

Te Takutai Moana



Economics, Politics & Colonisation

Volume Five
Second Edition

Te Takutai Moana

Economics, Politics & Colonisation

Volume Five

Second Edition

**A Series of Readers Examining Critical Issues in
Contemporary Maori Society**

Prepared by Tino Rangatiratanga for publication as a volume of the IRI, Economics,
Politics & Colonisation Series 2003

CONTENTS

HE WHAKARITENGA	4
INTRODUCTION	5
NGA PATAI	6
Knowing What the Words Mean: Moana Jackson	9
THE PAEROA DECLARATION	11
ARTICLES	
Like A Beached Whale: Moana Jackson	12
Foreshore's Lament: Annette Sykes, Carl Mika, Jason Pou Kirsti Luke	15
Common Law Precedent and The Doctrine of Aboriginal Title: Annette Sykes, Carl Mika, Jason Pou, Kirsti Luke	19
There Are Obligations There: A consideration of Maori Responsibilities & Obligations to the Seabed and Foreshore: Moana Jackson	29
The Foreshore Issue: What I Expect of my Pakeha Allies: Gareth Seymour	32
The Invisible Threat: How Globalisation Trumps Tikanga: Jane Kelsey	33
Backgrounding The Paeroa Declaration: Moana Jackson	38
Hauraki Hui on Foreshore and Seabeds: A Personal Observation Potaua Biasiny-Tule	41
Out of Sight: Jason Pou	48
TE WHAKAPUAKINGA: TARANAKI DECLARATION	52

HE WHAKARITENGA

Na Rua Rakena (Ngai Tahu/Nga Puhi) tenei karakia i tuhi.

Nga atuataka

Mai nga tupuna i heke mai i aua waka,
Me aua kaipuke a,
U mai ki aotearoa nei,
Otira,
Kei tenei,
Kei tenei o tatou e whakamine nei:

Kia hua mai i tenei kaupapa:

I a matou koorerorero,
I a matou whiriwhiri,
I a matou kimihanga akuanei:

Te matauranga
Te maaramatanga
Te pono
Te tika
Te aroha
Te tina oranga-
A tinana,
A wairua,
A hinengaro,
A whanau;

Ehara i te mea mo naiane anake,
Engari, mo ake tonu atu

INTRODUCTION

E kore a muri e hokia

This version of Te Takutai Moana has been developed as a follow up to a publication produced specifically for the National Hui at Paeroa that was called to provide a forum for Maori to discuss the issues pertaining to the foreshore and seabed debate. As with the previous publication this version represents a collection of writings have been brought together to provide a resource for our people at a time when fundamental rights are again under attack by the Crown. Recent developments have indicated that this government, like many before it, has failed to recognise the tangata whenua rights that are inherent not only in Te Tiriti o Waitangi but which are handed down through whakapapa and exist irrespective of the ongoing acts of raupatu that are imposed upon our people.

The articles provide frameworks and analysis for understanding the current state of affairs in regard to our Takutai Moana and recent legal developments. They have been collated by the roopu Tino Rangatiratanga, drawing on the work of Te Hau Tikanga - Maori Law Commission and the writings of Moana Jackson (Ngati Kahungunu), Annette Sykes, Carl Mika (both Te Arawa), Jason Pou and Kirsti Luke (both Ngapuhi), Gareth Seymour (Waikato), Jane Kelsey, Rata Pue (Ngati Maru) Potaua Biasiny-Tule (Te Arawa/Tuhoe). We acknowledge in particular the karakia written specifically for this Kaupapa by Rua Rakena, to open the way for the discussion that follows and to Te Puraranga who have provided the Taranaki Declaration 'Te Whakapuakinga' as a statement of Maori sovereignty. The International Research Institute for Maori and Indigenous Education (IRI) have at the request of Tino Rangatiratanga, taken on the task of bringing these pieces together as a resource. We thank Lucy Kapa and Ngarimu Daniels for their mahi to help bring this resource together. We invite the wide distribution of this material and therefore encourage Maori to copy the material as needed. Crown agents and government agencies are however expected to contact the roopu 'Tino Rangatiratanga' for permission to utilise the material provided.

Kaati ake ko te manako ka marakerake te kitea i te ara tika kia kore tenei taonga tuku iho e ngaro ki a taatau tamariki mokopuna. Ki te tukua tenei mana tuuturu e kore a muri e hokia

Otira he koha taunaki tenei ma te iwi Maori. Paanuitia, tohatohatia!

He kuuaka marangaranga, kotahi te manu i tau ki te tahuna, ka tau, ka tau, tau atu e!.

Leonie Pihama

Director, The International Research Institute for Maori and Indigenous Education (IRI)

NGA PATAI

Nga Patai is a reproduction of 'A Foreshore Primer' prepared by Te Hau Tikanga – The Maori Law Commission. This section canvasses some of the questions being raised in the current debate about the foreshore and seabed. It is based upon common concerns expressed by Maori over a course of Crown action that has already been labelled a new confiscation and which raises serious constitutional issues about the true nature of the Treaty relationship.

1. Is this debate a new issue?

No. Ever since 1840 Iwi and Hapu have claimed that the foreshore and seabed fall within the exercise of tino rangatiratanga because they are both part of the whenua. However the Crown has assumed that it has absolute ownership of it and there have been numerous Maori protests and court cases through the years.

2. So is it a Treaty issue then?

Yes. It is clearly covered as a Treaty right in Article Two which acknowledges that Iwi and Hapu have “exclusive and undisturbed possession” of lands etc. However the Treaty merely reaffirmed a right and authority, which Maori had exercised for centuries before 1840.

3. Why has the debate become so prominent only recently?

The Court of Appeal decided on June 26 that the eight Iwi in Marlborough could have their claim to their stretch of foreshore and seabed heard in the Maori Land Court.

4. Was the case decided as a Treaty issue?

No. The Court considered the matter as a common law issue because English and colonial law had long ago decided that “aboriginal” or “customary rights and title” continued after the Crown had established a colony. The Court decided

that it was the job of the Maori Land Court to define what they were.

5. Are these common law “customary rights and title” the same as those claimed by Iwi before 1840?

No. There are similarities but the major difference is that the extent and nature of the common law version is actually defined by the Crown which has also assumed a right to extinguish or remove them.

What may be called the tipuna or Maori law version was defined by Maori – thus for example only Nga Puhi could define their rights and title and certainly no other Iwi had any right to extinguish them.

6. So what was the government’s reaction to the decision?

The day after the Court decision government raised objections and announced it would pass legislation clearly vesting ownership of the foreshore and seabed in the Crown. It effectively sought to override both the tipuna version and its own common law version of Maori rights.

7. Why did the government have such a response?

The Prime Minister and the Attorney General argued that it had always been “assumed” that the Crown owned the foreshore (had “title” to it) and that it merely wished to confirm that for the benefit of “all New Zealanders”.

The government has also said Pakeha people were worried that Maori might block off access to the beaches or sell them.

There was also concern because many of the free trade agreements that the government enters into require that there be no confusion over title.

8. Has the government done this kind of thing before?

Lots of times. Only a few weeks ago it rejected a Waitangi Tribunal Report acknowledging a Maori interest in oil and petroleum.

9. Did the government discuss the issue with Maori?

No – not even its own Maori MP’s.

10. Do the other political parties support the Government?

Most appear to do so. ACT and National have already said the Crown must immediately extinguish any Maori claims to title because of the “public interest” and because there must only be “one standard of citizenship for all”.

11. What is the current government position?

It has effectively not changed since its original announcement. The obvious Maori opposition to its policy has resulted in meetings with Maori caucus and other Maori groups but its basic stance is still that it will legislate to take ownership while recognising certain

“customary uses”. It has also raised the possibility that compensation for Iwi might be considered.

12. Isn’t that some sort of progress though?

The extent of progress always depends where you measure it from and the government’s current position as outlined by Michael Cullen is seriously flawed.

It justifies caucus discussions because it has “an electoral mandate to represent Maori” but their representation is within the government – the Crown in effect is talking to the Crown.

It illustrates its argument that the key issue now is customary use by suggesting that Maori never had a concept of ownership. However the use absolutely depended upon the “title” of rangatiratanga – without that title and its “full and exclusive” authority the rights could not be properly protected or exercised. In that context the issue is a fundamental constitutional one and such questions are never best or finally settled by the payment of compensation.

13. What does the government decision mean?

It blocks access to the courts for those iwi and Hapu who wish to pursue common law claims. In effect the government is denying one of the fundamental rights in the Magna Carta. It subordinates rangatiratanga to the whim of the Crown and acts in breach of the Treaty.

It assumes Iwi and Hapu are claiming “special” rights from the Crown when in fact Maori are simply trying to reaffirm rights that have been in existence for centuries.

It suggests the Crown needs to assume exclusive title to the foreshore and seabed in order to guarantee free access for everyone when in fact under Maori law covenants of use could always be negotiated.

It also incorrectly implies that Iwi and Hapu might freely sell off the foreshore when in fact an interest held collectively and exercised according to tikanga was non-tradeable.

14. What are Maori doing?

The government has left few options open for Maori. A National hui was held in Paeroa on the 12th of July and a declaration was developed by those present which expresses the fundamental values and rights held by Maori in regard to the takutai.

Some Iwi and other groups are still trying to pursue their court actions and lodging new claims with the Waitangi Tribunal. Others are organising actions to block beach access to Crown officials without obstructing the public in any way.

15. What is the Customary Rights Justification?

In a Parliamentary debate on Tuesday June 24 the Attorney General reassured Maori that customary rights would not be affected and that it was “the government’s intention to preserve the ability of Maori to pursue claims to the foreshore and seabed compatible with the Crown’s ownership rights”.

There is at best a dubious logic in such an approach because in denying Maori title the Crown effectively restricts the nature of the customary right and makes it liable to future extinguishment by the Crown. As an analogy, if a couple has title to their home they can make whatever alterations they choose and exercise complete rights in relation to it. However if they are tenants and ownership is vested in someone else they cannot do so without permission and the extent of their rights is diminished.

The Crown proposal reduces Maori to tenants of the foreshore which Iwi and Hapu have exercised kaitiakitanga over for centuries. It subordinates tino rangatiratanga to the whim of the Crown.

Knowing what the Words Mean: The origins of the Crown Discourse on the Foreshore & Seabed.

The series of definitions that follows has been prepared by Te Hau Tikanga, The Maori Law Commission

*We have to know where the government words come from, because they do not
always mean what we think they mean.*

Red Cloud, 1876

This brief paper attempts to clarify some of the terms used by the courts and lawyers in the foreshore and seabed debate. It is important to remember that iwi and hapu rights in relation to the foreshore and seabed are derived from our own traditions and law. These rights, based in whakapapa, precede the treaty, and the common law definitions of Maori rights which were introduced after 1840.

Many iwi and hapu of course tried to protect their rights through courts and common law. However there is a clear distinction between the rights available in common law and the rights derived from our whakapapa. The foreshore and seabed issue needs to be addressed in terms of our own traditions and laws and the rangatiratanga exercised to protect them and give them life.

Some of the Key Terms

Customary Law

Customary Law is the common law definition of the customary law and practices of indigenous peoples. It originated in the 17th century court cases in England and the USA to subordinate the rights and laws of indigenous peoples to that of the colonising powers. It is not the law defined by tipuna but the law defined by colonising courts including the Maori Land Court.

Customary Title

The term customary title refers to the authority which colonising courts have decided to grant to indigenous peoples over taonga tuku iho. It redefined and subordinated Maori interests to those of the Crown.

In Maori terms, the rights and obligations held by iwi and hapu are a tipuna title derived from our whakapapa and exercised through rangatiratanga. It is definable only by iwi and hapu, not by courts, nor the crown.

Customary Use Rights

The term customary use rights refers to rights that colonising courts and governments have decided indigenous peoples can have with respect to their taonga tuku iho. They

are not derived from tipuna but are defined to suit and be compatible with crown interests and authority.

In Maori law iwi and hapu would define when and how certain areas could be used, left to rest, or placed under something like a rahui. However, customary use rights as defined by the crown take away and control the meaning of those things.

Extinguishment

Extinguishment is the power assumed by colonising powers to remove indigenous peoples' rights and obligations. It was first defined in church law in the 15th century and subsequently, refined by numerous European lawyers. In Maori terms it would be equivalent to Ngati Kahungunu, for example, assuming they had a power to deny or remove the rights of Ngati Porou.

The common law now limits the power to extinguish by requiring it be done through specific legislation or through the consent of the iwi and hapu concerned. Yet in Maori terms it is clearly impossible for an iwi or hapu to consent to somebody else extinguishing their rights because whakapapa cannot be extinguished.

There is always an overriding obligation to past and future generations. Accepting a crown power to extinguish our rights is equivalent to an extinguishment of our existence as a people.

The Context

Hapu and iwi may as an exercise of their prerogative choose to seek some resolution at common law. However the issue is ultimately sourced in our rangatiratanga as defined by our tipuna. It is therefore a political and constitutional issue more than a court or crown defined legal one.

Conclusion

The starting point must therefore be that the foreshore and seabed are ours because of the whakapapa obligations that tie us to them. Our obligations and rights are neither those of mere guardians nor crown approved users but are part of the sovereign responsibility we have as mokopuna. They are our tipuna rights.

THE PAEROA DECLARATION

Resolution One:

The foreshore and seabed belong to the Hapu and Iwi under our tino rangatiratanga.

Resolution Two:

We reaffirm our tupuna rights to the foreshore and seabed as whenua rangatira.

Resolution Three:

We direct all Maori MPs to oppose any legislation which proposes to extinguish or redefine customary title or rights.

Resolution Four:

We support all Hapu and Iwi who wish to confirm their rights in the Courts.

Resolution Five:

The government must disclose its proposals to whanau, Hapu and Iwi immediately, whose decision to accept or reject will be final.

Resolution Six:

The final decision on the foreshore and seabed rests exclusively with whanau, Hapu and Iwi.

Resolution Seven:

We accept the invitation of Te Tau Ihu to host the next hui.

ARTICLES

‘LIKE A BEACHED WHALE’: A CONSIDERATION OF PROPOSED CROWN ACTIONS OVER MAORI FORESHORE

This article was written by Moana Jackson as an immediate response to the governments announcement to legislate against The Court of Appeal decision that the eight Iwi in Marlborough could have their claim to their stretch of foreshore and seabed heard in the Maori Land Court

As our rights and our mana are slowly hacked away we become like a beached whale struggling to live on the shore.” - Te Ataria, 1887.

ABSTRACT

This paper considers the arguments used by the Crown in its recent decision to pass legislation dealing with Maori claims to the foreshore and seabed. Because the issues raised by the Crown proposal are so far-reaching and impact so directly on the status of Maori as tangata whenua, and upon Iwi and Hapu Treaty rights, it may be helpful to put them in some context. The Paper therefore has two Parts:

- Part One simply gives a brief time-line of events and the long Maori history of asserting and validating rights to the foreshore and seabed.
- Part Two analyses the main arguments that the Crown has used to justify its decision. Such analysis will hopefully be of some help as Maori consider possible future strategies because although the proposed legislation has not yet been drafted and the government is now promising extensive consultation it seems determined to pursue a course of action which will effectively “extinguish” long-held Maori rights.

PART ONE: THE TIME LINE:

In all Maori history and law the sea and land were the domain of different atua but interrelated in terms of the poetic metaphors of creation which linked all things together. The authority which Iwi and Hapu exercised to safeguard and protect them was a fundamental component of mana and tino rangatiratanga because the seabed and foreshore were of the people as surely as the people were of them. It was a collective title and interest held of and for the collective. That relationship and authority was clearly reaffirmed in Article Two of Te Tiriti o Waitangi. The Crown however unilaterally claimed the right to own the seabed and foreshore as part of what it assumed to be its absolute sovereignty after 1840.

Maori never accepted that assumption and numerous protests and Court battles have been waged over the years to have Maori title recognised not just in terms of Maori law but the common law as well. In each case the Courts essentially held that with the “cession” of sovereignty by Maori to the Crown any Iwi and hapu claims were effectively “extinguished”. The latest of these battles was undertaken by the eight Iwi at the top of the South Island who for nearly a decade have diligently pursued due legal process to have their claims to the seabed and foreshore recognised.

On Thursday June 19 the Court of Appeal overruled the earlier decisions and decided that the eight Iwi could have their claim to the Marlborough seabed and foreshore (the area between the high and low tide marks) considered by the Maori land Court. It concluded that the nature and extent of the common law “customary rights and title” was in many ways unclear and needed to be argued in a specific case. This quite narrow decision was widely misinterpreted by many Pakeha as restricting the ability of “every New Zealander to use the beaches which were their birthright” and a threat to future investment in marine development. The very next day the Prime Minister announced that steps would be taken to confirm absolute Crown title over the foreshore because it was “important to establish what has long been assumed that the beaches and seabeds have long been there for all New Zealanders. Her views were reinforced by Attorney General Margaret Wilson who announced that legislation would be introduced to “give clear expression of the Crown’s ownership of the foreshore and seabed”. Their actions effectively close off Maori access to a Court hearing and “extinguish” any possibility that the seabed and foreshore might belong to Iwi. They also raise major constitutional questions about Te Tiriti o Waitangi and the genuineness of the Crown’s good faith.

PART TWO – THE CROWN JUSTIFICATION FOR ITS DECISION:

The Crown has put forward a number of reasons for its decision but they seem neither logical nor valid in terms of its own law and Te Tiriti o Waitangi. In fact they are fundamental denials of Maori rights.

The Free Access Justification:

The Crown has suggested that it needs to assume exclusive title to the foreshore and seabed in order to guarantee free access for everyone to beaches etc. However the argument is misleading because there has never been unfettered access. Port companies, the Department of Conservation, and numerous other authorities have for years restricted entry to the waterfront.

It is also dishonest because it assumes that Maori would deny others normal use and enjoyment. That has never been the Maori intention and the possibility that it might occur in the future could be easily prevented with appropriate covenants about use rights as were often negotiated in pre-Pakeha Maori law.

It is also misinformed because in its parallel assumption that Iwi and Hapu might freely sell off the foreshore it ignores the collective nature of the interest which makes it non-tradeable.

The Public Interest Justification:

The Crown justifies the legislation in terms of the “public interest” and to ensure the rights of “all New Zealanders”. However in denying Iwi a chance to have their claims heard in Court the Crown is effectively allowing the “public interest” to override a right of access to justice. That is essentially a breach of the Magna Carta and is not denied even to the most violent of criminals. Thus even though public interest might demand a murderer receive the stiffest possible sentence that interest does not override his right to a fair trial. The Crown is effectively denying Maori a “fair trial” on this issue.

It is also confusing the need to consider the “public (non-Maori) interest” with the right of the “Maori public” in terms of Te Tiriti o Waitangi. It thus redefines tino rangatiratanga as a minority interest when Treaty rights are never dependent upon numbers – if there was only one Maori left in Aotearoa he or she would still have Treaty and tangata whenua rights. In that context the “public interest” argument is a politically expedient distortion of the Treaty relationship.

It is worth noting that most other political parties appear to support the government and ACT has even put its own gloss on the “public interest” argument by seeking reassurances that “access to beaches...will be available equally to all New Zealanders without distinction or privilege on the basis of race or ethnic inheritance”. Such an approach diminishes the nature of the Treaty rights at issue which would be the same no matter what the “ethnic inheritance” of the parties.

The Customary Rights Justification

In a Parliamentary debate on Tuesday June 24 the Attorney General reassured Maori that customary rights would not be affected and that it was “the government’s intention to preserve the ability of Maori to pursue claims to the foreshore and seabed compatible with the Crown’s ownership rights”. There is at best a dubious logic in such an approach because in denying Maori title the Crown effectively restricts the nature of the customary right and makes it liable to future extinguishment by the Crown. As an analogy, if a couple has title to their home they can make whatever alterations they choose and exercise complete rights in relation to it. However if they are tenants and ownership is vested in someone else they cannot do so without permission and the extent of their rights is diminished.

The Crown proposal reduces Maori to tenants of the foreshore which Iwi and Hapu have exercised kaitiakitanga over for centuries. It subordinates tino rangatiratanga to the whim of the Crown.

SUMMARY:

The proposed Crown actions have been rightly termed a new “confiscation” and they are certainly based on the same dubious assumptions and rationalisations that underpinned the raupatu of the 19th century. They draw upon old colonising legal precedents which vested a self-defined power in the Crown to determine or deny indigenous rights. They thus maintain what the Lumbee jurist Robert Williams has called the “baseless substance of an illusion” that Indigenous Peoples can even be assumed to “consent” to such extinguishment. They are not only “draconian” as described by one kaumatua but fundamentally unjust.

FORESHORE'S LAMENT

The irony of contemporaneous return a bit of land/take lots of other rights dichotomies is not lost on those Maori who are participating in the foreshore/seabed debacle. As usual, Maori are unwilling partners in this latest constitutional foxtrot being led by the Crown. The writers of this article, Annette Sykes and Carl Mika (both Te Arawa) and Jason Pou and Kirsti Luke (both Ngapuhi), expose the Crown in its inability to adhere to rulings set down by its own arbiters of its own laws. The article that follows is also written by these authors and places current events in an international context.

INTRODUCTION

The issue of customary ownership, usage and right has arisen as a frustrated one in the minds of government officials. The contortion of definition, with the potential for reductionism of traditional Maori ownership and control over foreshore and seabed, is apparent to Maori. Maori see the matter of control of customary ownership of foreshores and seabed as clearly delineated, and recourse to proof of ownership is narrowly supported by the recent decision of the Court of Appeal. However the obfuscation of issues which are straight-forward to Maori and the Court of Appeal is the malady of the government and should not require reaction by Maori.

This discussion shall focus on the legal and constitutional ramifications of the decision handed down by the Court of Appeal in relation to customary ownership of foreshore/seabed. It will then traverse the potential constitutional consequences of retrospective legislation, whilst sourcing the discussion within a political framework. An examination of the relationship of Maori with the foreshore/seabed will then be advanced within the context of te Tiriti o Waitangi.

THE COURT OF APPEAL DECISION

Key Issue

The single issue before the Court of Appeal was whether the Maori Land Court could enter into a substantive enquiry as to the nature and extent of customary title and rights for those lands located within the foreshore/seabed territories of the tribal applicant groups.

The Decision

The appeal was allowed and the applicants were permitted to go to hearing in the Maori Land Court.

The Court of Appeal upheld unanimously the following:

- That the judgment of the High Court was in error
- That the purported transfer of sovereignty did not affect customary property. Those interests are preserved by operation of the common law until extinguished in accordance with the common law
- That after an examination of the legislation relied on by the Crown in the High Court found that it did not in its precise terms extinguish any Maori property in the foreshore/seabed.

- That *In Re the Ninety-Mile Beach* was wrong in law and should not be followed. *In Re the Ninety-Mile Beach* the Court had followed the discredited authority of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 which was rejected by the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561.

The raison d'être

A number of significant matters were explored by the Court of Appeal. We summarise these as below: The Court observed:

a) The legal status of customary interests in land

- In British territories with native populations, the introduced common law adapted to reflect local custom, including property rights. The laws of England were applied in NZ only “so far as applicable to the circumstances thereof.” This was made explicit in NZ by the English Laws Act 1858. Land in NZ was not available for disposition by Crown grant until Maori property was extinguished.
- *Wi Parata v Bishop of Wellington* held that the rule of the common law that native customary property survived the acquisition of sovereignty had no application to the circumstances of NZ. This reasoning was rejected by the Privy Council in 1901 but continued to influence thinking in NZ. The error in this approach was its equation of sovereignty with ownership.
- Elias CJ states at para 31 that any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature, as it was held by the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* (1921).
- The customary rights of the native community continued at common law to exist until fully extinguished. “NZ was never thought to be *terra nullius*...as it was accepted that the entire country was owned by Maori according to their customs and that until sold, land continued to belong to them.” (para 37)

b) Ownership of foreshore and seabed at common law

- Any prerogative of the Crown as to property in foreshore and seabed as a matter of English common law in 1840 cannot apply in NZ if displaced by local circumstances. The existence and extent of any such customary property interest is determined in application of tikanga.
- That is a matter for the MLC to consider on application to it.

c) The jurisdictional objection that “land” in Te Ture Whenua Maori Act excludes sea areas

- Elias CJ is of the view that seabed and foreshore is “land” for the purposes of s129(1) of Te Ture Whenua Maori Act 1993.
- As a matter of language, Elias CJ is unable to draw a distinction between lake beds or river beds and seabed. Both lake beds and river beds have been the subject of claims to the MLC without jurisdictional impediment.

d) Area specific legislation vesting foreshore or seabed in the Marlborough Sounds

- The Maori Appellate Court asked whether nine Acts said to vest areas of the Marlborough Sounds in harbour boards, local authorities and other persons extinguish any Maori customary title to the foreshore and seabed in those areas.
- The terms of the legislation were not the subject of argument. Consequently Elias CJ did not answer the question in its terms.

e) The Harbours Acts 1878 and 1950

- It has been argued that from 1878 the Harbours Act deprived the MLC of jurisdiction to investigate land below high water mark.
- Elias CJ held that the legislation cannot properly be construed to have confiscatory effect.

f) Territorial Seas Acts

- Both the Territorial Sea and Fishing Zone Act 1965 and the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 deem the seabed and its subsoil from the low water mark to the limits of the territorial sea to “be and always to have been vested in the Crown.” Existing grants made before and after the Act are specifically reserved.
- The language of deeming and the preservation of existing property interests make it impossible to construe the legislation as extinguishing such property.

g) Section 9A Foreshore and Seabed Endowment Revesting Act 1991

- The Foreshore and Seabed Endowment Revesting Act 1991 was one “to revoke certain endowment of foreshore and seabed, and re-vest those endowments in the Crown.”
- The Crown argues that s9A effects a vesting of all foreshore and seabed land in the Crown.
- Elias CJ held that s9A applies only to lands which are property of the Crown. In conformity with the Land Act 1948 and the common law, Maori customary land is necessarily excluded. No expropriation was intended by Parliament.

h) The Resource Management Act 1991

- It was argued that the present claims to ownership of property in foreshore and seabed are inconsistent with the controls of the coastal marine area under the Resource Management Act.
- The management of the coastal marine area under the Resource Management Act may substantially restrict the activities able to be undertaken by those with interests in Maori customary property. However, the legislation does not effect any extinguishment of such property.

i) Investigation of title to land bounded by sea (In Re the Ninety-Mile Beach)

- *In Re the Ninety-Mile Beach* it was argued by the Crown that, on the assumption of sovereignty, the Crown “by prerogative right” became the owner of the foreshores in NZ. This result was said to follow from the fact that the common law had become “the law of the colony until abrogated or modified by ordinance or statute.”
- The Court based its conclusions on an assumption that the English common law of tenure displaced customary property in land upon the assumption of sovereignty.

- The reasoning in *In Re the Ninety-Mile Beach* was based upon that accepted in *Wi Parata*. The reasoning in *In Re the Ninety-Mile Beach* is contrary to *R v Symonds*, the Canadian cases dealing with native title and property interests and the majority judgments in *Mabo v Queensland*.
- In Elias CJ's view *In Re the Ninety-Mile Beach* should not be followed.
- At para 88 Elias CJ states, "I consider that an investigation and grant of coastal land cannot extinguish any property held under Maori custom in lands below high water mark. Whether there are such properties is a matter for the MLC to investigate in the first instance as a question of tikanga."
- An approach which precludes investigation of the fact of entitlement according to custom because of an assumption that custom is displaced by a change in sovereignty or because the sea was used as a boundary for individual titles on the shore is wrong in law. (para 89)

Conclusion

Therefore the Court concluded that individual cases could proceed to the Maori Land Court and deferred the other seven questions raised by the appellants to be considered at a later time as they were matters dependent on the facts of each prospective case.

COMMON LAW PRECEDENT AND THE DOCTRINE OF ABORIGINAL TITLE

This article, also by Annette Sykes and Carl Mika (both Te Arawa), Jason Pou and Kirsti Luke (both Ngapuhi), continues from the previous article and sources the Crown's position in a wider international context.

English colonial law provided for native laws and customs to continue on assumption of sovereignty by the colonising power. More importantly the Privy Council held indigenous customary law to be enforceable legal rights.¹ The doctrine of aboriginal title is a common law concept and as such is enforceable in the ordinary Courts irrespective of whether or not the Treaty of Waitangi or the Treaty principles have been expressly incorporated into legislation.

Indigenous customary rights have been recognised as enforceable in comparable jurisdictions.² More over they have received recognition as a feature of New Zealand law.³ In **Te Runanga o Muriwhenua v Attorney General**⁴ the Court vindicated the rights of the Maori litigants referring to the:

“... wealth of material on an international scale on the principles as to the customary or treaty rights of aboriginal or indigenous or native peoples.”

Maori customary rights continue unless and until they are extinguished explicitly by Statute and the natives freely consent to such extinguishment.⁵ In **The Queen v Symonds** Chapman J stated⁶:

“...Whatever may be the opinion of the jurists as to the strength or weakness of the Native Title, whatsoever may have been in the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected but it cannot be extinguished (at least in times of peace) otherwise than by the pre-consent of the Native occupiers”.

The above passage received endorsement from the Privy Council in **Nireaha Tamaki v Baker**⁷ and more recently by our Court of Appeal in **Te Runanganui o Te Ika Whenua Incorporated Society v A.G.**⁸ and also the recent Court of Appeal judgment of **Ngati Apa and others v AG**⁹

¹ *Oyekan v Adel* [1957] 2 All ER 785, 788 & 790 per Lord Denning delivering the advice of the Privy Council, and citing the leading authorities.

² *Mabo V Queensland* (1992) 175 CLR 1.

³ *R v Symonds* (1847) NZPCC 387; *Te Weehi v Regional Fisheries Officer*

⁴ [1990] 2 NZLR 641

⁵ *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680. *Te Runganganui o Te Ika Whenua Inc Society & Or v A.G.*[1994] 2 NZLR 20 (CA); *R v Symonds* 918470 NZPCC 387 at 390 In Re Bed of the Wanganui River.

⁶ (1847) NZPCC 387 at 390.

⁷ (1901) NZPCC 371 at 384

⁸ [1994] 2 NZLR 20, 23-24.

⁹ CA 173/01 [19 June 2003]

The **Te Weehi**¹⁰ case is particularly interesting as the judgement, relying upon the common law doctrine of aboriginal title, admits a legal pluralism directly in New Zealand law without the need for express incorporation of native rights by legislation.

Maori custom was applied in **Baldick v Jackson**¹¹ in preference to an English statute of Edward II, to a claim to a whale, and in **Public Trustee v Loasby**¹² where Maori custom was applied to an issue whether the costs of a tangi could be paid out of the estate.

While Maori customary title has been the recipient of much adverse legislation, judicial findings and political debate its larger sibling Maori customary rights has been noticeably ignored. Customary rights are those rights enjoyed by the indigenous inhabitants prior to colonisation. In the interests of avoiding confusion the Court of Appeal has said that the expressions “*Maori customary rights*” and “*aboriginal rights*” are interchangeable. (see **Te Runanganui o Te Ika Whenua Incorporated Society v A.G.** [1994] 2 NZLR 20.)

Aboriginal rights exist as a doctrine of common law. Since it is a rule of common law it can be enforced without statutory recognition of the right, unless the aboriginal right has been extinguished by statute. (see **Richard Boast** [1990] NZLJ 680).

In the seminal case of **Te Weehi v. Regional Fisheries Officers** [1986] 1 NZLR 680 Williamson J advanced the approach taken by earlier courts. (See for example, **Baldick v Jackson** (1910) 30 NZLR; **Inspector of Fisheries v. Weepu** [1956] NZLR 920; **Keepa v. Inspector of Fisheries** [1965] NZLR.

The **Te Weehi** case continued to further enlarge the boundaries by adopting the test propounded in **Hamlet of Baker Lake v. Minister of Indian affairs & Northern Development** (1979) 107 DLR [3d] at 691. Where aboriginal title rights are extinguished by statute the statute must exhibit “a clear and plain intention” to extinguish that right.

In the **Te Ika Whenua** case Cooke P noted the authoritative stance taken by earlier courts (see for example; **R v. Symonds** (1848) NZPCC 387 at 390 and **Nireha Tamaki v Baker** (1901) NZPCC 371 at 384) that customary title cannot be extinguished (at least in times of peace) otherwise than by the fee consent of the native occupiers. It is submitted that this standard should also be applied similarly to all customary rights and not restricted to the subset of rights under the doctrine of aboriginal title.

The Court of Appeal in **Te Ika Whenua** also upheld the finding in **Te Runanga o Muriwhenua Inc v. Attorney General** [1990] 2 NZLR 644 at 655 that:

“...The Treaty guaranteed to Maori, subject to British kawatanga or government, their tino rangatiratanga and their taonga. In doing so the treaty must have intended effectively to preserve for Maori their customary title.

A full New Zealand Court of Appeal described aboriginal title in the following terms:¹³

“...Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the

¹⁰ Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680

¹¹ (1910) 30 NZLR 343

¹² (1908) 27 NZLR 801

¹³ Te Runanganui o te Ika Whenua Inc Society v Attorney-General [1994] 2 NZLR 20 at pg 23.

time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights”.

Customary rights may extend from mere rights of use in common with others to the full and exclusive possession or title in respect of the relevant resource.¹⁴ The nature and incidence of the customary rights are matters of fact dependent on evidence in the particular case.¹⁵ Judicial cognisance of those rights will however vary from jurisdiction to jurisdiction - though the full Court of Appeal in **Muriwhenua v Attorney-General** [1990] 2 NZLR 641 observed that:¹⁶

“... in interpreting New Zealand parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of aboriginal peoples are in North America”

THE CANADIAN SITUATION

Since 1982 when aboriginal rights were given constitutional protection in Canada, their courts have been consciously developing case law on the principles for the recognition of rights both at common law and under treaties protecting such rights in general words. In **R v Sparrow**, the court laid out the framework for analysing claims. In three 1996 judgements concerning fisheries, **Van Der Peet**, **Smoke House** and **Gladstone**, the court clarified that aboriginal title is a subset of aboriginal rights.¹⁷ Finally in **Delgamuukw**, the court undertook a full definition of aboriginal title. It is further submitted that because aboriginal and treaty rights are constitutionally protected in Canada it does not make Canadian decisions less relevant to the New Zealand situation. While Section 35 (1) of the Constitution Act, 1982 provides that:

“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed”

The Canadian Supreme Court has pointed out that the section does no more than confirm existing rights.

In **Delgamuukw**, the majority reiterated the agreed position that:

“Aboriginal title at common law is protected in its full form by s. 35 (1). This conclusion flows from the express language of s. 35 (1) itself, which states in full:

*‘(T)he existing **aboriginal** and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed’(emphasis added).*

¹⁴ Consider *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC); *R v Symonds* (1847) NZPCC 387; *Te Runanga o te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA); *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 (CA); *Mabo v State of Queensland (No 2)* [1992] 174 CLR 1, 89.

¹⁵ *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 at pg 147.

¹⁶ At page 655.

¹⁷ Consider *R. v. Van der Peet* (1996) 137 DLR 4th 289;

On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were “existing” in 1982. The provision, at the very least, constitutionalised those rights which aboriginal peoples possessed at common law, since those rights existed at the time s. 35 (1) came into force. Since aboriginal title was a common law right whose existence was recognised well before 1982 (e.g. Calder, supra). s 35 (1) has constitutionalised it in its full form.

I expressed this understanding of the relationship between common law aboriginal rights including aboriginal title, and the aboriginal rights protected by s. 35 (1) in Van der Peet. While explaining the purpose behind s. 35 (1), I stated that “it must be remembered that s.35 (1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognised under the common law (at para. 28) Through the enactment of s. 35 (1) ‘ a pre-existing legal doctrine was elevated to constitutional status’ (at para. 29), or in other words, s. 35 (1) had achieved “ the constitutionalisation of those rights” (at para.29).

Finally, this view of the effect of s.35 (1) on common law aboriginal title is supported by numerous commentators”.

The Canadian Supreme Court observed that aboriginal title may encompass:

“the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures.”

This expansive definition allows for the flexible interpretation of those rights so as to permit their evolution or development over time.¹⁸ This may include the development of a commercial right to utilise resources.¹⁹ It is also now universally accepted that the courts must be careful not to render native title conceptually in terms which are appropriate only to systems which have grown up under English law.²⁰

In Te Runanga o Muriwhenua v. A.G. [1990] 2 NZLR 641 at 655, the Court of Appeal commented that in the area of fiduciary duties owed to indigenous peoples by the Crown, not only are the constitutional differences between New Zealand and Canada of minimal importance, but:

“...Moreover, in interpreting New Zealand parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of aboriginal peoples are in North America”.

It is submitted that the view of the world of indigenous customary practices must be given equal weight with the common law. The Supreme Court of Canada recognises that the aboriginal rights doctrine is an attempt to synthesise two approaches, the

¹⁸ Refer: *R v Sparrow* [1990] 1 SCR 1075 and *R v Van der Peet* [1996] 2 SCR 507, *Hunter v Southam* [1984] 2 RCS 145; *Muriwhenua v AG* [1990] 2 NZLR 641 (CA).

¹⁹ *Ibid.*

²⁰ *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) and *Te Runanga o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at pg 26 (CA).

common law, and aboriginal practices. Their approach is to give “equal weight” to both common law and aboriginal title perspectives. In the Van der Peet judgement, the Chief Justice expressed the unopposed view that “ *the essence of aboriginal rights is their bridging of aboriginal and non- aboriginal cultures*”.

DIFFERENCE BETWEEN ABORIGINAL RIGHTS AND ABORIGINAL TITLE

In **R v. Adams** the Supreme Court of Canada found that:

“ Aboriginal rights do not exist solely where a claim to aboriginal title has been made out. Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not show that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition.” (para 39)

In **Van der Peet** the Chief Justice explained it this way:

“Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organisation and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimants’ distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors to the identification and definition of aboriginal rights.”(para 74)

In the same case, Judge L ‘heureux-Dube put it this way:

“... aboriginal title exists when the bundle of aboriginal rights is large enough to command the recognition of a sui generis proprietary interest to occupy and use the land. It follows that aboriginal rights can be incidental to aboriginal title but need not be; these rights are severable from and can exist independently of aboriginal title.” (para 119)

It is submitted that the New Zealand courts should follow the approach of the Canadian Supreme Court outlined. As the decision in **Van der Peet** observed customary title is but a sub category of the wider group of customary rights. Customary rights have already been judicially endorsed in the Te Weehi case in the New Zealand courts.

Extinguishment

Aboriginal title should only be extinguished by consent and then only by “clear and plain” statutory language.²¹ Furthermore, extinguishment must be in strict compliance with the provisions of any relevant statutes and there must be fair compensation.²²

²¹ Te Runanga o te Ika Whenua Inc Society v Attorney-General [1994] 2 NZLR 20 (CA) at pg 27; Delgamuukw v British Columbia [1997] 3 SCR 1010 at pg 6; Yanner v Eaton [1999] HCA 53.

These basic concepts find expression in the Treaty of Waitangi which affirms the rights of Maori in respect of their land; their forests; their fisheries and their customary practices and laws and which accords to Maori all the rights of British Citizens, including the rule of law.²³

TE TIRITI O WAITANGI (THE TREATY OF WAITANGI)

It is submitted that the Treaty of Waitangi is also a relevant consideration when looking at the operation of Maori customary right in the present case. In general the Treaty should be viewed not as a descriptive but as a prescriptive document when determining customary rights. Certainly the Treaty of Waitangi created its own regime of unique rights and obligations, however these should be seen as distinct from the pre-existing rights that the Treaty also affirms and protects.

The Social context

*The basic social unit in traditional and modern Maori society was the whanau, an extended family which included three generations. At its head were the kaumatua and kuia, the male and female elders of the group. They were the storehouses of knowledge, the minders and mentors of children.*²⁴

*Children belong to the whanau (and beyond that to hapu and iwi) as members, not as possessions. They are taonga, highly valued 'treasures' held collectively and in trust for future generations. (emphasis added)*²⁵

*When Maori values are not applied in our country, but western values are, we presume our society is monocultural. In our multicultural society the values of minorities must sometimes give way to those of the predominant culture, but in New Zealand, the Treaty of Waitangi gives Maori values an equal place with British values, and a priority when the Maori interest in their taonga is adversely affected (emphasis added)*²⁶

The Treaty Context

"...Maori autonomy is pivotal to the Treaty and to the partnership concepts it entails. Its more particular recognition is Article 2 of the Maori Text. In our view it is also the inherent right of peoples in their native territories.

The international term 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Maori

²² Refer *ibid*, *Oyekan v Adele* [1957] 2 ALL ER 785.

²³ These concepts in turn are found in the Magna Carta and the Bill of Rights.

²⁴ Walker Ranginui; "Ka Whawhai Tonu Matou: Struggle without end" page 63 (1990)

²⁵ Metge Dame Joan; cited by Judge Boshier in *Re Adoption of A* [1992] NZFLR 421,424

²⁶ Waitangi Tribunal, *Manukau Report* (1989 Wai 8), pp 78 –79 cited by Chilwell J in *Huakina v Waikato Valley Authority* (1987) 2 NZLR 188, 221

words are “*tino rangatiratanga*’ as used in the Treaty and “*mana motuhake*”, as used since the 1860’s”.²⁷

The Treaty is a document of fundamental importance both to Maoridom and to New Zealanders as a whole. In recent years the principles of the Treaty have been afforded some statutory recognition and have applied by the courts to protect and advance the rights of Maori as treaty partners.

Necessarily because:

- a) It is a document of considerable constitutional significance;
- b) It is relatively brief in its content;
- c) There are two versions , English and Maori, which are “not translations the one of the other and do not necessarily convey the same meaning”.²⁸

Thus it is said that the Treaty has come to be acknowledged as a living instrument to be applied in the light of developing national circumstances.²⁹ It was noted by a full high court in **Barton Prescott v Director General of Social Welfare**,³⁰

“... we also take the view that the familial organisation of one of the peoples a party to the Treaty, must be seen as one of the taonga, the preservation of which is contemplated... Family organisation may be said to be included among those which the Treaty was intended to preserve and protect.”

Some relevant Treaty principles to the present case it is submitted include:

Partnership: The Treaty signified a partnership between Maori and the Crown. Cooke P said that³¹:

“...What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties...”

Consultation: Associated with a duty of partnership, is the duty of consultation. Richardson J said³²:

“...the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has proper regard to the impact of the principles of the Treaty...”

In the *Forestry*³³ case Cooke P further discussed this principle, stating:

“...In the judgements in 1987 this Court stressed the concept of partnership. We think it right to say that the good faith owed to each other by the parties must extend to consultation on truly major issues...”

²⁷ Waitangi Tribunal, The Taranaki Report, Kaupapa Tuatahi. Wai 143 (1996) at pg 5.

²⁸ NZMC v. A.G

²⁹ see Te Runanga o Muriwhenua V. A.G. [1990] 2 NZLR 641.

³⁰ [1997] NZFLR 642 .

³¹ At p 664.

³² At p 683.

³³ NZ Maori Council v Attorney General [1989] 2 NZLR 142, at 152.

Good Faith: Both parties have a duty to act reasonably towards each other in the utmost good faith³⁴. Cooke P stated that³⁵:

“...In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership...”

THE BILL OF RIGHTS

Section 20 of the New Zealand Bill of Rights Act 1990 provides:

“A person who belongs to an ethnic, religious, or linguistic minority in New Zealand ...has the right in community with other members of that minority to enjoy their culture, to profess and practice the religion or to use the language of that minority”.

It is contended that the above passage not only incorporates Te Tiriti o Waitangi (the Treaty of Waitangi) in particular the preamble; Article 2 and Article 4 into domestic law but also recognises the peculiar vulnerability of Maori, as a minority group, to the submersion of their values within the prevailing Pakeha community. It is submitted that section 20 of the New Zealand Bill of Rights Act 1990 has provided a means for that swamping process to be resisted.

It is submitted that the present application enables the courts to identify and give effect to Maori values in the administration of justice consistent with the laws of New Zealand. By the Preamble to the Treaty:

“... the Crown confirms and guarantees to the Chiefs, tribes and individual Maori their full exclusive and undisturbed possession and te tino rangatiratanga...”

The Treaty of Waitangi further prescribes by Article the Second:

“... Her Majesty the Queen of England and confirms and guarantees to the Chiefs and tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their lands and estate; forests; fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.”

It is submitted that the Treaty of Waitangi contemplates that all Maori shall enjoy a special relationship with the Crown. It follows then that each and every Maori enjoys the protection afforded by the guarantees stated in the Treaty of Waitangi.

CROWN RESPONSE

Since the handing down of the decision the Crown has rushed to wrest the ownership of foreshore/seabed from Maori tribal applicants. Petulantly it has stamped its legislative

³⁴ See also Richardson J at p682; Somers J at pages 692 - 693; Casey J at page 702

³⁵ At p 664.

foot to protect its perceived prerogative. It has undertaken to vest imaginary ownership in itself of things which are inherently the domain of Maori, and has proceeded to *auto-consult*, going so far as to suggest that by discussing matters with the Maori caucus, the only democratically elected Maori representatives of the State, they have absolved themselves of the responsibility of meeting and discussing the issues with Maori communities – whanau, hapu and iwi. Consulting with themselves has been broadened, through concerted vociferous opposition by Maori communities, to other Maori bodies which are nevertheless, in the main, statutory creatures, with whom they are obliged to consult on matters of Maori interest because of the Maori Community Development Act 1962 and other statutory provisions. Dragged screaming and kicking into a dialogue, their ‘reasonableness’ has now been extended to talking about these concerns on their own terms and within their own frameworks.

The Crown has evoked the doctrine of legal positivism at its best, by deeming rights to stem merely from legislative power. The issue of ‘rights’ is a fraught one in itself, and in Western discourse tends to stem from a Lockesian view of proprietary right in something. This is problematic for Maori who conceive of the compartmentalization inherent in that assumption as dangerous to their existence.

This is further exacerbated by the Crown’s clinical bifurcation of *tikanga* into “customary right” and “customary title” amongst other terminologies. Of potential danger to Maori, who become entrapped by the semantics of such discussions through fragmentation, it reduces the meaning of a term which is much wider in nature, meaning and concept. In order to avoid this journey of disconnection, there needs to be a retention of the terminologies specific to Maori belief. By dividing the current argument into one of “rights, use and title” where title is not able to be considered because of flawed Crown perception, there exists the threat of Maori losing sight of the true nature of the relationship with the foreshore/seabeds and therefore te hononga mai i a Tangaroa raua ko Hinemoana ki Tane Mahuta raua ko Hinetewaonui.

It is the *modus operandi* of the Crown to excise these fundamental aspects in order to dilute the conceptual paradigms of Maori and therefore to retain control of argument. The expropriation of terminology is also apparent through this mechanism. The Crown and its subjects are transformed into the true traditional owners while Maori are forced to prove pre-existence and fluid relationships with the foreshore/seabed.

Through the colonizing tactics of the Crown officials intrude upon the integrity of the Maori worldview and so marginalize the philosophies of the tangata whenua. This assumption of sovereignty is flawed within an analysis of their own doctrines of common law and is a fundamental breach of te Tiriti o Waitangi.

This is further exacerbated by the flagrant disregard to accepted norms of constitutional law. Legislation which reverses a judicial decision is a breach of the rule of law if it reverses the outcome of a case in question, and not merely the application of that law to future cases (see *Brookfield “High Court, High Dam, High Policy.”*³⁶) Such action can be regarded as especially serious when the decision being reversed is adverse to the wishes of the Government, for it indicates that Government is willing to use its strength in Parliament to overturn the law when a legal decision goes against it. As William Shakespeare said “It is excellent to have a giant’s strength, but tyrannous to use it like a

³⁶ [1983] Recent Law 62f.

giant see *Shakespeare, "Measure for Measure."* It is clear then that such tyrannical wielding of the governments legislative might brings to the fore the Leviathan Hobbes warned of, with all the trappings of corruption that such absolute power entails.³⁷ Such behaviour is repugnant and offensive and should not under any circumstances by any culture be tolerated.

SUMMARY OF CONCERNS

Broadly speaking Maori now assert that in contravention of their customary title and rights, the fiduciary duty of the Crown and the principles and guarantees of te tiriti o Waitangi, the Crown's proposals infringe and violate the customary relationship of nga whanau, nga hapu and nga iwi Maori with their foreshore seabeds. Examples of the infringement include the non-consensual introduction of legislation to extinguish title without the consent of all Maori and without just compensation.

Such action infringes and damages not only the relationships that Maori have with their taonga, it is also reprehensible in the eyes of western discourse breaching a wide range of western norms and mores as is shown above. In an era where recognition is being given to the serious impacts of unjust confiscations carried out by the crown and the entrenchment of poverty that this has caused within Maoridom, it is repugnant to consider that this is a cycle that the crown are unwilling to break.

³⁷ Hobbes, T. "The Leviathan" (C.B. MacPherson ed. 1968).

"THERE ARE OBLIGATIONS THERE": A CONSIDERATION OF MAORI RESPONSIBILITIES & OBLIGATIONS IN REGARD TO THE SEABED AND FORESHORE.

This article has been written by Moana Jackson. In this paper Moana attempts to outline some of the broader Maori-based issues surrounding the foreshore and seabed and the kaitiaki responsibilities that are inherent within them. It suggests that they provide a fairer and more equitable means of resolution to the current debate than that envisaged by the Crown and thus ensures a more honourable base for the Treaty relationship.

ABSTRACT:

*"The sea was before the land and sky, cleansing, joining, and where the sea meets the land there are obligations there that are as binding as those of whakapapa".
Teone Taare Tikao.*

The Paper positions the issues as an expression of Iwi and Hapu rights and obligations that are determined by the exercise of rangatiratanga as distinct from use rights and title as defined by the common law. Those rights and obligations are tikanga or Maori law-based and are parts of the whakapapa linking the land and sea to the guardianship and authority of Iwi and Hapu. They are absolute rights and obligations but they were never exercised or claimed in an absolute way that unreasonably or unjustly denied others the ability to share in the use of certain resources because to do so would be contrary to the reciprocity inherent in whakapapa. At the same time they could neither be subordinated to, nor extinguished by another, because to do so would be to subordinate or extinguish tikanga and thus rangatiratanga itself. The Paper acknowledges that the issue is essentially a constitutional one.

INTRODUCTION:

As often happens in debates over major issues between Maori and the Crown the parameters of the discourse about the foreshore and seabed have been set by the Crown within common law rules and its own view of its authority. This was perhaps inevitable because the political issue was prompted by the Court of Appeal decision which was of course decided in terms of the common law. In that context there are persuasive arguments that the Crown's common law response is in fact incorrect and contrary not only to long-standing Court decisions but also established constitutional traditions. Indeed the judgement was based on accepted precedents which the Crown is now choosing to override and there are clear constitutional conventions which regard legislation as a breach of the rule of law if it reverses the outcome of a case and not merely the application of that law to future cases. However it is clear that whatever reading is given to the common law rules they were developed as part of what the Lakota jurist Vine deLoria has called "a discourse of dispossession" that subordinated indigenous rights to the overriding interests of the colonising State. Notions of "customary use" and even "customary title" in the common law therefore became a set of sub-rights which colonising powers assumed they could describe and extinguish (with or without "consent"). They ceased to be the custom and tikanga as defined by the

peoples concerned and became "pre-existing practices" determined according to the custom of the colonisers.

The Crown's response seeks to retain that colonising determination but rephrases it by emphasising the need to consider the "public interest" and the rights of "all New Zealanders". However such reasoning actually confuses the "public (non-Maori) interest" with the right of the "Maori public" in terms of Te Tiriti o Waitangi and in fact constrains the ability of Maori to exercise the rights and authority contained therein. It subordinates both the nature and meaning of Maori-defined rights and rangatiratanga itself to the whim of the Crown.

There is therefore a very real constitutional danger in accepting a common-law based resolution (whether enacted through legislation or not) because it renders tikanga as a simplistic concept controllable by the Crown and closes off possibilities for constitutional change that will ensure the more effective exercise of rangatiratanga. Yet there are other parameters to the debate that are sourced in tikanga and in what Justice Eddie Durie has called "Maori custom law". They avoid the notion of sub-rights and provide a context which recognises te hononga mai i a Tangaroa raua ko Hinemoana ki Tane Mahuta raua ko Hinetewaonui.

They suggest the possibility of a "win-win situation" that is actually impossible within the current Crown proposals which necessarily confine our people to a position of loss simply because they recognise Maori rights only in ways that "are compatible with Crown title".

THE NATURE OF THE OBLIGATIONS THERE:

Because of the context within which common law (and hence the Crown) notions of "customary use and title" are developed and perceived any attempt to resolve the foreshore debate in those terms distorts the values base of the "custom law" which should regulate the relationships between Iwi and hapu and their lands and in fact between Maori and others who are here because of Te Tiriti o Waitangi. It also traps Maori in terminology that restricts kaitiakitanga to a Crown-defined management role instead of situating it as a component of rangatiratanga which necessarily involves much more than management. By its very nature the current Crown approach is both delimiting and exclusionary - it is based less upon an obligation to protect and share and more upon an assumed right to control. It accepts "exclusive title" as a right to exclude rather than a specific authority vested in certain collectives to nurture and sustain. It assumes "customary use" as something stripped of the links between values and obligations and between obligations, relationships, and authority. Indeed as Jason Pou has noted "it is tantamount to describing the relationship between tuakana and teina as merely one of customary use" when in fact it is sourced in all sorts of reciprocal obligations and relationships as well as different perceptions of authority. Many Iwi and Hapu have seen the obligations inherent in their relationships to the seabed and foreshore as being similar to the values that pertained to the storage of kumara when they were placed in a rua for preservation after harvest. Mereiti Rarere noted in 1959 that "The rua was never locked away but it was protected and sometimes even rationed, and in the same way Tangaroa and Hinemoana never intended their bounty to be locked up but its use was to be regulated so that there would always be plenty for the mokopuna. In the same way the kai and the wood in the forest was always available but regulated. The restrictions and

regulations were always based upon whakapapa although the sharing could extend beyond the whanau and hapu. it was a very generous but careful way of doing things". The Maori legal construct of seabed and foreshore use and access (the "obligations that are there") thus had several interrelated parts –

It flowed, as all law does, from the exercise of a constitutional and political authority, specifically the mana or tino rangatiratanga of Iwi and hapu.

It was derived from the clear values of reciprocity, maintenance, and sustainability that are inherent in kaitiakitanga.

Its primary purpose was the well-being of those bound by whakapapa, but rather like the kawa of the marae the reach of its manaakitanga could include those not directly related.

In some cases specific use covenants were negotiated to ensure access on terms consistent with tikanga.

Like whakapapa it was a construct that could never be voluntarily given away nor denied by somebody else. In a very real sense the rights and obligations were values-based in kaitiakitanga but were given expression through the political exercise of rangatiratanga. They gave meaning to tikanga not just as a set of rituals or ethics but as a template for legal and constitutional authority.

The current Crown approach and indeed even the common law discourse enunciated by the Court subsume that authority and reconstruct the values upon which it is based. There is therefore a very real need for the Maori to seek resolution in a way that re-situates the issue within the constructs of Maori law if rangatiratanga and thus our rights are not to be further diminished. That will in turn require the Crown to have the political courage and intellectual insight to work outside the square of its current paradigms.

**THE FORESHORE ISSUE:
WHAT I EXPECT OF MY PAKEHA ALLIES.**

Ko Pirongia te maunga. Ko Kawhia te moana. Ko Ngati Te Mihinga raua ko Ngati Te Umu ki Whakatane nga hapu. Following on from the previous discussion of obligations, Gareth Seymour shares his expectations of Pakeha who wish to ally with Maori in the Foreshore struggle.

1. I expect your support in the struggle to stop the government extinguishing Maori rights to the foreshores.

2. I expect you to inform yourself about the history, the issues and the background to the case that Maori are making for our rights to the foreshores.

3. I expect you to be vocal with other Pakeha when this issue is raised.

4. I expect your leaders to be vocal in support of Maori.

5. I expect you to write to your MPs and other appropriate bodies to let them know that there are Pakeha willing to stand up as allies with Maori when Maori are under attack.

6. I expect you to consider the way you are privileged when Maori rights are extinguished and when Maori are under attack. When we are under attack, you aren't. This is your privilege.

7. I expect you to consider the benefits of having local resources in local hands, and not handed over to the highest bidder

Please distribute to all Pakeha

THE INVISIBLE THREAT: HOW GLOBALISATION TRUMPS TIKANGA

Jane Kelsey is a Professor in Law at The University of Auckland. In this article Jane raises issues beyond the local and national context to that of the impact of International treaties and relationships.

When the *New Zealand Herald* runs a headline 'What do Maori want?', rather than 'What do Maori want *back*?', it is clear that we are heading for another media-orchestrated emotional backlash that avoids the pivotal issues. There is no attempt to engage with the central question raised by the Ngati Apa decision: what was, and is, the relationship of iwi and hapu to the foreshores and seabeds according to tikanga Maori, and why should colonial law trump that tikanga?

Equally, there is no challenge to the blunt assertion by all the judges that Maori ceded sovereignty and the Crown has the absolute right to extinguish any relationship that exists under tikanga Maori. Nor is there any recognition from those who assert 'one law for all' that this involves the taking of what belongs to Maori - something they would otherwise call theft and consider to be both unjust and intolerable. And there is no sense of hypocrisy that, for all the talk about Maori claims endangering public enjoyment of our common heritage, commercial private property rights have been and (largely) continue to be created over fish catch, ports, marinas, mussel farms and even private beaches.

Amongst Maori the main focus of debate has been at the domestic level - what iwi and hapu want, what laws the government is threatening to pass, what more extreme measures the opposition parties are demanding, what the Pakeha-dominated opinion polls are saying, which political, legal and protest strategies can best ensure recognition of tino rangatiratanga over this part of the whenua. There is another dimension to the issue, which has not figured in the debate so far. Over the years successive New Zealand governments have entered into international treaties that guarantee foreign companies and individuals enforceable rights over and use of these resources. The current government is negotiating more of these agreements. Such commitments are incompatible with the recognition of rangatiratanga. Resolving the seabed and foreshore issue requires the government to roll back these commitments and not to make any new ones. But the government will be very unwilling to do that.

This exposes a fundamental conflict between te Tiriti o Waitangi and the international trade and investment agreements. Whereas te Tiriti is seen to involve merely moral obligations that are unenforceable against the Crown, the government and opposition parties insist that international agreements are binding on New Zealand under international law. They impose enduring obligations on all parties, including the New Zealand government. They are enforceable. Yet these agreements are negotiated and entered into by the Crown without any vote in Parliament and often without any debate. There is no formal role for the 'treaty partner'. The rights of Maori - and the general public - are signed away in favour of foreign companies, and no one has any right to know until it is all signed off, because these negotiations are 'confidential' to the parties. Provided the sovereignty of the state is recognised by the United Nations, there is no question about the exclusive right of a government to enter treaties in the international arena. There is no space at the international level to recognise the sovereignty and self-determination by indigenous peoples, unless they are also recognised as a state.

The trade and investment treaties all follow a similar line. Basically they aim to open up countries to foreign corporations and stop governments from giving preference to local firms. They view everything from an economic and property rights perspective, so considerations of a social, cultural, employment, regional development or environmental kind - and pre-existing and conflicting obligations of governments under treaties, such as the Tiriti - are (almost) never seen as relevant.

These trade and investment agreements are much more powerful than other international treaties, such as the Cartagena Protocol on Biodiversity, because the trade treaties are enforceable and the others are not. Documents that have not been formally recognised under international law, such as the draft Declaration of Indigenous Peoples, are simply ignored.

So why don't we have the *Herald* or the National Party jumping up and down about these treaties? What is it that makes the prospect of Maori exercising mana whenua over the foreshore and seabed so much more scary than the profit-driven transnational corporations whose sole mission is to maximise their profits and move on to plunder somewhere else in the world?

Part of the answer is deeply embedded racism, built on a legacy of colonial arrogance, ignorance and self-interest and fuelled by opportunist politicians and profit-driven media. If people aren't exposed to alternative explanations, arguments, histories, worldviews, then they can't be expected to understand and sympathise with them. But it is also because the supremacy of economic interests over all other interests, especially the rights of tangata whenua, has become so normalised that few people challenge them. The voices that have the most power today are the major beneficiaries of this system. As a result, new property rights over our so-called 'common heritage' are being created and guaranteed all the time, but that process goes unchallenged. The commercial interests in exploiting the foreshore for tourism purposes, the coastline for ports or the seabed for aquaculture and mining, mean there is much more at stake here than just a populist backlash from Pakeha electors who want to maintain access to the beaches.

There are many different ways in which the growing number of international agreements could impact on Maori rights over the seabed and foreshore. Just two examples – mining on the seabed and marinas - are given here, although activities, like tourism ventures and ports, raise similar issues. One of the most lucrative 'assets' a mining company can secure is the right to explore and mine on the ocean floor. These licenses are viewed in law as property rights and are extremely valuable. Not surprisingly, the transnational mining companies (which almost all of them are) want any restrictions on foreign investment to be very limited. They want guaranteed rights to access those licenses, with no preference given to locals, whether tangata whenua or not, and no requirements that they operate through joint ventures with such locals. They want full rights to extract the resource until it is extinguished, with minimal restrictions on where they can mine and how they can operate.

They also want guarantees that current and future governments won't change the rules in ways that reduce a mining company's profitability, even if the new rules are for environmental reasons – or to reinstate rights wrongly denied to Maori. If the rules do change in a way that reduces a firm's value or profitability, the investor will want full compensation. That could run into tens of millions of dollars.

Such rights have already been guaranteed by the New Zealand government in investment agreements with four countries: China, Hong Kong, Chile and Argentina (although the last two haven't come into effect yet). These agreements have a very broad definition of investment, which includes 'business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources'.

The agreements contain rules against what is called 'expropriation', where the government takes away the property right, and 'measures having effect equivalent to expropriation', which basically means actions by the government that reduce the value of the investment. They provide extremely limited justifications for breaching the rules, which do not include tikanga Maori or te Tiriti. These rights are enforceable by an international panel of experts that conducts hearings in secret, where the only parties are either the two governments or the foreign investor versus the government, and where the pay out could be many millions of dollars.

These rules would apply where exploration and mining licences have been granted to investors who have entered New Zealand through companies set up in China and Hong Kong. They will extend to Chile and Argentina when those governments bring the agreements into effect. The New Zealand government also wants to negotiate agreements with other countries, such as Mexico and Thailand, which could apply similar rules. And, of course, it wants a deal with the US, which would undoubtedly insist on such protections for its investors.

A second example involves marinas, which involve property developments located at least partly on the water, whether rivers or sea. As indigenous fishing communities have found in many countries, marinas can have a devastating impact on tides, fishing grounds and water quality. They are also the exclusive playgrounds for the rich and famous and deny rights of access and use to those who can't afford the huge cost of buying or renting a berth. These marina companies, the marina structure and leases on the individual berths are all investments that, where foreigners are involved, would be protected under the same investment agreements as mining licenses.

Marinas are also potentially covered by another set of international trade rules, the ones that guarantee rights to foreign firms that are involved in providing services. These rules guarantee that governments won't tighten the rules for vetting of foreign investors, such as requiring a Tiriti audit as a condition of approving the investment, and that local firms won't get preferential treatment over foreign firms. Governments promise not to limit the 'market' which foreign firms can access, for example limiting the number of operations or service providers in a particular area. The grounds for granting of licenses also have to be the least burdensome possible to achieve their goal. Again, there are very few recognised grounds for breaking these rules, and no generic exceptions to cover indigenous peoples or competing treaties.

The rules on services exist under the World Trade Organisation's (General Agreement on Trade in Services GATS) and a number of agreements between New Zealand and individual countries (currently Singapore and Australia, but the government wants them also with at least Mexico, Chile, Thailand and the US). At this stage they only apply to specific services that the government has agreed should be covered by those rules.

Marinas could come under these rules in various ways: the construction and maintenance of the marina, operating the marina or running sports, fishing and recreation activities from the marina or from individual births. If the New Zealand government made a full commitment to apply these trade rules to marinas it would become impossible to limit the total number of marinas permitted in the country or in a particular rohe. It would also be impossible to impose special obligations on foreign investors wanting to set up marinas (or other tourism ventures on or using the seabed and foreshore) that they obtain prior approval or enter into joint ventures with the tangata whenua.

At present New Zealand doesn't appear to have made any commitments relating to marinas. Negotiations are underway for governments to expand their commitments, and marina aren't on the list of new services that the government is proposing to include. But the categories of services are very unclear, so there may be some risk already. There are also real dangers that future governments could make commitments relating to marinas, without consulting with Maori. Under APEC (the Asian Pacific Economic Cooperation) New Zealand has made a 'non-binding' promise to achieve 'free trade' in services by 2010. In theory, everything is therefore on the table and it is quite possible that a future government could consider bringing marina-related services under these trade rules.

There is some limited protection for Maori under the services agreement at the WTO. But this applies only to commercial and industrial activities Maori are engaged in. It does not allow the government to break the GATS rules to honour its non-commercial obligations to tangata whenua in relation to seabed and foreshore. A broader protection applies to services under the agreement with Singapore. That refers to te Tiriti as well as to more general preferences for Maori, and the Singapore government is not allowed to dispute what these rights are. But it only applies where a firm from Singapore is affected.

The number of these agreements is about to expand. All the major political parties are busting to negotiate a free trade and investment agreement with the US, and there is huge pressure from Europe, Japan, the US and their transnational companies for a 'mother of all investment agreements' at the WTO. Either would make the situation even worse for Maori.

At present, the risk in relation to services is more potential than actual. But negotiations to extend the range of New Zealand services covered by the WTO agreement are already underway and the government has begun negotiations for new agreements with Chile, Mexico and Thailand, who may well demand commitments on these services. So, of course, might the US in any negotiations with them.

While these agreements only provide guarantees to foreign companies, shareholders or investor, there are few major developments these days in which foreigners are not involved. These international trade and investment agreements are based on a worldview that treats everything as a commodity and believes that nature exists for companies to exploit so as to maximise their profit. The only players in this arena are governments, whose right to negotiate such deals on behalf of all within their country is never questioned, and foreign producers and investors whose interests are given precedence over everyone else. Maori currently have no recognised role in deciding whether or not to enter such a treaty or to negotiate terms that ensure tikanga Maori and te Tiriti are protected.

As part of the current struggle to secure recognition of tino rangatiratanga over the foreshores and seabed, it is vitally important to stop the Crown from tying its hands through these international treaties. New Zealand's withdrawal from or renegotiation of existing agreements, and a moratorium on any current or future of negotiations, should form an integral part of any settlement on the seabed and foreshore issue. That would also set an important precedent for developing a new and acceptable approach to the exercise of tino rangatiratanga at both the international and the national level.

BACKGROUNDING THE PAEROA DECLARATION.

This paper is written by Moana Jackson (Ngati Kahungunu) and provides discussion of the Paeroa Declaration and gives detail to each of the resolutions within the Declaration.

This Paper gives some background to the Declaration on the foreshore and seabed that was issued at the Paeroa hui of Iwi and Hapu on Saturday, July 12, 2003. It also contains explanations of the terminology used in the Declaration and answers some misconceptions already raised in the media and by various politicians. It is based upon transcripts of the discussions at the hui which led to the Declaration as well as the written submissions received from those Iwi and Hapu that were not able to be present. The Declaration itself is a synthesis of the views of the Hui.

THE DECLARATION

Resolution One:

- *The foreshore and seabed belong to the Hapu and Iwi under our tino rangatiratanga.*

This resolution simply reaffirms that the foreshore and seabed have always been under the jurisdiction of Iwi and Hapu as part of the authority of tino rangatiratanga. Te Tiriti o Waitangi acknowledged that jurisdiction as part of the “exclusive and undisturbed” possession of lands and taonga etc.

Resolution Two:

- *We reaffirm our tupuna rights to the foreshore and seabed as whenua rangatira.*

This resolution recognises that in Maori law and philosophy the foreshore, the seabed, and the land are all interrelated. The term “tupuna rights” acknowledges that the rights are derived and take legitimacy from ancestral precedents. It also acknowledges that they have never been relinquished (as the Court of Appeal in fact also decided).

Resolution Three:

- *We direct all Maori MPs to oppose any legislation which proposes to extinguish or redefine customary title or rights.*

This resolution simply urges Maori MPs to support the wishes of Maori people as clearly expressed at the hui. It is directed quite deliberately at all Maori MPs, and not just members of government.

Perhaps more importantly it acknowledges that the government authority to extinguish or redefine Iwi and Hapu rights is itself an assumed one with precedents based solely on the power taken by colonising States to dispossess Indigenous Peoples.

Resolution Four:

- *We support all Hapu and Iwi who wish to confirm their rights in the Courts.*

This resolution is obviously a recognition of the rangatiratanga of each Hapu and Iwi to pursue the issue in the way it thinks best. However it also acknowledges that the government attempts to pass legislation vesting ownership of the foreshore and seabed in the Crown effectively denies Iwi and Hapu access to the Courts – they deny the due process of its own law.

Resolution Five:

- *The government must disclose its proposals to whanau, Hapu and Iwi immediately, whose decision to accept or reject will be final.*

This resolution arose from concern that not only was the government's original decision to legislate made without reference to Maori, but all subsequent policy proposals have involved only minimal Maori participation. It was also a recognition that discussions with government Maori MPs was not a Treaty-based dialogue but simply the Crown talking to itself.

Resolution Six:

- *The final decision on the foreshore and seabed rests exclusively with whanau, Hapu and Iwi.*

This resolution was simply a reaffirmation that decision-making on this issue is properly an exercise of rangatiratanga. It was also a signal that Crown appointed functionaries did not have the authority to make such decisions and that while other Maori bodies such as the New Zealand Maori Council or Te Ohu Kaimoana might have expertise to offer the final decision had to rest with those to whom the rights belong.

Resolution Seven:

- *We accept the invitation of Te Tau Ihu to host the next hui.*

This resolution acknowledged the need for further work on the issue and also recognised the role that Te Tau Ihu have played as parties in the case heard by the Court of Appeal.

SOME QUESTIONS AND ANSWERS ABOUT THE DECLARATION AND ITS STATUS:

Is the Declaration a statement denying access of non-Maori to the beaches?

No. It is simply a clear and definitive synthesis of Maori views that the foreshore and seabed have always belonged to Iwi and Hapu.

A declaration of rights in that sense is never a claim to deny access. Indeed even though the claim that Maori would deny access has often been repeated in the last several weeks it is mischievous and dishonest.

What does the term “tupuna rights” mean?

It reflects the fact that the seabed and foreshore are vested in the ancient authority of rangatiratanga. They are part of what may be called a “tupuna title”.

Are they like guardianship rights?

The obligation upon Iwi and hapu to be kaitiaki is part of the tupuna title but kaitiakitanga itself is only a part of the broader authority of rangatiratanga.

Are tupuna rights use rights?

They include the right to use taonga on agreed conditions.

It has been suggested that they are only limited to the *use* of the resource because Maori had no concept of European-style ownership. However rights never exist in isolation – they must be derived from somewhere and in Maori law they are sourced not in a notion of individual ownership but in the collective authority of rangatiratanga. Without that authority there are no use rights.

Did the Hui have a mandate to make such a Declaration?

In Maori terms it clearly had such a mandate as most Iwi were represented and many of those unable to be present made written submissions.

In spite of the short time available to organise the hui and the limited resources available to do so, the fact that over 1000 people attended is further testament to the validity of the views expressed.

The Acting Prime Minister Jim Anderton has commented that “I don’t take this particular declaration very seriously because I don’t think it has any standing” is simply a gross misrepresentation of Maori realities.

HAURAKI HUI ON FORESHORE & SEABEDS: A PERSONAL OBSERVATION

A personal reflection on the hui at Paeroa is provided by Potaua Biasiny-Tule. To introduce this piece Potaua writes: "I am from the shores of Rotoiti, the beaches of Opotiki, the forests of Te Urewera and have lived upon the concrete of FordBlock. I am both urban and iwi Maori, and feel that the most important unit of my identification and affinity is my whanau. My message is to the future - whanau katoa, please continue to develop and strengthen our relationship with our whenua, with our moana and with each other; respect the lores which surround and bind us; and continue to build a better World for all Maori to live in. By learning lessons from nature, we'll take the battle to the streets. Ake. Ake"

Introduction

A few weeks ago, I was transfixed by the announcement from PM Helen Clark and Hon. Margaret Wilson that Maori customary title to the nation's foreshore & beaches would be extinguished, and instead be vested under the Crown's control. Up until that point, I believed that the Crown dictated claim and dominion over all land and water within the territorial boundaries of Aotearoa; this issue was to show me otherwise. This paper is a brief reflection on the lead-up to the Hui in Hauraki, the views expressed on the foreshore and beaches issue at the Hui Taumata and a few personal after-thoughts.

Reflection

Admittedly, much of the initial information about the issue came via Pakeha/mainstream media outlets. This proved problematic as Government & Opposition Ministers voiced opinion on behalf of a bewildered public; did this mean that barbeques on the beach were now subject to Maori laws? Or were Maori now creating a new set of legal claims that could be settled financially? Were New Zealanders now being restricted from accessing the beach? Did Maori now have exclusive beach & foreshore rights? What about one standard of citizenship for all New Zealanders?

To hear 'the other side' of the story, I contacted knowledgeable whanau and started to fill in the gaps. The Court of Appeal had recently decided to allow eight iwi from the top of the South Island to present their case to the Maori Land Court, who in turn could investigate title to the foreshore and seabed of the Marlborough Sounds. The Crown, the Marlborough District Council & other parties challenged the Maori Land Courts jurisdiction to determine the status of the foreshore and seabed under the Te Ture Whenua Maori Act 1993. To be honest, I was still confused.

I was confused because I had not considered the foreshore separate from the land. A friend later reminded me that I was using a Maori World View, and that the foreshore argument came primarily from a Pakeha World View (he himself being a Pakeha New Zealander). The only way I could learn more was to ask more. So I began searching online, reading old newspaper articles and corresponding with friends and family. A photo of my dad and my nephew collecting pipi from Maketu gave me a solid view of what the grey area looked like. A story I had just finished reading also pointed out that the foreshore was the place of many great battles, as warriors would fight upon the low-tide sand. I received a great deal of information, press releases and opinions on the

foreshore issue and then heard that a Hui Taumata had been called by the Hauraki Maori Trust Board in Paeroa, on Saturday the 12th of July. I decided I had to attend.

Hui Taumata

Nikolasa (my beautiful wife) and I invited Celia Hotene to travel along with us to Paeroa. It was a last minute call, but she arrived at our home early Saturday morning. With some sadness, she asked us to delay our departure until she could pay her respects to her cousin who had passed away. At midday, Celia returned with her moko, Leticia. All aboard. We hopped into the car, turned the key to start our journey and then...nothing. The car wouldn't turn over, wouldn't start. We then turned to Celia who said "Ok, we need to say a karakia". With words of encouragement, protection and guidance, Celia said a small prayer. Our car started. We were on our way.

We arrived in Paeroa around 1pm. We followed directions to Te Moananui Flats Road, where we met a huge presence – hundreds of vehicles lined the long, narrow road, and many, many people walking toward the Marae entrance. We parked the car and made our way onto the grounds of Ngahutoitoi Marae. It had such a relaxed atmosphere, but was hiding the serious kaupapa under discussion. Familiar faces were everywhere. Well over a thousand people were present – talking, laughing, arguing, discussing and catching up on the latest goss. I saw my whanaunga Annette Sykes speaking with Moana Jackson, media woman Tini Molyneux speaking with Willie Jackson, John Tamihere sitting on a bench with friends – our little ope found a seat and began listening to the roar of the ocean, the song of the birds.

The Hui had three parts to it – those milling about near a special marquee, erected for this occasion; those sitting on forms listening to the discussion over a PA system, watching the proceedings on a television screen; and those inside the whare tupuna, leading the discussion. We made our way closer to the TV monitor and heard Maui Solomon conclude his presentation. Dissent was all about us, with few being happy with what Maui had just said.

The next to speak was John McEnteer, who introduced the Continental Shelf Project - he told the Hui that the NZ Government sought to extend its Exclusive Economic Zone (EEZ) beyond the 200km area (which had to be filed before 2006) and would follow the underwater continental shelf as far as Fiji, Tonga, New Caledonia and Australia. Boundaries needed to be established, but this project had the support of high-ranking Government officials. "Obviously", he said, "Maori were not being consulted". Many were interested in this development, and a few questions were asked before the Chair of the Hui moved into recess – it was lunch time.

We moved into *Te Puna o Te Aroha* wharekai and enjoyed a beautiful meal – mussels, raw fish, fruit, meat, yummy vegetables. Thanks to our wonderful hosts who provided a sumptuous kai for all.

The Hui resumed with an open forum. A representative of Te Tau Ihu (the Eight Marlborough Iwi – Te Atiawa, Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa and Rangitane) stood and spoke. I believe his name was Rory. He acknowledged the support of Te Ohu Kai Moana, Grant Powell and his team during this entire legal process. A historical brief was presented from the area, and interesting points were raised. One issue related to the Resource Management Act, which was initially regarded as positive due to the protection mechanisms within the statute. This

view changed as few applications to develop Maori aquaculture ventures were successful; meanwhile non-Maori ventures were given the go-ahead. Joe Williams was asked to represent Te Tau Ihu. A key litigant, the Mussel Farming Council, was now reconsidering its appeal as 40% of its annual levy came from Maori mussel ventures. The Marlborough District Council wanted to continue the legal challenge.

Te Tau Ihu wanted the Hui to hear its message:

1. That the eight iwi were united;
2. That the Crown must talk to the eight iwi; and
3. That Te Tau Ihu would like to be a part of the team that completes the matter.

A challenge from the floor was heard and proved to be one of the sticking points of the Hui – How do you define the Crown? Or more, who was the Crown? Was it the historical Crown, the modern Queen, the sitting NZ Parliament or the residing Government? This matter was not resolved sufficiently.

Disagreements on speaking order surfaced, with the Chair reminding all of ‘the process’. It was agreed that a speaking order had to be followed, where those who wished to speak to the forum had to be listed. This would remain a contentious issue right until the end of the Hui.

John Linstead (Pare Hauraki) spoke of his rohe sitting on the boundaries of the largest city (Auckland) and how in 1870 his tupuna had a high regard for the area, speaking of it as a taonga. Manu Paul (Mataatua) addressed the Hui by saying that he had sent a press release titled “Enough is Enough”, and encouraged Maori to develop a Bill which could ‘Manage, control & utilise areas for marine, aquaculture and tourism’.

A representative from various Northern Runanga & Trust Boards spoke to support the kaupapa, support group movement and wished to call a Hui to discuss the take further. This, however, was challenged by claims that the representative had no mandate to speak on behalf.

Betty Williams (Ngati Huarere, Ngati Maru) said that this issue could be the impetus for a new Land March. Her comments that “our whenua continues under the moana”, that we should not follow fragmented Pakeha-view of the land, and instead, implement a Maori holistic view, were well received. Entitlement is not granted by title, but sealed in our whakapapa and this Hui should support whakapapa as the basis of entitlement.

Margaret Mutu (Ngati Kahu) said that she & Ngati Kahu felt like there was no national body able to contest the Government, so urged the formation of the Maori Paremata (Parliament), as well as offering Ngati Kahu support for the National Maori Congress. Trust between Ngati Kahu and the Treaty Settlement Office had been breached by this announcement, which may be difficult to repair.

Rikirangi Gage (Te Whanau-a-Apanui) mentioned the sacrifices made during the World Wars for this country, and moved back in time to 1840, where the Treaty was signed by Te Whanau-a-Apanui in Te Kaha. Support for establishing a small working party was raised and offered.

A host of speakers from Ngati Awa and Kahungunu re-iterated important points of land use, government mistrust and the great significance of Te Tiriti o Waitangi. Hapeta

Rameka got up and told a great joke and hoped that people not get too wound up during the evening, while the next speaker stated that the Hui was starting to look and sound 'circular', in that the problems were being discussed over and over again.

A letter was tabled by John Wano, an engineer who wished to deal with the foreshore issue by offering a greater vision of hope. Arapeta Tahana (Te Arawa) rose to compare the foreshore/seabed issue with the Lakes issue faced by Te Arawa in 1912 (and today), and also faced by Tuhoe with Lake Waikaremoana. He said that the Crown had deep pockets and would fight Te Arawa all the way. The final Court is Parliament, and they were now motivated by an upsurge in aquaculture, oils & minerals, and ports & harbours. By pointing out Te Ohu Kaimoana as an example of division, Arapeta stated that we either find unity, or 'they' would divide and conquer Maori. Some recommendations were made:

1. Te Arawa oppose extinguishment of customary rights;
2. All Maori MP's should oppose extinguishment
3. All hapu lodge applications to the Maori Land Court;
4. That all discussions be made with Iwi; and
5. That a working party be established no later than the 1st of August 2003.

Moana Jackson (Ngati Kahungunu) introduced himself and Te Hau Tikanga, the Maori Law Commission. He recommended a set of broad strategies including constitutional change, the encouragement of 'Tupuna Title' and proposed three recommendations:

1. Endorse whanau, hapu & iwi to assert Tupuna Title;
2. That the Hui support action associated with Tupuna Title; and
3. That ownership is exclusive to whanau, hapu & iwi.

Annette Sykes (Ngati Pikiao) offered salient opinion on Crown representatives, historical mis-representation and the lack of information flow. By urging the Hui to thought and action, Annette cautioned those present to be weary of another Sealords-type deal. She pointed out the fact that older male views were being overly represented, and applauded those whanau who 'walked the walk' by respecting the relationship between Tangaroa, Hinemoana and themselves. "Use rights were nothing without respect for this relationship". Annette urged the Hui to believe in the kaupapa and said there was little room for confusion – Maori need to put aside petty, political differences and should be united, come out fighting and be assertive.

Morrie Love (Te Atiawa) wanted to make sure that the message from the Hui was absolute and clear to the Government, while Jim Nicholls (Ngati Haua) said that this could be the final debate on land issues. Speaking from the perspective of the NZ Maori Council, he believed that full support should be given to iwi & hapu. A Ngati Porou representative said that she could not speak generically as no consultation Hui within her rohe had been held, but was cautious of a pan-Maori group being established, especially after the Sealords debacle.

Hiniora Munroe (Ngati Wai) remembered that the Hikoi of the 1970's was planned in Ngati Wai rohe, where the call was "Not One Acre More". The position of the Ngati Wai Trust Board was that the Hui needed to determine rights and a collective position. While many others wanted to speak, a break was called and dinner announced.

Again, another wonderful meal was served in Te Puna o Te Aroha, and I thoroughly enjoyed the kai. I mean, who can turn down bowls of raw fish, kumara and pumpkin,

and steam pudding. I was in heaven. Dinner talk was fast and furious, as many were beginning to design future talks, while others were expressing opinions on the day's proceedings.

The Hauraki Declaration

We all returned to the marae to formulate a declaration. About 350 people remained to discuss the key points of the day. Much of the crowd was now suspicious of the declaration that met us once we entered the whare, as it had been shaped by the Hauraki Trust Board. Challenges had been thrust from the floor to the speaker/chair the entire day, but now, the mood was changing. The first declaration looked like this:

1. The foreshore and seabed belong to hapu and iwi under our tino rangatiratanga;
2. We have never relinquished our tupuna rights in the foreshore and seabed;
3. We direct all Māori MP's to oppose legislation which proposes to extinguish Māori customary rights;
4. We support all hapu and iwi who wish to confirm their rights in the Courts;
5. The Crown must discuss its proposals with hapu and iwi immediately;
6. The final decision on any Crown proposal rests with hapu and iwi; and
7. We accept the invitation of Te Tau Ihu to host the next Hui.

Immediately, challenges from three very vocal groups arose, with one group calling the entire process into question. Annette Sykes and Moana Jackson sought clarification and attempted to explain each recommendation, line by line. Some were not happy with particular words; others resented the idea of a court re-affirming ancient rights. It was decided that each individual recommendation had to be shaped and passed before the Declaration in its entirety could be approved.

The first recommendation was voted and passed, while the second was asked to be worded more positively. Recommendation three included the phrase "extinguish or redefine" before being accepted, while recommendation four changed from 'affirm' to 'reaffirm'. Recommendation five was changed to include whanau, while talk to delete recommendation six emerged, as it could be seen to be covered by 5. Recommendation 7 was passed, and recommendation 6 reworked to include whanau, hapu and iwi. This final individual passing of the recommendations brought great applause from most. Stern opposition, however, was still present. Calls of 'conflict of process' could be heard, and toward the closing of the Hui, a great wave of dissension began to overwhelm those gathered. Letitia and Celia had to cover their eyes and ears to avoid the abuse, bad language and curses that flew toward the front table. Some whanau left the Hui at the stage, disgusted that a collective agreement was being forged, that did not go far enough in their view. Others attempted to speak to voice this concern but to no avail. A Hīmene was used to close the Hui but I could still hear two counter-voices – one was a kuia singing a waiata against the group and the other was a rangatahi wanting to be heard. But agreement was reached at the hui.

This was the official declaration:

THE PAEROA DECLARATION

Resolution One:

The foreshore and seabed belong to the Hapu and Iwi under our tino rangatiratanga.

Resolution Two:

We reaffirm our tupuna rights to the foreshore and seabed as whenua rangatira.

Resolution Three:

We direct all Maori MPs to oppose any legislation which proposes to extinguish or redefine customary title or rights.

Resolution Four:

We support all Hapu and Iwi who wish to confirm their rights in the Courts.

Resolution Five:

The government must disclose its proposals to whanau, Hapu and Iwi immediately, whose decision to accept or reject will be final.

Resolution Six:

The final decision on the foreshore and seabed rests exclusively with whanau, Hapu and Iwi.

Resolution Seven:

We accept the invitation of Te Tau Ihu to host the next hui.

We exited the whare to a cold, dark evening. Conversations sprouted at every step and if it hadn't been so late already, talk would have gone on until the small hours of the morning. We returned back to Hamilton with Celia and Letitia, talking over what we had witnessed during the ride home. Letitia wondered why some people continually swore during the Hui, while Celia appreciated the entire experience (although it did get a little bit heated at the end). Nikolasa & I continued to talk about the Hui, the Declaration and its implications with greater interest.

Conclusion

It was surprising, then, to read and hear the Pakeha/mainstream media outlets over the next few days. No one seemed to capture the essence of the Hui, nor did they seek explanation, clarification or insight from those who attended. Instead, we heard ministerial opinion, oppositional rhetoric and blatant lies about the Hui, the participants and the outcomes. I couldn't help but notice that the substance of the Hui had all but disappeared, and only brief, key points remained.

Mind you, it should come as no surprise, really. This issue took me a long time to comprehend and I had a lot of informative help along the way; media outlets are, for all intent and purposes, not there to inform Maori; and the entire process was rushed. I appreciate the urgency but wonder if a Sealords-backroom deal is being negotiated.

I hope it isn't. In my opinion, such a move would ignite something far more furious than anything seen before in history. The next Hui will provide many, many answers.

Acknowledgements

Firstly, thanks to Cecelia Hotene & her moko Letitia for making our journey such a wonderful one. It was great to be able to share such an important moment with interested (and interesting) people. Kia Ora, Whaea.

I'd like to share my deep thanks and admiration with Annette Sykes and Moana Jackson for sharing all their valuable knowledge with a novice like myself. I am so privileged to share this Earth with such dedicated, committed people and appreciate all the time and effort you put into helping us raise our levels of consciousness.

Thanks also to the many, many people who I have exchanged emails, notes and papers with over the last six weeks. I really appreciate receiving all this valuable information, and admire the fact that we are all willing to share, to inform and to exchange thoughts and ideas. We have all used our online panui, RANGIKAINGA, to its fullest extent, and hope we continue to do so over the next few months.

I would like to send a special note of thanks to the people of Hauraki and appreciate very much your effort in hosting such a historic event. Thank you for the time spent in welcoming our small roopu onto your whenua, for giving us all the opportunity to discuss such a vital kaupapa and for providing wonderful hospitality.

And finally, big hugs to my wife Nikolasa who came into this issue with an open mind, has provided a wonderfully fresh perspective to many of the issues raised over the foreshore and seabed matter and continues to support my pursuit for knowledge, for justice and for the return of our stolen land.

RETURN TUHOE LAND BACK INTO TUHOE HANDS

(Please remember that this is a record of my experience at the Hui Taumata, recited from brief notes and memory. If any of the names or iwi/hapu need to be corrected, please send me an email at mookaa@xtra.co.nz I encourage wide distribution and reproduction. All comments welcome - Potaua)

OUT OF SIGHT

This article was written by Jason Pou of Ngati Pakau me Te Mahurehure of Nga Puhi to articulate the fundamental values that we hold as the basis for defining relationships within Te Ao Maori. Jason asserts that maintaining and protecting our connectedness is critical to understanding the debates surrounding Te Takutai.

Maori belong to the foreshore, the foreshore belong to Maori and we are not mean-spirited. We have shared the foreshore since the arrival of the first settlers, as we will continue to share, as long as that foreshore is not put at harm. The key issues that need to be considered in this debate is the intimate relationship that Maori have with these things and it's a relationship born of respect and making sure that those things are there for future generations”³⁸

We are Maori because we are Maori. Our relationships and connections to our whenua are based on whakapapa and whanaungatanga.

*Komuruhia te poioneone kia toe ko te kirikiri kotahi.
Ahakoa tana kotahi, e honoa ana ia ki te whenua, mai i te whenua ki te rangi, te rangi ki te whenua, ki te maunga, ki te moana, ki te tangata e tu ake nei;
ko au tenei te kirikiri nei*

*Rub away the earthen clump to leave but one lone grain of dirt;
whilst it is but one, yet it is inextricably joined to the land, from the land to the sky, the sky to the land, to the mountain, to the sea, to the people;
tis I who is that one lone grain.³⁹*

The Corners of My Heart

Our relationships are for us to define nobody else. My relationship with my whaea is deep and dynamic. Yes, we argue. Yes, we fight. But through all the raruraru through all the embarrassments I may cause, I will always know that I am her son. There is a corner in my heart that is just for her. I have another corner within my heart for my whaiaipo. This intimate relationship is also very deep, changing dramatically with the wind. The emotions and connections within these relationships help to define who I am and contribute significantly to the way I behave.

These relationships, however are mine. While you may have immense love for your whaea and whaiaipo, the relationships are, as most would agree, vastly divergent. Any misinterpretation around these relationships will inevitably end in utmost offence. Furthermore, it is not for my whaea to define the relationship I have with my whaiaipo and vice versa. Any attempt to do so, also invariably ends up in conflict.

*he kokonga whare e kitea ana, engari, anoo te kokonga ngaakau,
e kore e kitea.
the corners of the house are visible, but inner feelings are not for the eye.*

³⁸ Annette Sykes, Interview with Paul Holmes, IZB (Monday 21st July, 2003).

³⁹ Na Tom Winitana.

The Corners of the Beehive.

It follows from this then, that any attempt to define relationships from an outsider's perspective will always be fraught with danger. It is therefore unfortunate, that increasingly some are feeling the need to squeeze Maori and their relationships into artificial templates in order to define and describe what Maori are. Such efforts are usually purported by those who would redefine, to be in the best interests of Maori. However, these efforts to constrict Maori into such 'square boxes', are usually rejected by Maori such as Dr Rangimarie Pere, who has vehemently declared that she is neither a template, nor does she fit within anybody else's.

*Te raukura a Rerenoa
Piri ki te Punui
He kaioaraora*

*Like the parasite of Rerenoa
That clings to the Punui
Devouring its essence alive⁴⁰*

The government's continual effort to redefine and conceptualise Maori values and principles via the cross-cultural projection and interpretation of behaviour can only lead to misunderstanding and conflict. Such practises have led Helen Clarke to assert that:

At the moment the Maori land court legislation doesn't refer to customary title and this has been part of the problem that it enables the Maori land court to look at whether there's a customary use and of course that was always with respect to what we understood was land which didn't include foreshore and seabed. If it upheld a claim of customary use, then it could deem something to be customary land, but it doesn't talk about title. So, the issue of what customary title actually is is a bit vague. So there's very complicated legal issues, but I go back to where I began on the issue, there does need to be clarifying legislation and it's very important to the government that we hold up two sets of rights.⁴¹

Thus our relationship to our whenua is redefined, minimised, bastardised and then stereotyped. And as Helen Clarke has stated on this topic:

... we've got ministers and MP's and policy analysts working very, very hard on it.⁴²

It is worth noting that constructs such as customary law and customary title have sprouted from common law definitions where Maori have been *allowed* to have rights subject to those of the Crown. The arrogance of the Crown to assume that a relationship based on whakapapa and whanaungatanga is only able to exist because they let it is abominable. Such arrogance shows clearly the ingrained belief that Maori may only have rights at the whim of the government, and what the government may give, it may also take away. In light of the relationships that have been described earlier, such power is almost godlike. In essence the government reserves the right to redefine whakapapa, and then state to Maori what significance it should have. It is unsurprising therefore that Maori are now reacting so strongly to this self acclaimed power that the government has so arrogantly assumed.

⁴⁰ Maori Law. Proverb provided by Mr Hohepa Kereopa, esteemed Maori Elder of Tamakaimoana in Te Urewera Aotearoa.

⁴¹ Helen Clarke, Interview with Paul Holmes, IZB (Monday 21st July, 2003).

⁴² Ibid.

Helen Clarke has stated further that:

If you look at the fisheries legislation and some of the Settlements like the Ngai Tahu one, there's provisions in there for Maori fisheries reserves where there's some kind of co-management role. Those are kinds of issues we can talk about, because there are Precedents.

Within this statement is a marginalisation of the social structures that Maori employed to ensure social well being. What precedents is she speaking of? Moana Jackson while describing such Maori social structures remarked:

When, in the course of everyday events, a person ... upset the balance, and people wondered how to restore the good order and peace of the iwi, a story would be told. A tale of past imbalance in those who had done wrong, and of the wise acts of those who in the past had restored their place and the place of those people or places wronged. And from the story came a certainty that created a tradition of precedent and law to guide the ways of all people, and a legal tradition to protect the balance in all things.⁴³

Are these also precedents that we may talk of with the government? Or does the government consider them to be relics of a society of savages to be swept into a corner and out of sight? In such shadows it becomes clear that the corner Maori occupy within the heart of the government is indeed desolate and removed. It is the place you send someone when you don't want to see them any more.

While We are Made to Stand in the Corner

The active misrepresentation of Maori relationships is becoming an almost daily phenomenon. These misrepresentations are then used to prop up assertions by the media and certain members of Parliament who advocate that Maori are greedy and just looking for handouts. Such statements are then used to raise fear and trepidation within the New Zealand community generating wide speculation as to what these greedy Maori will do with their new found right.

This essay articulates that what Maori are asserting is not a newly invented right. Furthermore to assume that one would have rights over their mothers body is clearly reprehensible. It would be one of the sickest of minds that would dream of customarily using their mother let alone desire to own her. The relationship that is discussed is one that has existed for centuries. It generates obligations rather than rights, and it is these obligations that Maori will see fulfilled.

Conclusion

The requirement of constitutional change as a minimum response to the issues at the heart of these matters would not only show the Government's respect for the autonomy and independent authority of Maori, it would also proceed some distance to implanting some honour and credibility in the conduct of the Government and its many organisms. This is the base line from which Maori assert begin the processes of reconstruction for the future relationships between the government and Maori.

⁴³ Burnett, M. "The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations" 19 Suffolk Transnational Law Review 389, 433.

Maori are the whenua, the whenua is Maori. As such, it is only they who can describe their connections, their roles, themselves. Any attempt to tinker with these relationships is basically an attempt to distance and sever us from that which we are related. In essence this is an attempt to kill us.

The surest way to kill us is to separate us from our part of the Earth. Once separated, we will either perish in body or our minds and spirits will be altered so that we end up mimicking foreign ways, adopt foreign languages, accept foreign thoughts and build a foreign prison around our indigenous spirits which suffocates [us].... Over time, we lose our identity and eventually die or are crippled as we suffer under the name of 'assimilation' into another society.⁴⁴

It is these attitudes that Maori are so fervently resisting. As I cling to my mother, my mother clings to me. I will not let that connection fail.

*Ko te pakiaka
Pou ki te whenua
He uretu ki te mura o te ahi*

*The profound and enduring connection to the tap-root of the Earth Mother
Will remain steadfast
Despite the ravaging fires of destruction⁴⁵*

⁴⁴ Gupta, R. "Indigenous Peoples And The International Environmental Community: Accommodating Claims Through A Cooperative Legal Process" 74 New York University Law Review 1741 at 1784.

⁴⁵ Maori Law. Proverb provided by Mr Hohepa Kereopa, esteemed Maori Elder of Tamakaimoana in Te Urewera Aotearoa.

Te Whakapuakinga: Taranaki Declaration

Te Whakapuakinga was drafted at Parihaka on Saturday July 26th, 2003 by the roopu 'Te Puraranga' to declare Maori sovereignty over land and seas

TE WHAKAPUAKINGA

Whaia, Kia Honoa Te Rongo
Kia Hohou ai Te Rongo!
Taranaki Hapu Whanui. Oho mai!
Kotahi noaiho te pu kawatanga
i runga i te puke i Parihaka 1881!
Tau 2000, kei nga puke katoa!
No reira, Taranaki!
Turia te Pou... Tu Whenua!
Turia te Toka... Tu Moana!
Turia te Mana Tu Tangata!
Koia nei te Tikanga Maori!
Kaore he tikanga whai mana ke ake!
ara
He Mana Atua, He Mana Whenua!
He Mana Tangata, He mana Moana!
KO TE TINO RANGATIRATANGA!
Mai te takinga mai o nga tupuna i te
Moana nui a Kiwa,
Tangaroa Takapau Whariki i Papatuanuku!

TARANAKI DECLARATION

Pursue Peace and Unity
To secure its abundance
Taranaki Hapu Collective, wake up!
Only one government cannon
Was on the hill at Parihaka in 1881!
Year 2000, there is one on every hill!
Therefore Taranaki!
Stand as firm as the Pou Whenua!
Stand as firm as the Rock in the Sea!
Stand firm as Keeper of Sovereignty
This is Maori Law!
There is no other worthy Law!
and that is to say
Authority of Maori Mana over Land!
Authority of Maori Mana over our seas!
OUR SOVEREIGNTY AND OWNERSHIP!
Since our ancestors mastered ocean travel
on the Great Sea of Kiwa
Tangaroa Sacred Mat of Earth Mother!

HOLD FIRMLY TO MANA MAORI MOTUHAKE AND THE RIGHT TO SIT EQUALLY WITH THE OTHER MEMBERS OF UNITED NATIONS ASSEMBLY.

Ahakoia iti taku iti
ka turia e au
nga maunga nunui o tenei ao
E kore au e ngaro
te kakano i ruia mai i Rangiatea

Though I may appear insignificant
I will stand firmly on the
lofty mountains of this world.
I cannot be displaced, for I am of
the seed sown from Rangiatea.
(Titokowaru 1860)

TENEI TE TINO RANGATIRATANGA!
PURUTIA, UKAHATIA KIA MOU!
KO TE TIRITI O WAITANGI
KEI TE TAUTOKO I TENEI TU!

THIS IS SOVEREIGNTY
HOLD IT FIRM AND TIGHT
THE TREATY OF WAITANGI
AFFIRMS THIS STAND!

Tu Mai Taranaki e, tiketike mai ra tatou
roto i te kawa tapu, hapainga to mana
torotika ki a Rangi e-e-i

Rise Up Taranaki, ITS TIME TO ACT
Within our sacred beliefs, uphold
Mana Rangatira, to the Radiating Sun!
(Ruka Broughton 1983)

KO TE TANGATA TO MUA!
KO TE WHENUA TO MURI!

STAND FIRMLY ON & FOR THE LAND!
PROTECT IT FOR THE FUTURE!
(Titokowaru, Manawapou, 1854)

