable of enforcement in New Zealand courts.

However there is also authority to suggest that the Geneva Convention's use of the word "sovereignty" did not include full *imperium* or the ability to recognise full proprietary rights. In the *Seas and Submerged Lands Case* two Australian High Court judges made comments to this effect.<sup>131</sup> The case itself centred on whether the Australian Parliament had the ability to make laws relating to the territorial seabed. The Court was unanimous that Parliament did have this ability. There was disagreement however on whether this included the ability to recognise proprietary rights in it. A majority held there was no such ability. Barwick CJ (representing the majority) stated that the international concession of power to states: "was not that the territory of the nation in a proprietary or physical sense was enlarged to include the area of water in the territorial sea or the area of subjacent soil."<sup>132</sup> Mason J appeared to confirm this when he said:<sup>133</sup>

This is not to say that the seabed is territory in the sense that the land territory of the coastal state is territory. But it is to say that *subject to the Convention and to the rules of international law* the coastal state possesses that supreme authority over the bed and subsoil of territorial waters which it enjoys over its land mass...(emphasis added)

<sup>134</sup>United Nations Convention on the Law of the Sea, above n119, implemented in New Zealand by the United Nations Convention of the Law of the Sea Act 1996.

<sup>131</sup>(1975) 135 CLR 337.

<sup>132</sup>*Seas and Submerged Lands Case* above n131, 363.

<sup>133</sup>*Seas and Submerged Lands Case* above n131, 475.

In essence therefore Mason J identified the seabed and terra firma as being essentially different pieces of land over which different types of *imperium* were exercised. This is probably because of the various international law obligations which exist in respect of the seabed which do not exist in respect of terra firma. As noted earlier, the right of innocent passage of foreign ships through the territorial sea is regarded as a particularly important international obligation. An obligation to protect the marine environment in this area probably also exists now under international law.<sup>134</sup>

The 1998 case of *Mary Yarmirr v The Northern Territory of Australia* confirms this approach and provides observations on the type of aboriginal title which could be recognised in the seabed.<sup>135</sup> The Federal Court affirmed the view of the *Seas and Submerged Lands Case* that there was a distinction between the type of sovereignty exercisable over land and the type of sovereignty exercisable over the seabed.<sup>136</sup> This was because of the various restrictions imposed by the Geneva Convention in respect of the territorial seabed. These restrictions were outlined above. The Federal Court held that the enactment of the Seas and Submerged Lands Act itself was a recognition by the Australian Parliament of these international law obligations.<sup>137</sup>

According to the Federal Court, these obligations meant that the extent of aboriginal title over the seabed was also limited. In particular, the Court was not prepared to award to the claimant the exclusive possession, occupation, and use of the waters which she desired.<sup>138</sup> This of course is a right which Brennan J's conception recognises over terra firma.

<sup>134</sup>United Nations Convention on the Law of the Sea, above n119, implemented in New Zealand by the United Nations Convention of the Law of the Sea Act 1996.

<sup>135</sup>*Yarmirr* above n107.

<sup>136</sup>*Yarmirr* above n107, para 132.

<sup>137</sup>*Yarmirr* above n107, para 133.

<sup>138</sup>*Yarmirr* above n107, para 136.

Ultimately, the type of aboriginal title which the claimants had in the seabed was a non-exclusive right to have free access to it for the following purposes:<sup>139</sup>

- i. To travel through or within the claimed area.
- ii. To fish, hunt, and gather for the purpose of satisfying their personal, domestic or non-commercial communal needs, including the purpose of observing traditional, cultural, ritual, and spiritual laws and customs.
- iii. To visit and protect places which are of cultural and spiritual importance.
- iv. To safeguard their cultural and spiritual knowledge.

These rights of course are similar to the non-territorial rights asserted by McHugh and confirmed by *Te Weehi*, as existing in the New Zealand foreshore. They are rights which reflect traditional indigenous uses of the area. However, McHugh recognised non-territorial title as existing only because there had been partial extinguishment of the territorial title in the area.<sup>140</sup> *Yarmirr* recognised the above interests because international law prevented it from awarding the exclusive possession, occupation, and use of the waters to the claimants.

A dearth of New Zealand litigation in this area makes it difficult to ascertain the extent to which proprietary interests in the territorial seabed may be recognised here. However, there are strong arguments for suggesting the *Yarmirr* reasoning should be followed. As noted earlier, the 1977 Act could be regarded as simply declaratory of the international law obligations which were imposed by the 1958 Geneva Convention. In this way the 1977 Act is analogous to the Australian Seas and Submerged Lands Act. These international law obligations indicate that the Crown does not acquire the type of territorial sovereignty which would enable it to enforce full aboriginal proprietary rights in the seabed. A more limited form of aboriginal title would be all that could be recognised.

<sup>139</sup>*Yarmirr* above n107, para 161.

<sup>140</sup>*The Maori Magna Carta* above n57, 139.

C *Hingston J's Reasoning on Seabeds in the Marlborough Sounds Case*

Hingston J refused to accept the Crown's argument that section 7 of the 1977 Act vested both *imperium* and *dominium* in the territorial seabeds to the Crown. Hingston J thought that while section 7 statutorily assumed the *imperium* for the Crown, the same could not be claimed of the *dominium*. He held that to do so would effectively extinguish aboriginal rights by a "side wind".<sup>141</sup> Hingston J stressed the fact that this was the first time Maori customary rights to the seabed had been before a court of competent jurisdiction.<sup>142</sup> The Maori Land Court was considered to be competent for this purpose because section 7 had incorporated the seabed as part of New Zealand's territory. Likewise, there had been no legislation which excluded the Maori Land Court jurisdiction in this area. However this part of the paper has suggested that before awarding full proprietary rights (the Maori Land Court awards freehold title), an examination is firstly required of the ability of the Crown to grant them. The Crown's *imperium* may be simply of too limited a kind to enable it to do this. Certainly this is a matter which was not addressed by Hingston J.

In the context of this paper, Hingston J's position at least accepts the declaratory nature of section 7, discussed on pages 29-31 of the paper. This would mean that the Crown's territorial sovereignty as well as any burden of aboriginal title would be sourced in either the common law or the international law which existed when the 1977 Act was passed.

With regard to the common law, Hingston J accepted the Crown's proposition that there was too much uncertainty prior to the 1958 Geneva Convention for proprietary rights to be recognised in the seabed.<sup>143</sup> However Hingston J's acceptance of the applicant's argument that he must look to Tikanga Maori rather than the common law when ascertaining aboriginal title, is a little confusing.<sup>144</sup> Hingston J may have been applying a conception similar to Brennan J to consider the content and incidents of aboriginal title as being sourced in pre-European times rather than in the common law itself. This is of course distinguishable from McNeil's conception which essentially regarded aboriginal title as a common law right.

<sup>141</sup> *Marlborough Sounds* (1997) 22A Nelson MB 9.

<sup>142</sup> *Marlborough Sounds* above n141.

<sup>143</sup> *Marlborough Sounds* (1997) 22A Nelson MB 6.

<sup>144</sup> *Marlborough Sounds* (1997) 22A Nelson MB 7.

However, even Brennan J's conception assumed that the Crown took territorial sovereignty and radical title to the land it claimed.<sup>145</sup> This is because aboriginal title must still be an interest which is cognisable by the common law. It is this radical title from which proprietary claims and aboriginal title claims may be made. Therefore, if the Crown does not acquire territorial sovereignty to the seabed at all, whether through the common law or international law, it is difficult to see how aboriginal claims may be made also. Reference to Tikanga Maori should probably only have been made when the source of the Crown's radical title to the seabed had been ascertained.

With regard to the international law, both Hingston J and the Crown appeared to accept that the Crown acquired full territorial sovereignty and radical title to the seabed, when the 1958 Geneva Convention was passed.<sup>146</sup> In doing so, both parties also apparently accepted the argument, alluded to on page 34, that New Zealand was then able to define the nature of the territorial sovereignty itself. If this is the case, then this sovereignty would be burdened with aboriginal title because the common law in New Zealand at present operates on that presumption. It is unlikely that section 7 of the 1977 Act would extinguish this title because it is not explicit enough to do so. However, the *Seas and Submerged Lands Case* and *Yarmirr* both suggest that the territorial sovereignty conceded by international law may be of too limited a kind, for full aboriginal proprietary rights to be recognised. Indeed, even Brennan J's conception which recognises occupancy rights only, was rejected by *Yarmirr*. Certainly it is a matter which requires further litigation in New Zealand. Determining the nature of proprietary interests in the seabed's soil is probably an issue which a higher New Zealand court must decide.

#### **D Summary of Aboriginal Title in the Seabed**

The main issue in relation to the seabed is whether the Crown acquires the type of sovereignty in it which would enable the Crown to enforce full aboriginal proprietary rights. The international law stemming from the 1958 Geneva Convention and implemented in New Zealand by 1965 and 1977 statutes, is the most likely source for this.

<sup>145</sup>As noted earlier however, Michael Mansell has argued that Brennan J's conception, if taken to its logical conclusion, would also deny territorial sovereignty to the Crown. "The Court Gives an Inch" above n26, 5.

<sup>146</sup>*Marlborough Sounds* (1997) 22A Nelson MB 6.



If the reasoning from the Australian authorities is adopted then this has important implications for the types of aboriginal title which could be recognised. It would firstly mean that the Maori Land Court would not have the jurisdiction to grant a freehold title. New Zealand's international law obligations would prevent this. It would also mean that Brennan J's conception of occupation rights, would be rejected, at least to the extent it is exclusive. *Yarmirr* is authority on this point.

However, there are other incidents of aboriginal title. They could be enforced through the ordinary court process in New Zealand and the degree of its exclusivity and manner of extinguishment would probably also require judicial determination. Also, the Crown's obligation to consult with Maori on matters pertaining to the seabed, cannot be discounted. *R v Keyn* illustrated that, while the Crown was incapable of full territorial sovereignty over the seabed, its courts were still capable of exercising jurisdiction over it. The Crown in its Executive or Legislative capacity has also been empowered to make decisions regarding the seabed. The international law has not changed this. The fiduciary obligation incumbent upon the Crown, suggests Maori must be involved in any decisionmaking process. There is Canadian authority in particular which supports this conclusion.<sup>147</sup>

## VI EFFECTS OF ABORIGINAL TITLE ON RMA COASTAL PERMITTING

### A Introduction

The Resource Management Act 1991 (RMA) is not a statute pertaining to the ownership of foreshores and the seabed per se. Instead it is a statute which promotes the sustainable management of these resources according to section 5. Accordingly, the Environment Court has held that it is the inappropriate forum to deal with the issue of proprietary rights.<sup>148</sup> Recognising aboriginal title in the coastal area however could have an impact on whether local authorities have the jurisdiction to make management decisions relating to the coastal environment at all. Even if aboriginal title did not restrict this jurisdiction, it is certainly a significant matter which local authorities would have to consider in any decisions on the foreshores and seabed.

<sup>147</sup>*Delgamuukw* above n40, 264.

<sup>148</sup>*Haddon v Auckland Regional Council* [1994] NZRMA 49, 56-57.

This part of the paper discusses the various effects which aboriginal title will have on these issues. The RMA's emphasis on management rather than ownership is shown by the way it separates the right to carry on certain activities, from the right to occupy land for carrying out those activities. For instance, on terra firma, any restricted activity requires a resource consent. A resource consent will be issued where this is consistent with sustainable management. However, the consent holder does not acquire occupation rights as well. The right of occupation must be negotiated privately with the landowner before the consent's activity can be exercised. In this way, the issue of a resource consent does not impact on the ownership of the land.

In relation to the coastal marine area the separation of these rights does not occur. The coastal marine area is the relevant area in the *Marlborough Sounds* case. According to section 2 of the RMA it includes the foreshore, seabed, coastal water, and air space above the water. The coastal marine area has various restricted activities for which a coastal permit is usually required.<sup>149</sup> The rights to occupy and remove materials from the coastal marine area are outlined in section 12(2). Subject to the same exceptions as in section 12(1), a coastal permit is required for these rights also.

The right of occupation is expressed to be exclusive of others in section 12(4)(a)(ii). However the extent of this exclusion right is unclear. Section 122(5)(c) for instance states that a coastal permit cannot be regarded as authority for the holder to occupy an area to the exclusion of others. The lack of clarity on this point is illustrated by various Environment Court decisions. In *Aqua King Limited (Anakoha Bay) v The Marlborough District Council* for example, Kenderdine J stated that the local iwi, Ngati Kuia in this case, would be legally excluded from the relevant site if a coastal permit was issued.<sup>150</sup> Both *Director General of Conservation v The Marlborough District Council* and *Greensill v Waikato Regional Council* however held that there was practical or de facto exclusion from the relevant site only.<sup>151</sup>

<sup>149</sup> According to section 12(1), the only exceptions to this include: an express authorisation by a rule in a regional coastal plan or a proposed regional coastal plan, or a resource consent.

<sup>150</sup> (30 June 1997) unreported, Environment Court, Decision No W 71/97, 14.

<sup>151</sup> (22 September 1997) unreported, Environment Court, Decision No W 89/97, 13 and (4 March 1995) unreported, Planning Tribunal, Hamilton, Decision No 17/95, 10.

If this was indeed the case then there would appear to be strong arguments to suggest that any indigenous rights in the area remain unextinguished and should be capable of being enjoyed by local iwi. New Zealand courts after all have indicated an unwillingness to extinguish by a "side wind".<sup>152</sup>

Perhaps the better view is that legal exclusion does occur to the extent to which the occupation by others would be inconsistent with the permitted activity. Of course, this exclusion would vary depending on the type of activity or use which the coastal permit allowed. In relation to the issuance of marine farming licences, practice at least suggests that the public retains certain access rights to the sites. These rights are often incorporated into the agreement between individual marine farms and the issuing authority.<sup>153</sup>

Despite the uncertainty surrounding exclusion, once a coastal permit has been issued, no further consent from the Crown is required to exercise its rights.<sup>154</sup> This is based on the presumption that the Crown *owns* the land in the coastal marine area because the rights of access and occupation are determined solely by statutory process rather than by private negotiation with landowners. This distinction with the resource consent process relating to terra firma is apparent. The presumption of Crown ownership is also shown by section 12(2) itself which applies to "land of the Crown" or land "vested in the regional council", and by section 112, which obliges coastal permit holders to pay rent to the Crown.

### **B The Effect of Maori Freehold Title on Coastal Permits**

If the *Marlborough Sounds* case is affirmed by higher authority, then, where the coastal blocks were purchased from Maori by the Crown, the Maori Land Court will have jurisdiction to issue freehold title in the coastal marine area. This would also undermine the presumption of Crown ownership of the coastal marine area. The consequent impact on the rights conferred by the existing coastal permits is more difficult to ascertain. As suggested on page 40, the Environment Court has indicated an unwillingness to deal with proprietary issues.

<sup>152</sup>*Faulkner* above n30.

<sup>153</sup>Personal interview with Grant Powell, legal counsel for Te Tau Ihu iwi, 21 September 1998.

<sup>154</sup>Section 354(3) of the Resource Management Act 1991.

This was further illustrated in *Greensill* when Treadwell J stated:<sup>155</sup>

Determinations of Treaty issues as between the Crown and the appellants [coastal iwi] would simply resolve the question of who is landlord. Thus should ownership change during the time a marine farming licence was in force that would not of itself terminate the licence unless legislation made changes to rights of occupation protected by the licence.

Although Treaty issues are dealt with by the Waitangi Tribunal which is able to make recommendations only, the situation is certainly analogous to Maori Land Court rulings. The Maori Land Court decides ownership issues when it awards freehold title.

However, it is the presumption of Crown ownership which seems to underlie the ability to issue exclusive occupation rights in coastal marine areas. Rebutting this presumption by acknowledging that the Maori Land Court has jurisdiction in this area appears to impair the ability of consent authorities to issue these rights and allow them to be recognised by the Environment Court. This is, of course, anomalous to the "hands off" approach which the Environment Court has asserted in resource management issues. The preferable solution to prevent this anomaly in the future would appear to be an amendment to the RMA to separate the right to carry out a restricted activity in the coastal marine area from the right to occupy.<sup>156</sup> The amendment would institute a regime similar to the resource consent process relating to terra firma. That is, the Crown could authorise the right to carry out a certain activity (such as marine farming), but the right to occupy portions of the foreshore and seabed to enjoy this activity, would require negotiation with coastal iwi. This is simply because coastal iwi would have freehold title to the coastal area upon a Maori Land Court determination.

Such an amendment would also have an impact on the payment of coastal rents. Presently, coastal permit holders who occupy space in the coastal marine area are obliged to pay rent to the Crown.<sup>157</sup> The amounts payable are set out in regulations empowered by section 360 of the RMA.

<sup>155</sup>(4 March 1995) unreported, Planning Tribunal, Hamilton, Decision No 17/95, 5.

<sup>156</sup>Fiona McLeod, "Maori Customary Title to the Foreshore and Seabed and the Allocation of Coastal Permits under the Act" (1998) 2 BRMB 101, 103.

<sup>157</sup>Section 112 of the Resource Management Act 1991.

This regime has proved particularly controversial and in October 1994 the Government commissioned a review of it.<sup>158</sup> Subsequent to this, an amendment to the RMA was passed in 1997 which now gives regional councils rather than central Government, the option of introducing charging regimes for occupation through regional coastal plans.<sup>159</sup> Maori have expressed strong objections to the rights of others to impose coastal rents at all.<sup>160</sup>

Indeed, some coastal iwi have asserted that they, as owners of the foreshore and seabed, should be the bodies capable of collecting and benefiting from such charges.<sup>161</sup> A Maori Land Court ruling which grants Maori freehold in the coastal marine area, and a subsequent RMA amendment to acknowledge this, would certainly make these assertions more persuasive than before. Existing coastal permit holders may be required to pay coastal rents to their new "landlord", coastal iwi, rather than to regional councils or the Crown.

### *C The Impact of Other Forms of Aboriginal Title on Local Authority Decisionmaking*

#### *1 General*

The uncertain effects of awarding Maori freehold title in coastal marine areas suggests that higher courts may continue to deny the sort of jurisdiction to the Maori Land Court over the foreshores and seabed which Hingston J claimed in the *Marlborough Sounds* case. There are strong indications however that aboriginal title, of some sort, would still be recognised in the coastal marine area. On pages 24 and 25, this paper used the example of *Te Weehi* as a New Zealand case which recognised McHugh's non-territorial title over the foreshore. Similarly, as noted on pages 36 and 37, *Yarmirr* identified a Brennan J occupation right as an aboriginal interest in the seabed. Neither of these interests regard aboriginal title as being the same as a fee simple one.

<sup>158</sup>Wayne Kimber *Coastal Rentals Under the RMA: Report Under Contract to the Minister for the Environment* October 1994.

<sup>159</sup>Section 12 of the Resource Management Amendment Act 1997.

<sup>160</sup>Submissions to *Coastal Rentals Under the RMA* above n158. Hauraki Maori Trust Board [Paeroa] subm 271, Ngaiterangi Iwi Incorp Soc [Tauranga] subm 310, Ngai Tahu Trust Board subm 311.

<sup>161</sup>Subm 310 and 311 to *Coastal Rentals Under the RMA* above n158.

Both Brennan J's occupation right and McHugh's non-territorial title, are potentially inconsistent with the occupation and removal rights which a consent authority can award in section 12(2) of the RMA. This is because, according to section 12(4), the rights awarded are exclusive of others. The uncertainty surrounding the nature of this exclusion was discussed earlier. However, in an activity such as marine farming, even if coastal iwi were not legally excluded by the statutory provisions, there would often be factual exclusion anyway. The rights to collect shellfish and enjoy other customary rights over the foreshore and seabed may be difficult to exercise amongst the various structures which a marine farm uses. The question of whether or not an inconsistency actually exists is probably a factual issue which requires determination in each case.<sup>162</sup> Where there is no inconsistency then clearly Maori will be entitled to continue to enjoy their customary rights in the area. Where a factual inconsistency does occur however, there are two possibilities which could result. Both of these possibilities will be examined in turn.

## 2 Section 12 of the RMA as a restrictive provision

The RMA does not expressly extinguish aboriginal title. Indeed, as noted earlier, the statute does not profess to deal with issues of ownership at all. This paper has also shown that New Zealand authorities regard extinguishment by implication as extinguishment by a "side wind".<sup>163</sup> Because of this, statutory provisions which impliedly extinguish aboriginal title would not be viewed favourably by the courts.

However, there are also arguments to suggest that the RMA's statutory management controls effectively amount to the extinguishment of indigenous proprietary rights in the foreshore and seabed.<sup>164</sup> That is, a declaration by the High Court that iwi had aboriginal title to these resources would have little practical effect because of the management regime in place. This remains an issue which future courts may have to decide. What is worth noting at this stage however, is that extinguishment in this manner suggests a serious breach of the Crown's fiduciary obligation to Maori. Indeed there would be powerful arguments in favour of a right of compensation for coastal iwi from the Crown (as per *Ika Whemua*).

<sup>162</sup>Personal interview with Grant Powell, above n153.

<sup>163</sup>*Faulkner* above n30.

<sup>164</sup>This possibility was raised by Richard Boast in *Resource Management* (Brookers, Wellington, 1991) binder 1A, Treaty of Waitangi and Maori Resource Management Issues, para 1.05.

The case of *Falkner v Gisborne District Council* is especially relevant to this discussion.<sup>165</sup> The case centred on concerns by coastal residents that the Crown was no longer taking measures to prevent erosion along the waterfront. The residents argued firstly that the Crown had a common law duty to protect land from encroachment by the sea.<sup>166</sup> Secondly, the residents argued that they themselves had a common law right to protect their land from the inroads of the sea.<sup>167</sup> However, Barker J held that, while these common law rights existed, they were no longer applicable because they were inconsistent with the scheme of the RMA.<sup>168</sup> In particular, Barker J thought that the right of an individual to protect her property from the sea was inconsistent with the resource consent procedure envisaged by the RMA. Hence, any protection work must be subject to that procedure.

*Barker J suggested that a provision similar to section 19 of the United Kingdom Coast Protection Act 1949.* This case certainly suggests that any practical inconsistency between the exercise of rights granted by the RMA and the continued enjoyment of common law rights should be decided in favour of the RMA provisions. The doctrine of aboriginal title arises from the common law. *Falkner* may therefore be used as a basis for arguing that, to the extent of any inconsistency, section 12 of the RMA restricts the enjoyment of aboriginal title in the area. This does not amount to an extinguishment as such. Indeed *Tawa v Bay of Plenty Regional Council* is authority for the proposition that the grant of a coastal permit does not amount to a permanent denial of the rights claimed by iwi.<sup>169</sup> However, it would mean that indigenous proprietary rights should be subordinated to the rights conferred by a coastal permit.

The Australian case of *Wik* may be used by way of analogy.<sup>170</sup> The granting of pastoral leases in that case is similar to the granting of coastal permits in the *Marlborough Sounds* case. Indeed, in section 12(4)(a)(iii) of the RMA, the right to occupy a part of the coastal marine area is considered to resemble a lease or licence. Also, the sort of aboriginal title recognised by *Wik* is similar to the non-freehold conceptions of aboriginal title which this paper has addressed. Brennan CJ, representing the majority in *Wik* held that the mere granting of a pastoral lease did not extinguish aboriginal title.<sup>171</sup>

<sup>165</sup>[1995] 3 NZLR 622 [*Falkner*].

<sup>166</sup>*Falkner* above n165, 628.

<sup>167</sup>*Falkner* above n165, 630.

<sup>168</sup>*Falkner* above n165, 632.

<sup>169</sup>(24 March 1995) unreported, Planning Tribunal, Auckland, Decision No A 18/95, 9 in citing *Sea Tow Limited* Decision No 129/93.

<sup>170</sup>(1996) 187 CLR 1 [*Wik*].

<sup>171</sup>*Wik* above n170, 87-88.

However, he also concluded that the rights of lessees prevailed over the rights of Aborigines to the extent of any inconsistency.<sup>172</sup> Indeed Brennan CJ held that an inconsistency extinguished aboriginal title.<sup>173</sup> *Tawa v Bay of Plenty Regional Council*, alluded to above, is authority illustrating that aboriginal title could not be extinguished in this way in New Zealand's coastal marine area. However, *Wik* at least supports the proposition that the aboriginal rights which are inconsistent with the practice of marine farming, would be held in abeyance for the period of the coastal permit.

Barker J in *Falkner* also made some interesting observations regarding compensation for the residents in that case. While the RMA did not provide for compensation, Barker J suggested that a provision similar to section 19 of the United Kingdom Coast Protection Act 1949, would be a worthwhile amendment.<sup>174</sup> Section 19(1) provides for compensation to the extent to which a person's interest in land has been depreciated by coastal protection work. This concern over compensation for the abrogation of private property rights was reiterated by *Ika Whenua* in relation to the abrogation of indigenous property rights. Although there are no compensation provisions in the RMA itself to assist Maori, there certainly appear to be compelling reasons why the RMA's infringement of customary rights should be duly and justly compensated.

### 3 *Restrictions on the section 12 rights*

An alternative view of section 12 suggests that it does not restrict aboriginal title. *Falkner* can be distinguished because it dealt with the common law rights of private property owners. New Zealand courts in recent times have shown a reluctance to restrict indigenous property rights in the same way, particularly where there is no express statutory restriction. This provides for indigenous rights to be viewed as restrictive of the types of rights which a coastal permit recognises under section 12.

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<sup>172</sup>*Wik* above n170, 88.

<sup>173</sup>*Wik* above n170, 95.

<sup>174</sup>*Falkner* above n165, 633.



Firstly however, it is important to note that if a Brennan J or McHugh type aboriginal title continues to exist in the coastal marine area, it is unlikely that consent authorities could be viewed as lacking the jurisdiction to issue permits for the occupation of coastal space under section 12(2) of the RMA. The lack of jurisdiction was suggested earlier as a possibility if the *Marlborough Sounds* case was confirmed by higher courts. A similar argument in relation to other forms of indigenous rights should be less persuasive because otherwise, there would be a failure to distinguish between the Maori freehold title which the Maori Land Court awards (a McNeil conception), and the types of interest conceived by Brennan J and McHugh. The better argument is probably that an aboriginal occupation or non-territorial title simply restricts the sort of occupation rights which have been conferred by coastal permits. Aboriginal title would also require local authorities to grant coastal iwi a significant role in the decisionmaking process, and would probably result in a greater reluctance to issue coastal permits in the future. The Crown's fiduciary obligations appear to require this.

Section 12(4) stipulates the extent of the occupation rights conferred by a coastal permit. They are rights which exclude others, except those who have a relevant resource consent, or an allowance under a rule in a regional coastal plan or proposed regional coastal plan. Unextinguished aboriginal title could be recognised therefore by implementing a rule in a regional coastal plan which confirms it. This would not create a new property right as such but would simply declare an existing indigenous property right which has thus far been ignored by the legislation. The problems posed by *Falkner* would also be circumvented since aboriginal title would be within the scheme of the RMA rather than simply being a right which existed independently of it. While the fee simple in the land in the coastal marine area would remain with the Crown, Maori would also be entitled to exercise their traditional rights of occupation and removal from the area. Indeed these are the rights which both Brennan J and McHugh thought were the significant indigenous proprietary rights.

<sup>173</sup> (22 September 1997) unreported, Environment Court, Decision No W 89/97, 13.

<sup>176</sup> (20 February 1998) unreported, Environment Court, Decision No W 12/98, 7.

<sup>177</sup> *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 680; *Gill v Roturua District Council* [1993] 2 NZRMA 604; *Hobbs v Auckland Regional Council* [1994] NZRMA 49.

<sup>178</sup> *Greenhill v Waikato Regional Council* 4 NZPTD 241; *Horton v Auckland City Council* [1994] NZRMA

280.

<sup>179</sup> *Aqua King* above n159, 13-15.

This proposed solution could of course create practical difficulties. In effect, it would amount to two parties having occupation rights to the same area of land. Many Maori would undoubtedly consider this unsatisfactory. In one marine farming case, *Director General of Conservation v Marlborough District Council*, it was the perception of alienation from traditional resources which iwi were concerned about rather than actual access to those resources in itself.<sup>175</sup> In *Marlborough Seafoods Limited v Marlborough District Council*, it was the pollution of the seabed from the shell and organic fall created by a marine farm with which coastal iwi were concerned.<sup>176</sup> It is unclear therefore whether this solution would be workable. Certainly for it to be so, a spirit of negotiation and compromise would be required by both iwi and holders of the coastal permits.

The recognition of a Brennan J or McHugh type aboriginal title in the coastal marine area requires the active participation of local iwi in decisions relating to the future issue of coastal permits. A fiduciary relationship requires this. There are presently two lines of authority regarding the consultation requirement. One line of authority establishes a duty on consent authorities to consult local iwi.<sup>177</sup> The other line of authority suggests consultation is good practice but is not mandatory for local authorities to exercise.<sup>178</sup> A finding of aboriginal title of some sort in the coastal marine area should strengthen Maori rights in this area and would therefore appear to favour the former approach, since it promotes the active participation of iwi in the decisionmaking process. This is more compatible with the fiduciary obligations which *Delgamuukw* recognised as incumbent on the Crown when aboriginal title is confirmed.

Aboriginal title is also relevant in relation to the RMA Part II principles which consent authorities must consider before issuing coastal permits. Indeed Maori access to their traditional kaimoana areas has already been treated as a Part II matter which should be considered.<sup>179</sup>

<sup>175</sup>(22 September 1997) unreported, Environment Court, Decision No W 89/97, 13.

<sup>176</sup>(20 February 1998) unreported, Environment Court, Decision No W 12/98, 7.

<sup>177</sup>*New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641; *Gill v Rotorua District Council* [1993] 2 NZRMA 604; *Haddon v Auckland Regional Council* [1994] NZRMA 49.

<sup>178</sup>*Greensill v Waikato Regional Council* 4 NZPTD 241; *Hanton v Auckland City Council* [1994] NZRMA 289.

<sup>179</sup>*Aqua King* above n150, 13-15.

For instance, aboriginal title could be regarded as an important part of cultural well being under section 5(2). Under section 6(e), local authorities must recognise and provide for the relationship of Maori and their culture and traditions with their water. Aboriginal title makes this section particularly important. The principle of kaitiakitanga in section 7(a) would also include notions of aboriginal title as would the principles of the Treaty of Waitangi in section 8. While none of these provisions can override the central purpose of sustainable management in section 5, it is likely that the recognition of aboriginal title would accord them greater priority than before.

The New Zealand Coastal Policy Statement (NZCPS) would also be affected by a finding of aboriginal title in the coastal marine area. The NZCPS is important to consent authorities for two reasons. Firstly, the regional coastal plan must not be inconsistent with it.<sup>180</sup> Secondly, the consent authority must "have regard" to the NZCPS when deciding on whether a coastal permit should be issued.<sup>181</sup> The importance of customary seafood resources is already expressly recognised by section 58(b) of the RMA.<sup>182</sup> Aboriginal title in these resources results in this provision assuming greater prominence as a matter which decisionmakers "must have regard to" according to section 104(1)(c).

In particular, Policy 1.1.3(a), (b), and (c) of the NZCPS state that it is a national priority to protect features which are themselves essential elements of the coastal environment. In *Aqua King* the Anakoha Bay coastline was treated as being protected under this provision because of the special spiritual, historical, and cultural significance of it to local iwi in accordance with Tikanga Maori.<sup>183</sup> Tikanga Maori is defined in section 2 of the RMA as meaning Maori customary values and practices. In order to satisfy the evidential requirements for aboriginal title, it is likely that this definition will have to be met. Once this is done however, courts could utilise Policy 1.1.3 to expressly protect Maori interests in the coastal areas. As well as Policy 1.1.3, Policy 4.2.1 is also relevant. This Policy recognises the relationship of Maori and their culture and traditions with their ancestral lands.

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<sup>180</sup>Section 67(2) of the Resource Management Act 1991.

<sup>181</sup>Section 104(1)(c) of the Resource Management Act 1991.

<sup>182</sup>Mahinga maataitai is defined in section 2 of the Resource Management Act 1991 as the areas from which food resources from the sea are gathered.

<sup>183</sup>*Aqua King* above n150, 9.

### D *The Impact of Aboriginal Title on Coastal Tendering*

The Te Tau Ihu iwi claim in the Marlborough Sounds was prompted by Government plans to tender out the water space there for marine farms.<sup>184</sup> Part VII of the RMA enables the Crown to do this. Coastal tendering is a process which allows the Crown to choose between competing applicants for the same coastal space and to maximise financial return to the Crown for the occupation of that space. The process therefore also rests on the presumption of Crown ownership of the coastal marine area.

Tenders are made for an "authorisation".<sup>185</sup> This is something which an applicant for certain coastal permits within an area could be required to hold before a coastal permit application is considered. Once an authorisation is granted, an Order in Council may be made to direct regional councils not to grant coastal permits in that area.<sup>186</sup> To carry out a restricted activity in the coastal marine area, the holder of an authorisation must still apply for a coastal permit.<sup>187</sup> Clearly however, an authorisation in an area would prevent coastal permits being issued to others in respect of that area.

There are strong suggestions that any type of aboriginal title in the foreshore and seabed would undermine the Crown's ability to tender out the coastal marine area. Certainly the granting of Maori freehold title would appear to have this effect and even indigenous occupational or non-territorial title would at least restrict the range of rights which an authorisation could confer. However, *Falkner* could also be used as authority for the contrary proposition. That is, because coastal tendering is included in the RMA, its provisions must be given precedence over aboriginal title. The Ngai Tahu Claims Settlement Bill provides a useful illustration of how Ngai Tahu proposes to resolve this difficulty within the purview of the RMA. In section 305 of the Bill, Ngai Tahu acknowledges the right of the Crown to tender out the coastline but retains the preferential right to purchase 10 percent of the area of the authorisations granted.<sup>188</sup>

<sup>184</sup> <<http://tvone.co.nz/news/general/22Dec1304.html>> (last modified 22 December 1997).

<sup>185</sup> Section 161 of the Resource Management Act 1991.

<sup>186</sup> Section 152 of the Resource Management Act 1991.

<sup>187</sup> Section 162 of the Resource Management Act 1991.

<sup>188</sup> Section 305(2)(a) of the Ngai Tahu Claims Settlement Bill 1998.

Ngai Tahu is further deemed to have lodged a valid tender for the authorisations upon payment of one dollar to the Crown in remuneration.<sup>189</sup> This type of settlement process, ultimately to be codified by legislation, may be a method by which other coastal iwi could ensure that their aboriginal rights are satisfactorily enforced.

## VII CONCLUSION

The presumption of Crown ownership of the foreshores and seabed has formed the basis of the general public's access to these areas throughout New Zealand's history. It also forms the basis for the various rights which the Crown grants under the RMA. *In Re Marlborough Sounds Foreshore and Seabed* is a case, presently awaiting a decision from the Maori Appellate Court, which uses the doctrine of aboriginal title to challenge this presumption. This paper has used the case to prompt discussion on the possible implications of this challenge, for Maori and non-Maori alike.

Firstly, the paper examined the various conceptions of aboriginal title and the part they have played in recognising indigenous proprietary rights. New Zealand's statutory history suggests McNeil's conception of aboriginal title has been particularly influential in this country. However, other conceptions were also analysed in this paper because they provide alternative characterisations of indigenous rights which could be utilised by future New Zealand courts. These alternative conceptions include: Brennan J's judgment in *Mabo*, the Canadian conception in *Delgamuukw*, and McHugh's non-territorial title.

New Zealand's legal history regarding aboriginal title in the foreshore was then summarised. *Re the Ninety Mile Beach* is the crucial authority here. This case held that the Maori Land Court investigation of coastal blocks extinguished aboriginal title in the foreshore itself. I outlined the controversy surrounding this case and the reasons why a modern Court of Appeal may be more willing than ever before to reconsider the decision. However, the public policy concerns of freehold ownership of the foreshore, were also discussed. These concerns would probably form the basis for affirming the *Re the Ninety Mile Beach* principle.

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<sup>189</sup>Section 307(1) of the Ngai Tahu Claims Settlement Bill 1998.

This would not mean that Maori could not have any proprietary rights in the foreshore. *Te Weehi* is authority for this. Instead it means that the alternative conceptions of aboriginal title, alluded to above, would have to be utilised by the courts.

At present, there is a dearth of critical discussion on the legal regime of New Zealand's seabed. This paper alleviates the situation somewhat by introducing some of the key issues involved. In particular, the paper suggests that the uncertain nature of the Crown's territorial sovereignty in the seabed corresponds to an uncertainty over whether proprietary rights (including aboriginal title), can be recognised in it.

If section 7 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 is considered to be a declaratory provision, then New Zealand's view of its international law position is especially important. This view is unclear however. One approach appears to be that the Crown acquires full *imperium* in the seabed. If this approach is adopted then full proprietary rights exist also, and the Maori Land Court is capable of awarding freehold title in it. Alternatively, the Crown may only acquire a more limited type of *imperium* because of its international law obligations regarding the seabed. This approach would not enable full proprietary rights to be recognised as such. The Australian authorities of *Seas and Submerged Lands Case* and *Yarmirr* support this latter view. Once again however, this would not deny aboriginal rights to the seabed altogether. These rights would simply be of a more limited kind which the Maori Land Court itself is incapable of awarding.

The final part of this paper analysed the potential effects of the various types of aboriginal title on coastal permitting under the RMA. In particular, if the Maori Land Court's jurisdiction to award aboriginal title in the foreshore and seabed (the coastal marine area), is affirmed, then an amendment would probably be required to the RMA. This amendment would be required because the presumption of Crown ownership could no longer be made. Separating the right to occupy the coastal marine area from the right to carry out a restricted activity there, is a necessary consequence of this. The impact of other conceptions of aboriginal title on the coastal permitting regime, is less clear. This paper has introduced several possibilities resulting from the recognition of these types of indigenous rights. Certainly these possibilities raise issues which future Environment Courts will be required to address.

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