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THE FORESHORE

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**RANGAHAUA WHANUI SERIES
THEME Q**

THE FORESHORE

**A REPORT TO THE WAITANGI TRIBUNAL
R.P. BOAST
SEPTEMBER 1996**



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Preface

The identity and self-awareness of all New Zealanders is strongly bound up with our coast. Most New Zealanders live by or close to the coast, and take rights of access to beaches and the sea for granted. This is not a state of affairs the author of this report would in any way want to see changed.

However, the coast has its own legal history, which this report will attempt to explicate. The legal assumption on which governments, regional councils, and most individuals rely, consciously or unconsciously, is that beaches and the foreshore are public property - or that, putting it in legal terms, they belong to the Crown. This report will examine this assumption closely. The conclusion is advanced that the Crown's supposed territorial claim to the foreshore rests at present on very shaky legal foundations. The Crown's legal advisers have, in fact, been well aware of this since the 1930s, although the issue became less significant once apparently resolved by the Court of Appeal in 1963 in *In re Ninety Mile Beach*.¹

If this analysis is correct - as I am convinced that it is - then the question remains as to what should be done about it. Reports prepared for the Rangihaua Whanui series are meant to be historical studies, not law reform proposals. Still, it seems somewhat irresponsible to expose a major weakness in the assumed Crown title to an important public resource and simply leave it at that. So in the final sections of the report some proposals for future action are very diffidently advanced.

One option is to clarify matters beyond doubt by simply announcing in statute that for the avoidance of doubt full title to the foreshore is, and shall be deemed always to have been, vested in the Crown. However such an action would be clearly expropriatory, a statutory eradication of customary title which would not be legally possible in either Australia or the United States. It would also follow some dubious New Zealand precedents best avoided. Another is to assume that the whole of the foreshore today must be regarded as Maori customary land. That, however, leads to a number of possible outcomes. One is that some kind of nation-wide deal or arrangement be struck; another, however, is simply to restore the former jurisdiction of the Maori Land Court and allow foreshore claims to be made out and proved in the ordinary manner. Not all parts of the foreshore are equally important, and possibly for much of it the Land Court would not be persuaded to issue a certificate of title. Yet another possibility is to consider carefully the possibility of some new form of title which will recognise both the historic property rights of the tribes and the importance of public access today.

The highest and best formulation of the Crown's title to the foreshore has been that of a kind of trustee - that it holds the foreshore for the benefit of all, Maori and non-Maori alike. This is how the Crown's right was put by Sir Vincent Meredith on behalf of the Crown in opening submissions in the *Ninety-Mile Beach* case in 1957. This is not a contention that should be dismissed out of hand, or regarded as simply self-serving. It is a time-honoured justification for the special legal position of the foreshore that the 'ownership of the Crown is for the benefit of the subject'.² This report argues that new

1

[1963] NZLR 461.

2 Lord Westbury in *Gann v Free Fishers of Whitstable* (1865) 11 HLC 192, 207; cited in McNeil, *Common Law Aboriginal Title*, 105.

life needs to be given to the conception of a trust, but the question as to who are trustees and who are beneficiaries needs to be reconsidered.

In fact, historically, access to the foreshore has never been much of an issue. Maori have not been concerned about people bathing in the sea or relaxing on the beach. At the local level, for the most part, there have been few real difficulties. What *has* caused problems are situations where governments have not acted in the least like a trustee but have behaved, rather, like absolute proprietors careless of the rights and interests of tangata whenua with an interest in the coast. Claiming to hold the foreshore in trust is one thing. Handing large areas of it over to harbour boards (as at Napier, the Manukau, Whangarei Harbour to name a few), allowing private individuals to build stop-banks so that shellfish gathering areas are ruined and Maori landowners lose access from the sea (as at Hokianga), permitting trucks and buses to use a beach as an unrestricted road (as on Ninety-Mile beach), and allowing reclamations, sewage disposal, marine pollution and so on (as just about everywhere), is quite another. It is in situations of the latter kind that tensions have reason, leading to inquiries, petitions and litigation.

One other aspect of this report necessitates some explanation, this being the extent to which it considers the matter of Maori customary law. During the process of writing this report, and during discussions of the various drafts with Professor Ward and Tribunal staff, it became apparent that the matter of Maori claims to the foreshore was closely linked with the matter of customary law. It was felt that this report should make some attempt to address the basic issues relating to Maori customary law. And 'attempt' is certainly the operative word: issues are raised in this report, but not resolved; and certainly the author has no pretensions to expertise in the content of Maori custom. As, however, there is so little material available on this subject it is hoped that the discussion in this report, which draws on discussion of indigenous customary law in the Pacific, Australia and North America will prove useful.

As this report is as much a legal discussion as it is a historical study, the report has been written somewhat differently from most of the other Rangahaua Whanui reports. There is a liberal use of headings and sub-headings, and the citation conventions of legal scholarship and legal writing are employed throughout.

Although this report has been discussed with Professor Ward and Tribunal staff all errors and omissions are my own responsibility. I would like to express my thanks to Alan Ward, Ben White and Janine Ford for their assistance.

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July 1996.

1.0 INTRODUCTION

1.1. General Issues

1.1.1. Meaning of “the foreshore”³: In English and New Zealand law the ‘foreshore’ has a distinctive meaning: it is a piece of land, the intertidal zone, the area between high water and low water mark. To Maori, this area was of course of vital importance, but it did not necessarily have any particular legal regime attached to it. The reason that the ‘foreshore’ is a particular issue in New Zealand law and of importance in the Waitangi Tribunal is because of particular rules of the common law (as they have been applied and developed in New Zealand) which have effectively vested this significant area of land in the Crown. This was the issue at stake in the crucial decision of the Court of Appeal in *In re Ninety Mile Beach*.⁴ This decision will be discussed fully below. For the present it can be noted that in the Court of Appeal’s view there is a vital connection between the Crown’s putative ownership of the foreshore and the process of title investigation carried on by the Native Land Court operating under the Native Lands Acts. The key matter to emphasise is that a separate Rangihaua Whanui report on the ‘foreshore’ arises not from any concepts or categories recognised by Maori customary law but rather from particular rules of the Common Law as they have been applied in New Zealand and as they have been developed, supplemented and supplanted by statute.

1.1.2. Overlap with general law relating to the coast and coastal management: In a broader sense, management of the coast and of coastal waters (including coastal fisheries) has long been a crucial matter affecting relationships between the Crown and Maori. In the course of New Zealand legal history there have been many inquiries and investigations into Maori claims to areas of the coast. More recently the coast has featured prominently in the reports of the Waitangi Tribunal. The Motunui (Wai 6, 1983), Manukau (Wai 8, 1985), Muriwhenua Fishing (Wai 22, 1988), Mangonui Sewerage (Wai 17, 1988), Ngai Tahu Sea Fisheries (Wai 27, 1992), and Te Whanganui-a-Orotu (Wai 55, 1995) reports are the main instances. Issues raised in these reports include marine pollution, damage to inshore fisheries, environmental impacts on shellfish beds, and the effects of reclamations and harbour developments. None of these reports, however, deal in any sustained way with the legal history of foreshore ownership. Coastal issues are also important in some claims currently being heard, in particular the Muriwhenua Lands (Wai 45) case. The coast is an area where resource management law interrelates with fisheries law. Many Maori foreshore claims, even if framed in territorial terms such as the claims to Napier Lagoon or the Manukau Harbour, are in large part based on concerns relating to the inshore marine fishery and shellfish. It is, however, important to note that in a number of instances Maori territorial claims to areas of foreshore have arisen independently of fisheries issues: reclamations and loss of access, for example, have also been important.

³ See *Halsbury’s Laws of England*, 4th Ed, vol 49, 187: “The seashore, foreshore or sea beach (for in legal parlance these are generally synonymous terms) is that portion of the realm of England which lies between the high-water mark of medium high tide and low-water mark, but it has been said that all that lies to the landward of high-water mark and is in apparent continuity with the beach at high-water mark will normally form part of the beach, and it has been held on special facts that “foreshore” means the whole of the shore that is from time to time exposed by the receding tide.”

⁴ [1963] NZLR 461

This chapter focuses primarily on Maori ownership and management issues relating to the coastal marine area, and is not intended to be a comprehensive analysis of the complex law relating to coastal fisheries. Nevertheless ‘fisheries’ and ‘foreshore’ are intertwined and in terms of Maori customary law any distinction between the two probably had little meaning.

1.1.3. Links with other legal problems. The legal history relating to the foreshore interrelates most closely with related legal problems connected with navigable rivers and lakes. In all cases the central problem has been an insistence by the Crown that it had particular rights over these water bodies arising from the Crown’s status at common law. The legal issues have been resolved rather differently. Essentially the Crown was successful with navigable rivers and the foreshore, but conceded the argument with respect to lakebeds.

In the case of navigable rivers, the main event was in 1903, with s 14 of the Coal Mines Amendment Act of that year. This vested the beds of all “navigable” rivers in the Crown.⁵ The legislation may have been intended to be declaratory, rather than expropriatory: certainly Sir John Salmond believed that at Common Law the Crown had title to inland navigable waterways. It was held by the Court of Appeal in *In re the bed of the Wanganui River*⁶ that there was no tribal title to the bed of the river and that an investigation of title in the Native Land Court extinguished customary title to the river bed *ad medium filum aquae*. This case, combined with s 14 of the Coal Mines Amendment Act settled that the Crown owned the beds of navigable rivers and that it was under no obligation to pay compensation for the extinguishment of Maori title to river beds. A degree of uncertainty has, however, now arisen with the decision of the Court of Appeal in *Te Runanganui o Te Ika Whenua v Attorney-General*⁷, where Cooke P doubted whether the provisions of the Coal Mines Amendment Act were by themselves sufficient to extinguish Maori title to rivers:⁸

In their *Te Ika Whenua-Energy Assets Report* in 1993 and *Mohaka River Report* in 1992 the Waitangi Tribunal have adopted the concept of the river as being taonga. One expression of the concept is ‘a whole and indivisible entity, not separated into beds, banks and waters’. The vesting of the beds of navigable rivers in the Crown provided for by the Coal-mines Amendment Act 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept, although it is odd that the concept seems not to have been put forward in quite that way in the line of cases concerning the Wanganui river, the last of which is the decision of this Court in *Re the Bed of the Wanganui River*...

With lakes, however, the Crown (or the Crown Law Office, at least) was unsuccessful in an endeavour to establish that inland navigable lakes belonged to the Crown. The main stumbling-block was the Court of Appeal’s decision in *Tamihana Korokai v Solicitor-*

⁵ This provision was enacted in response to the decision in *Mueller v Taupiri Coal Mines Ltd* (1900) 20 NZLR 89 (CA). The provision became s 206 of the Coal Mines Act 1925 and s 261 of the Coal Mines Act 1979. Although now repealed anterior vestings pursuant to this provision are preserved by s 354 of the Resource Management Act 1981.

⁶ [1962] NZLR 600 (CA).

⁷ [1994] 2 NZLR 20 (CA).

⁸ *Ibid*, 25.

*General*⁹, where it was held that the Native Land Court had jurisdiction to enter into an investigation of title to the bed of a navigable lake and that it was a matter for the Land Court whether title had been proved according to Maori customary law. In practice Maori claims to lakebeds have been settled by special statutory arrangements.¹⁰

The close parallels between the three areas of foreshore, rivers and lakes are obvious. To reiterate, the principal underlying link is the Crown's claim to a special interest in these areas. The foreshore closely parallels in particular the situation regarding navigable rivers. The main difference is that - in contrast to rivers - there is no statutory provision vesting foreshore in the Crown.

1.2 Maori customary law - general issues¹¹

1.2.1. Introduction: This report is constructed around the central argument that Maori society possessed its own body of law relating to 'ownership' and 'management' of the foreshore. The existence of such a body of law was seen by the Maori Land Court as a vital ingredient of any territorial claim to a particular part of the foreshore. This will be dealt with in the following section. As, however, the general literature relating to Maori customary law is so scanty, and as - as far as the author is aware - no Rangihaua Whanui report touching specifically on Maori customary law has been commissioned, it may be helpful if the matter is discussed in general terms in this report. The present author, needless to say, disclaims any knowledge of the *content* of Maori customary law. If it is accepted that Maori law deserves recognition as a fully-fledged legal system in its own right, it follows that it is a system which the present author has not been trained in and the exposition of which must properly be left to others.

1.2.2. Customary law as 'law': Lawyers trained in the Western common law or civil law traditions often tend to see the laws of so-called primitive societies as unsophisticated and amorphous. A glaring example of this may be found in Megarry V.C.'s judgment in *Tito v Waddell* [1977] 3 All ER 129, where he assumes that the Banaban people of Ocean Island could not have grasped the concept of a trust.¹² But in fact there is a substantial literature on the legal systems of tribal societies, including the classic accounts of law in Melanesia by Malinowski¹³ and among the Cheyenne by Llewellyn and Hoebel.¹⁴ Such scholars emphasise that the rules, far from being vague

⁹ (1913) 33 NZLR 321 (CA).

¹⁰ Examples include: (1) the Reserves and other Lands Disposal and Public Bodies Empowering Act 1907 s 53, Reserves and other Lands Disposal Act 1914 s 57, Native Land Amendment and Native Land Claims Adjustment Act 1921 s 12 [Wairarapa Lakes]; (2) Horowhenua Lake Act 1905, Reserves and other Lands Disposal Act 1956 s 18 [Lake Horowhenua]; (3) Native Land Amendment and Native Land Claims Adjustment Act 1922, s 27 [Rotorua Lakes]; (4) Native land Amendment and Native Land Claims Adjustment Act 1926 [Lake Taupo]; (5) Lake Waikaremoana Act 1971.

¹¹ This discussion draws to some extent on the present author's chapter in P Spiller, J Finn and R Boast, *A New Zealand Legal History*, Brooker's, Wellington, 1996, and on R.P. Boast, *Maori customary use and management of geothermal resources*, A report to Te Puni Kokiri on behalf of FOMA Te Arawa, November 1992.

¹² See [1977] 3 All ER 129, 227.

¹³ B. Malinowski, *Crime and custom in savage society*, Routledge and Kegan Paul, London, 1926.

¹⁴ K.N. Llewellyn and E.A. Hoebel, *The Cheyenne Way*, University of Oklahoma Press, Norman, 1941.

and indistinguishable from religious and ethical concepts were in fact quite clear and precise. (It should be noted, too, that other scholars have argued that the supposed certainty of *Western* legal systems is in fact a myth.¹⁵) Although it is often commonly asserted that many 'tribal' societies know no distinctions between 'custom', 'law', and religious and ethical beliefs, and, indeed that to make such distinctions is to impose 'alien categories of thought'¹⁶, other scholars dispute this and assert that in most societies there can be found a body of rules backed up by sanctions of various kinds which properly speaking can be regarded as truly 'legal'. As Malinowski put it:¹⁷

There must be, in all societies, a class of rules too practical to be backed up by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to be left enforced by an abstract agency. This is the domain of legal rules.

Perhaps the division of opinion amongst Western-trained scholars reflects divergent views as to whether 'law' should be regarded as an analytical scientific term or whether only concepts meaningful to traditional societies themselves should be used in describing and analysing them¹⁸.

Apart from special courts such as the Maori Land Court,¹⁹ and, to an extent, the Waitangi Tribunal itself, the ordinary courts have in the main simply ignored Maori customary law. Although it is clear that the *content* of aboriginal title can only be explained by reference to customary law, as the High Court of Australia has recently emphasised,²⁰ and of course customary law has in some contexts been 'incorporated' by

¹⁵ Julius Stone has argued this thesis at length. See J. Stone, *The Province and Function of Law*, Maitland Publications, Sydney, 1961; *Legal Systems and Lawyers' Reasoning*, Maitland Publications, Sydney, 1968.

¹⁶ See E. Egglestone, *Fear Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, ANU Press, Canberra, 1976, 278.

¹⁷ B. Malinowski, *op.cit.*, 67-8.

¹⁸ This report is hardly the place to embark on a sustained discussion of cultural relativism and law. A certain strand in modern jurisprudential thought, deriving in the main from conservative German nineteenth-century thinkers such as Herder and Von Savigny, insists that law is culturally relativist: that is that it is the cultural emanation or expression of a particular people or *Volk*. There are some echoes of this in the work of modern Maori scholars such as Moana Jackson. The present author's position, for what is worth, is that a thorough-going cultural relativism is impossible and is in any case intellectually and morally bankrupt. It amounts to a repudiation of some of the few genuinely enlightened and progressive developments to have occurred in the twentieth century, including the Universal Declaration of Human Rights. To insist that there are *no* universally applicable norms and that concepts of law, custom and justice are *entirely* culturally relative is easily disproved (what if it is established that a particular culture is shown to have had the long-established 'cultural' practice of carrying out pogroms?) Nevertheless, it has to be recognised that *to some extent* law is culturally relative, and that an unquestioning imposition of one legal system on a culturally distinct minority is undesirable. It is not necessary to pretend that there are no universal norms to accept that members of a particular culture or ethnicity have a right to be governed by their own legal system if that is what they wish. Jews have the right to be governed by Talmudic law; the Catholic Church to be regulated according to Canon Law; and Maori to manage lands and resources by Maori customary practices. The role of the State must be to act as a guarantor of basic human rights and liberties.

¹⁹ The Native Lands Acts required the Native Land Court to apply Maori custom: see e.g. Native Lands Act 1865 s 23 (certificate of title to specify who "by Native custom" own or are interested in the land. In the case of succession the Court's jurisdiction under s 30 of the same Act was to ascertain "who according to law *as nearly as it can be reconciled with Native custom*" - a significantly different emphasis.

²⁰ See *Mabo v. Queensland* (1991-92) CLR 1, 56, per Brennan J: "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs." This is standard when it comes to recognition of Native title, of course: what else can govern the

statute,²¹ it is far from clear to what extent Maori law is *otherwise* part of the common law of New Zealand and is directly enforceable in the ordinary courts of law²². Partly this uncertainty may be due to doubts as to whether New Zealand ought properly to be regarded as a colony of “settlement” or “cession”²³ (the present writer’s view is that if New Zealand can only be regarded as a colony of cession, but there does not seem to be a consensus on this). There never has been any formal investigation of Maori customary law by state agencies, although the New Zealand Law Commission has recently commenced a study of the subject. Nor has there existed a scholarly tradition of legal anthropology in this country, perhaps a reason for the paucity of publications on the subject,²⁴ and the teaching of law in New Zealand law schools always has been, and largely remains, firmly positivist.²⁵ Recently, however, there have been two major enquiries into customary law into two jurisdictions close to New Zealand. These are the

content of such title but the indigenous customary law. Brennan J. notes further that “the general principle that the common law will recognise a customary title only if it be consistent with the common law is subject to an exception in favour of native title” (ibid, 59). In New Zealand the Court of Appeal in *Re Landon & Whitaker Claims Act 1871* (1871) 2 NZCA 41, 49, observed: “The Crown is bound, both by the common law of England and its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right *by established Native custom appears to be*, the Crown is bound to respect it.”

²¹ As in the Native Lands Acts. A recent example is the Resource Management Act 1991: see e.g. s 2(1) (definitions of kaitiakitanga, mana whenua, tangata whenua, taonga raranga, tauranga waka, tikanga Maori); s 6 (e) (relationship of Maori culture and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga a matter of national importance); s 14(3)(c) (taking of geothermal water not prohibited if the use is in accordance with tikanga Maori and does not have an adverse effect on the environment). For a full commentary see R.P. Boast and D.A. Edmunds, “The Treaty of Waitangi and Maori Resource Management Issues” in *Resource Management* (Wellington, Brooker’s, 1991) vol 1A.

²² The current status of Maori customary law is unclear. In *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 74, Prendergast CJ famously denied that Maori had “any settled system of law”: the Courts could not enforce Maori law as there was no ‘law’ to enforce. Prendergast’s remarks are somewhat at odds with the contemporary statutory directions in the Native Lands Acts and with the Court of Appeal’s decision in *Re Landon & Whitaker Claims Act 1871* (1871) 2 NZCA 41. See also the Privy Council decision in *Nireaha Tamaki v Baker* (1901) NZPCC 371, 382, where the Privy Council, apropos of the argument that Maori customary law did not exist, thought it “rather late in the day for such an argument to be addressed to a New Zealand court”. There are a few cases where Maori law has been applied, or the issue at least discussed, but these are exceptional: see *Public Trustee v Loasby* (1908) 27 NZLR 801; *Hineiti Rirere Arani v Public Trustee*, (1919) NZPCC 1; and Chilwell J’s comments in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, at 215.

²³ These classifications had important implications for the status of customary law. In colonies of settlement British law is said to apply automatically; in colonies of cession - and conquest - the existing law continues until modified in some way by the new sovereign power. This report is hardly the place to unravel the tangled jurisprudence on this matter, the relevance of which is probably marginal after *Mabo v Queensland*. This case did not seek to change Australia’s status as ‘settled’ but the High Court of Australia was in no doubt that Native title nevertheless continued in operation. In any case there seems to be no logical reason why the law of England supposedly applying automatically in a colony of settlement cannot include the law relating to aboriginal or Native title, which is after all part of the common law.

²⁴ Some exceptions are N Smith, *Native Custom and Law affecting Native Land*, Wellington, Maori Purposes Fund Board, 1942; Tania Rei, Bob Young, and others of Nga Kairangahau and Manatu Maori, *Customary Maori Land and Sea Tenure: Nga Tikanga Tiaki Taonga o Nehera*, Manatu Maori/Ministry of Maori Affairs, Wellington, 1991. Material on Maori custom can also be found in the various reports of the Waitangi Tribunal; and see also E.T. Durie, “Custom Law”, (unpublished paper 1994).

²⁵ This is unlikely to change significantly, in accordance with the perceived requirements of students and the legal profession. However the Law School at the University of Waikato has recently received substantial funding for a major research project on Maori customary law - how this will interrelate with the New Zealand Law Commission’s own project on the same subject is unclear. Next year the present author and Caren Wickliffe will offer an optional one-semester course on Maori customary law at Victoria University of Wellington as part of the LLB programme.

report of the Law Reform Commission of Australia on *The Recognition of Aboriginal Customary Laws*, published in 1986²⁶ and the *Report of the Commission of Enquiry on the Rehabilitation of Phosphate Lands in Nauru*, (Weeramantry Commission) presented to the Government of Nauru in 1988.²⁷ Both these reports are (or should be) of great interest to New Zealand lawyers and contain a great deal of valuable material bearing on the nature, functions and current status of customary law.

1.2.3. Sophistication of ‘customary’ systems: The sophistication of the customary law of Nauru (which was probably not dissimilar from that of the Maori) has been emphasised by Weeramantry:²⁸

Not only did the Nauruans have a legal system, but that legal system was a fairly sophisticated one.

It had worked out the question of ownership rights to a fine degree of detail. Land devolved in precisely calculated shares. Ownership was recognised of the reef and the sea within the reef line. This portion of the sea was divided within well-established lines or boundary demarcations and the separate portions were the subject of private ownership. These little portions of sea were used for fishing and there were well-established fishing rights within these areas. Further, in relation to the inland water, namely the Buada lagoon and other small lakes, there were also clearly demarcated areas within which the different tribes exercised their fishing rights. Fish were bred here and strict rights of ownership were recognised.

So also in relation to underground water and wells. These were the subjects of clearly defined rights of ownership. They belonged to the owner of the surface. Others would be permitted to share them but only on the basis that full ownership rights were with the surface owner. There was indeed a strong Nauruan custom of sharing, particularly in times of adversity, but there was always a clear understanding that the wells were the subject of private ownership.

1.2.4. Customary law in the modern era. Can Maori ‘customary’ law be brought back to life at the present day? After over a century of marginalisation and occasional denigration and active hostility what remains? Some might argue that this does not matter, in that theoretically, at least, in that as all legal systems change and adapt, there is no reason why a system of Maori ‘customary’ law cannot be applied at the present day. Even though the content may have dramatically changed the law’s credentials, it might be argued, as ‘customary’ are not in doubt: after all the Common Law is still the Common Law even though it has changed dramatically since its classical age in nineteenth-century Great Britain. Some, however, (including the present author) may find this a little too glib, an easy evasion of some very severe difficulties. The issue has been fully debated in Australia. Professor T.G.H. Strehlow, a distinguished anthropologist who has spent much of his career working with

²⁶ The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, (Report No. 31), 3 vols, AGPS, Canberra, 1986.

²⁷ A full copy of this report is not available to me. However I have been able to read the summary study by C Weeramantry, *Nauru: Environmental Damage under International Trusteeship*, Oxford University Press, Melbourne, 1992, Professor Weeramantry was one of the three commissioners hearing the Nauru investigations and is now a judge of the International Court of Justice. The government of New Zealand, along with those of Australia and Great Britain (the three trust powers) declined to participate in the commission.

²⁸ Weeramantry, *op.cit.*, 158.

the Aranda people of central Australia, has argued that it is now too late to recognise Aboriginal customary law in Australia. Strehlow contended that misguided attempts to do so could create only a hybrid, neither Aboriginal nor Australian. In a submission to the Law Reform Commission of Australia he stated:

True 'tribal law' is probably dead everywhere. It could not change, for there were no aboriginal agencies that had power to change any of the traditional norms.

But other scholars, such as Professor Keith Maddock, decline to accept Strehlow's approach. In his classic study *The Australian Aborigines*, published in 1982, Maddock writes:²⁹

Strehlow appears to have assumed that customary law means the law of communities unaffected by outside ideas, concepts and values. As there are no such communities left, there can be no such law. He was judging present-day Aborigines by the standards of their forebears. This argument against recognition loses its force if we see present-day rules and customs as having grown out of the pre-European past but has having been formed and malformed also through the shock of foreign contact and the process of adaptation that followed. Sometimes the outcome may have been a degenerate travesty of an older and purer standard, but there is no reason to view every change with so little sympathy.

The Law Reform Commission of Australia, while not unmindful of the practical difficulties of recognition, was much more inclined to Professor Maddock's view, noting that Strehlow's approach amounted in essence to a 'counsel of despair':³⁰

Changes or adaptations in traditional rules or customs, in an attempt to cope with the great changes European settlement has brought about, no doubt produce something which could be described as 'synthetic'. The fact that legal systems are synthetic does not mean that they are less real or important to those whom they affect. In the present context, it does not mean that efforts should not be made to recognise those aspects of Aboriginal traditions and laws which can helpfully and effectively be recognised. Indeed, Strehlow himself saw the need for some such measures, at least in such areas as prosecution policy and sentencing. His comments on the mistakes made over Aboriginal customary laws in particular cases support the introduction of better methods of consultation and proof. The Commission believes that Strehlow's views represent a counsel of despair. Accepting that Aboriginal traditions and laws have been subject to outside interference and to pressures of various kinds does not entail that those traditions and laws have vanished, or have ceased to be valid or recognisable. On the contrary they have in many areas survived and adapted. These changes, and the continuing interaction with the general Australian community, must influence the ways in which recognition can occur. They do not preclude it.

The matter of the recognition of Maori customary law in New Zealand has not to date received anything like the degree of careful thought and scrutiny that the subject of Aboriginal customary law has received in Australia. Clearly, however, the Australian discussion has real relevance for New Zealand as the underlying issues are very similar. It can at least be noted that the Australian Law Reform Commission has cautiously endorsed a programme of the recognition of Aboriginal customary law, and that it has

²⁹ Keith Maddock, *The Australian Aborigines*, 2nd ed., Penguin Australia, Ringwood, 175-6.

³⁰ Law Reform Commission of Australia, *The Recognition of Aboriginal Customary Laws*, (Report No 31), AGPS, Canberra, 1986, vol I, 90.

declined to be persuaded that despite the obvious practical difficulties the attempt should not be made. The extent to which Maori 'customary' law still survives, and the extent to which its development should be fostered, are matters now requiring detailed objective study in New Zealand.

1.2.5. Customary law and tribal self-management: In some United States case-law management by customary law has been viewed by the courts as an integral aspect of rights of tribal autonomy and self-management protected by Treaty and the United States constitution. The most important and certainly the best-known of these cases is the 1974 District Federal Court decision in *United States v State of Washington*,³¹ referred to at some length by the Waitangi Tribunal in its *Muriwhenua Fishing Report* (1988).³² Tribal sovereignty implies tribal self-government which implies tribal management by the rules of customary law - provided that certain prerequisites are met.³³

1.2.6. Summary: The preceding discussion is necessarily somewhat impressionistic and inconclusive. Certainly the matter of the recognition of Maori customary law is both important and deserving of much careful thought. The extent to which a body of living law and tradition of coastal management can still be said to subsist is not something regarding which the present author is competent to make pronouncements. It can be seen that in some other jurisdictions, Australia and the United States, the recognition of indigenous customary law has at least been carefully considered and is recognised as generally desirable by courts and commissions of inquiry (support from the indigenous groups concerned can probably be taken for granted, although there is likely to be a division of opinion about the mode of recognition and certainly about whether the dominant legal system has the right to go about laying down pre-conditions for the recognition of customary law). Despite this, it must also be noted that although the Australian Law Reform Commission reported on aboriginal customary law in 1986, nothing has been done to implement the report; and the extent to which the legal codes of American Indian tribes actually reflects 'customary' law is problematic.

It also seems obvious enough that a comprehensive grasp of Maori 'customary' law is not possible without a sophisticated and sensitive understanding of Maori social organisation, both in the past and at present. The Land Court tended to operate on the assumption that Maori society was divided up into clearly defined 'tribes' which were on some occasions regarded by the judges of the Court as miniature states. But in all

³¹ 384 F Supp 312 (1974).

³² *Muriwhenua Fishing Report*, Wai-22, 1988, 159-168.

³³ Two different kinds of prerequisites are emphasised by Judge Boldt. Before tribes are entitled to regulate resources such as sea fisheries the tribe has to have an actually existing governmental structure (the tribe must have "competent and responsible leadership", "well organized tribal government", "well qualified experts in fishery science and management" etc.); secondly, the customary laws will need to be written down (a pre-condition for the continued exercise of tribal self-regulation is that the tribe shall "provide for full and complete tribal fishing regulations"): See 384 F Supp 341, 382. This approach has the merit of insisting that if tribal self-regulation is to be recognised it must be done fully and comprehensively and in a modern manner. Whether all Maori tribal authorities would meet Judge Boldt's minimum preconditions, however, is unclear. It is probably unnecessary for this report to mention the complexity and difficulty of Maori representation issues at the present time. It is even possible that to speak of *tribal* self-regulation and *tribal* self-government is to engage in wishful thinking somewhat out of step with the realities of Maori social organisation at the present time, a point which this author lacks the expertise to pursue any further.

probability social organisation was far more fluid: Maori society was and remains elusive, persistently escaping from all attempts to impose tidy frameworks on it. Which was the social unit which in fact had, and made, 'law'? Is it, in fact, meaningful to speak of 'Maori' law? There seem to have been some rules, practices, devices, typical of Maori society as a whole. But there were other rules which operated at iwi, hapu, and family levels: was there, perhaps, "Ngati Toa" law, hapu "law", whanau "law" - and is the tidy division into iwi-hapu-whanau itself a deception in any case?

Narrowing the issue down specifically to the foreshore, it can certainly be maintained that if the foreshore is still in a sense tribal property - a point yet to be discussed - then from this 'property' necessarily follows a right of management, including (but not necessarily, or not limited to) management according to the norms of customary law. Customary law is relevant at both ends of the argument, in fact. The right of 'property' in fact flows *from* management by customary law; and 'property' implies management *by* customary law. As will be seen, in the Ninety-Mile Beach litigation the fact that Maori managed the beach by means of customary management practices such as rahui was an important part of the corpus of evidence on the basis of which the Maori Land Court felt justified in issuing a title to the beach. On the other hand, a territorial interest in the beach implies a right to manage the area according to customary practices. To some extent such management is envisaged by the Resource Management Act 1991. This will be discussed fully below also.

1.3: Maori law relating to coastal ownership and management: substantive aspects

1.3.1. Maori Land Court records : The minute books of the Maori Land Court record a great deal of information on all aspects of land and resource management by Maori. Most of the evidence in the Minute Books is in fact concerned with proof of descent - claimant groups would 'set up' a particular ancestor as the basis of title and then prove through whakapapa descent from him (or her). However there is a wealth of material on other matters, and sensitively used the Minute Books can be used to provide material on a range of matters, including the functioning of Maori customary law³⁴. The hearings in the Maori Land Court relating to Ninety Mile Beach in 1957, for example, contain information on the use of rahui, or prohibitions, as a management device. Other important cases include the special enquiries conducted by the Court into Te Whanganui-a-Orotu at various times, and the sequence of cases relating to the Waitemata, Hokianga, Whangape and Herekino harbours heard by the Land Court in the 1920s and 1930s. Many of these Northern cases were heard at first instance by the Tai Tokerau Maori Land Court judge, Frank Acheson³⁵. Acheson, regarded as a "very pro-

³⁴ Some scholars, however, dismiss the Minute Book material as unreliable: see Layton, "Alienation Rights in Traditional Maori Society: A reconsideration" (1984) 94 *Journal of the Polynesian Society* 423. Layton's focus is on alienation rights, and he argues that the material in the Minute Books is, in fact, "useless" for "establishing traditional Maori alienation rights" (ibid, 430). This seems an extreme position. See Alan Ward, "Alienation Rights in Traditional Maori Society: A Comment", (1986) 95 *Journal of the Polynesian Society* 259; Spiller, Finn and Boast, *A New Zealand Legal History*, Brooker's, Wellington, 1996, 126-7.

³⁵ As Acheson will figure prominently in this report, a few biographical details should be given at this stage. Acheson was born on 17 June 1887 at Riverton, Southland, and was educated at Otago University for his LLB and at Victoria University where he obtained an LLM in 1913. He began work at the Native Department in 1914 and was appointed a judge of the Native Land Court in 1919 at the age of 32. For the next six years he was judge of the Aotea District of the Court and became friendly with the Te Heu Heu family. In 1925 Acheson became judge of the Tokerau

Maori judge”³⁶ by the Crown Solicitor at Auckland, was sympathetic to Maori claims to the foreshore and tried hard to accommodate such claims where possible.

1.3.2. Waitangi Tribunal reports : Further details, often deriving directly from oral tradition, have been collected by the Waitangi Tribunal and published in various reports. In the *Kaituna River Report*, for example, the Tribunal drew attention to Ngati Pikiao customs relating to food collection and preservation³⁷. Another example is the following passage in the Tribunal's Muriwhenua Fisheries Report (Wai 22, 1988, p 24):

The laws of Tangaroa (God of the fish) are still observed by many. We were told that incantations must be offered to Tangaroa before going out to fish. Only certain days are suitable for fishing, according to the Maori calendar, and only if approved by the tohunga (experts or priests). When someone drowns at a particular place the spot is prohibited for fishing. No seafood is taken until Tangaroa returns the dead . . . Some rules, we thought, were basically directed towards the maintenance of clear waters and balanced fish habitats. It is forbidden to gut fish in the open seas, or to dispose of small fish, excess bait, food or rubbish. We were told that expeditions did not take food with them and sometimes were not allowed to carry cigarettes. Bait was carefully apportioned in baskets for each member so that it might be sparingly used . . .”

Such citations could be readily multiplied. The Waitangi Tribunal does not, however, see its task as preparing comprehensive studies on tribal customary law. Rather, its focus is on acts or omissions of the Crown which may be in breach of the principles of the Treaty. Customary rules and practices are relevant to this in that government policies may have ignored customary rules, or given them insufficient weight, or have failed to provide machinery which allow for the customary rules to be realised and practised. In the Waitangi Tribunal, in other words, matters of customary law are simply a part of a general corpus of evidence relevant to the dominant issue as to whether there have been any acts or omissions of the Crown contrary to the principles of the Treaty of Waitangi. The law that the Waitangi Tribunal itself actually applies is not Maori customary law.

(Northland) division of the court and president of the Tai Tokerau District Maori Land Board. Acheson was of a strongly conservative political disposition but did not see this as inconsistent with a very tenacious belief in the importance of protecting Maori rights and a commitment to the Treaty of Waitangi. Along with the Te Heu Heu family Acheson enjoyed close relations with other influential Maori leaders, including Eru Ihaka, Mutu Kapa and Whina Cooper in the North and Te Puea Herangi in Northland; his relations with Sir Apirana Ngata, however, seem not to have been very cordial. Acheson was a committed supporter of the revival of interest in the Treaty of Waitangi in the 1930s and of the 1940 commemorations. His dislike of bureaucrats led to an unfortunate feud with his registrar, J. Robertson, which was connected with a protracted dispute between the Native Department and Acheson over advances made by the Tokerau Board for the development of a dairy farming project at Te Kao. His judicial decisions, especially those relating to foreshore matters, were often highly innovative and the cause of much concern to officials. Acheson had poor relations with the Labour Ministers of Maori Affairs, Langstone and Mason, and in 1943 he was compulsorily retired due to the alleged insolvency and illegal expenditures of the Tokerau Board. He returned to his home town of Riverton, Southland, and died in 1948. Acheson's foreshore decisions are an important part of the narrative which follows and are discussed fully below.

³⁶ Sir Vincent Meredith's autobiography, *A Long Brief: Experiences of a Crown Solicitor* was published by Collins, Auckland, in 1966. At p 30 of this, obviously referring to Acheson, Meredith writes: "Some matters in connection with the ownership of Maori land necessitated going to the most outlandish places. These were generally heard before a Maori land Court judge who was very pro-Maori, and who insisted that the hearing should be heard amongst the people - that is, on the particular spot which was the subject of dispute."

³⁷ Waitangi Tribunal, *Kaituna River Report*, Wai 4, 1984, pp 8-9.

1.3.3. Maori law relating to the foreshore:ownership : Although there has been much dispute over whether the Native Land Court had jurisdiction to grant foreshore titles, judges of the Land Court have long been of opinion that in terms of Maori custom the foreshore and the coast was ‘owned’ in much the same way as the land. For example in a an enquiry relating to Te Whanganui-a-Orotu in 1920 Chief Judge Jones of the Native Land Court was in no doubt that in Maori customary law property rights could include the foreshore and the sea.³⁸ He summarised the range of possible property rights as follows:³⁹

...In fact, Maori rights were not confined to the mainland, but extended as well to the sea. These rights were exercised principally for the procurement of food, and would have special significance in an inland sea of this nature; but they were no less applicable to the ocean. Deep-sea fishing grounds were recognised by boundaries fixed by the Maoris in their own way; they were well-known, and woe betide any alien who attempted to trespass upon them...The inshore fishing seemed to have somewhat more restricted rights, and as time went on particular spots would be recognised as the sole privilege of a single family, just as eel-weirs in fresh-water rivers. In a place like Ahuriri Harbour there would probably be several fishing stations; and in addition the pipis and shell-fish, which covered the mud-flats at low tide, would, subject to mutual understandings, be the common property of all, to gather food where they would.

In the *Ngakororo* case (1942) the Native Appellate Court could see no difference in principle between ordinary land and land below high-water mark:⁴⁰

The Native Land Court’s decision as to whether these mud flats are papatupu land must rest upon findings of fact. Just as in the investigation of title to customary land, it is necessary for the claimants to establish their right, and this is done by showing that the land has descended to them from a tribal ancestor and has been in the continual occupation of the claimants and their predecessors prior to 1840 and down to the date of investigation.

And in the *Ninety-Mile Beach* litigation the findings of the Maori Land Court at first instance were in favour of the Aupouri and Te Rarawa iwi having title by Maori custom over the intertidal zone. This title was proved in the Court in the same way as title to the land: by proof of descent from a particular ancestor, of exclusive use, of resource harvesting, and of control through the mechanisms of Maori custom. Chief Judge Morison stated that the evidence had clearly demonstrated the following:⁴¹

- (a) That the Northern portion [of the beach] was within the territory occupied Te Aupouri and the Southern portion was within the territory occupied by Te Rarawa.
- (b) That the members of these tribes had their kaingas and their burial grounds scattered inland from the beach at intervals along the whole distance.
- (c) That the two tribes occupied their respective portions of the beach to the exclusion of other tribes.

³⁸ See Judge Jones’ report at 1921 AJHR G-5.

³⁹ Ibid. A copy of this report may also be found on MA 1, 5/13/17 [Napier lagoon].

⁴⁰ (1942) 12 Auckland NAC MB 137. This judgment is set out in full in the Appendix.

⁴¹ (1957) 85 Northern MB 126-7.

(d) That the land itself was a major source of food supply for these tribes in that from it the Maoris obtained shell fish, namely toheroa, pipi, tuatua and tipa from the beach itself, and kutai from the rocks below high water mark at the part known as Maunganui Bluff.

(e) That the Maoris caught various fish in the sea off the beach, and for this purpose went out in canoes. The fish caught were mullet, schnapper, flounder, kahawai, parore, herrings, rock cod, yellow-tail, kingfish and shark.

(f) That for various reasons from time to time rahui were imposed upon various parts of the beach and the sea itself.

(g) That the beach was generally used by members of these tribes.

In other words, ownership of the foreshore by a particular descent group is regarded by the Land Court as a matter of fact, to be proved by the elements of exclusivity, actual use, and management by customary law (rahui, in this instance). So the starting-point to any discussion of Maori claims to the foreshore must begin with the general point that as far as the country's principal specialist tribunal dealing with Maori land and Maori custom is concerned, titles to the foreshore were theoretically provable in the Court in the same way as titles to the land. Of course there was the important jurisdictional problem as to whether the Court had a jurisdiction to issue titles to the foreshore at all, but this problem arose from statutes and the application of the Common Law in New Zealand, and not because Maori property rights in the foreshore were in any other sense problematic.

The practice of the Court was particularist, rather than general, in that it is concerned with particular claims by particular groups, rather than any general concept of 'Maori' ownership of the foreshore. It is possible that not always was the foreshore 'owned' in the same way. Particular parts of it may have been much more valuable than others and title could have been quite variable. Certainly most of the historic claims to areas of the foreshore have been highly particularist and tend to relate to especially prized areas which are valuable in terms of the resources they yielded, or which, like Ninety-Mile Beach, had additional qualities of a spiritual nature. (As well as the associations with Cape Reinga and Kapo Wairua this beach also forms part of what is styled Te Wharo Oneroa a Tohe, the great pathway of Tohe. Tohe was a founding ancestor who travelled south with his slave in ancient times from Kapo Wairua to Whangape naming all the prominent features of the landscape, many of them coastal features.⁴²)

The way in which a claim to a particular area of foreshore might be structured is shown by the submissions prepared by Mr Dragicevech, counsel for the claimants in the Ninety-Mile Beach case in the Land Court in 1957:⁴³

Uses of beach to prove ownership:

1. Substantial portions closed for long periods for:
 - (a) In recognition of death of chief.
 - (b) To fatten shell-fish.
2. Pakehas and other tribes excluded.

⁴² See Waerete Norman, 'The Muriwhenua Claim' in I H Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, Oxford University Press, Auckland, 1989, 181, 195. See also kaumatua and kuia evidence in Wai-45 claim (Muriwhenua lands).

⁴³ The minutes for this case, which include copies of Dragicevich's legal submissions and his written statement of the structure of the evidence (cited in text) are at (1957) Northern MB 7-67.

3. Inexhaustible supply of food e.g. fish and birds.
4. Place of recreation:
 - (a) Wrestling
 - (b) Boxing
 - (c) Athletics
 - (d) Horse racing.
5. Religious ceremonies associated with rahui (3 types)
6. Actual possession and control, embodied ownership - along whole of beach.
7. Occupation by virtue of necessity - in respect of food, fish on beach and birds in bush.
8. With advancement of Pakeha influence, Maori continued to occupy foreshore and on coastline.
9. Regarded by all northern tribes as belonging to them and being held under customs and usages.
10. No evidence to show Crown purchased or acquired this land and being customary land not possible for Crown to acquire by purchase.
11. Maori custom recognised the ownership of the foreshore land at 90 Mile Beach and other parts of coastline.

1.3.4. Customary law: management: In various cases the Land Court has identified various methods of Maori management of the foreshore by Maori custom. As explained above, the Court has tended to search for evidence of the existence of such custom as an aspect of proof of title. The principal management device discussed in the Court's minute books is the rahui, or prohibition, which was fairly fully described in the evidence given in the Ninety-Mile Beach case in the Land Court in 1957. Hohepa Kanara, a witness before the Land Court in 1957, explained the purpose and significance of rahui.⁴⁴

I saw some of the customs on the beach — rahuīs. There are many reasons for them. If a person drowned at sea a rahui would be made within the area he was drowned for a certain period. If food from the seabed became exhausted a rahui would be created so as to make allowance for pipis etc to replenish supply. A Chief could effect a rahui by declaring a certain area subject to the mana of a rahui — during this period no one can do anything within the rahui until such time as the restriction has been lifted . . . Once a place has been declared subject to the mana of a rahui no person is allowed to trespass.

The persistence of customary management practices and firmly exercised Maori authority over the beach was vividly described by James Bowman, a Pakeha who appeared before the Land Court in 1957 to give evidence in support of the Maori claimants. As a child he had been a member of one of the very few Pakeha families living at Ahipara in the early days. He describes the situation on the beach in the 1880s:

[There were] no Pakeha missionary families living there [Ahipara] in my young days. They came out to the beach only when I was a young man. They could not please themselves as to when they came and went. A chief named Mumu was in charge. He was the head one of the whole lot — there were a lot of chiefs. Mumu controlled very nearly the whole beach and the land too. Mumu and his brothers and cousins were in charge up to Hukatere. We couldn't do what we liked — we were frightened of them — we wouldn't dare to walk and

⁴⁴ See (1957) 85 Northern MB et seq.

trample over it. I saw rahuis on the beach. When the old chief Mumu died they buried him and put up a rahui. They put up a pole, a good thick post, and they carved some sort of tattoo on it. When they put this rahui up it was for one part of the coast — they left the other part open . . . It was the Maori custom that if a chief died they closed part of the beach to fishing. The people were not allowed to fish in the sea off the beach either . . . If anyone came along and broke the rahui they would make him pay. They might chuck him in the tide. Later on they did away with this custom; when the older chiefs died.

1.3.5. Descent from a founding ancestor. Although the kaumatua evidence given in the Ninety-Mile Beach case in 1957 certainly does traverse such matters as rahui, resource gathering and so on, a careful reading of the evidence indicates that as far as the witnesses themselves were concerned the most important thing was actually descent from Tohe, the first ancestor who had travelled down the beach and named all the prominent landmarks. In other words, title was proved by whakapapa back to the original explorer and namer of the land. A similar approach was taken by some of the witnesses in the recent Muriwhenua Lands (Wai-45) hearings. Thus although in some respects proof of title according to Maori custom was similar in some respects to the Common Law, in other respects it is radically different: an insistence on links to an all important ancestor who either found the land empty or who conquered it from others has no real Common law equivalent (although it conceivably might have in Anglo-Saxon law). The ‘title’ comes from the knowledge of the ancestor, an ability to claim descent from him, and an ability to link present-day features of the landscape back to the ancestor. In this respect foreshore was no different from any other parcel of land.

Thus in the Ninety-Mile Beach case in 1957 the claimants’ first witness was Rarawa Kerehoma. Rather than discuss use, management, and customary law, he begins with the story of Tohe, relating him back and forward in time:

I will refer back to the great ancestor Tohe. There are generations from Tohe to the canoe Kurahaupo. The chief on this canoe was Po - Po had issue Toroa. Toroa had Te Irima
Te Irima

Kitewairua=Whatatangi

Tohe

Tohe lived at Muriwhenua. At one stage he wanted to visit a daughter at Hokianga. He left Muriwhenua (near Parengarenga). *He travelled by way of the beach. It was high tide when he made his journey.* He and his slave travelled by way of the beach and reached Ahipara. There are many places along the beach that Tohe gave names to. Other witnesses will name them. They reached Karihi a place in Ahipara. *At that point [Tohe] measured how far back [the] tide had receded. This was done by using his hands. The distance the tide receded was two arms’ lengths. It also rose a similar length. Through his measuring sand by this method, the name “Wharo” was derived.* The further name attached was Oneroa a Tohe: that is my knowledge of how the Oneroa a Tohe. The descendants of Tohe are Te Aupouri, Te Rarawa (tribes), Ngati Kahu and many other sub-tribes under these three headings.

And, significantly, Waata Tepania’s application for an investigation of title to Ninety-Mile Beach of 19 May 1955 identifies as the first of the grounds for the claim that “the said land is customary land having at one time been completely under the jurisdiction of a Maori [namely] Tohe.”

1.3.6. Multiplicity of rights: It seems to be the case that Maori property interests in areas of foreshore could be very complex. A hint of this complexity is conveyed by James Mackay's evidence to the 1869 parliamentary committee on the Shortland Beach bill.⁴⁵

The Natives occasionally exercise certain privileges or rights over tidal lands. They are not considered as the common property of all Natives in the Colony; but certain hapus or tribes have the right to fish over one mud flat and other Natives over another. Sometimes even this goes so far as to give certain rights out at sea...The lands contained in the schedule of the Bill are probably the most famous patiki (flat fish) ground in New Zealand, and have been the subject of fighting between various hapus of the Thames Natives. At the present time the right to fish there there is vested almost exclusively in the Ngatirautao hapu of the Ngatimaru Tribe.

Rights were complex, contested, and overlapping: once again showing that Maori had no particular 'foreshore' law. It was the same as any other valued property.

Given that Maori saw the foreshore in this way, a claim that the Crown 'owned' it *automatically* can only be seen as expropriatory.

1.4. Importance of the coastal zone

1.4.1. Maori concern over European claims : The coast has long featured in the legal issues arising between the Crown and Maori in the course of New Zealand legal history. In the Waitangi Tribunal's 1985 Manukau report, considerable importance was attached to the Orakei hui (meeting) of 1879 at which one of the most frequently discussed topics was control over the foreshore.⁴⁶ Manukau Report. A consistent theme was concern over the Crown's claim that it owned the foreshore by operation of law. Apihai te Kawau, a chief of Manukau, remarked:

It was only the land that I gave over to the pakehas. The sea I never gave, and therefore the sea belongs to me. Some of my goods are there. I consider the pipis and the fish are my goods. I have always considered them my goods up to the present time.

The issue resurfaced at an important conference of northern chiefs held at Waitangi in 1881. Challenged on the basis of the Crown's claim to the foreshore, Rolleston, the Native Minister, responded:

The law of nations is that the great highway of nature, the foreshore, is reserved for the use of the whole. Without a special vote of parliament the foreshore belongs to the sovereign for the use of both nations.

To which a chief named Honi Mohi replied:

We don't object to ships and boats travelling the sea. It is what the sea produces we object to having taken away by Europeans without any returns to us.

⁴⁵ See (1869) AJHR E-7, 7.

⁴⁶ *Manukau Report*, p 28

Hori Ngatai of Ngaiterangi challenged the Crown's claim to ownership of the foreshore and seabed in a speech made to John Ballance in 1885:⁴⁷

...with regard to the land below high water mark immediately in front of where I live, I consider that is part and parcel of my own land...part of my garden...I am now speaking of the fishing grounds inside the Tauranga harbour. My mana over these places has never been taken away. I have always held authority over these fishing places and preserved them; and no tribe is allowed to come here and fish without my consent being given. But now, in consequence of the word of the Europeans that all the land below high water mark belongs to the Queen, people have trampled upon our ancient Maori customs and are constantly coming here whenever they like to fish. I ask that our Maori custom shall not be set aside in this manner, and that our authority over these fishing-grounds may be upheld. The whole of this inland sea [i.e. Tauranga harbour] has been subdivided by our ancestors, and each portion belongs to a proper owner, and the whole of the rights within the Tauranga harbour have been apportioned among our own different people; and so with the fishing grounds outside the heads:...I am speaking of fishing grounds where hapuku and terakihi are caught. Those grounds have been handed down to us by our ancestors. I am not making this complaint out of any selfish desire to keep all the fishing grounds for myself; I am only striving to regain the authority which I inherited from my ancestors.

1.4.2. Judicial and official concern over Maori claims. If the claim of the government that it owned the foreshore outright by prerogative powers has provoked considerable Maori concern, it is also the case that Maori claims to property rights in the foreshore has provoked considerable official and judicial concern too. In fact applications for investigation of title to areas of the foreshore by various Maori individuals and groups in the twentieth century were viewed with anything but equanimity by the Crown Law Office and other Departments. Such claims were usually strongly opposed by the Crown, which took the trouble to be represented by expensive counsel at the hearings at which every point was fought over at length. This is especially the case with the Northern cases relating to the Hokianga and Herekino harbours and Ninety-Mile Beach. The ordinary courts were also unsympathetic. Maori claims to such areas tended to fail in the ordinary courts. The Court of Appeal in the *Ninety-Mile Beach* case regarded the argument that the Land Court had a jurisdiction to investigate foreshore titles as “novel” and “far-reaching”.⁴⁸ The Court could not have been very well-informed about recent history: however “far-reaching” such claims might be, they were anything but “novel”.

Why were Crown officials, in particular, so hostile to such claims? This is not so clear. Departmental and Crown Law correspondence simply tends to assume that it is obvious and axiomatic that Maori foreshore claims had to be opposed at all costs. At its highest and best level, the Crown's position was that it ‘owned’ the foreshore as a trustee for the benefit of all, but whether this was the real, or at least the predominant, factor is unclear (although it was certainly important). Possibly there may have been some concern that if Maori property rights in the foreshore were recognised in the Land Court, this would have a number of undesirable consequences: it might mean that the Crown would have to purchase such areas, or pay compensation for harbour works and

⁴⁷ 1885 AJHR G-1. See also New Zealand Law Commission, *The Treaty of Waitangi and Maori Fisheries - Mataitai: Nga tikanga Maori me te Tiriti o Waitangi*, Preliminary Paper No 9, Law Commission, 1989, 147-151.

⁴⁸ *In re the Ninety-Mile Beach* [1963] NZLR 461, 466, per North J: “This is not the first time within recent years that this Court has been called upon to consider novel and far-reaching claims made by Maoris to freehold orders in respect of territory which was once held by them under their customs and usages.”

reclamations; and it might mean that Maori, as owners of parcels of foreshore, would have the legal right to sell them, leading to areas of the foreshore ending up in the hands of private purchasers. Sir John Salmond and the Crown Law Office saw Maori claims to waterbodies as mischievous and vexatious:⁴⁹

There is no interest of the Natives save the interest of preventing the public from navigation, recreation, and European fisheries.

The present writer's impression is that by the 1930s and 1940s Maori foreshore claims were simply regarded as absurd and reactionary, a challenge to the state at a time when the state's dominant role in managing all aspects of the national life and economy was taken for granted. There were political ramifications, hard to delineate now, but probably important. Judge Acheson, that bete noire of government departments and the Crown Law Office, had a loathing of the expansive state and notoriously bad relations with the Native Department and especially with the Labour Government's (1935-49) Ministers of Maori Affairs. Acheson certainly had the reputation amongst officials as something of a loose cannon. Significantly, Acheson was quite willing to consider Maori claims to areas of the foreshore. In the broadest sense, private property rights and Maori autonomy competed with the expanding state.

1.4.3. Major cases : At the heart of Maori concern was control over the all-important foreshore resources, fish and shellfish. The conflict between the Crown and Maori was fought out over a number of important estuaries, lagoons, and areas of foreshore, culminating in the litigation over Ninety Mile Beach. The issue tended to become a narrow one of foreshore ownership due to then current elaborate statutory constraints, but the underlying concerns, such as reclamation and environmental change certainly may be said to apply to the coastal area in a much more general sense. These earlier cases or inquiries included Awapuni Lagoon at Gisborne, the Ahuriri Lagoon at Napier, the Whakarapa mudflats of the Hokianga, and cases relating to accretions at Orakei (Waitemata Harbour) and at Herekino Harbour in Northland. In short, legal issues relating to the control and ownership of the coastal zone have long been important and continue to be so today. As these cases leading up to the *Ninety-Mile Beach* decision focus on the precise issue of the Land Court's jurisdiction to grant investigations of title to the foreshore discussion of the cases is postponed to subsequent parts of this report. However it needs to be remembered that in a sense the narrow jurisdictional issue over which the cases were fought was in a sense accidental. Broader issues were at stake. These are encapsulated in the words of Hori Ngatai cited above. He spoke of the conceptions of Maori custom (the foreshore is *part of my own garden*); the violations of Maori custom (*in consequence of the word of the Europeans that all the land below high water mark belongs to the Queen, people have trampled upon our ancient Maori customs*), and the desire to protect an ancestral heritage (*I am only striving to regain the authority which I inherited from my ancestors*). It is probably not necessary to labour the point, but what was really at stake was the continuation of Maori concepts of property and property management, which was in turn based on control and authority. It was a struggle over law and power.

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⁴⁹ Crown Law legal submissions in the Rotorua lakes case (these are clearly the work of Sir John Salmond), CL 174/1, National Archives, Wellington (reprinted in full in the Appendix).

2.0 Ownership of the Foreshore: Evolution of New Zealand law

2.1. Coastal ownership: the common law and its application in New Zealand

2.1.1. Common law principles : It is essential at the outset to clarify the *kind* of Crown title in issue. The Crown's position, in this century at least, has not been merely that it has title to the foreshore in the same way that it has title to the rest of the land in the country. Rather the Crown's stance is that it "owns" the foreshore as *Crown land* - or, to use formal terminology, that it has *dominium* as well as *imperium* over this area.

The foreshore and the sea-bed have always been regarded as exceptional at common law. The general principle at common law is that the Crown is, by prerogative right, the presumptive owner of the foreshore, the beds of tidal rivers, the seabed, and coastal waters. This is a presumptive title only which can be displaced by proof of a Crown grant or continuous occupation. The common law position is summarised by McNeil:⁵⁰

In the case of the foreshore and the sea-bed the Crown is presumed to have been in possession all along. Accordingly no record of the Crown's title is necessary. Subjects who occupy these lands are prima facie intruders. Furthermore, in the absence of a Crown grant, any predecessors through whom they claim would have been intruders as well, without an estate or interest that could have been passed on. It has therefore never been necessary for the Crown to initiate an inquest of office to establish its original title to the foreshore or sea-bed. It could simply lay an information of intrusion thereby casting the burden on the defendant to prove either a Crown grant, or continuous occupation for sufficient duration for a grant to be presumed or a title by limitation acquired.

And, to similar effect, is the following statement in *Halsbury*:⁵¹

...by prerogative right the Crown is prima facie the owner of all land covered by the narrow seas adjoining the coast, and also of the foreshore. There is a presumption of ownership in favour of the Crown. This presumption arises from the fundamental principle that all the land in the realm belonged originally to the sovereign.

This is a well-established rule well-supported by authority, such the decision of the House of Lords in *Attorney-General v. Emerson*⁵² where Lord Herschell said:⁵³

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

⁵⁰ McNeil, *Common Law Aboriginal Title*, Clarendon, Oxford, 1989, 105

⁵¹ *Halsbury*, 4th ed., vol 8, 1418:

⁵² [1891] AC 646.

⁵³ *Ibid*, 653. This passage was cited by Turner J. in *In re Ninety Mile Beach* [1960] NZLR 673, 675.

The New Zealand Law Commission has in its Preliminary paper titled *The Treaty of Waitangi and Maori Fisheries: Mataitai: Nga Tikanga Maori me Te Tiriti o Waitangi* (1989) discussed Crown ownership of the foreshore. At p. 69 of this report it is observed that “statute apart, there is no difference between the Crown’s title over the foreshore as ultimate proprietor and its ultimate title over the dry land”. With respect, this is to state the point too strongly, for as McNeil explains there *is* a crucial difference in that the Crown’s title to the foreshore is presumed, which is different from the situation which prevails with ordinary land where it is presumed that the current possessor has lawful seisin (title) unless the contrary is proved. The general rule is that “the Crown’s title must be a matter of record before the Crown can be in possession of lands”, but the foreshore is an exception to this.⁵⁴ The burden of proof is cast on all who claim possession of the foreshore to prove a title adverse to the Crown by means of either (i) a Crown grant; or (ii) or ‘continuous occupation for sufficient duration for a grant to be presumed or a title by limitation acquired’. Nevertheless it is still true to state - as the Law Commission goes on to do - that there is no reason at Common Law why Maori title to a particular parcel of foreshore could not displace the Crown’s presumed title. The criteria for establishing a title to the foreshore as applied by the Native Land Court are essentially the same as those necessary at Common Law to displace the Crown’s presumed title to the foreshore. As the Law Commission puts it:⁵⁵

So the fact that the Crown holds the paramount title to the foreshore is not even *prima facie* incompatible with the legal recognition of indigenous property rights.

Quite why the foreshore and the sea-bed were regarded as exceptional by the common law is a matter of some debate. McNeil sums up the various arguments usefully:⁵⁶

As for the reason for the rule, it has been suggested that, unlike other lands, the foreshore and sea-bed were not generally granted out by the Crown, and consequently its original title has usually been retained. But we have seen that Crown grants of other lands are in most cases fictitious. Why not apply the same fiction here? A possible explanation lies in the fact that the fiction of grants was invented along with the fiction of original Crown occupation and ownership to explain the Crown’s paramount lordship over lands that were originally occupied by others. But the foreshore and sea-bed are different because, except where a pier, retaining wall, or the like is built, they cannot be occupied in the same way as other lands. More commonly they are unoccupied, and probably always have been, and are therefore presumed to have remained in the original occupation of the Crown, which extends to all waste lands that have never been held by subjects. Furthermore, there are important public rights of navigation and fishing over tidal and coastal waters that need to be protected.

⁵⁴ McNeil, *op.cit.*, 105.

⁵⁵ Law Commission, Preliminary Paper No. 9, *The Treaty of Waitangi and Maori Fisheries: Mataitai: Nga Tikanga Maori me Te Tiriti o Waitangi: A Background Paper*, Wellington, 1989, 69-70.

⁵⁶ *Ibid*, 104-5.

As noted, it is quite possible at common law to have Crown grants made to parcels of foreshore. Such a grant, however, “is subject to the public rights of navigation and fishing and rights ancillary thereto existing over the locus of the grant.”⁵⁷

2.1.2 The New Zealand position: The question is, however, whether this law has been imported into New Zealand. In the *Ninety-Mile Beach* case in 1957, the Crown submitted that on the cession of New Zealand by means of the Treaty of Waitangi the common law of England was imported “under which the foreshore always was the property of the Crown and was held by the Crown for the benefit of the subjects of the Crown which would include Maoris and Europeans alike”. This overstates the common law position, and ignores the fact that, if the common law rule had been applied, Maori should theoretically have been able to defeat the Crown's presumptive title in specific instances of continuous occupation. It also ignores the fact, as will be shown, that the government does not itself seem to have believed this during the earliest decades of the colony's history. But in any event the Court of Appeal doubted the validity of the Crown position. T A Gresson J stated that to accept that Maori title to the foreshore was extinguished by mere operation of the common law “would involve a serious infringement of the spirit of the Treaty of Waitangi and would in effect amount to depriving the Maoris of their customary rights over the foreshore by a side wind rather than by express enactment”: *Re the Ninety-Mile Beach* [1963] NZLR 461, 477 (CA). Thus, whatever the basis for the Crown's claim to ownership of the foreshore, it cannot simply be on the basis merely of the reception of the common law. As will be seen, the Court of Appeal in *Ninety-Mile Beach* proceeded to devise other rationales for the Crown's supposed title to foreshore. As will be argued below, however, none of these other rationales can stand up to close analysis. Nor does any statute specifically vest the foreshore in the Crown at the present day. The legal position is thus a rather extraordinary one with the Crown's title resting on very shaky legal foundations. It is the present writer's opinion, in fact, that it can be plausibly argued that the entire foreshore at the present time is still Maori customary land, no doubt a conclusion both surprising and inconvenient as far as the Crown is concerned.

2.1.3 Aboriginal title: The other principal area of common law which is relevant to our subject is the general law of Aboriginal (or “Native”) title. It is not proposed to traverse this in full. However it must be noted that the legal tests for extinguishment of such title are very strict. The High Court of Australia has held that extinguishment may be either by executive or legislative action, but in either case there must be “a clear and plain intention to do so”.⁵⁸ This has been followed by the New Zealand Courts. In *Faulkner v Tauranga District Council* (1995) Blanchard J said:⁵⁹

It is well settled that customary title can be extinguished by the Crown only by means of a deliberate Act authorised by law and unambiguously directed towards that end. Unless there is legislative authority or provisions such as were found in ss 85 and 86 of the Native Land Act 1909, the Executive cannot, for example, extinguish customary title by granting

⁵⁷ *Halsbury*, 4th ed., vol 49, 286.

⁵⁸ *Mabo v Queensland (No 2)*, (1992) 175 CLR 1, 64 (per Brennan J.)

⁵⁹ [1996] 1 NZLR 357, 363.

the land to someone other than the customary owners. If it does so the grantee's interest is taken subject to the customary title: *Nireaha Tamaki v Baker* (1901) NZPCC 371. Customary title does not disappear by a side wind.

It is important to bear the strictness of this standard in mind, as it is certainly arguable that none of the supposed bases of extinguishment of Maori customary title to the foreshore actually meet it. Neither the Public Reserves Act 1854, nor the Crown Grants Act 1908, nor the Harbours Acts or the Native and Maori Lands Acts contain any provisions which could amount to an extinguishment of the customary title to the foreshore "by means of a deliberate Act authorised by law and unambiguously directed towards that end." It seems beyond doubt that there *is* a customary title to the foreshore, which (arguably) has never been lawfully extinguished. Whether a claim to the foreshore could be pursued in the ordinary Courts today - on the basis, perhaps, of a prescriptive title or on the basis that the customary title has never been extinguished - is now complicated by the limitation provisions contained in Te Ture Whenua Maori/Maori Land Act 1993.⁶⁰ Should an action seeking a title to the foreshore now be statute-barred it is surely nevertheless a matter of some concern that the Maori title has never been lawfully extinguished. The main legal decision focused on in this report, the Court of Appeal's decision in *In re Ninety-Mile Beach* was concerned, it should be emphasised, with the limits of the *statutory* jurisdiction of the Maori Land Court to issue titles under the legislation relating to Maori land. That is a different question from a claim in the ordinary courts invoking either a prescriptive title or asserting simply that the customary title has never been extinguished at any time. In any event, as will be argued in this report, the decision in *In re Ninety-Mile Beach* was probably wrongly decided.

2.2. Statutory modifications

2.2.1. Public Reserves Act 1854: The legislative history in New Zealand begins with the Public Reserves Act of 1854, s 2 of which allowed the Governor to grant reclaimed

⁶⁰ See Te Ture Whenua Maori 1993 ss 360 and 361. These limitation provisions have a curious history, which originate with the well-known ss 84-100 provisions of the Native Lands Act 1909. (See generally P. Spiller, J. Finn and R. Boast, *A New Zealand Legal History*, Brooker's, Wellington, 1996.) The 1909 provisions were intended to in effect abolish proceedings relating to customary land in the ordinary courts and to give Maori essentially one option when it came to asserting rights to Maori customary land - that is to say, to obtain a certificate of title to it in the Native Land Court. With the 1993 Act all of the the s 84 etc. sections were abolished (with one exception, now s 144 of the 1993 Act). Their repeal was, however, accompanied by amendments to the Limitation Act 1950 (the Limitation Act prescribes the time limits for civil actions in the ordinary courts). The limitation period for an action to recover Maori customary land is now fixed at 12 years "from the date on which the cause of action accrued". Sections 360-61 have not been tested in the Courts. They relate only to actions "against the Crown or any person claiming through the Crown"; and the question is whether a claim to the foreshore in the ordinary Courts after 1993 would in fact necessarily have to be framed as an action against the Crown. Such a claim might possibly be advanced by means of an application for a declaration without naming the Crown as a defendant; in which case ss 360 and 361 might not apply. This is a convoluted point of civil procedure which the present author has insufficient expertise to develop further.

It is possible that one of the reasons for the installation of ss 360 and 361 in the 1993 Act was P.G. McHugh's important 1988 article, "The legal basis for Maori claims against the Crown", (1988) 18 *Victoria University of Wellington Law Review* 1. At *ibid* 5-6 McHugh considered the effects of the repeal of ss 155 et seq of the Maori Affairs Act 1953 (these sections continuing ss 84 etc. of the 1909 Act). Such a repeal, he argued, might open the way to civil actions of various kinds against the Crown, such as an action in contract invoking the Crown's failure to comply with its obligations in Kemp's purchase. In an effort to forestall this the Limitation Act has been amended accordingly.

areas and parcels of the foreshore to the provincial government, and with provincial government approval, to private individuals. The provision states:

It shall be lawful for the Governor of the said Colony, with the advice of his Executive Council, to grant and dispose of any land reclaimed from the sea, *and of any land below high-water mark in any harbour, arm, or creek of the sea, or in any navigable river or on the sea coast within the said Colony*, either to the Superintendent of the Province and his successors, in or to which such land is situate or adjacent, or in such other manner to such other persons and upon such terms as shall be thought fit: Provided always that every such grant or disposition within any Province, other than to the Superintendent thereof, shall be made in pursuance of a joint recommendation by the Superintendent of such Province and of the Provincial Council thereof: Provided also that nothing herein shall prejudice the rights of persons claiming water frontage.

A full analysis of this Act is beyond the scope of this study, but on the face of it the provision is essentially a move in the direction of increasing the power of the provincial governments vis-a-vis the central government and the Crown. The formula “it shall be lawful for the Governor...with the advice of his Executive Council” is legal shorthand for a decision of the Cabinet. The provision in effect disbars the Governor from making grants to the foreshore without Cabinet approval, and prevents such grants from being made (except to the provincial governments themselves) without the approval of the provinces. Section 2 is subsidiary to Section 1, the main provision in the Act, which empowers the Governor to vest the demesne lands of the Crown in the provincial governments. Quite what legal assumptions as to foreshore ownership the provision may be said to be based on is uncertain. Section 2 allows the governor to grant areas of foreshore, which might indicate that the Act must be founded on the assumption that the foreshore is legally the Crown’s to grant. However the provision does not seem to envisage a general vesting, but only of *parts* of the foreshore, which might be read to apply only to those parts of the foreshore to which the Maori title had already been extinguished. Alternatively, the legislation arguably vests in the provinces areas of foreshore subject to whatever Maori rights originally burdened the Crown’s title: the Maori encumbrance on the title is shifted from the Crown in right of the General Government of New Zealand to the Crown in right of the Provincial Governments of New Zealand; but that aside the Maori proprietary rights, whatever they may be, remain unaffected. This amounts in effect to arguing that s 2 of the 1854 is insufficient by itself to extinguish Maori proprietary rights regarding the foreshore. Certainly a modern Court would take a great deal of persuading that s 2 can be taken as extinguishing, by itself, Maori property rights in the foreshore; and no case that the writer is aware of ever seems to have suggested that it might. It is significant that when Donald McLean was asked by H K Taiaroa - who was particularly concerned about reclamations⁶¹ - about the Crown’s legal rights to the foreshore in 1874 McLean laid stress not on the Public Reserves Act 1854 itself but on the particular provisions of pre-emption era deeds of cession:⁶²

⁶¹ (1874) 16 *New Zealand Parliamentary Debates* 853 (11 August 1874). Taiaroa asked: “By what any land below high watermark has been reclaimed for public purposes on the North Island, and whether such reclamations are not in contravention of the rights reserved as to fisheries to the Native race by the Treaty of Waitangi; and if infringement of the Treaty has taken place, how the Maori people can obtain compensation?”

⁶² (1874) 16 *New Zealand Parliamentary Debates* 853.

For the information of the House, that land below high water mark was granted to the Superintendent under the Public Reserves Act of 1854, and was also leased under the authority of the Act. In regard to all territories ceded by Maoris to the Crown, it had been held that when the lands were ceded, all the rights connected with them were also ceded such as rivers, streams and whatever was on the surface of the land or under the surface. Almost all the deeds of cession contained a clause to that effect, and all the conditions of the deeds had been adhered to strictly by the colony. There had been no breach of the Treaty of Waitangi and every Government of New Zealand had carefully preserved the rights of the Natives.

Again it must be noted that the Public Reserves Act 1954 has to be evaluated by the standards set out by Blanchard J in *Faulker v Tauranga District Council*⁶³: “a deliberate Act authorised by law and unambiguously directed towards that end”. It is unlikely that a modern Court would accept that the Public Reserves Act 1854 comes anywhere near this.

2.2.2. Pre-emption era deeds and the foreshore: A full review of pre-emption era deeds of cession is beyond the scope of this study. Many such deeds in fact did contain references to coastal and inland waterways as forming part of the corpus of properties supposedly alienated to the Crown by the deed. Often the language used is somewhat allusive and imprecise, making it far from clear exactly which water bodies are being referred to. One example is the Ahuriri deed of 1851 itself. This contains the following clause:

Kua oti i a matou huihinga korero te mihi te tangi te poroporoake te tino te wakaae tapu kia tukua rawatia enei whenua o a matou tipuna tuku iho ki a matou *me nga moana me nga awa me nga wai* me nga rakau me nga aho noa iho aua whenua ki a Wikitoria te Kuini on Ingarini ake tonu atu.

A modern translation of this passage by Professor S.M.Mead is as follows:⁶⁴

At our meetings we have completed our greetings, our weeping and our farewells and (offered) our solemn agreement to gift these lands for ever (to really let go of these lands) that were handed down to us as ancestral treasures and these *include the seas or lakes, and the rivers and the waters* and the trees and whatever other benefits come from those lands, to Victoria, the Queen of England, for all time.

The ambiguities and difficulties of this phraseology have already been fully explicated by the Tribunal.⁶⁵ Of course the pre-emption deeds have been subjected to much scrutiny in recent years, both by the scholarly community and the Waitangi Tribunal, and problems concerning their vagueness and imprecision, and the risks of a lack of meeting of minds when it comes to fathoming the respect intentions of Maori ‘vendors’ and the Crown’s negotiators have been thoroughly discussed in many forums. In principle, however, there seems to be little objection to the proposition that Maori, if they owned the foreshore and other water bodies, were at liberty to sell them to the

⁶³ [1996] 1 NZLR 357,363.

⁶⁴ As given in the Waitangi Tribunal’s *Te Whanganui-a-Orotu* report, 1995, p. 63.

⁶⁵ See *Te Whanganui-a-Orotu* report, 1995, 63-66.

Crown if they so chose, and may on occasions have intended to do so. The fact that it was judged necessary to insert clauses into the deeds relating to ‘nga moana me nga awa me nga wai’ indicates that as far as the Crown was concerned such areas (ill-defined as they might be) did not belong to the Crown by mere operation of law. They had to be bought and paid for.

There is some evidence that Crown officials generally believed that a pre-emption deed of cession, if validly made, would extinguish property rights in the foreshore. McLean’s opinion to this effect has already been noted. Another who claimed this was James Mackay, who in 1869 said to the Select Committee on the Thames Sea Beach Bill:⁶⁶

I believe the general custom with the Native Lands Purchase Department, respecting lands between high and low water-mark, has been to consider that when the Native title is extinguished over the main land, then any rights which the Natives have over the tidal lands have ceased. As long as the Native title is not extinguished over the main land, the Natives consider - or, at least, the Natives have enjoyed all rights over the tidal flats. I am not aware of any cases having arisen in which the Government have required to make use of tidal lands previous to the extinguishment of the Native title over the main land.

Mackay’s evidence, like McLean’s, is an important clue as to Crown practice in the pre-emption era. If Mackay is right, then the government did *not* act on the assumption that it ‘owned’ the foreshore: title to the the “main land” had to be extinguished first. And, it appears, governments did not even try to assert title over areas of foreshore where the adjacent land was still in Maori hands. Thus, in very sharp contrast with what the Crown was later to argue in twentieth-century cases, the general presumption seems to have been that Maori owned the foreshore and it was necessary for the Maori title to be extinguished.

The completion of a purchase was followed by a proclamation in the *Gazette* describing the area comprised within the deed as an area over which “the Native Title has been extinguished”. It seems beyond doubt that Maori could legally sell areas of foreshore to the Crown and that the Crown could legally purchase it. Provided that it was clear in the deed and in the proclamation that the relevant foreshore in fact *was* purchased this might well meet the “deliberate Act authorised by law and unambiguously directed towards that end” requirement set out in *Faulkner* and in other cases. And, in fact, this seems to be the most natural and sensible way of regarding foreshore acquisition rather than the convoluted analyses of later times. (The odd thing is that the Court of Appeal in *In re Ninety-Mile Beach* stated that it was the Native Land Court process, and *not* pre-emptive purchasing, which operated to lawfully extinguish Maori title.) In general it makes better sense to think of the Crown as owning today those areas of foreshore which it clearly and unambiguously purchased by a pre-emption era deed of cession.

2.2.3. Shortland Beach Act 1869: As with all areas of importance touching on the legal relations between Crown and Maori in regard to land, sea and resources, matters have been complicated by thickets of statute. The issue first became of critical importance in the late 1860s and early 1870s. The precise matter at issue was ownership

⁶⁶ 1869 AJHR F-7, p.6.

of the foreshore around Thames. Here, for once, the principal resource at issue was not fish or shellfish, but gold: the intertidal zone was gold-bearing and there was a real risk of violence involving local Maori and miners.⁶⁷ The outcome of a sequence of reports and investigations in late 1869 was the Shortland Beach Act 1869, which prohibited persons other than the Crown from entering into any “contract lease or conveyance” with any “aboriginal Native” in regard to any foreshore land at Thames.⁶⁸ The Shortland Beach Act did not definitively settle the matter of the Crown’s title to the foreshore, and politicians were not united in their views (Fox thought that “the right of the Crown to land between high and low water-mark...would not admit of any discussion” but J.C. Richmond thought it likely that with the waiver of Crown pre-emption by statute in 1862 it was now too late for the Crown’s prerogative rights to the foreshore to be revived.⁶⁹) Attention then shifted to the Land Court. In some instances the Land Court had been granting titles to parcels of foreshore,⁷⁰ although in 1870 Chief Judge Fenton repudiated the practice in the *Kauwaeranga* decision.⁷¹ The government of the day (the Fox-Vogel regime, in which Donald McLean was the Native Secretary and Minister of War) eventually took action to prevent the Land Court from embarking on any further investigations of title to foreshore around Thames. Section 4 of the Native Lands Act 1867 allowed the Governor to suspend the operation of the Land Court in any districts. In purported (and perhaps rather doubtful) reliance on this a proclamation was then issued suspending the Court’s operations “within the Province of Auckland, being all that portion of the said Province situate below high water mark”.⁷² (This is interesting in itself, showing that generally the government accepted that the Court perhaps *could* issue foreshore titles.) The Crown also took action to purchase areas of foreshore

⁶⁷ See *Report by Mr Mackay on the Thames Gold Fields*, 1869 AJHR A-17; *Report of the Select Committee on the Evidence Adduced before the Native Lands Bill Committee*, 1869 AJHR F-6A; *Report of the Select Committee on the Thames Sea Beach Bill*, 1869 AJHR F-7; Shortland Beach Act 1869.

⁶⁸ There is an excellent discussion of the Thames goldfield legislation in the Law Commission’s Preliminary Paper No. 9, *The Treaty of Waitangi and Maori fisheries*, pp 153-157.

⁶⁹ Fox’s comments are at (1869) 6 *New Zealand Parliamentary Debates* 196. At *ibid* 903 Richmond states: “...at least seven years ago [Richmond is presumably referring to the Native Lands Act 1862], we had done with any rights which, as men going into a wild country to subdue it, we might have previously possessed. Having thus, as he had pointed out, swallowed the camel, it seemed that we were now to strain at the gnat - that this wretched little strip of land on the Shortland beach was now, on the plea of prerogative rights unknown and incomprehensible to the Natives, to cause a renewed assertion of those beneficial rights which we had abandoned as to every other part of the Colony.”

⁷⁰ Information on these blocks is not easy to find. The Crown collected the details together when preparing the Crown case for the Ninety-Mile Beach investigation of title in the Maori land Court in 1957. A box file was created which is now held by the Department of Survey and Land Information’s Auckland office. The present writer was able to inspect this file in 1990 and make copies from it; these are now set out in vol 2 of my *Ninety-Mile Beach report* filed with the Waitangi Tribunal. The blocks are shown on Maori Land Plans 2390-2403 and 1677.

⁷¹ See (1870) 4 *Hauraki MB* 236; Fenton’s judgment is reprinted with commentary and notes by Alex Frame at (1984) 14 *Victoria University of Wellington Law Review* 227. This case is often discussed in approving tones as an early judicial recognition of the Treaty of Waitangi. Its real point, however, lies in Fenton’s refusal to issue a *title* to the area of foreshore at issue. He issued instead a right of fishery, observing that he could not contemplate “without uneasiness” the “evil consequences which might ensue from judicially declaring that the soil of the foreshore will be vested absolutely in the natives”: see (1984) 14 *Victoria University of Wellington Law Review* 244.

⁷² (1872) 187 *New Zealand Gazette* 347.

awarded to Maori claimants by the Land Court.⁷³ At the next foreshore-related case at Thames in 1872, involving a block known as Kapanga Moana No 2, Crown counsel turned up at the hearing and triumphantly produced the proclamation, which not unnaturally brought the case to a halt.⁷⁴ MacCormick, Crown counsel, nevertheless told the Court that his instructions were that the government had not made up its mind about Maori claims to areas below high-water mark: the proclamation was intended to be temporary and it was not intended to deprive Maori of their any “just rights” they might have to the foreshore.⁷⁵

It may be necessary that the question of what is to be done with all the claims by natives to the sea-shore should be considered in the General Assembly, where there will be natives to take part in the deliberations upon it. I am, therefore, instructed to impress upon the natives that the hearing of these claims is only deferred, not refused; and that the Government have not the wish, as they certainly have not the power, to deprive the natives of any just rights they may have to the foreshore. I am also to state that, in consideration of the hearing of these claims having been delayed some time for the convenience of the Government, the Government will pay the claimants their reasonable expenses in attending the Court in Auckland. If the claimants will apply to me immediately after the rising of the Court I will settle with them, but they must distinctly understand the Government do not acknowledge any claim.

These remarks are consistent with some of Fox’s remarks made in the House of Representatives during the debates on the Shortland Beach Act (although convinced of the Crown’s right to the foreshore he had stated that “ample provision would be made against the Natives suffering any loss”⁷⁶ and with the Report of a Parliamentary Select Committee on the Thames foreshore legislation in 1869.⁷⁷ However, the proclamation was inadvertently rendered ineffective in 1873 when its empowering statute was replaced by the Native Lands Act of that year. The proclamation seems not to have been repeated.

2.2.4. Harbours Act 1878:The first important statutory provision impacting on ownership of the coastal area generally was s 147 Harbours Act 1878. It provided that “no part of the shore of the sea” could be conveyed or granted in any way to any body or

⁷³ On example of this is a block of foreshore known as B Whakaharatau A, Deed 3981 D, 6 May 1872. This was an area of 7 acres of foreshore apparently investigated by the Court and vested in its owners by Maori customers, who later sold it to the Crown for L.15.

⁷⁴ See (1872) 2 Coromandel MB 315-16. Counsel for the Maori applicants were Messrs Rees and Hesketh. “Parumoana” means “mudflats”. The Crown was represented by a Mr Maccormick who “appeared on behalf of the Crown and produced and read a Proclamation suspending the operation of the Native Lands Court to all lands below high water in the Province of Auckland.” The minutes and an extract from the *Daily Southern Cross* describing the case may be found in the Document Bank.

⁷⁵ See *Daily Southern Cross* for Thursday May 16 1872 (in Document Bank).

⁷⁶ See (1869) *New Zealand Parliamentary Debates* 196.

⁷⁷ See (1869) AJHR F-7. The Committee reported that:
“(i) until the question of the prerogative rights of the Crown, and of native claims in relation thereto, over the foreshore and over precious metals in the Colony, are set at rest, it would be inexpedient to legislate upon the particular case of the Hauraki Gulf. (ii) the Government should take the necessary steps to obtain the cession of prerogative rights of the Crown, as above defined, over the fore-shore and precious metals in the Colony. (iii) steps should be taken to arrange with the Natives for the control of the Thames Sea Beach by the Government of the Colony.”

person “without the special sanction of an Act of the General Assembly”. This ultimately became s 150 Harbours Act 1950. This provision was later to be given particular emphasis by some of the judges in the Ninety-Mile Beach legislation. On the face of it, however, it is only a limitation on the prerogative powers of the Crown. After 1878 grants to the foreshore could only be made by Acts of Parliament. This does not definitively establish that the Crown had the right in New Zealand to make such grants before that time, or that Maori were not entitled to apply for titles to the foreshore in the Maori Land Court, or that the foreshore did not have the status of Maori customary land. The Harbours Act does not on the face of it meet the *Faulkner* test either. The parliamentary debates give no indication that the provisions were entitled to cancel Maori claims to the foreshore. That issue was not, in fact, debated at all. The only reference to s 147 was made by Whitmore in introducing the second reading of the Bill in the Legislative Council, where he remarked:⁷⁸

Foreshores and land under the sea could only be granted by special authority of the General Assembly, for reasons which were obvious.

Whitmore may have Maori assertions to ownership of the foreshore in mind, but not necessarily.

2.2.5. Relationship between Harbours Act and Native Lands Acts: In any case, there was the issue of quite how the Harbours Act interconnected with the jurisdictional provisions of the Native Lands Acts. The Harbours Act provided that grants of title to the foreshore could only be done pursuant to statute. But, of course, the Native Lands Acts were a statutory process for the investigation and granting of titles: the Court investigated and then the successful claimants were entitled to a grant. The Native Lands Acts did not of themselves prevent the Court from investigating title to the foreshore. Arguably the Native Lands Acts fitted within the general principle of the Harbours Act. In later years, at least one Native Land Court judge (Judge Acheson) was in no doubt that his Court could investigate and grant certificates of title to parcels of foreshore, and in a number of instances he did precisely that.

As far as is known, the Crown acted on the general assumption that it owned the foreshore by prerogative right, or that any deficiencies in its title had been cured by the Harbours Act. It certainly felt confident enough of its putative ownership for various areas of foreshore and estuary to be granted to harbour boards by various special Acts (for example the Napier Harbour Board Act 1874). There were, however, a number of uncertainties. The extent to which the foreshore is public property was uncertain. In 1923 a Magistrate at Auckland decided that foreshore vested in a harbour board was not a ‘public place’ for the purposes of the Police Offences Act.⁷⁹

⁷⁸ See (1878) 28 *New Zealand Parliamentary Debates* 214

⁷⁹ The case involved discharge of a firearm at Hobson Bay on an area of foreshore vested in the Auckland Harbour Board. The Magistrate, W.R. McKean S.M. said that since the Harbour Board could restrict access to areas of foreshore vested in it the area was not a place to which the public were entitled to go as a matter of right. The decision is recorded in full in the *Auckland Star*, 20 July 1923, copy in M1, 4/1491, [Foreshores: “Public Place” within meaning of Police Offences Act] NA Wellington.

2.2.6. The Crown Grants Act: Section 12 of the Crown Grants Act 1866 (which later became s 35 of the Crown Grants Act 1908, still in force) states:

Where in any grant the ocean, sea, or any sound, bay, or creek, or any part of thereof affected by the ebb or flow of the tide, is described as forming the whole or part thereof shall be deemed and taken to be the line of high-water mark at ordinary tides.

Some weight was placed on this provision in the judgments given in the High Court and the Court of Appeal in the *Ninety-Mile Beach* litigation, especially by Turner J. in the High Court⁸⁰, but it is hard to see why. The Crown Grants Act merely sets in place a standard presumption conveyancing: if a grant is described as bordered by the sea or the coast, it is presumed that the boundary line extends inland of high-water mark. But there is no logical reason why this should in any way be determinative of *title* to the foreshore.

The definitions of foreshore in the Crown Grants Act and the Harbours Act, as it happens, are not the same. The Crown Grants Act states that seaward boundary is taken to be *the line of high water mark at ordinary tides*. But in the Harbours Act the reference is to those lands covered and uncovered by the ebb and flow of the tide *at ordinary spring tide*. Crown Law opinions frankly admitted that the sections were in conflict and that the Crown's claim to the area between the ordinary and spring tide lines was particularly weak.

2.2.7. Statutory endowment grants to Harbour boards. Acting consistently with the requirement in the Harbours Act that grants of the foreshore could only be made pursuant to statute, the New Zealand government over the years vested areas of land in Harbour Boards as endowments under various special Acts. Some of these statutory endowment grants in fact preceded the Harbours Act 1878. One example is the Napier Harbour Board Act 1874. The surrounding circumstances have already been considered by the Waitangi Tribunal in its *Te Whanganui-a-Orotu* report of 1995.⁸¹ This Act vested in the Napier Harbour Board (which had not at that time come into existence) substantial areas of the lagoons, foreshores and tidal estuaries at Napier, including the Te Whare-o-Maraenui block, bought by the Crown in 1869, and the whole of Te Whanganui-a-Orotu (Napier inner harbour), an area of about 8,000 acres.⁸² The purposes of these vestings were to ensure that Harbour Boards had adequate control over land for the construction of harbour works but also as a general endowment. Another purpose of the grants to harbour boards was to create a security interest which could allow harbour boards to borrow monies for harbour improvement projects, although what sort of security the mud and shingle banks of the great lagoon at Napier might offer is difficult to say. Rather than assist harbour boards directly with grants and loans paid for out of general revenue the approach of the New Zealand government was to confer on the boards substantial land assets at minimal expense to taxpayers. The fact that many of these areas of lagoon, harbour and estuary were of particular importance to Maori

⁸⁰ See *In re an Application for Investigation of Title to the Ninety-Mile Beach*, [1960] NZLR 673, 678.

⁸¹ Waitangi Tribunal, *Te Whanganui-a-Orotu Report*, Brooker's, Wellington, 1995, 97. This reveals that the driving force behind the legislation was J.D. Ormond, provincial superintendent for Hawke's Bay and MHR for Clive.

⁸² Napier Harbour Board Act 1874, Schedule. See also R.P. Boast, *Te Whanganui-a-Orotu (Napier Inner Harbour)*, Wai 55 Doc#D1, 41-44. The Napier Harbour Board legislation had a long history of amendments: see Boast op.cit. 61-65; Waitangi Tribunal, *Te Whanganui-a-Orotu Report*, 1995, Appendix VI.

communities was not a matter of much concern. There have been many of these vesting Acts and in only one of them was any attempt to protect Maori property interests in harbours and estuaries. The exception is found in Section 2 of the Whangarei Harbour Board Vesting Act 1917, which reserved from the area of Whangarei Harbour vested in the Board “any Native Land as defined by the Native Land Act 1909 and any Native fishing grounds and fisheries.”⁸³ All areas of foreshore formerly vested in Harbour Boards were re-vested in the Crown in 1991 as a part of the process of converting the former harbour boards into port companies.⁸⁴

2.2.8. Native Lands Act 1909: The next link in the chain of statute that needs to be mentioned is the Native Lands Act 1909. Sections 84 et seq. of this celebrated enactment provided that Maori customary title was unenforceable against the Crown. One effect was that Maori were unable to bring proceedings in the civil courts for trespass to areas of foreshore on the basis of a purely customary title. The statutory noose was drawn tighter. As was pointed out by Stout C.J. subsequently in *Waipapakura v Hempton* the Land Court had no jurisdiction to grant a fishery title; customary rights were unenforceable against the Crown in the ordinary courts (which seems to have extended, by way of some unexplicated process of implication, to mean that they were unenforceable against *anyone*); all of this adding up to the reality that the only option Maori had when it came to foreshore claims was by means of an investigation of title under the Native Lands Act 1909. To obtain any kind of effective legal recognition of customary title to the foreshore it was necessary to obtain a title in the Land Court; the legislation made no provision for fisheries or other kinds of less than full-fee titles; and thus the issue of whether the Court had jurisdiction to issue titles to the foreshore was thrown into very sharp relief. This probably explains the proliferation of claims to the foreshore after 1909 in the Land Court. These cases form the principal substance of this report and are described fully in later chapters. Not until 1962 was the point settled in favour of the Crown.

2.2.9: Case law: *Waipapakura v Hempton*. The decision in *Waipapakura v. Hempton* was founded on an action in conversion brought by a Maori woman against a fisheries officer. The officer had seized the plaintiff’s nets on the grounds that she was fishing unlawfully in breach of the Fisheries Regulations; the plaintiff argued that the seizure was itself unlawful as she was exercising a Maori fishing right protected by s 77(2) of the Fisheries Act 1908. The Supreme Court held, in essence, that the fishing rights protected by s 77(2) had to be *statutory*. The reasoning in this case is as follows:

(a) Firstly, Stout C.J. states that the Magistrate in the court below was wrong when he said that the Maori rights preserved by s 77(2) could not be enquired into by the Magistrate’s Court, but only by the Native Land Court. The Supreme Court opted for an even more restrictive approach by denying that even the Land Court could conduct an enquiry into Maori fishing rights:⁸⁵

⁸³ Whangarei Harbour Board Vesting Act 1917 s 2. For a full discussion of the background to this provision see Law Commission, *Treaty of Waitangi and Maori fisheries*, 163.

⁸⁴ Foreshore and Seabed Endowment Revesting Act 1991 s 5. This Act is obviously predicated on the assumption that the foreshore was the Crown’s to grant - and re-vest. In fact the only parts of the foreshore to which the Crown has a clear title are these re-vested areas, and even here it could well be argued that neither the original grant nor the re-vesting was sufficient of itself to extinguish Maori title to the areas in question.

⁸⁵ (1914) 33 NZLR 1069.

The Native Land Court has jurisdiction only to ascertain the title of Natives to land, and to grant a certificate accordingly. No special jurisdiction has been conferred on the Native Land Court to deal with “fisheries” - i.e. fishing-rights.

(b) Generally the Treaty of Waitangi is not enforceable in the New Zealand Courts:⁸⁶

How the treaty is to be interpreted is stated in *Wi Parata v Bishop of Wellington and The Attorney-General*. Assuming we are bound by that decision - though, perhaps, not by all the expressions used in the judgment - it is clear from the decision of the Privy Council in *Nireaha Tamaki v Baker* that, until there is some legislative proviso as to the carrying-out of the treaty, the Court is helpless to give effect to its provisions.

(c) Accordingly, Maori fishing rights have to be sourced in statute. The Fisheries Act does not in fact create fishing rights in the Maori people; and therefore the Court must apply the rules of the common law, which is that in tidal waters all have a right to fish⁸⁷. Private rights of fishery must at common law be derived from statute.

(d) It is at this stage in Stout C.J.’s analysis that the matter of ownership of the foreshore is reached. He states:⁸⁸

There is no allegation in this case that the land over which the tide flows belongs to the Maoris. The Maoris have land adjoining, but if so the Crown grant would be to high-water mark and would not include the land under the sea or tidal waters. In *Mueller v The Taupiri Coal-mines* 20 NZLR 89 the Court of Appeal held that even the bed of a navigable river remained vested in the Crown and did not pass to grantees of land fronting the river.

Is Stout C.J. accepting in this passage that the Crown ‘owns’ the foreshore? Certainly that is what the Crown (in the person of Salmond) argued this in the case. Salmond had tried to demonstrate that Maori fishing rights were *territorial* - so that, once a parcel of Maori freehold land had been sold, any rights of fishery would be alienated with it. In this case Maori were attempting to pursue a *non-territorial* fishing right ‘in the tidal waters of the Crown’: the land ‘has belonged to the Crown since the Crown came to New Zealand’. Salmond is certainly of the view, in other words, that the Crown ‘owns’ the foreshore by prerogative right. But is Stout C.J.? He expresses himself very carefully - that the Crown grant to the adjacent Maori land would only be to high-water mark. As fishing-rights are territorial, then any claim to them cannot be based on the relevant title to blocks of coastal Maori freehold land. As to whether the foreshore itself is Maori property, that simply has not been argued: *there is no allegation in this case that the land over which the tide flows belongs to the Maoris*. The point is open for argument, in other words. Salmond J. always believed that the Supreme Court accepted his arguments in full and that *Waipapakura* stood clearly for the proposition that the foreshore belonged to the Crown. But later Crown counsel were not so sure.

⁸⁶ Ibid, 1071.

⁸⁷ The flaw in the Court’s reasoning at this point is obvious enough - for the common law also recognises and protects property rights - which can include rights of fishery - of the indigenous population. The Court’s stance is that *only* rights of fishery protected specifically by statute are cognisable by the court.

⁸⁸ Ibid, 1072.

In any event, the Court of Appeal in the *Ninety-Mile Beach* case was later to reject the Crown's claim that in New Zealand it had a territorial title to the foreshore by prerogative right.

The Crown's title arose, rather - in the Court of Appeal's view - from statute. The position adopted in this paper is that while the Court of Appeal was certainly right in doubting that by mere operation of the common law the Crown had a territorial title to the foreshore, the alternative statutory bases advanced in *Ninety-Mile Beach* do not withstand serious scrutiny.

2.2.10. Departmental views: Up to 1870 or so, it appears, governments operated on the assumption that Maori foreshore titles had to be expressly extinguished. After that the emphasis seems to have gradually changed. By the 20th century the prevailing view was simply that the Crown 'owned' the foreshore. A number of government departments, including the Marine Department and the Department of Lands and Survey, certainly operated on an assumption that foreshore ownership was vested in the Crown. The following extract from a Lands and Survey opinion, written in 1952, (dealing with the Awapuni lagoon at Gisborne) may serve as a representative example:⁸⁹

When New Zealand was ceded to Her Majesty, Queen Victoria, in 1840, the English law governing property, with the exception of certain statutes such as the Mortmain Acts which were passed to remedy certain local abuses in England, applied in New Zealand and therefore the law relating to the ownership of the foreshore and bed of tidal rivers applied in New Zealand. "The property in the soil of the shore of the sea, of estuaries and arms of the sea, and of navigable rivers between high and low water mark is prima facie vested of common right in the Crown"; *Gann v. The Free Fishers of Whitstable* (1864) 11 HL 192; 35 LJC 29; 12 LT 150; and other cases quoted in *Coulson and Forbes on Waters and Land Drainage* 5th Edition 1933, but it may belong to a subject by ancient or modern grant or charter from the Crown, or by prescription: *Calmady v. Rowe* (1844) 6 CB 861. The same authority states that the bed of all tidal rivers where the tide flows and re-flows and of all estuaries and arms of the sea is by law prima facie vested in the Crown.

2.2.11. Crown Law opinions: However, the Crown Law Office was much less sanguine about the Crown's position and in fact was alarmed by the legal uncertainties surrounding the Crown's claim to be the owner of the foreshore. Sir John Salmond himself had taken the robust view that the Crown was the owner of the foreshore simply by prerogative right. In the case of the lagoon at Napier, for example, Salmond stated in a Crown Law opinion in 1916:⁹⁰

The inner harbour, whether included in the Crown purchase or not, is tidal water and the limits of Native customary title are high water mark. Whatever the title of Natives may be to inland non-tidal waters they have no title to any part of the sea, whether land-locked or otherwise. This seems to have been determined by the Court of Appeal in *Waipapakura v. Hempton* (1914) 33 NZLR 1065.

⁸⁹ Memorandum for Director-General, Department of Lands and Survey, re Awapuni Lagoon, copy on M 1,4/1877, NA Wellington [full text in document bank]

⁹⁰ Salmond to Under-Secretary of Lands, 28 August 1916, copy on L 1, 29057 [Ahuriri lagoon]. This file is Document #A8(d) in the Wai-55 (Te Whanganui-a-Orotu) claim.

Salmond's views were based largely on his particular reading of New Zealand legal history: he was not persuaded that Maori owned the whole corpus of land and resources in the country, and therefore it did not follow that merely because it could be proved that a particular resource had never been alienated to the Crown that it must necessarily belong to Maori at the present day.⁹¹

Native title is not universal. It is not true that the whole of New Zealand, whether land or water, is necessarily the subject of Native title except so far as such title has been extinguished by cession, forfeiture or otherwise.

A second basic assumption was a particular approach to the law of Native or 'aboriginal' title, which was that the source for such title in New Zealand was the Treaty of Waitangi which was unenforceable except to the extent that it had been recognised in statute (whereas a modern Court would view rights derived from the Treaty and the common law of aboriginal title as certainly distinct, and in the case of the latter, at least, would operate on the assumption that no statutory recognition is necessary). According to Salmond in an opinion he wrote for the Rotorua lakes case:⁹²

Native customary title depends for its legal existence on the Treaty of Waitangi as recognised and validated by a grant of legal title by the successive Acts dealing with Native land.

In effect, that unless the Native customary had been given effect to in statute it could have no "legal existence".

A further aspect of Crown Law's approach to the matter lay in the complexity of the interplay between Maori customary titles and the kind of titles recognised by the Common Law. The view seems to have been that Maori could only have a proprietary title over *small* water bodies; when it came to larger bodies of water, such as Lake Taupo (or the sea, for that matter) the Maori titles equated only to rights of "fishery" and of navigation. These rights were insufficient foundations for a title from the Native Land Court (which could not, as it happens, grant rights of fishery after 1909 in any case: it was a full title or nothing). An argument along these lines was developed by the Crown in the Rotorua Lakes case, and the following extract is taken from the Crown submissions on the Crown Law file on this case held at National Archives:⁹³

⁹¹ Crown's legal argument in Rotorua lakes case, written submission found on CL 174/2, National Archives, Wellington. This document also contains some other important clues as to Crown Law Office (or Sir John Salmond's) thinking. One is that a right of 'property' could not be manufactured out of fishing and fisheries management: "Ownership involves exclusive possession and use for all purposes. Fishing rights and navigation rights are different from rights of ownership. It may well be that particular parts of Rotorua have been by native custom recognised as being subject to exclusive rights of fishery, but this is a different thing from saying that these parts of the Lake are the exclusive property of the Natives." One can see some force in this argument, but, in fact, the point remains that Maori title to land is proved in exactly the same way: by evidence of use, management, ancestral connexion and so on. The Crown law analysis is predicated on a sharp distinction between ordinary land and land under water, but it is hard to see why the presence of water should make a difference. As this report has tried to demonstrate, there is ample evidence that Maori viewed water-covered land in the same way as ordinary land: in some respects it may well have been *more* important.

⁹² Salmond to Under-Secretary of Lands, re Lakes Rotorua and Waikaremoana, 11 June 1917, CL 174/1, [Rotorua Lakes case], National Archives, Wellington.

⁹³ Copy on CL 174/1, [Rotorua Lakes case], National Archives, Wellington.

It may be suggested that since some waters are admitted to be the subject of Native ownership, it is impossible to draw a line and say that other waters, however extensive, are not in the same position; that this is merely an impracticable distinction of degree. It is a difference in degree but by no means impracticable, the smaller the water the more probable it is that Native custom regards it as merely appurtenant to the adjoining land and as forming part thereof and held in ownership by the same title. The larger the water, on the other hand, the more probable it is that Native custom did not recognise it as part of the land but as distinct from the land just as the sea is and not the subject of exclusive possession and ownership like the land. In particular this is so where the water is so large as to serve as a public navigable highway. Natives on the shores of Lake Taupo did not think that they owned the Lake anymore than Natives on the shores of the sea thought they owned the Pacific Ocean. In each case what they claimed was a right of fishery and navigation. Each case must be judged on its own merits having regard to the size of the water and its use or utility for the purpose of navigation. If some tribe had claimed to own part of Lake Taupo because they had a right to fish there, the other tribes would dispute such a claim of ownership because they possessed a right of navigation over the same water.

Maori customary law, it was said, could not conceive of 'ownership' of large water bodies - not only the sea, but inland navigable waterways as well.

Also critical to Crown Law's stance was a distinction drawn between 'land' and 'fishery' rights, a distinction which derived ultimately - it was claimed - from the Treaty of Waitangi itself. The Treaty protected 'lands' and 'fisheries'; thus where the right being protected was one essentially of fishing it fell, as it were, into the fisheries basket, not the 'lands' basket, and could generate only a fisheries title, not a territorial title.⁹⁴

The wording of the Treaty of Waitangi. Fisheries are expressly mentioned and distinguished from lands. This shows that even then their fishing rights were distinguished from the ownership of land and that the Natives considered their fisheries whether inland or sea to be different from their lands. I submit that the land to which they have acquired title by New Zealand legislation is land as distinguished from fisheries and the waters over which such rights of fishery are exercised. The fishing rights of the Natives have been recognised by subsequent statutes apart altogether from Native land. See the Fisheries Act 1909, Section 77. The Fish Protection Act 1877, s 8. This Act provides that the Act is not to repeal, alter or affect any of the provisions of the Treaty of Waitangi or to take away or abridge any of the rights of the aboriginal Natives to any fishery secured to them thereunder. Now this Act expressly provides that it shall not apply to waters the property of any private person. This survey of Native rights therefore does not refer to fisheries in Native land, for this is their property and the Act does not apply. The saving is therefore of the fishing rights preserved by the Treaty of Waitangi over waters which were not the property of the Natives but of the Crown. This is a distinct recognition by statute therefore of the fact that Native fishing rights do not involve ownership of the waters.

But by the 1930s Crown Law was becoming much less certain of the Crown's supposed title to the foreshore under prerogative powers. On reflection Salmond's ingenious arguments did not seem so persuasive after all. In 1932 the Crown Law Office prepared an opinion on the Northland foreshore cases then pending in the Native Land

⁹⁴ Ibid.

Court.⁹⁵ The opinion begins with a clear recognition of the distinction between the primary or radical title of the Crown and the proprietary title sought by the applicants.⁹⁶

By Section 2 of the Native Lands Act, 1931, the definition of *customary land* is land which being vested in the Crown is held by Natives or the descendants of Natives under the customs and usages of the Maori people. The argument by the Maori claimants is, therefore, that although tidal lands may be vested in the Crown it is also customary land.

The Crown Solicitor also thought that in the Ngakororo case the Maori landowners had two options, one of seeking some sort of easement in the Supreme Court, and the other of seeking an investigation of title in the Land Court to the foreshore areas. Either way their chances of success were good:

that whilst the grounds for their claim alleged by the Native owners might support easements or other subsidiary rights over the land claimed, in the Supreme Court, they would be sufficient in the Native Land Court to establish a claim to customary title.

It was the Crown solicitor's view that "the Crown has little hope of success in the present case" and he suggested a number of possible steps which might be adopted in response to the claim:

One course which is open to the Crown is to make a formal assertion before the Court that the Crown claims this land and on the decision of the Court to lodge an appeal under Section 61 of the Act, and perhaps, ask the Appellate Court to state a case under Section 71 of the Act for the opinion of the Supreme Court. The adoption of this procedure would hold up a final decision for a period, but I understand the desire is to get the matter settled as early as possible...The alternative course is to obtain legislation defining the title of the Crown and providing compensation for those entitled to claim. A Proclamation could be issued under Section 113 of the Native Lands Act, 1931, but such procedure would not bring the issue to finality.

In 1934 Crown Law prepared a opinion on the ownership of the former lagoon at Napier (raised above sea level by the Hawke's Bay earthquake of 1931). The author could see no reason why Maori could not assert territorial claims to the foreshore:⁹⁷

With all respect to the late Solicitor-General's opinion, I doubt if *Waipapakura v Hempton* (1914) 33 NZLR 1065, goes as far as he suggests; once the law has recognised the assertability of Native rights in the demesne lands of the Crown, which no doubt it has done - *Nireaha Tamaki v. Baker* [1901]AC 561 - it is difficult to find a good ground for excluding any land over which the Crown has imperium, dominium, and mesne ownership, whether it be land covered by air or covered by water, whether the covering water be river, lake or sea, whether tidal or not, and whether the land be above, within, or below the foreshore strip. But I trust such important issues will not be raised on the present reference.

⁹⁵ Memorandum of Crown Solicitor to Under-Secretary of Lands, 7 march 1932, re Ngakororo case (found in Lands and Survey Department box file relating to the Ninety-Mile Beach case, held by DOSLI Auckland: copy on Boast, Ninety-Mile Beach report vol 2 (Wai 45 Doc#C3A, Annexure 8).A transcription of this opinion is in the Appendix.

⁹⁶ Ibid.

⁹⁷ Crown Law Office to Under-Secretary, Department of Lands and Survey, 15 March 1934, copy on L 1/29057, NA Wellington.

A further memorandum was prepared in 1935 for the Solicitor-General in regard to the Ngakororo case which took the position that the Crown's claim to the area between high-water mark (ordinary high tides) and the land covered by ordinary spring tides was especially weak. And, in general, the Crown's claim to the foreshore as a whole rested on doubtful foundations:⁹⁸

The consensus of opinion (in which I fully concur) is that the claim of the Crown is weak. The Department would prefer that the matter, if possible, be removed from the jurisdiction of the Native Land Court.

This memorandum identifies a number of possible strategies, no doubt with an eye to the unconventional opinions of Judge Acheson, who, as everyone knew, was judge of the Tokerau division of the Court where most of the key foreshore cases would come up for hearing. The Ngakororo case could be allowed to proceed, but this was undesirable: it might "have the effect of encouraging further applications from optimistic Natives".⁹⁹ The other was to oppose the application vigorously, and at the same time endeavour to have the case moved out of the Land Court into the ordinary courts:¹⁰⁰

[The Crown should] oppose the application vigorously from this stage onwards, asking in particular for a re-hearing of the evidence taken in the absence of the Crown, and on the judge finding for the natives, to lodge an appeal on general grounds, and in addition to ask for a re-hearing on the ground that evidence was taken in the absence of the Crown - this application for a rehearing constituted a last endeavour to obtain an opportunity to cross-examine the witnesses put forward by the applicants. In addition, to give consideration to the question of having a special case stated for the Supreme Court to determine whether "tidal lands" may be customary lands within the meaning of the legislation relating to native customary lands.

Crown Law's advice was eventually acted on in the Ninety-Mile Beach case, when counsel for the claimants, Mr Dragicevech, allowed himself to be persuaded to agree to the matter being referred to the Supreme Court on a case-stated basis rather than be appealed to the Maori Appellate Court. It is unknown whether he was aware that this was a long-matured Crown Law Office strategy.

The conventions which govern Crown Law's role and the extent to which these might be a little different from those of an ordinary legal adviser are obscure. It may be the case that some of the opinions cited above hover very close to the fuzzy line separating legal from policy advice. It is quite noticeable how prominent the Crown Law

⁹⁸ Crown Solicitor to Solicitor-General, 30 August 1935, found in Lands and Survey Department, Auckland, box file relating to Ninety-Mile Beach case; a copy of this memorandum is in R.P. Boast, Annexures to Evidence regarding Ninety-Mile Beach, Wai 45, Doc#C3A, Annexure 16.

⁹⁹ Ibid, para 19.

¹⁰⁰ Ibid, 19(2). It is not an objective of this report to engage in finger-pointing at the Crown Law Office, which, of course, acts as a legal adviser to the Crown and is fully entitled to advise its client of the best strategic options, as any legal adviser would do. Nevertheless the objective facts are that (i) Crown law believes that the Crown has a weak claim to the foreshore; (ii) rather than concede this, the Crown should do nothing to encourage further claims by Maori to the foreshore; (iii) at all costs the Crown should try to remove the matter from the Maori Land Court and into the ordinary courts. It is intriguing to say the least that the unarticulated major premise of all this is that the judges of the High Court and the Court of Appeal could be confidently relied on to come up with the 'right' answer (i.e. one that favoured the Crown).

office was in formulating government strategy over foreshore cases; and this prominence is no doubt a legacy of the immense prestige of Sir John Salmond's tenure of the office of Solicitor-General when he was regarded as the source of all wisdom on knowledge on Maori land and waters matters and related issues. Apart from the role of the Crown Law Office there is the position of the government itself. Is it unconstitutional for the government to actively maintain before courts and tribunals conclusions of law that its own advisers have suggested are probably untenable? If the area concerned relates to Maori grievances can it be said that such a stance is itself a breach of the principles of the Treaty? This is a difficult question which this report will not attempt to answer. But it is unfortunate that a situation arose in which Maori claims to the foreshore, which were, in strictly legal terms, quite well-founded, were perceived as something to be outmanoeuvred rather than confronted in a frank and open manner.

Although the Crown Law Office during the 1930s was becoming somewhat doubtful about the legality of the Crown's putative ownership of the foreshore, when it came to the Crown's *public* stance the argument continued to be put forward that the Crown owned (in the sense of possessing full *dominium* over) the foreshore by prerogative right. One example of this is the legal argument in the Maori Land Court in the *Ngakororo* case in which Sir Vincent Meredith, Crown solicitor at Auckland, pressed the traditional view to a clearly incredulous Judge Acheson:

JUDGE ACHESON: You are saying that the presumption of law is that that foreshore land is Crown land?

MR MEREDITH: Yes, we are saying that.

JUDGE ACHESON: Am I then to be bound by that?

MEREDITH: Not if you disagree.

ACHESON: I would like you to prove that is carried on.

MEREDITH: We can only put that proposition up as being the correct position of law. Your Honour may disagree with it, and if you do we have our remedy, but I am not submitting to you that because I say so that is the application.

JUDGE ACHESON: I want proof that that does apply in this case.

MEREDITH: I have quoted *Findlay's case* and the proposition from *Halsbury*, and apparently the general acceptance everywhere is that it is so, and that the fact that our legislature legislated on the basis that it is so -

ACHESON: That the common law of England applies here?

MEREDITH: Yes, and that the foreshore is vested in the Crown.

ACHESON: And that [it] has been Crown land immemorial, even before they never heard of New Zealand?

MEREDITH: No, that could not apply until the British took over the sovereignty.

ACHESON: The British took over the sovereignty of [sic] the common law applied that everything under tidal waters was Crown property?

MEREDITH: If it is tidal water, mudflats, an arm of the sea - yes.

ACHESON: What about the valley of the river entering a drowned bay?

MEREDITH: If the tidal flow goes up a valley or whatever you may care to term it - yes.

ACHESON: If it bursts through into a valley occupied by Europeans, then all that land goes to the Crown?

MEREDITH: If it became part of the foreshore under tidal waters and the sea - yes. That would alter the character of the land underneath it.

ACHESON: I would like to get to something more definite than a presumption.

MEREDITH: I submit that it is not a presumption, but a statement of law. In that statement in *Halsbury* it says "prima facie" in the Crown. That means it starts off being in the Crown. The discussion on that point in the note in *Halsbury* merely points out that in certain cases the Crown had ceded the foreshore in certain places, and grants had been

made on the foreshore to certain people, which the Crown could do. It started off with being in the Crown, and if anyone wished to upset the Crown's title and claim to it, they or he had to establish that there had been some grant to him or his predecessor in title.

In fact, in some of these comments Meredith went beyond orthodoxy. Even if the common law rules do apply without modification in New Zealand, they in fact do amount merely to a presumed title: the Crown does not have to *prove* title. And Meredith was incorrect in asserting that private titles to the foreshore could arise only by Crown grant: they could also arise by prescription, and it is not easy to see why, even at Common law, Maori could not pursue prescriptive claims to areas of foreshore in the ordinary courts.

In the Native Appellate Court in the Ngakororo case Meredith made the same argument: firstly, "that upon the the establishment of English [sic] Sovereignty in New Zealand in 1840, the common law of England was brought to New Zealand; it followed that as the Crown in England owns "all land below high-water mark" then "the Crown [i.e. in New Zealand] owns the land between high-water mark and low-water mark".¹⁰¹ In what was either a total misunderstanding of the Crown argument or a brilliantly adroit manoeuvre to circumvent it, the Appellate Court was quite happy to accept that "the title to all land in New Zealand and land below high-water mark passed to the Crown".¹⁰² (This, of course, was not at all what Meredith was contending: he was not arguing that the Crown merely had *radical* title - "imperium" - over the foreshore, but that it "owned" it as Crown land; that it had "dominium".)

The denouement of these arguments and earlier cases came in the litigation over Ninety-Mile Beach, which will be discussed in the next section.

2.2.12. Anomalous areas: There are a few areas around New Zealand where, for various reasons, private ownership of the foreshore exists, or has existed. In the first decades of the colony's history there were a number of grants of areas below high water mark to private citizens.¹⁰³ There are some areas where private title to areas of foreshore flows from subsequent sale of titles derived from the Native Land Court. One is at Wenderholm north of Auckland. Apparently here the Native Land Court had at one time issued a title down to low water mark and the land had afterwards been acquired by a Major Whitney.¹⁰⁴ To complete his title he needed special legislation as well as having to pay the Crown for the land. Presumably because of the special circumstance of a prior purchase of an area of which the ML plan gave a boundary down to low water mark legislation was passed in Whitney's favour, this being s 10 of the Reserves and other

¹⁰¹ Citing from the summary of the Crown submissions in the judgment of the Native Appellate Court: see (1942) 12 Auckland NAC MB 137. For a full discussion of the Ngakororo case see below.

¹⁰² See (1942) 12 Auckland NAC MB 137.

¹⁰³ There is a return at (1868) AJHR C-3. The Law Commission is probably correct in its observation that the return is likely to be incomplete: see Law Commission, *Treaty of Waitangi and Maori Fisheries*, 69.

¹⁰⁴ See Under-Secretary, Department of Lands and Survey, to Secretary for Marine, 4 September 1909, M 1, 2/2212 [Foreshores: Waiwera: Title to Low Water Mark belonging to Major Whitney (Wenderholm Estate)], NA Wellington: "The Minister has received an application from Major Whitney to purchase two areas which he has either reclaimed or intends to reclaim along the frontage of his property near Waiwera, in the Auckland District, and which in his title is bounded by water lines, supposed to be, according to the Native Land Court plan, pretty well about low water mark." In other words special legislation was necessary to perfect the title but Whitney's special entitlement derived from the ML plan.

Lands Act 1910, which empowered the Auckland Harbour Board to dispose of the area to Whitney which was accordingly done. Subsequently a legal problem developed as to whether s 10 of the 1910 Act amounted to a “special Act” as required by the Harbours Act. (The Crown Law Office determined that it was).¹⁰⁵

2.2.13. Present statutory framework: The present statutory framework relating to the seabed and the foreshore is as follows:

(a) Foreshore :

— Section 150 of the Harbours Act 1950 was repealed by s 362 of the Resource Management Act 1991. Section 150 is not, however, referred to in s 354 of the Resource Management Act¹⁰⁶, which protects property vested in the Crown by provisions equivalent to s 150 in other statutes, such as s 261 of the Coal Mines Act 1979¹⁰⁷. This may have been an oversight, but perhaps not. In any case it must be noted that the principal statutory provision on which a Crown title to the foreshore might conceivably be based - even if not very persuasively - has now been repealed.

— The foreshore is defined in the Conservation Act 1987, the Foreshore and Seabed Endowment Revesting Act 1991, and the Resource Management Act, although the definitions are worded slightly differently. The definition in s 2 Conservation Act (as amended by s 3(1) of the Conservation Law Reform Act 1990) is “such parts of the bed, shore or banks of a tidal water as are covered and uncovered by the flow and ebb of the tide at mean spring tides”. The definition in the Foreshore and Seabed Endowment Revesting Act 1991 is the same as the Conservation Act. Section 2 of the Resource Management Act defines the “foreshore” to mean:

¹⁰⁵ See Crown Law opinion in Document Bank, 10 December 1915.

¹⁰⁶ There are now two principal statutory provisions which consolidate and extend Crown resource nationalisations made under earlier statutes. These are s. 10 of the Crown Minerals Act 1991 and s. 354 of the Resource Management Act 1991. Section 10 states:

Notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum, gold, silver, and uranium existing in its natural condition in land (whether or not the land has been alienated from the Crown) shall be the property of the Crown.

And s 354 states:

Without limiting the Acts Interpretation Act 1924...it is hereby declared that the repeal by this Act or the Crown Minerals Act of any enactment, including in particular -

- (a) Section 3 of the Geothermal Energy Act 1953; and
- (b) Section 21 of the Water and Soil Conservation Act 1967; and
- (c) Section 261 of the Coal Mines Act 1979;

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

¹⁰⁷ This provision derives from the Coal Mines Amendment Act 1903. Following litigation relating to the beds of the Arahura (*In re Beare's application* (1900) 2 GLR 242) and Waikato (*Mueller v Taupiri Coal Mines Ltd* (1900) 20 NZLR 89 (CA)) rivers this astonishing enactment simply vested the beds of all ‘navigable’ rivers in the Crown.

any land covered and uncovered by the flow and ebb of the tide at mean spring tides and, in relation to any such land that forms part of the bed of river, does not include any area that is not part of the coastal marine area.

Although all of these statutes *refer* to the “foreshore”, none of them explicitly vest it in the Crown.

— Somewhat different from the “foreshore” is the *coastal marine area* as defined in s 2 of the Resource Management Act. This is a unit of planning, or resource management law, rather than the law of property. The ‘coastal marine area’ is all land, water, and air space above the water, extending from high water mark to the outer limits of the territorial sea. It is compulsory for a regional council to have in operation a regional coastal plan relating to this area.¹⁰⁸ Such a plan must comply with the New Zealand Coastal Policy Statement (NZCPS).

— All areas of foreshore formerly vested in Harbour Boards are now revested in the Crown (s 5 of the Foreshore and Seabed Endowment Revesting Act 1991). An important example is the Manukau Harbour, the subject of the Waitangi Tribunal's Manukau Report (Wai 8, 1985), which was vested in the Auckland Harbour Board by the Manukau Harbour Control Act 1911. Another important example is Te Whanganui-a-Orotu (Napier Inner Harbour), which was vested in the Napier Harbour Board in 1874¹⁰⁹ and which has already been considered by the Waitangi Tribunal in its *Te Whanganui-a-Orotu report*. It is unlikely that this process of vesting and revesting of itself extinguishes Maori property rights in respect of these areas - following Brennan J's approach in the majority judgment in *Mabo v Queensland* it would have to be shown that the process was factually inconsistent with continued Maori title. This would be very hard to demonstrate. Maori continued to exercise customary rights over such areas whether in harbour control or not (and often petitioned and protested about such areas, an obvious example being Te Whanganui-a-Orotu). It is far more likely that a modern court would hold that the Maori customary title continues in operation unaffected by the process of vesting in harbour boards and their revesting in the Crown in 1991. As Blanchard J put it in *Faulker v Tauranga District Council* [1996] 1 NZLR 357, 363:

...The Executive cannot...extinguish customary title by granting the land to someone other than the customary owners. If it does the the grantee's interest is taken subject to the customary title...Where action taken by the Crown which arguably might extinguish aboriginal title is not plainly so intended the Court will find that the aboriginal title has survived.

— Section 237A of the Resource Management Act deals with the special situation of esplanade reserves, in effect an uncompensated expropriation of land exacted from those carrying out subdivisions under the elaborate approval procedures of the Resource Management Act 1991. Whether it is fair to force people carrying out subdivisions to hand parcels of valuable land over to the government for free will not be debated in this report. Any areas of lake or river shown on the subdivision plans are required to be vested in the local territorial authority, and any such areas within the coastal marine area

¹⁰⁸ Resource Management 1991 s. 64.

¹⁰⁹ See Napier Harbour Board Act 1874, and schedule describing “Ahuriri lagoon”. The area vested in the Harbour Board, however, excluded a number of islands which retained the status of Maori customary land.

are to be vested in the Crown.¹¹⁰ How significant this is in the general scheme of things is hard to say: it is probably fairly marginal.

— All areas of foreshore formerly held by the Crown are deemed to be stewardship land (providing certain criteria are met) by s 62 Conservation Act 1987. But the section relates only to areas of foreshore ‘formerly held’; and does not of itself resolve the question as to whether the Crown *did* ‘hold’ the foreshore.

— The strip of land 20 m wide inland of the foreshore is included as a marginal strip deemed to be reserved from sale by the Crown by s 24 of the Conservation Act 1987.¹¹¹

— It is an offence to disturb any freshwater fishery, spawning ground, or food supply of freshwater fish in the foreshore by introducing a foreign substance.¹¹²

There does not appear to be any statutory provision which explicitly vests ownership of the foreshore in the Crown, although some statutes (for example the Foreshore and Seabed Endowment Revesting Act 1991 and, perhaps, the Conservation Act 1987) appear to be based on an assumption that the foreshore belongs to the Crown. But assumptions are not enough. When it comes to statutory extinguishment of customary title, the extinguishment must be clear and plain. In fact there is a general presumption *against* extinguishment, stated most clearly in the judgment of Deane and Gaudron JJ in *Mabo v Queensland (No 2)*:¹¹³

The strong assumption of the common law was that interests in property which existed under native law or customs were not obliterated by the act of State establishing a new British colony but were preserved and protected by the domestic law of the colony after its establishment.

Courts in Australia, Canada and New Zealand, in applying a presumption against extinguishment, have repeatedly stated that any purported extinguishment of customary title must show a “clear and plain intent” to do so.¹¹⁴ None of the current statutory provisions relating to the foreshore meet this requirement.

(b) Seabed :

The area between low water mark along the coast (including all coastal islands) and the outer limit of the territorial sea is specifically vested in the Crown by s 7 Territorial Sea and Exclusive Economic Zone Act 1977. The Common Law rules relating to the seabed are summarised in *Halsbury* as follows:¹¹⁵

¹¹⁰ At least, I think that is what the provision means.

¹¹¹ As inserted by s 15 of the Conservation Law Reform Act 1990.

¹¹² Conservation Act 1987 s 39(4) and (7).

¹¹³ *Mabo and Others v. The State of Queensland (No. 2)* (1992) 175 CLR 1, 82.

¹¹⁴ *Ibid*, per Brennan J., 165; per Deane and Gaudron JJ, 111; per Toohey J. 195; *Delgamuukw v British Columbia* (1993) 104 DLR (4th), per McFarlane JA at 523; *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 691 (per Williamson J.); *Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 361.

¹¹⁵ *Halsbury*, 4th ed., vol 49, pb 155, “Water”, para 285, relying on *A-G v Chambers* (1854) 4 De GM & G 206, 213; *Gammell v Woods and Forests Commissioners* (1859) 3 Macq419, (HL); *Gann v Whitstable Free Fishers* (1865) 11

The soil of the sea between the low-water mark as shown on Admiralty charts and extending for 3 miles is within the territorial sovereignty of the Crown, although outside the realm; the soil of the bed of all channels, reeks and navigable rivers, bays and estuaries, as far up as the tide flows, is prima facie the property of the Crown. The Crown also claims to be entitled to the mines and minerals under the soil of the seas within these limits.

In terms of formal law in New Zealand, at least, in respect of the area *below* low water mark there is no argument: it belongs to the Crown. It is of course possible that this provision might be contrary to the Treaty of Waitangi, and certainly would be if it could be shown that it had extinguished Maori property rights.

There are examples of aboriginal property rights featuring in cases relating to the continental shelf and territorial sea. This issue became important in Alaska with litigation brought by some Native Alaskan villages seeking to prevent the Secretary of the Interior from selling oil and gas leases on the outer continental shelf.¹¹⁶

3.0. The Native/Maori Land Court and the Foreshore

3.1. The earlier cases

3.1.1. Introduction: It remains to consider in detail the very specific issue whether the Native/Maori Land Court had jurisdiction to issue titles to areas of foreshore. As explained above, the Court has never doubted that in terms of *Maori customary law* claims to the foreshore could certainly be made. But this was a different matter from the narrower point whether the Land Court had jurisdiction to convert such a customary entitlement to a Court-derived certificate of title which could then be perfected by a Crown grant or a certificate of title under the Land Transfer Act. Whether the Maori Land Court had jurisdiction to conduct an investigation of title to the foreshore was a difficult point. In general the issue was whether the jurisdictional provisions of the Native Lands Acts had been overridden by statutes such as the Harbours Act or the Crown Grants Act. Initially, it seems, the Land Court was willing to issue foreshore titles. However, following Chief Judge Fenton's decision in *Kauwaerenga* (1870) the Court generally operated on the assumption that it could only grant rights of fishery, as opposed to freehold titles, to parcels of the foreshore. In the twentieth century there was a shift in direction. In a number of instances in the 1930s and 1940s, Judge Acheson of the Tai Tokerau division of the Maori Land Court conducted hearings of claims to areas below high-water mark and was certainly willing to entertain applications for investigations of title to the foreshore. These cases will be discussed fully below. As noted above, this practice caused considerable concern to officials of the Crown Law Office who believed that in strict law the Crown's claim to own the foreshore was weak. Finally, in the *Ninety-Mile Beach* case, decided by the Court of Appeal in 1962, the

HL Cas 192; *Lord Advocate v. Wemyss* [1900] AC 48, 66, (HL); *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139, 166; *Denaby and Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171, CA. To the contrary see *R v Keyn* (1876) 2 Ex C 63, 199, (CCR). See also *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153.

¹¹⁶ The continental shelf has to be distinguished from the territorial sea. Typically states claim various rights in areas of adjoining continental shelf, although not typically full rights of ownership. In New Zealand the applicable statute is the Continental Shelf Act 1964. For an American example of litigation involving indigenous claims and the continental shelf see *People of Village of Gambell v Clark*, 746 F 2d 572 (1984); *People of Village of Gambell v Hodel*, 774 F 2d 1414 (1985); *Amoco Production v Gambell*, 480 US 531, 94 L Ed 542, 107 S Ct 1396 (1987).

point was authoritatively settled that the Maori Land Court had no jurisdiction to conduct investigations of title to the foreshore at the present day, although it may have been able to do so at an earlier time. This remains the law at the present time.

3.1.2. The *Kauwaerenga* decision: As noted above, there were instances when the Native Land Court in the Hauraki area was willing to grant freehold titles to areas between high- and low-water mark, the plans being approved and registered by the Provincial Surveyor. Some of these foreshore areas were then repurchased by the Crown. However, in the *Kauwaerenga* decision, also concerned with an area of foreshore near Thames, Chief Judge Fenton disavowed earlier landcourt practice. While willing to grant a right of fishery, or piscatory right, to the Maori applicants, Fenton was concerned about the implications of granting Land Court titles to areas below high water mark and declined to do so. He stated:¹¹⁷

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

Fenton concluded:¹¹⁸

Lyttelton's maxim that "the honour of the King is to be preferred to his profit" has not been forgotten, but it appears to me that there can be no failure of justice if the natives have secured to them the full, exclusive, and undisturbed possession of all the rights and privileges over the locus in quo which they or their ancestors have ever exercised; and the Court so determines, declining to make an order for the absolute propriety of the soil, at least below the surface.

What Fenton was prepared to grant, if not the "absolute proprietary", was nevertheless a substantial exclusive property interest. To obtain access to the foreshore the Crown felt it necessary to purchase the various Land Court fishery/foreshore titles awarded by the Native Land Court in the Hauraki area, and a number of transactions were entered into from August 1871 to August 1873. The relevant deeds can now be found in *Turton's Deeds*. The Land Court's willingness to issue titles of this kind was the main reason for the Proclamation of May 1872 removing the foreshore in the Province of Auckland from the jurisdiction of the Native Land Court

3.1.3. Subsequent cases. There were a number of other foreshore cases in the Land Court in the nineteenth and early twentieth centuries. Those that the author is aware of are:

- (i) *Parumoana case*

¹¹⁷ (1870) 4 Hauraki MB 236; reprinted in (1984) 14 *VUWLR* 227, at 224.

¹¹⁸ *Ibid*, 245. The final order, at (1871) 4 Hauraki MB 259 entitled the applicants to "the exclusive right of fishing upon and using for the purpose of fishing, whether with stake-nets or otherwise the surface of the soil of all the the portion of the foreshore or parcel of land between high water mark and low water mark."

This related to an area of tidal flats near Porirua; the claimants were Ngati Toarangatira. Following *Kauwaeranga* the Native Land Court awarded a freehold fishing title to an area below high water mark.¹¹⁹

(ii) *Te Whanganui-a-Orotu*

Te Whanganui-a-Orotu, or Napier Inner harbour, was a major issue and was at the centre of a number of special investigations and enquiries from 1916-1995 (the most recent, being, of course, before the Waitangi Tribunal itself¹²⁰). In 1916 a claim was lodged in the Native Land Court claiming ownership of the lagoon, a considerable portion of which was tidal, and seeking an investigation of title. The Lands Department obtained a legal opinion from Sir John Salmond, the Solicitor-General, to the effect that as the lagoon was tidal that meant it was technically “foreshore” and belonged to the Crown by prerogative right (and thus, it was irrelevant whether or not the Crown had actually bought the lagoon with the Ahuriri deed of 1851, a pre-emption era deed of cession negotiated by Donald McLean and the Heretaunga chiefs).¹²¹ At a hearing in 1916 the Native Land Court (Judge Gilfedder) found, quite correctly, that it had no jurisdiction to enquire into the lagoon, as at the time the lagoon was legally the property of the Napier Harbour Board and was therefore not Maori freehold land or Maori customary land.¹²² In view of this local Maori proceeded with an alternative strategy. This had two prongs: first, seeking an investigation of title to the lagoon *islands*, which were undoubtedly Maori customary land, and second, lodging petitions requesting that Parliament establish a special enquiry into the lagoon by statute.

The strategy was only partially successful. The claim to the lagoon islands ran into difficulties because of survey problems.¹²³ By the time of the Napier earthquake, which raised and drained the lagoon, the islands were still uninvestigated and were still Maori customary land. The earthquake meant that many of the former islands were now indistinguishable from the former lagoon bed. Some of the islands were eventually taken compulsorily under special statutory powers¹²⁴; others may still be Maori customary land today. The second limb of the strategy, seeking a special investigation, resulted in two separate inquiries, one in 1920 heard by Chief Judge Jones,¹²⁵ and one heard in 1934 by Judge Harvey. (Harvey, in a scandalous case of delay, did not complete his report

¹¹⁹ (1883) Wellington MB 147

¹²⁰ Waitangi Tribunal, *Te Whanganui-a-Orotu Report*, Wai 55, Brooker’s, Wellington, 1995.

¹²¹ Salmond’s opinion may be found on LS 1,29057 [Ahuriri lagoon]; see also R.P. Boast, *Te Whanganui-a-Orotu (Napier Inner Harbour) 1851-1991: A legal history*, Report to the Waitangi Tribunal (Wai 55 Doc#D1) 67-72.

¹²² (1916) 66 Napier MB 235.

¹²³ Boast. *op.cit.*, 72-74.

¹²⁴ Napier Harbour Board Empowering Act 1932-33 s 5(d). This gave special powers to the Maori Land Court to convert the islands into Maori freehold land. Section 6(1) allowed the Court to vest the islands in trustees. Titles were made and the trust established in 1936; the parcels of land were taken compulsorily in 1939 “for the purpose of adjusting the boundaries both external and internal, of the Ahuriri lagoon endowment”. No compensation was ever paid for these areas. See Boast *op.cit.*, 102-4.

¹²⁵ Chief Judge Jones’ report may be found at 1921 AJHR G-5.

until 1948¹²⁶). Both reports were inconclusive and the situation remained unresolved, necessitating a further inquiry by the Waitangi Tribunal in 1994-95.

Much of the argument and evidence at the various inquiries into Napier lagoon focused on the somewhat arid issue as to whether the lagoon ought to be classed as a “lake” or an “arm of the sea” at the relevant time. These classifications had no bearing on Maori customary law but simply reflected the position at Common Law (as clarified in the decision in *Tamihana Korokai* which decided that the Native Land Court certainly could conduct investigations of title to lakebeds): if the lagoon was a freshwater lake, then it was land and could be investigated by the Land Court; if it was tidal, then it was foreshore and supposedly belonged to the Crown. So not for the first or last time, Maori applicants found that a property claim had to be fitted into Common Law categories for any progress to be made. Not surprisingly Judge Harvey found the evidence inconclusive. After waiting for fourteen years local Maori learned only that the question could not be resolved. Judge Harvey was rather more guarded than Judge Acheson, his counterpart in the Tai Tokerau division of the Court. In regard to Maori rights in Te Whanganui-a-Orotu on the supposition that it *was* “foreshore” he would say only this:¹²⁷

If the area in question was in any year (say 1840) below mean high-water mark the question of Native rights over it becomes too involved to be dealt with adequately by this Court, or upon the case presented in these proceedings. It can be said, however, that the law has recognised the assertability of native rights in the demesne lands of the Crown (*Nireaha Tamaki v. Baker* [1901] AC 561. The Native Land Court, a special Court with land jurisdiction only was set up to adjudicate upon the rights of Natives under their customs and usages as against the title of the Crown.¹²⁸ In some cases, as already shown, the Native Land Court has dealt with lands which lie below high-water mark and the Crown has to some extent recognised these orders by giving a limited title to Natives.

(iii) *Awapuni Lagoon, Gisborne*

The Awapuni lagoon near Gisborne is another protracted foreshore case. In 1919 a firm of Gisborne solicitors wrote to the Minister of Marine enquiring whether the Crown would be willing to sell the Awapuni lagoon to a client of theirs.¹²⁹ The Awapuni lagoon was located at the mouth of the Waipaoa River and was by this time permanently open to the sea and subject to the tides: at low tide there was “but a small stream meandering along the lagoon with mud flats on either side, which are covered at high tide”.¹³⁰ The lagoon, which covered about 726 acres, was connected to the Waipaoa

¹²⁶ *Report and recommendation on Petition No 240 of 1932, of Hori Tupaea and four others, praying for relief in connection with Whanganui-o-Rotu (or Napier Inner harbour) and their property rights therein*, 1948 AJHR G-6A.

¹²⁷ 1948 AJHR para 163(d); p. 90.

¹²⁸ But what *kind* of Crown “title” does Judge Harvey mean? Modern aboriginal title theory tends to stress the distinction between *imperium* (the Crown’s sovereignty over land at international law) and *dominium* (title to land as landowner, as under the Land Act 1948).

¹²⁹ Kane and Dunlop, Barristers and Solicitors, to Minister for Marine, 28 April 1918, M1, 4/1877, NA Wellington.

¹³⁰ District Engineer, Gisborne, to Engineer-in-Chief, Public Works Department, Wellington. 7 June 1919, M1, 4/1887, NA Wellington. See also *Poverty Bay Herald*, 16 June 1919, clipping on *ibid*: “The lagoon is situated at the mouth of the Waipaoa River, and is subject to the rise and fall of the tides.”

river by a winding watercourse and was separated from the sea by a long peninsula, this being also the Paokahu block which by this time was cut up into four subdivisions.¹³¹ Awapuni lagoon was “only navigable by small boats at high water and practically empties when the tide goes out”.¹³² The purchaser wanted to reclaim the lagoon and was willing to “give an easement so that any flood waters could be dealt with”.¹³³ The Marine Department was not very interested in the Awapuni lagoon and could see no reason why it should not be reclaimed, but was uncertain who it belonged to: the most likely candidate was “apparently” the Lands Department which therefore had the responsibility of deciding whether or not to sell it.¹³⁴ The matter was referred to the Lands Department but what happened then is unclear.

In 1925 the Marine Department was again contacted about Awapuni, but this time by the Gisborne Harbour Board, which wanted the lagoon transferred to itself. The Harbour Board had already compulsorily taken some Maori-owned¹³⁵ blocks adjacent to the lagoon and had intended to take the lagoon too, assuming it to be Maori freehold land. The Board’s solicitors were puzzled to discover that there was no Native Land Court title to the lagoon; on the assumption that the most likely owner was the Crown and the responsible agency the Marine Department, the Department was invited to consider transferring the lagoon to the Board under section 21 of the Public Works Act 1908.¹³⁶ The Board, confident that Awapuni was “absolutely valueless”, (indeed that it was an “eyesore”¹³⁷) intended to fill it in with the spoil from planned harbour developments.

The Marine Department had changed its mind about who was responsible for the lagoon: as it was tidal the Marine Department rather than the Department of Lands had jurisdiction. Officials could see no particular reason why the Gisborne Harbour Board

¹³¹ See Plan M 4/930, copy on M 1, 4/1887, NA Wellington.

¹³² Memo to Minister of Marine, 17 October 1919, M1, 4/1887, NA Wellington.

¹³³ District Engineer, Gisborne, to Engineer-in-Chief, Public Works Department, Wellington, 7 June 1911, M1, 4/1887, NA Wellington.

¹³⁴ Memo to Minister for Marine. 17 October 1919, M1, 4/1887, NA Wellington: “The land occupied by the lagoon apparently belongs to the Lands Department, and I recommend that the application be brought before that Department, and that it be told that the Marine Department has no objection to the lagoon being reclaimed should the Lands Department see fit to dispose of it for that purpose.”

¹³⁵ That these adjoining blocks were Maori-owned appears from the letter sent by the Board’s solicitors, Chrisp and Chrisp, to the Under-Secretary of Marine on 30 September 1926 (M1, 4/1877, NA Wellington): “As you are aware the Board took some of the Native land adjoining the lagoon for harbour works purposes and would have taken the whole of the property only they were advised that it was, as you state, “tidal land”.

¹³⁶ Chrisp & Chrisp, Solicitors, Gisborne, to Under-Secretary, Marine Department, Wellington, 17 December 1925, M1, 4/1877, NA Wellington: “When taking the parts of the Awapuni Blocks above mentioned we were instructed, at first, by the Board to take the lagoon as well. However, in making a search in the Native Land Court records we could find no trace of any order vesting the lagoon in the Natives although there had been an application put in by certain Natives for an investigation and issue of title to the Natives. This was not gone on with and allowed to lapse - for what exact reason it does not show - but we think, presumably, because it was considered that it was Crown land - being either foreshore or the bed of the sea. If it is Crown land then no doubt the proper way to get it would be as provided by section 21 of the Public Works Act 1908. It is absolutely valueless except perhaps to the Board in connexion with its Harbour Works.”

¹³⁷ Chrisp & Chrisp, Solicitors, Gisborne, to Under-Secretary, Marine Department, 30 December 1926, M1, 4/1877, NA Wellington.

should have a 726-acre lagoon handed over to it for free, as was being proposed. The Board “should be prepared to pay something”.¹³⁸

Nothing further seems to have happened until 1928, when local Maori brought an application for an investigation of title to the lagoon bed in the Native Land Court. This application was obviously generated by concern regarding the earlier attempts to obtain and the reclaim the lagoon. As was later to be the case with the lagoon at Napier, lawyers representing the Maori applicants believed that their only option was to try to prove that the lagoon had recently been a freshwater non-tidal lagoon. The local Commissioner of Crown Lands, E.H. Farnie, was instructed to attend the Land Court on behalf of the Crown to apply for an adjournment. He reported on January 20:¹³⁹

With reference to the above, I have to advise that I attended the Land Court on the 6th. instant and applied for an adjournment for a month to enable a reply to the Natives’ claim to be prepared. An adjournment to the 7th. February next was granted and I would be glad to receive your instructions in the matter at an early date.

No evidence was taken at the sitting of the Court but Mr Pitt, who is appearing for the Natives in the case, informed me that the Natives based their claim on the fact that the Lagoon was, within the memory of living men, composed of fresh water and that raper[?] grew in the centre.

It is believed also that at one time the Lagoon formed part of the Waipaoa River bed, that then discharged its waters into the Bay near the north end of the present lagoon, but there is no evidence of this fact, it being only Native tradition.

Our oldest surveys made in 1869 show this to be a tidal lagoon and there appears to be very little alteration at the present day. There is a certain amount of fresh water coming into the lagoon from large springs on the western side but the amount is small. At low tide the lagoon comprises mud flats these being mostly covered at high tide.

The 1928 application in the Native Land Court was heard by Chief Judge Jones. He dismissed the application for a freehold order without prejudice. He saw the key issue as being the means by which the lagoon had assumed its tidal character at the present day. Although the lagoon was by 1928 an arm of the sea this “by no means settles the question”:¹⁴⁰

It is of importance to ascertain how the bed of the lagoon became an arm of the sea since if it became such by some sudden erosion or convulsion of nature it would not pass to the Crown...On the other hand if the land became an arm of the sea through slow and gradual accretion it would become the absolute property of the Crown. In this case there is not sufficient evidence of how the the land became overrun by seawater to justify the Court in displacing the prima facie title of the Crown.

Note that Judge Jones accepts that generally the Crown has a “prima facie” title to areas of foreshore. His view is that much turns on how coastal lagoons have become arms of

¹³⁸ Internal memorandum, G.C. Godfrey, Secretary for Marine, 3 February 1926, M1, 4/1877, NA Wellington.

¹³⁹ E.H. Farnie, Commissioner of Crown Lands, to Under-Secretary for Lands, 20 January 1928, copy on M1, 4/1877, NA Wellington.

¹⁴⁰ The judgment is at (1928) 56 Gisborne MB 284.

the sea. If the process is by “slow and gradual accretion” then the area belongs to the Crown. Probably “accretion” is not quite the right term in this context. An accretion at common law is a gradual extension to a parcel of land caused by the receding of the sea or an inland water body, and is distinguished from an avulsion, a *sudden* change of some sort, such as an earthquake or a river shifting its course. Judge Jones means to suggest, rather, that if the lagoon had become tidal imperceptibly then - as the Crown ‘owns’ the foreshore - the Crown’s foreshore has, as it were, gradually extended itself. Technically this is not “accretion” but *dereliction*. Judge Jones’ approach applies the Common Law correctly. According to *Halsbury*:¹⁴¹

The presumption of law is that where land or foreshore is subject to accretion or alluvion¹⁴² and the added land is above high-water mark, the addition belongs to the owner of the dry land to which it is added, and if the added land is above the low-water mark it belongs to the owner of the foreshore. Evidence can be admitted to rebut this presumption, but that evidence must be very strong.

Where the opposite process, dereliction, takes place and the tidal water gradually and imperceptibly encroaches upon land which was formerly situated above high-water mark, that land becomes the property of the owner of the foreshore and the ownership of land which was formerly part of the foreshore passes to the owner of the bed of the tidal water.

Judge Jones left open the question whether the Land Court could grant a title to an arm of the sea. (Judging the passage previously quoted he is in any case confining this to those circumstances where the Crown’s prima facie title could be displaced at common law). He noted the provisions of the Harbours Act¹⁴³ and observed:¹⁴⁴

A freehold order issued by the Court has the same effect as if the land named therein has been granted by the Crown and is deemed to be so granted accordingly. It may be that the provisions of the Harbours Act estops the Native Land Court from issuing a title but it is not necessary to finally decide that question in the present proceedings.

The lagoon next makes an appearance on the Marine Department file in 1936, when the Gisborne Harbour Board advised the Department that it was considering filling in the lagoon by using silt laden flood waters from the Waipaoa river and whether “your Department would favour the vesting of the area in this Board as an endowment”.¹⁴⁵ But the Public Works Department’s district engineer opposed filling in the lagoon and the matter was taken no further at the time.¹⁴⁶ In 1952, however, an elaborate flood control

¹⁴¹ *Laws of England*, 4th ed., vol 49 p. 161; *Water*, para 295.

¹⁴² “Alluvion” is “the gradual and imperceptible deposit of matter on the foreshore: *ibid*.”

¹⁴³ At this time s 144 of the Harbours Act 1923.

¹⁴⁴ (1928) 56 Gisborne MB 284.

¹⁴⁵ Secretary-Manager, Gisborne Harbour Board, to Secretary, Marine Department, 30 May 1936, M 1, 4/1877, NA Wellington.

¹⁴⁶ District Engineer, Gisborne to Engineer in Chief, Wellington, 14 July 1936, M 1, 4/1877, NA Wellington. The District Engineer’s view was that the lagoon was a “necessary receptacle for flood waters” and that “I do not consider natural processes of foreshore accretion are yet sufficiently advanced to warrant filling up the Awapuni lagoon.”

scheme was drawn to the attention of the Marine Department by the Director-General of the Department of Lands and Survey. This was a government project coordinated by the Lands and Survey.

For present purposes the principal matter to record is Judge Jones' 1928 decision. In essence his view appears to be that the Land Court can indeed conduct investigations of title to areas that are foreshore at the present time in those circumstances where claims to areas of foreshore at present would have been recognised at Common Law. He appears to envisage, however, that at Common Law there are only some highly restricted circumstances where such a claim could be advanced.

3.2. Judge Acheson and the northern foreshore cases

3.2.1. Introduction. It was, however, in Northland that the foreshore issue was most important and most troubling. This can be explained by a number of factors, one of which was undoubtedly Judge Acheson himself. Acheson was very willing to allow Maori claims to foreshore areas, and combined this willingness with an attitude towards government actions and policies which was scathingly critical, to put it mildly. Northland also happened to be an area of high Maori population, typified by a long coastline relative to its land area, and was also a place where Maori dependence on the resources of the foreshore and the sea had always historically been important and continued to be so.

The main areas in dispute, with the exception of Orakei (Auckland) were all on the west coast of the Northland peninsula: the Ngakororo mudflats in the Whakarapa 'river' (actually an arm of the northern Hokianga harbour) near Panguru; the Herekino harbour; and Ninety-Mile beach itself. Much has already been said in this report about the Ninety-Mile beach litigation, which began its slow journey to the Court of Appeal with the application for an investigation of title to the beach lodged in the office of the Maori Land Court at Kaitia on 16 May 1955 by W.H. Tepania of Ahipara. The Ngakororo, Orakei and Herekino cases are discussed fully in the case studies section of this report. In general what took place was a lengthy courtroom battle in which the Crown (in the person of Sir Vincent Meredith) was pitted against Judge Acheson. In the middle was the Maori Appellate Court which did its best to devise compromise solutions, probably pleasing no one. With the exception of the Ninety-Mile beach litigation (in which Judge Acheson played no part) all of the Northland cases were complicated by difficult legal and factual problems relating to accretions.

The difficulties which confronted Acheson in dealing with these cases were many. The Maori applicants to the Court were usually unrepresented. On the other hand the cases were opposed by the Crown, represented by the formidable Meredith, who had the resources of the Lands and other departments to draw on, and who was able to present complex arguments on the legal position of the foreshore. In his courtroom Acheson had no counsel opposing the Crown who could provide him with precedents and alternative arguments, and had no one else to help him behind the scenes. By the late 1930s his relationship with his registrar and with the Native Department generally had become totally embittered. Acheson generally sensed something untenable about the Crown's stance over the foreshore (which is not surprising, since, as already discussed, Crown law opinions, which Acheson certainly never saw, were taking the stance that the Crown's claim was not tenable and the sooner the matter was removed from the Land Court the better). However he was not able to develop his views, carry out legal

research, or draw on the assistance of counsel or judge's clerks with legal qualifications. It is not surprising that promised final judgments setting out his views in detail often failed to appear.

3.2.2. The Whakarapa case. The Whakarapa 'river' is an arm of the northern Hokianga, in which is located an area of mudflats in the intertidal zone known as Ngakororo. This area became the centre of a lengthy and often bitter dispute¹⁴⁷. In 1922 one Robert Holland was given permission by the Marine Department¹⁴⁸ to extend his farm by draining and banking an area of foreshore, much to the dismay of local Maori. At one stage local Maori, with the involvement of Whina Cooper, took direct action by destroying Holland's stop-banks, but the main channels by which redress was sought were in fact the time-honoured ones of petitions and deputations to the government and through applications to the Native Land Court. This case is the most important and best-documented of the foreshore battles prior to the Ninety-Mile Beach case. The issue here was nothing to do with fisheries but with rights of control and reclamations. Holland had been given permission to, in effect, artificially create an area above high-water mark directly abutting on areas of Maori freehold land. The owners of these blocks were incensed. Holland's project, if successful, would destroy their areas of foreshore and cut them off from access to the sea.

In 1924 a deputation of Northern Maori called on the Minister of Marine (G.J. Anderson) to explain their concerns about the Hokianga foreshore areas. The deputation was led by W. Rikihana MLC and was introduced to the Minister by Tau Henare. The Minister was told that Europeans were illegally taking and selling toheroas from around the Hokianga foreshores. They also raised the matter of Marine Department leases of areas to mudflats to Pakeha farmers around the Hokianga. Henare told Anderson that "the Natives in the district were good farmers and considered it unfair that they did not have given to them an opportunity to work the mudflats, particularly when they adjoined the Natives' lands."¹⁴⁹ Local Maori wanted to reclaim and work the mudflats themselves, and resented the fact that to get to their own coastal properties they had to trespass over areas of foreshore leased to Pakeha settlers. Anderson was sympathetic and said that the matter would be looked into, but that probably nothing could be done about the existing leases. In the cases of new leases of foreshore he was willing to accept that local Maori should be given an opportunity to object before any fresh leases were granted, taking care to emphasise, however, "that he was course making that statement on the assumption that they [local Maori] would be prepared to improve the flats on the same lines as the Europeans proposed to do".¹⁵⁰ As for taking toheroas, this was an offence and the Department would willingly prosecute any offenders.

¹⁴⁷ The main file is MA 1, 5/13/1, Ngakororo Mud Flats: Title to reclaimed land, NA Wellington.

¹⁴⁸ Permission was granted pursuant to s 39 of the Harbours Amendment Act 1910. See 1922 *New Zealand Gazette* 236. The license allowed Holland to occupy the area of foreshore for 21 years and to execute works for reclamation purposes.

¹⁴⁹ Notes of a deputation representing Maori who waited on the Minister of Marine at Wellington on 29 September 1924, M 1, 4/1746 [Foreshores - Hokianga - Whakarapa], NA Wellington.

¹⁵⁰ Ibid.

On 15 October Rikihana and Henare called on the Secretary of Marine and discussed the foreshore leases and reclamations again. It had been earlier proposed that they provide a map indicating the areas at issue, but this they had been unable to do. It was decided that a Departmental official should visit the area to find out exactly where the disputed areas were. What happened then is not clear (there has not been time to read all of the relevant files, and probably to traverse the complexities of the Ngakororo affair in detail would result in another report as long as this one).

The Ngakororo litigation was long-winded in the extreme. The claim was partly heard by Acheson in 1926. In 1932 the case recommenced at Auckland, with a plan supplied. The Crown managed to attain an adjournment. In February 1932 the Native Land Court heard further evidence at Panguru (Hokianga). In 1941, following extensive legal submissions from the Crown (which have already been cited, and some of which are reprinted in the Appendix) Acheson gave judgment in favour of the main claimants. The Crown, which had been an active presence at all of the hearings, then appealed from Acheson's decision to the Maori Appellate Court.

Acheson's 1941 decision promises a fully-reasoned decision on foreshore matters to accompany its judgment on the Orakei case (I have not been successful in locating this, if, in fact, Acheson ever got around to writing it.) His 1941 judgment is quite brief and can be cited in full:

NGAKORORO MUDEFLATS (PANGURU)

Application for Investigation of Title.

Tuesday 30 September 1941

On FINAL JUDGMENT delivered by Judge Acheson today...the Court decides as follows:-

(1) The Court's considered findings on most of the legal questions at issue in this Ngakororo Case are held over until the Court deals at this present sitting with somewhat similar issues in its judgment on the Orakei Foreshore case. Therefore, for the purposes of any Ngakororo Appeal the Court fixes a limit of two months from the date when its Orakei Foreshore Judgment is entered up in Minute Book Kaipara No. 25.

(2) The Court gives FINAL JUDGMENT in favour of the Natives for the whole of the Ngakororo area in question as shown on Plans before the Court on the ground that it is papatupu or Native customary land for which an Order on Investigation of Title should issue.

(3) The Court further decides that it is Native land under the Pakeha law of Accretion, subject only to such charge (if any) as the Court may fix in favour of Mr. Robert Holland as compensation for improvements effected by him in good faith.

(4) As it is probable that the Natives interested will wish to have Ngakororo made into a Tribal Reserve as a Native Reservation under Section 5 of the Native Purposes Act 1937, so that rentals from its use may support community interests such as the Carved House of the Tribe, the Court holds over the fixing of names and shares, and directs that this matter be dealt with at a special sitting to be held at Panguru as soon as any appeals against the Court's decision have been disposed of. As such sitting the question of Mr Robert Holland's claim for compensation, and the question of his encroachment on Whakarapa No. 1 can also come up for hearing.

(5) In view of the long delays and hearing expenses already borne by the Panguru people the Court decides to charge no hearing or order fee.

It should be noted that Acheson's view is that the mudflats are "papatupu or Native customary land for which an Order on Investigation of Title should issue": the Court could, in other words, grant titles to foreshore areas.

The Crown appealed to the Native Appellate Court (the Appellate Court judgment¹⁵¹ is set out in the Document Bank). The Crown was represented by Meredith, and this time the Maori parties had legal representation, one Mr North.¹⁵² The Maori Appellate Court's judgment reversed Acheson's decision, but did so in terms which could not have given much comfort to the government's legal advisers. The Appellate Court accepted that the Crown had a title to the foreshore, but *only in the sense that it had title to the rest of the country*:

Now it is accepted by Counsel for the parties, and the authorities show, that upon the establishment of British sovereignty in 1840, the title to all land in New Zealand and land below high-water mark passed to the Crown. The rights of the Natives provided for in the Treaty of Waitangi as regards Customary land were preserved by the incorporation of statutory provisions therefor in the legislation of New Zealand which now appear in the Native Land Act, 1931.

The Appellate Court concluded that matters relating to accretions, prescription and the legal consequences of the license issued to Holland were matters for the ordinary courts and not the Maori Land Court. However, on the real issue at stake, whether the Land Court could issue titles to the foreshore, the Appellate Court was in no doubt:

If the proof offered by the claimants in respect of their claim established that these mud flats have been exclusively occupied by a particular hapu or tribe prior to 1840 and since then to the present day, without attempting to decide the matter we should have thought they might have been able to establish title to the land itself, although it may have lain below high-water mark. In England, the fee simple to land below high-water mark has, in certain circumstances, become vested in the proprietor of the foreshore. If, under the circumstances of the English people, title to the sea-bed can be established in this way, we see no reason why title should not just as well be established by the Maori people of New Zealand.

The Appellate Court's view was that a claim to an area of foreshore was a matter of fact, not law, and - this indicating a degree of confusion - cited Fenton's judgment in *Kauwaeranga* as illustrative of the requisite factual standards. (It will be recalled, however, that in *Kauwaeranga* Fenton concluded that the Court should *not* award freehold titles to areas of foreshore, which clearly is not the Appellate Court's position.) In the present case of Ngakororo the necessary standard had not been met and the appeal therefore had to be dismissed. The Appellate Court's comments are an important illustration of what is required to be proved before a claim for a certificate of title to an area of foreshore can be made out.

¹⁵¹ Ngakororo case, (1942) 12 Auckland NAC MB 137.

¹⁵² Query if this Mr North ultimately became North J., one of the judges of the Court of Appeal who heard the Ninety-Mile Beach case in 1962.

We have therefore made a full and careful examination of the evidence given in support of the claim, and find that it is in the most general terms and does not contain that particularity required to support a claim to papatupu land. The only evidence that suggests that any land existed above high water mark in 1906, the date of investigation, is that relating to a very small piece occupied by Hemi Ru. There is, however, nothing at all to suggest that this land existed as dry land in 1840, and if it was not then in existence it must have risen from the sea bed since that date. If that is so it is in the same position as the mudflats the subject of this judgment. In considering evidence in a case such as this it has to be kept in mind that it cannot be contradicted. The natives alone know their tribal history and the Crown is unable to lead evidence in contradiction. The evidence is not by any means to be rejected on this ground but it can only be accepted as convincing when it is so complete and reliable as to compel the conclusion that it is correct. The evidence to our mind falls far short of what is required to support the claim.

As against the claim put forward the evidence shows that the mud flats have been used at low tides by anyone desiring to cross and there is no indication that the claimants have exercised any proprietary rights in respect of the land or of exclusive rights of fishing or otherwise. There is no attempt at the definition of the area and apart from the general statements made, there is nothing one could feel is reliable in the shape of evidence to suggest the continuous and exclusive use of this land by the claimants and their predecessors from time immemorial. The use of it on the other hand appears to be precisely similar to the use of the foreshore by the general public viz. at low tide it was used for the purposes of fishing, for the gathering of shellfish, for boating and in general in precisely the same way as the foreshore would be used. There is no indication that there were any special shellfish beds over which proprietary rights were exercised by any particular section of the people, nor is there any satisfactory evidence that the mudflats existed in 1840 in much the same condition as they appear today. We find it difficult to believe that if the native claimants thought in 1906 that they were entitled to these mudflats as papatupu land under the same ancestor and by virtue of the same occupation under which the title was awarded in the case of the Whakarapa block, they would not have put forward their claim.

In essence, then, the Appellate Court's view was that the Native Land Court did have a jurisdiction to issue certificates of title to land below high water mark, but that the burden of proof was on the applicants and the standard of proof a very high one.

3.2.3. Herekino

Another Northland harbour which was the subject of a foreshore claim in the Land Court was Herekino, south of Ahipara on the west coast. The claim was brought by one Toma Atama on behalf of the Maori people of Rangikohu. Once again the claim was opposed by the Crown, and in fact the case was a re-run of the Whakarapa case in virtually every respect. Sir Vincent Meredith also appeared for the Crown on this occasion. The concerns of the applicants related to access to coastal land and the damage caused by reclamation dams installed by a local farmer. Acheson found that the applicants were entitled to the area at issue on the basis of accretion to their own properties and also on the basis that it was uninvestigated customary (or papatipu) land. Said Acheson:¹⁵³

¹⁵³ Herekino case, provisional judgment of Judge Acheson, (1941) 72 Northern MB, 22 January 1941.

It follows from the above that the Court in the exercise of its judicial duty to deal justly and equitably with the Native claim, cannot accept the suggestion made on behalf of the Crown that the Natives are entitled to the bulk of the land west of the Herekino River under the Pakeha law as to accretion. The Court holds definitely that the Natives are entitled to all the land west of the River and shown on Plan 13805 because it is "papatupu" or Customary Land for which an order on Investigation of Title can and should issue. The fact that the Natives would also be entitled to this land under the Pakeha law as to accretion is beside the point. The Court declines to derogate from the papatupu right of the Natives by basing its decision upon the law as to accretion. Vital issues are at stake and no attempt at compromise should be allowed by the Court.

The Crown again appealed Acheson's decision to the Maori Appellate Court and was again successful. The Appellate Court treated the issue as basically one of accretion and, as in the Whakarapa case, found that the Land Court had no jurisdiction to deal with accretions to parcels of Maori freehold land. The accretions belonged to the owners of the existing individualised owners who needed to apply to the District Land Registrar for correction of the plans¹⁵⁴

3.3. *In re Ninety-Mile Beach*

3.3.1 The Land Court decision: In order to fully grasp the analysis of the all-important *Ninety-Mile Beach* case which follows it is necessary to understand something of the earlier legal history of the beach, and especially of the history of the alienation of the coastal blocks. There were two pre-emption era deed transactions which affected the beach frontage. These were:

- (a) *The Muriwhenua South deed* of 3 February 1858 (86,885 acres).
- (b) *The Ahipara deed* of 13 December 1859 (9,470 acres)

These transactions have been considered fully in the Muriwhenua Lands (Wai 45) case. Together these two earlier deeds accounted for a substantial amount of beach frontage. The Muriwhenua South purchase accounted for about 25 miles of beach frontage.

Neither purchase explicitly vests any of the foreshore in the Crown - although, as noted above, Crown land purchase commissioners may have acted on the assumption that a pre-emption era deed extinguished the Maori title over the foreshore. The Muriwhenua South purchase simply describes the boundaries of the block in the usual manner, that is by referring to various well-known vantage points. The western boundary of this quite substantial block is described (using the text and translation in *Turton*) as follows:

he Rae kowhatu te tohu, ko te "Arai", ka whawhati, ka rere tonu i te tai tuauru a, - tutuki noa ki "Waimoho".

Until it reaches the sea on the western coast at a well-known rocky point called Te "Arai", - here it turns, and follows the western coast line until it reaches the southern extremity of the boundary at a point called "Waimoho".

And for the Ahipara South deed:

marere noa ki te moananui; otira kei te Mapi o te Ruritanga, te tino tikanga o nga Rohe, me nga wahi i kapea mo nga maori, tutaki noa ki te timatanga o te kaha.

¹⁵⁴ Maori Appellate Court, judgment re Rangikohu Mudflats, Herekino harbour, 1 September 1942.

...following the survey line to the coast (Reserves excepted) until it joins the point where the boundary commenced.

The area between the northern boundary of the Ahipara block and the southern end of the Muriwhenua South block came into Crown hands via the convoluted ‘surplus lands’ process, on which a considerable volume of evidence has been presented to the Waitangi Tribunal in the course of the Muriwhenua Lands claim.¹⁵⁵ There were two ‘surplus lands’ or ‘old land claims’ blocks involved, known as Otaki and Okiore, which began life as pre-Treaty transactions but which were not finalised until the Bell Commission reported in 1862.¹⁵⁶

The pre-emption deeds and surplus lands investigations led to most of the beach frontage being in Crown hands before the Native Land Court was actually established, a fact that the Court of Appeal was quite clearly unaware of in 1961. The remaining areas were investigated by the Court in a number of hearings: the most important of these blocks was known as Parengarenga, the subject of very substantial hearings in the Native Land Court in 1896 and 1898.¹⁵⁷ There were also a number of investigations to small blocks around Ahipara Bay.¹⁵⁸

The starting point for the Ninety Mile Beach litigation was an application by W H Tepania seeking an investigation of title into land between the high- and low-water marks at Ninety Mile Beach. There were in fact two applications, one dated 16 May 1955 and the other 19 September 1957. The grounds for the application are set out more fully in the earlier application. These were, firstly, that “the said land is customary land having been at one time completely under the control and jurisdiction of a Maori, [namely]Tohe”; secondly that “the Maori food Toheroa shellfish have disappeared from the said beach”; thirdly, that “the Marine Department which of recent years exercised control of the beach has failed in its duty through its ignorance of the mana and tapu the Maori have on this beach and fishing ground”; and, lastly, that “only on the restoration of the beach and fishing grounds to the control of the Maori will the Toheroa shellfish food return to the beach”. Obviously toheroa was a critical matter. An order was sought vesting the beach in trustees.

The case was heard in the Maori Land Court at Kaitaia from 12-15 November 1957 before Chief Judge Morison. The application was opposed by the Crown, represented once again by Sir Vincent Meredith; and the applicants were represented by G.G. Dragicevich, a solicitor practising locally at Kaitaia. (It should not be assumed that this was a mis-match: Dragicevich was obviously a very competent lawyer who prepared his case thoroughly and who handed in to the Court comprehensive written

¹⁵⁵ R.P. Boast, *Surplus Lands: Policy-making and practice in the Nineteenth Century*, June 1992; Michael Nepia, *Muriwhenua Surplus Lands: Commissions of enquiry in the twentieth century*, 1992; David Armstrong and Bruce Stirling, *Surplus Lands: policy and practice: 1840-1950* (1993). The Waitangi Tribunal is yet to report on the Wai 45 claim.

¹⁵⁶ 1862 AJHR D-10.

¹⁵⁷ See (1896) 27 Northern MB 95 (judgment at p. 300); (1898) 28 Northern MB 35.

¹⁵⁸ The blocks investigated by the Native Land Court at Ahipara include the Pukepoto block, (1865) 1 Northern MB 7; Ahipara Beach, (1865) 1 Northern MB 7; and the Ahipara papatipu block, (1909) 43 Northern MB 185. Ahipara has a very complex title history, partly due to the consolidation schemes of the 1930s presided over by Judge Acheson; the final hearings relating to title consolidation at Ahipara are in (1930) 63 Northern MB.

legal submissions which reveal a sound grasp of the issues at stake: the presence of Meredith does not seem to have fazed him, and he went on to argue the appeals in the High Court and Court of Appeal himself¹⁵⁹.) But, of course, the factual inquiry by the Court was only a small skirmish in a much bigger battle - that being, of course, whether the Land Court had the jurisdiction to hear a case of this sort at all. Dragicevich called a number of witnesses, most of them kaumatua of Te Aupouri and Te Rarawa (their evidence has been discussed in earlier sections of this report). Meredith, obviously under instructions not to concede anything, argued that the claim was ‘almost fantastic’ and denied that the evidence as to rahui, bird catching, shark fishing, burial grounds, cemeteries along the beach and so on pointed to any kind of title. There was nothing special about Ninety-Mile Beach: “if held communal lands [the] same would apply all over New Zealand”.

Judge Morison accepted the arguments of the claimants.¹⁶⁰ His judgment is very brief (two pages). He began by noting that the application was for an investigation of title between high water and low water mark. If he thought that the application was anything out of the ordinary, there is no indication of this in his judgment, which basically follows the time-honoured practice of the Maori Land Court when dealing with an investigation of title. He went to identify the applicants, these being the Aupouri and Rarawa tribes, and noted that there was no dispute between them as to where the boundary was. He next listed the Crown’s reasons for opposing the application, pointing out that the only point the Maori Land Court was to determine was the matter of traditional ownership. Judge Morison went on to comment on the evidence, analysing it as showing that the beach was within the territory of the claimant groups, that they had urupa and kainga on the beach frontage, that the beach was regarded as exclusive property, that important resources were gathered from the beach and fished from the nearby waters, and that the beach was managed by the customary device of rahui. He concluded:

The Maori tribes must be regarded as states capable of owning territory just as much as any other peoples whether civilized or not: The Court is of opinion that these tribes were the owners of the territories over which they were able to exercise exclusive dominion or control. The two parts of this land were immediately before the Treaty of Waitangi within the territories over which Te Aupouri and Te Rarawa respectively exercised exclusive dominion and control and the Court therefore determines that they were owned and occupied by these two tribes respectively, according to their customs and usages.

The claimants, and Mr Dragicevich, had won the first round; but the much more arduous legal struggles still lay ahead.

3.3.2. Turner J's decision in the Supreme Court¹⁶¹

¹⁵⁹ Dragicevich argued the High Court appeal alone. For the Court of Appeal, where the Crown was represented by the Solicitor-General (Sir Richard Wild), Dragicevich wisely briefed a barrister (Sinclair), but he also appeared in the Court of Appeal and conducted part of the argument.

¹⁶⁰ The judgment is at (1957) 85 Northern MB 126: the judgment is included in the Appendix.

¹⁶¹ *In re an application for investigation of title to the Ninety-Mile Beach*, [1960] NZLR 673 (SC)

The second round was heard in the Supreme Court at Auckland in 1960 before Turner J. The principal question stated to the High Court under the “case stated” procedure, was, simply, whether the Land Court has a jurisdiction to conduct title investigations to the foreshore:

Does the jurisdiction of the Maori Land Court conferred by Section 161 of the Maori Affairs Act 1953 to investigate the title to customary land and to issue freehold orders in respect thereof extend to the investigation of title to and the issue of freehold orders in respect of land lying between mean high water mark and mean low water mark, which was at the time of the cession of New Zealand to Her Majesty the Queen under the Treaty of Waitangi owned and occupied by Maoris according to their customs and usages.

And to this, Turner J’s answer was “No”.

He began his analysis with a summation of what he saw as the relevant legal principles. First, at the date of the acquisition of British sovereignty, every part of the country was owned by Maori according to their own customs¹⁶². Secondly, following the “establishment of British rule in this country the whole of its area became the property of the Crown, from whom all titles must be derived.”¹⁶³ Thirdly, Turner J held that “the rights of the Maoris themselves as original occupiers of the country were reserved to them by the Treaty of Waitangi”. However, “the treaty itself gave no Maori or group of Maoris any legal cause of action”: it is not until the Crown’s policy is translated into statute that the Treaty can become enforceable in the Courts.¹⁶⁴

¹⁶² [1960] NZLR 674, following *Tamihana Korokai v. Solicitor-General* (1912) 32 NZLR 321.

¹⁶³ *Ibid*, 675.

¹⁶⁴ *Ibid*, citing and following the Privy Council’s decision in *Te Heu Heu Tukino v. Aotea District Maori Land Board* [1941] NZLR 590, [1941] AC 308. This of course raises the thorny question of the nature of the legal “status” of the Treaty at the present time. There seems little doubt that the decision in *Te Heu Heu Tukino* is still as good law as it ever was. In the most recent case in the Privy Council in which the status of the Treaty was in issue, counsel did not seek to challenge the rule in *Te Heu Heu*: see *NZ Maori Council v. Attorney-General* [1994] 1 NZLR 513 (PC), 515, per Lord Woolf:

Before the Board, the argument for the appellants is based entirely on s 9 of the SOE Act. The appellants have not attempted to challenge or avoid the decision of the Privy Council in *Te Heuheu Tukino v. Aotea District Maori Land Board* [1941] AC 308 (PC) where it was held that the Treaty of Waitangi was not normally enforceable by legal action.

Although some cases, both at the High Court level and in the Court of Appeal have flirted with creating an independent status for the Treaty (as in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210, per Chilwell J, and in Cooke P’s judgment in *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641, 655-56) orthodoxy has apparently now been reasserted by the Court of Appeal in *NZ Maori Council v. Attorney-General* [1992] 2 NZLR 576 [broadcasting assets], where, speaking for the majority (Cooke P. dissenting), McKay J. stated that “Treaty rights cannot be enforced in the courts except insofar as they have been given recognition by statute.” And in the most recent case in which the point has been raised, *New Zealand Maori Council v Attorney-General*, unreported, High Court, Wellington, C40/96 [Radio NZ case] McGechan J. had this to say (p.9):

I turn to the submission that the Treaty is directly enforceable. To so find is not open at High Court level. The decision of the Privy Council in *Tukino’s* case, and in Court of Appeal decisions which have followed it, are binding. The attitude which the Court of Appeal might take in view of the vintage of the case, and the current position of the Privy Council, is a matter for that Court itself. Least, however, this seem intellectually lazy, I record a view that a matter of such fundamental constitutional importance, with serious implications, should be decided only by legislation, and arguably by a referendum and legislation.

The Crown (represented by the Solicitor-General, Sir Richard Wild Q.C.) argued that the Land Court had *never* had a jurisdiction to issue titles to the foreshore. But Turner J. found it unnecessary to decide this. While the Crown's argument that it had owned the foreshore since the proclamation of sovereignty in 1840 "may well be acceptable" there was no need to determine the point: the question was whether the Land Court *now* had such jurisdiction.¹⁶⁵ It did not, as a consequence of the current configuration of statutes. Turner J held that s 150 of the Harbours Act 1950 (originally s 147 Harbours Act 1878) and s 35 of the Crown Grants Act 1908 (originally s 12 Crown Grants Act 1866) could only mean that the Maori Land Court had no jurisdiction to issue titles to the foreshore. Section 150, said Turner J. "appears" to prohibit the grant or conveyance of any part of the foreshore. No Act had been cited which was "authority for the grant or conveyance of any part of the foreshore"¹⁶⁶ The Harbours Act in effect prohibited "the Maori Land Court from so exercising its jurisdiction as to effectuate a Crown grant of foreshore to any claimant".¹⁶⁷

Turner J's position is, in effect, that the Harbours Act and the Crown Grants Act extinguished Maori aboriginal title to the foreshore (given that in 1960 the *only* way in which a Maori territorial claim to the foreshore could be asserted was by way of an application for a freehold order in the Maori Land Court). Given the stringent requirement that a statutory extinguishment must be "clear and plain" it is unlikely that a modern Court would be prepared to accept Turner J's approach and accept that these two statutes had such confiscatory consequences. Turner J himself thought it mattered not that the statutory provision relied on was somewhat obscure:¹⁶⁸

It might be said that it is a little curious that so sweeping a provision is to be found in the Harbours Act, which might perhaps have been expected to confine its provisions to matters affecting harbours. This is no stranger, however, than it is to find the the provision as to the title to the beds of navigable rivers which may be discovered in the Coal-mines Act; and I never heard that that section was the less effective in practice because it was to be found in that statute.

In any event, the Court of Appeal was to devise an alternative analysis.

3.3.3. The Court of Appeal decision in *Re the Ninety-Mile Beach*

The claimants appealed to the Court of Appeal from Turner J's judgment. In the Court of Appeal, judgments were given by North J and T A Gresson J.¹⁶⁹ North J described the claim to the beach as "novel", although this was not at all the case. Maori claims to the foreshore had been asserted continuously in a variety of ways over a period of many years, although this of course had been occurring in the Maori Land Court and before special commissions of inquiry (such as those established to consider Te Whanganui-a-Orotu) rather than before the ordinary courts.

¹⁶⁵ [1960] NZLR 676.

¹⁶⁶ [1960] NZLR 677.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *In re the Ninety-Mile Beach* [1963] NZLR 461.

The appellants, represented by Sinclair and Dragicevich, argued that there was nothing in the Native Lands Acts which prevented the Land Court from investigating titles to the foreshore. It had been held in *Tamihana Korokai v Solicitor-General* (1913) 32 NZLR 321 that the Court could investigate lake beds, so why not the foreshore?¹⁷⁰ The purpose of the Land Court, Sinclair argued, was to investigate and give effect to property rights recognised in customary law: “if Maori custom and usage proves ownership of land on the foreshore, then the Maori Land Court had jurisdiction to deal with it”.¹⁷¹ Reliance was also placed on North J’s judgment in the earlier of the two *Wanganui River* decisions of the Court of Appeal.¹⁷² It was argued that the Harbours Act was insufficient to deprive the Land Court of jurisdiction: although there could not be a grant of the foreshore except by statute “the Maoris did not require a grant but merely an investigation, and therefore a freehold order”.¹⁷³ Furthermore, anticipating the contemporary approach towards statutory extinguishment of aboriginal title, s 150 of the Harbours Act was simply not clear and plain enough.¹⁷⁴

Only a clearly defined statute can take away the Maoris rights; s 147 (or 150) do not amount to that.

For the Crown, Wild simply took the standard position that with the proclamation of sovereignty in 1840 the common law of England automatically applied. So the beds of lakes and the foreshore were not analogous at all. At common law the Crown owned the foreshore, but not the beds of lakes and rivers; similarly in New Zealand.¹⁷⁵

The legal result that the Crown contends for, namely the Crown’s ownership of the foreshore, was therefore the consequence of the assumption of sovereignty. It is for this reason that the Crown is able to contend in this case, as it could not in other cases involving Maori claims of a broadly similar nature, that whatever rights the Maoris had to the foreshore by custom and usage they lost when British sovereignty was assumed. In the *Tamihana Korokai* case...the Crown resisted the claim but could not take the ground that we take here. It could not say that the Crown had ownership of the bed of the lake, because there is no such common law rule.

The appeal was dismissed. The Court of Appeal placed primary weight not on statutes such as the Harbours Act, but on the consequences of an investigation of title to adjoining coastal block by the Land Court. The Court was not, however, prepared to hold that Maori title to the foreshore was defeated by the presumption of Crown

¹⁷⁰ Ibid, 462: “The query I raise is, if title could be investigated in regard to the lake in that case, why not with any other area? The language of Edwards J. (ibid., 350) acknowledges that the Maori Land Court has jurisdiction over all land whether above or below water.

¹⁷¹ Ibid.

¹⁷² Ibid, citing *In re the Bed of the Wanganui River* [1955] NZLR 419 at 466.

¹⁷³ Ibid, 463.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid, 464.

ownership at common law, and in this sense the Crown was unsuccessful. Neither North J. or T.A. Gresson J was prepared to accept the Crown's argument. North J. stated:¹⁷⁶

There is an attractive simplicity about this argument which for a time appealed to me, but on reflection, I have come to the conclusion that the learned Solicitor-General's contention is not well-founded and that the better view is that in early times the jurisdiction of the Maori Land Court was not limited to the investigation of title to customary lands above high water mark.

And T.A. Gresson J. made the same point even more strongly:¹⁷⁷

Prior to the passing of the Native Lands Act of 1862, the Crown in my opinion might have either advanced the contention either that customary Native title over the foreshore had been extinguished by operation of the Common Law, or that the Public Reserves Act of 1854 might be construed as implying that native title to the foreshore was extinguished. I doubt the validity of these submissions even prior to 1862, and the acceptance of either contention would involve a serious infringement of the spirit of the Treaty of Waitangi and would in effect amount to depriving the Maoris of their customary rights over the foreshore by a side wind rather than by express enactment.

For the Court of Appeal, the key event was the establishment of the Native Land Court with the Native Lands Acts of 1862 and 1865. Proceeding on the basis (incorrectly, as it happens) that the Native Land Court must have investigated title to the coastal blocks adjoining the beach, the Court of Appeal held that, if the Land Court did not stipulate that the foreshore adjoining the coastal block under investigation was included in the relevant title, then the Maori customary title must be treated as extinguished. According to North J:¹⁷⁸

I am of opinion that once an application for investigation of title to land having the sea as one of its boundaries was determined [by the Land Court] the Maori customary communal rights were then wholly extinguished. If the Court made a freehold order or its equivalent fixing the boundary at low-water mark and the Crown accepted that recommendation, then without doubt the individuals in whose favour the order was made or their successors gained a title to low water mark. If, on the other hand, the Court thought it right to fix the boundary at high-water-mark, then the ownership of the land between high water mark and low-water mark remained with the Crown, freed and discharged from the obligations which the Crown had undertaken when legislation was enacted giving effect to the promise contained within the Treaty of Waitangi. Finally, as it would appear must often have been the case, if in the grant the ocean sea or any sound bay or creek affected by the ebb and flow of the tide was described as forming the boundary of the land, then by virtue of the provisions of s12 of the Crown Grants Act 1866 the ownership of the land between high water mark and low water mark likewise remained in the Crown.

This amounts to a simple assertion that the process of investigation of title by the Native Land Court is sufficient to extinguish Maori title to the foreshore, and, by implication, to any other associated property rights not specified by the Court and included in the

¹⁷⁶ Ibid, 468.

¹⁷⁷ Ibid, 477.

¹⁷⁸ Ibid, p. 473.

subsequent Crown grant. This is a point worthy of pausing over. Why, logically, should the process of investigation of title to a coastal block operate in the manner that the Court of Appeal describes? If the title did not include the foreshore area, then the simplest and most natural conclusion is not that the area of foreshore was somehow vested in the Crown, but, rather, that it remained uninvestigated and was still Maori customary land. When it is said that the area of foreshore *remained* in the Crown it seems that underpinning this is a sense that in some way the Crown “owned” the foreshore to begin with - so that if the Land Court process did not include the area in the title the Crown merely retained a piece of land that already, in some sense or other, belonged to it. That is to see the Native Lands Acts as a process by which the Crown allowed a specialist tribunal to grant titles to land which was *already Crown land*. That assertion is not tenable and would be unlikely to be accepted by a contemporary Court.

Moreover, in *Te Weehi v Minister of Fisheries* [1986] 1 NZLR 680 (HC), Williamson J rejected an analogous argument that the grant of a Maori Land Court title to a coastal block extinguished fishing rights. It can therefore be argued that the grant of title to a coastal block should not extinguish property rights in the adjacent foreshore, or at the very least that the presumptions identified by the Court of Appeal in *Re the Ninety-Mile Beach* (above) should be reversed. In other words, if the Court order and the grant do not specify that the foreshore is included, then the presumption should be that aboriginal title to the foreshore is unextinguished.

The Court of Appeal did not place nearly as much emphasis on the provisions of the Harbours Act as did Turner J in the High Court. North J stated that the argument that the words “except as may already have been authorised by or under any Act or ordinance” in s 150 of the Harbours Act 1950 had “the effect of preserving the original jurisdiction of the Maori Land Court” had “some force”. He concluded, however, that in the end the “better view” was that the section ensured that the foreshore was not “disposed of by special Act of Parliament unless express authority to that effect had already been given in particular cases”¹⁷⁹. It remains open whether the Court of Appeal at the present day would agree.

Lastly, the factual problems with this case must not be lost sight of. The Court of Appeal constructed its analysis on a factual supposition - that is, that all the coastal blocks must have been investigated at some stage by the Native Land Court - which was quite incorrect.

4.0. The law of foreshore ownership: summary and analysis

The current law relating to foreshore ownership is hopelessly confused and unsatisfactory, and needs to be reconsidered. A number of statutes, as identified above, impact on the foreshore and appear to reflect a presumption of Crown ownership. In *Re the Ninety-Mile Beach* (above), however, the Court of Appeal did not accept that the common law presumption of Crown ownership automatically applied in New Zealand.

For the present it will be assumed that the Court of Appeal is correct and that the Crown cannot therefore claim to ‘own’ the foreshore by mere operation of law in New Zealand. That being the case, the Crown’s claim has to rest on some other basis. The first of these is statute. Here there are a number of possibilities: the Public Reserves Act 1854, the Harbours Acts, or the Crown Grants Act 1908. At no stage does it seem to have been seriously advanced that the Public Reserves Act could conceivably have the

¹⁷⁹ Ibid, 474.

effect of cancelling Maori title to the foreshore and vesting it in the Crown. The Harbours Act is a more likely possibility. However, firstly, the Harbours Act has now been repealed by the Resource Management Act 1991 which made no attempt to protect anterior vestings under the Harbours Act as was done for the Coal-mines Amendment Act 1903 or the Geothermal Energy Act 1953. It is in any case doubtful that the Harbours Act could in any event meet the current stringent standards relating to valid statutory extinguishments of aboriginal title. The Crown Grants Act 1908 is only a conveyancing presumption. Even in *In re Ninety-Mile Beach* it was seen as being of subsidiary importance. There are no other statutes which explicitly vest the foreshore in the Crown and extinguish Maori title. Therefore the Crown's claim to the foreshore cannot rest on statute either.

Another possibility is that advanced in *In re Ninety Mile Beach* : the process of investigation of title by the Native Land Court cancelled Maori title to the foreshore in all instances where foreshore areas adjacent to coastal blocks were not specifically included in the certificate of title and the Crown grant. This matter has already been considered fully in the detailed analysis of *In re Ninety-Mile Beach* above. The suggestion is advanced that the Court of Appeal is simply wrong, for a number of reasons. Firstly, there just seems to be no reason why the title investigation process should have the effects that the Court of Appeal attributes to it. If the area of foreshore is left out of the title, logically all that can mean is that it was uninvestigated and remains customary land. Secondly, the Court of Appeal's analysis seems to be based on a view of the law relating to Native title which is at variance with contemporary understanding, especially in its view that the foreshore was in some sense Crown property before the Land Court title investigation process was established. A modern Court would find it very hard to see why the foreshore should "remain" in the hands of the Crown should the Land Court fail to include it in the title. Such a view could only be based on the understanding that Maori title to the foreshore had already been extinguished in some manner before 1862, but no basis for this assumption was put forward by the Court of Appeal in the case, and in fact there is none. And thirdly, the Court of Appeal operated on a set of factual assumptions which were not in fact correct. The Court was quite clearly under the impression that all land fronting on the beach (and perhaps all land in New Zealand) at some stage "passed" the Native Land Court. But this is (of course) not correct. The Court gave no consideration as to what presumptions should apply where coastal title was extinguished by means of pre-1862 deed of cession, or by means of some other mechanism - such as that applying to "surplus" lands.

In fact the Crown's best claim to the foreshore is probably one which has received no recognition in any of the authorities. There is no reason why Maori could not sell and the Crown could not purchase areas of foreshore if that was what both parties so desired. The relevant deed and the subsequent proclamation would still have to meet the "deliberate act authorised by law and unambiguously directed towards that end" test of *Faulkner* and other cases. Should it do so, there is no reason to suppose that an area of foreshore in such a case has been validly alienated to the Crown.

What this means, then, is that *some* of the foreshore may have been alienated, and much of it not. Where it has and has not been would require an understanding of the legal history of the piece of coast in question. This would involve checking whether the area has been the subject of a deed of cession, and, if so, what it happened to say about the foreshore. One wonders, however, whether it ought now be necessary to go to such lengths and to expend time and energy on the necessary research. Before some

suggestions are made as to the various options it is, however, necessary to review briefly the law relating to coastal *management*.

5.0 Coastal Planning: the Current Legal Framework

5.1. Introduction

5.1.1. Ownership and management This section will discuss briefly the current law relating to the *management* of the coast (including the foreshore). Management and ownership are, of course, completely different things: resource management (or ‘planning’) law is designed to apply generally irrespective of current land titles.¹⁸⁰ The present law relating to land and coastal management is contained in the Resource Management Act 1991, which applies to all land without exception, whether general land, Crown land, or Maori freehold or Maori customary land.

The earlier sections of this report were concerned with the vexed question of ownership of, or title to, the foreshore. It has to be recognised, however, that even if it is the case that the foreshore is still uninvestigated Maori customary land, nevertheless the land will still be controlled by the coastal management provisions of the Resource Management Act. The impacts of ‘management’ law on rights of ‘ownership’ can be severe, sometimes reducing rights of ownership to an empty shell.

From the enactment of the Town and Country Planning Act 1977 until the enactment of the Resource Management Act 1991 the law relating to land-use planning and (for lack of any better terms) ‘Maori-related’ or ‘Treaty’ issues grew increasingly complex and confused¹⁸¹. There were developments in a number of areas: the interpretation of section 3(1)(g) of the Town and Country Planning Act 1977¹⁸², water resources,¹⁸³ mining,¹⁸⁴ geothermal resources,¹⁸⁵ and environmental impact reporting

¹⁸⁰ However the dichotomy between ‘ownership’ and ‘management’ law can sometimes be pushed too far. To common lawyers, the right to ‘manage’ is an integral aspect of the right to ‘own’. If rights of management are virtually wholly stripped away it may be doubtful whether what remains can be meaningfully described as ‘ownership’ at all. An example from another context is geothermal resources. Although they may be privately owned at present, the management regime laid down by the Resource Management Act is so all-encompassing that even if there are private property rights in the resource, these have been rendered fairly meaningless. In other words laws which on the face of them deal merely with “management” can in fact impact significantly on “ownership”.

In the law of the United States, as a result of the “takings” clause of the Fifth Amendment (“nor shall private property be taken...without just compensation”) there is a huge body of law and commentary on “compensable regulation”, to which there is no direct New Zealand equivalent. Often courts will adjudge regulatory (or management) statutes to amount to *de facto* “takings” and thus unconstitutional unless full compensation is available. Many of the somewhat punitive land use controls typical of New Zealand, which can throw the costs of public issues such as safeguarding native forests onto private landowners and impose severe costs, would be unconstitutional in the United States.

¹⁸¹ For a full discussion see R.P. Boast and D.A. Edmunds, *The Treaty of Waitangi and Maori Resource Management Issues*, in Brooker’s *Resource Management*, vol 1A, especially chap. TW2.

¹⁸² Section 3(1)(g) listed as one of seven “matters of national importance” to be “recognised and provided for” in “the preparation, implementation, and administration of regional, district, and maritime schemes”... “the relationship of the Maori people and their culture and traditions with their ancestral land”. See especially *Royal Forest and Bird Protection Society v. Habgood* (1987) 12 NZTPA 76 (on the meaning of “ancestral land”).

¹⁸³ Here the main issue was whether Maori spiritual and metaphysical values were relevant to the “benefit/detriment” test governing applications to take or discharge into water pursuant to the Water and Soil Conservation Act 1967. The issue was mainly of importance in inland waters rather than the coast: see *McKenzie v Taupo County Council* (1987) 12 NZTPA 83 [Planning Tribunal]; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 [HC]; *Electricity Corporation of New Zealand v Manawatu-Wanganui Regional Council*, W 70/90 [Planning Tribunal (Wanganui River minimum flow levels)].

and assessment. The Waitangi Tribunal was concerned about aspects of the law at the time, and in its *Mangonui Sewerage Report*¹⁸⁶ drew attention to the deficiencies of objection rights in the various statutes and the need for representative institutions to be established:

The objection rights in planning laws do not fulfil Treaty obligations when there is not the facility for prior consultation with local tribes. The practical difficulty is that, through the neglect of tribal rights in former years, there is now a dearth of legally cognisable institutions representative of the tribes readily able to formulate a tribal position. Subject to the provision of such institutions, which in our opinion the Crown must now provide, the Planning Tribunal should have power to defer proceedings where in its opinion consultation is required.

The two principal policy papers initiating the long process which led eventually to the enactment of the Resource Management Act 1991 and the Crown Minerals Act 1991 were both prepared by officials of the Ministry for the Environment and released for public discussion in 1988.¹⁸⁷ Both reports strongly emphasised that the new legislation would be concerned only with resource *management* and that the review process was not an appropriate vehicle for considering problems relating to resource ownership. It was, for example, stated:¹⁸⁸

Government has agreed that the Resource Management Law Reform is not the appropriate place to resolve ownership grievances, and that issues relating to Maori ownership of resources not be dealt with in this review.

The reform process was a vast and complicated exercise as it was, and could hardly be burdened with the difficult problem of resolving ownership questions as well. However, the fact is that 'ownership' and 'management' are not as easy as it might seem to disentangle. A legal regime ostensibly concerned with management can restrict rights of ownership quite severely. The coastal management provisions of the Resource Management Act 1991 are a good example.

5.1.2. Coastal planning: Coastal planning now has a quite distinctive framework under the Resource Management Act 1991 and differs in a number of ways from ordinary planning law. The legislation goes to elaborate lengths to give special

¹⁸⁴ One issue that made national headlines concerned iron sand mining at Maoro, Waikato Heads, where Ngati Te Ata objected strongly to the mining, especially after portions of human remains turned up in the conveyers at the New Zealand Steel mill at Glenbrook. Also important were Maori objections in various applications for mining consents under the Mining Act 1971.

¹⁸⁵ See generally R.P. Boast, "Geothermal Resources in New Zealand: A Legal History", (1995) 6 *Canterbury Law Review* 1.

¹⁸⁶ Wai 17, Waitangi Tribunal, Wellington, 1988.

¹⁸⁷ *Directions for change: a discussion paper*, Ministry for the Environment, Wellington, August 1988; *People, Environment and Decision-making: the Government's proposals for resource management law reform*, Ministry for the Environment, Wellington, December 1988. Both these documents are written in a highly opaque and very generalised style and it is not always easy to envisage from them what exactly is being proposed.

¹⁸⁸ In *Directions for Change*, supra, at p. 15.

prominence to the Department of Conservation. The main provision is section 56, which requires that there shall be at all times at least one New Zealand Coastal Policy Statement (“NZCPS”), which applies to the whole of the “coastal environment” (which is not defined in the Act, but which is certainly a much bigger area than the foreshore). There is a binding obligation on the Minister of Conservation to prepare the NZCPS¹⁸⁹ which may state policies on, inter alia, “the protection of the characteristics of the coastal environment of special value to the tangata whenua including waahi tapu, tauranga waka, mahinga maataitai, and taonga raranga”¹⁹⁰. The Resource Management Act and the existing NZCPS certainly do give a degree of prominence to what can be generally regarded as “Maori issues” or “Maori values”, but, of course, only as part of a general management framework in which the principal role is played by the Department of Conservation and by the Planning Tribunal.

The NZCPS is an important document. It overrides all other local authority policy statements and plans,¹⁹¹ and all consent authorities, when hearing consent applications relating to the coast, are directed to “have regard” to it. The NZCPS is therefore certain to feature prominently at all consent hearings relating to the coast.

In general the Resource Management Act forbids private development over the foreshore and seabed. Section 12 of the Act provides that no person may reclaim any foreshore or seabed or carry out a number of activities and works over any foreshore or seabed in any part of the “coastal marine area” unless allowed by a rule in regional coastal plan. As noted, such plans must be consistent with the NZCPS.¹⁹²

5.1.3. Regional coastal plans: Under s 64 Resource Management Act there is required to be in operation at all times a regional coastal plan. These plans apply not to the “coastal environment”, as the NZCPS does, but to the coastal marine area as defined in s 2, that is, the area between high water mark and the outer limits of the territorial sea. Regional councils are also required to produce regional policy statements,¹⁹³ which the Act anticipates will also deal with the coast where appropriate. For example, s 62(2) provides that a regional policy statement may not be inconsistent with the NZCPS. It should be noted that when “preparing or changing” any regional plan, a regional council must “have regard to”, inter alia, “the Crown's interests in land of the Crown in the coastal marine area” (although precisely what those interests might be, as this report has attempted to demonstrate, is debatable); any “relevant document recognised by an iwi authority affecting the regional plan”, and any “regulations relating to the conservation or management of any taiapure or fisheries”.¹⁹⁴

¹⁸⁹ Resource Management Act 1991 s. 57.

¹⁹⁰ Resource Management Act 1991 s 58(b).

¹⁹¹ Resource Management Act 1991 ss 67 (2) and 75 (2). If there are inconsistencies between the NZCPS and any local authority policy statement or plan then the latter are required to be changed.

¹⁹² See *Hilder v Port of Otago Ltd* [1996] 1 NZLR 289.

¹⁹³ Resource Management Act 1991 ss 59-62.

¹⁹⁴ See Fisheries Act 1983 Part IIIA

5.1.4 Summary: This report does not pretend to be an exhaustive summary of the law relating to the Resource Management Act 1991 and the coast. The principal reason why this section has been included is to make the point that a legal regime ostensibly concerned with ‘management’ can have significant implications on rights of ‘ownership’ and, indeed, that the distinction between the two is somewhat artificial.

Should areas of foreshore be returned to Maori but the current law relating to management be unchanged, it is not easy to see what the point of the exercise could conceivably be. All coastal development will still remain subject to the Act, meaning in effect that it would be governed by the terms of the statute and the subsidiary planning instruments which it puts in place: the NZCPS and regional coastal policy statements and plans. □

6.0. Conclusions and options for reform

The present author has no wish to contribute towards any change to the current situation of open access to the foreshore and the coast. This is an important part of New Zealand life. To see the foreshore fenced about, partitioned off, hedged with trespass notices and so on would be a disaster and a diminution of important rights which all New Zealanders have long taken for granted.

As indicated above, the correct answer to the question as to who owns the foreshore is probably that the Crown owns some of it, and the rest of it might well have the status of Maori customary land. Elaborate and costly surveys to find out the limits of old pre-emptive purchases and an analysis of their provisions seems to be an unattractive option. Another possibility might be to restore the Land Court's jurisdiction to issue titles to areas below high water mark, and at the same time to amend the provisions in Te Ture Whenua Maori imposing a limitation period of 12 years for claims against the Crown relating to customary land. Both these options could, however, lead to a privatised foreshore. Few New Zealanders would find such an option attractive, one suspects.

One alternative might be to simply definitively vest the foreshore in the Crown - as has been done, after all, with the land between low-water mark and the outer limit of the territorial sea. Such an action would have the effect of focusing attention on the issue and might cause significant resistance. It would also amount to a straight expropriation of private property rights, and would follow the example of precedents such as the Coalmines Amendment Act 1903 which might be seen as undesirable at the present time.

Another option is that some wholly new form of title might be devised - perhaps a "Treaty" title, which would reflect both the historic claims of Maori and the importance of public rights of access at the present day. Whether these objectives must necessarily be competing is uncertain. Another possibility is a Trust model of some kind. The Crown has on a number of occasions claimed that it holds the foreshore in Trust. Possibly this could be reconstituted, with the foreshore being specifically vested in a separate trust in which the Crown and Maori have beneficial interests.

Finally, one supposes, there is another option - and perhaps the most likely one to be realised - which is to do nothing at all and leave the matter of foreshore ownership debatable and ambiguous as it always has been. It is perhaps not always wise to insist on absolute clarity.

□

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APPENDIX: SELECTED PRINCIPAL DOCUMENTS

1. KAPANGA PARUMOANA NO 2 CASE, (1872) 2 Coromandel MB 315-6

At a sitting of the Native Land Court at 10 a.m. Wednesday May 15, 1872

Present: F.D. Fenton, Esq., Chief Judge.

Assessor: W.M. Hikairo

Mr Rees and Mr Hesketh applied to be allowed to appear as Counsel in certain claims - granted.

Mr Jas. Russell also applied - granted

Kapanga Parumoana No 2

Claim read - Pita Taurua called. Dead.

Mr Rees and Mr Russell appeared as Counsel in this Claim.

Mr MacCormick appeared on behalf of the Crown and produced and read a proclamation suspending the operation of the Native Lands Court below high water mark in the Province of Auckland.

Mr Hammond, Interpreter to Native Land Court.

Interpreted to the Natives the Proclamation suspending the operation of the Native Lands Court to adjudicate upon lands below Water Mark in the Province of Auckland.

DAILY SOUTHERN CROSS, Thursday 16 May 1872

NATIVE LANDS COURT - Wednesday - Before Chief Judge Fenton and Wi Hikairo, Native Assessor.

COROMANDEL FORESHORE - The claims to the Coromandel foreshore were called on for investigation. Messrs Hesketh, Rees, James Russell and Graham appeared for various claimants. Mr MacCormick appeared on behalf of the Crown. When the first case - Kapanga Parumoana No 2 - was called on, Mr MacCormick produced a proclamation by the Government, dated May 14, and issued under the 4th section of the Native Lands Act, 1867, defining all that portion of the province of Auckland situated below high-water mark to be a district under that section; also suspending the operation of the Native Lands Act within that district. The effect of this proclamation will be to place these cases without the jurisdiction of the Court. Mr MacCormick asked the permission of the Court to state the reasons which had induced the Government to issue the proclamation. He said: I am instructed to state that the Government think it necessary to the public good to suspend for a time the hearing of these claims to the foreshore at Coromandel. It is considered that if these portions of the foreshore were given to the natives a great wrong would be done to the people living at Coromandel, and particularly to the Europeans who own lands there fronting the harbour. It would not be right for the natives, after they had sold land bounded by the sea-shore, to come now and ask to have the right to use this sea-shore taken away from those persons and given to the natives alone, as the claimants here are doing. This is a new thing, this claiming the use of the seashore for the natives only; it was not heard of before gold was found on the beach, and the Government must take time to consider which is best to be done both for the Maori and the European in the matter. It may be necessary that the question of what is to be done with all the claims by natives to the sea-shore should be considered in the General Assembly, where there will be natives to take part in the deliberations upon it. I am, therefore, instructed to impress upon the natives that the hearing of these claims

is only deferred, not refused; and that the Government have not the wish, as they certainly have not the power, to deprive the natives of any just rights they may have to the foreshore. I am also to state that, in consideration of the hearing of these claims having been delayed some time for the convenience of the Government, the Government will pay the claimants their reasonable expenses in attending the Court in Auckland. If the claimants will apply to me immediately after the rising of the Court I will settle with them, but they must distinctly understand the Government do not acknowledge any claim.

Editorial comment, *ibid*:

THE action, taken by the Government with reference to the Native claims to certain portions of the foreshore at Coromandel, although rather unusual, will, we are sure, meet with general approval. We have before drawn attention to the necessity for legislative enactment defining what will be recognised as constituting a legal claim to the beach; and we have no doubt that action would, under any circumstances, have been taken in the matter during the coming session of the Assembly. But in the meantime applications had been made in the Native Lands Court for a certificate of title to an important section of the beach at Coromandel; and had not prompt measures been adopted to protect public and private interests involved, it is not impossible that the natives might, under the present indefinite state of the law upon the subject, have established a claim fully as strong as that which was held to entitle them to the exclusive use of the Shortland beach. The effect of such a title would have been most damaging to the interests of private individuals who years ago purchased land abutting on the beach, under the impression that, in so doing, they were acquiring a water frontage, which could not, at any future time, be rendered unavailable. Under these circumstances it was necessary that some decisive action should be taken to prevent the sanctioning of such rights until the matter had been brought under the notice of the General Legislature; and with this view, as will be seen by our report of the proceedings in the Native Land Court yesterday, his Excellency the Governor has been pleased to bring into operation that clause of the Native Lands Act, 1867, which enables the operation of the Act to be suspended within any specified district, and, by proclaiming the whole of the foreshore a district within the meaning of the Act, has removed such claims altogether beyond the jurisdiction of the Court. We believe His Honor the Superintendent has been most urgent in his advocacy of this course; and, together with Mr MacCormick, who was engaged to watch the interests of the Crown, pressed the matter upon the attention of the Hon. Defence and Native Minister,¹⁹⁵ who, being fully alive to the importance of the matter, brought it under the notice of his Excellency with the result just stated. As Mr MacCormick remarked in the Lands Court yesterday, claims to the beach are a comparatively new feature in native land claims, and there is but little reason to doubt that it would never have occurred to the natives to lay such claims but for the kindly suggestions of some of their European friends. Under existing law, native fisheries and mineral land below high-water mark are recognised as being subject to the native title, and the former of those qualifications was held sufficient in the case of the Shortland beach to alienate from the Crown the use of a large portion of the foreshore. The Coromandel claims introduce a feature that has not before cropped up, and will show those of our readers who are not acquainted with the nature and effect of those beach claims how important they are. A very large portion of the beach, which is the subject of the pending actions,

¹⁹⁵ At this time, Sir Donald McLean.

fronts land purchased by private individuals years ago, and over which the native title has been altogether extinguished. The township of Kapanga is one portion of this property. Now, supposing that this township had been extensively built upon, and the native claims to the beach were subsequently recognised, the entrance to the place would have been completely blocked up. Indeed there is nothing to prevent such claims being made for portions of the beach abutting on the Waitemata harbour, and when it is considered how easy it might be for the natives to prove that their ancestors had fishing grounds in Mechanics', St George's, Judge's, or Freeman's Bay, we cannot be at all certain that such claims will not actually be made, unless the law is so framed as to render such claims inadmissible. We believe the Government are preparing a measure to deal with this grave question, and that the bill will be brought forward next session of the Assembly. The question is altogether a difficult one to deal with, for while it is necessary that the public interests involved should be stringently protected, it would be unfair under all circumstances to deprive the natives of their rights to fisheries which may be of great value to them. We think, however, that whatever provision may be made in the bill for the recognition of such rights it should be held that wherever the natives have disposed of land abutting upon the seashore, whether by sale or otherwise to the Crown or to private individuals, such alienation should be regarded as a tacit relinquishment of all claim to the beach in front of the property disposed of, unless there was a distinct understanding to the contrary at the time of the sale.

□

**2. Crown Law opinion on foreshore area at Wenderholm, 10 December 1915
(M 1, 4/2212, NA Wellington)**

Under Section 10 of the Reserves and other Lands &c. Act 1910 the Auckland Land Board was authorized to dispose of certain land situated below high water mark to the adjoining owner. The land was accordingly disposed of to Major Whitney, the adjoining owner, and I am asked to advise whether, as section 42 of the Harbours Amendment Act provides that no land shall be reclaimed from the sea except under the authority of a special Act, the land can be reclaimed without any further statutory authority.

There is no question that if it had been declared in section 10 that it was deemed to be a special Act authorising the reclamation then that would have been sufficient. The position therefore is, can section 10 be held to be a special Act without any such declaration. There is no definition of the term "special Act" as used in the Harbours Acts but every section of an Act is a substantive enactment and if it dealt with a particular matter could itself be held to be a special Act. In the preamble of section 10 it is stated that the land is situated below the ordinary high-water line and that the owner is desirous of acquiring the said land for the purposes of reclamation and protection from erosion. This preamble is part of the section intended to assist in explaining the purport and object of the section. It seems clear from this Preamble that Parliament intended that the adjoining owner, if he acquired the land, should have authority to reclaim it. For the reason set out in the preamble, the land would be no use to him unless he could reclaim it. Under these circumstances I think that section 10 should be construed as a special Act and as a sufficient authority to make the reclamation without requiring any further legislation, provided that a proper plan is deposited at the office of the Marine Department. I gather from the papers that a plan has been so deposited.

E.Y. Redward, Assistant Law Officer, Crown Law Office, 10th December, 1915.

□

**3. Opinion of John Salmond, Solicitor-General, on Napier Inner Harbour
L&S 29057, NA, Wellington**

Inner Harbour, Napier

On examining the Deed of Purchase from the Natives of the Ahuriri Block, it would seem clear that the purchase does not include the Inner Harbour. The description in the body of the deed shows the boundary as following the interior lines of the harbour. It is true that the plan attached to the deed would, by its colouring, indicate the inclusion of the inner harbour. This, however, I take to be an error and the exterior red line on the plan must be taken to refer merely to the spit of land lying between the inner harbour and the sea. I agree, however, that the question is of no practical importance. The inner harbour, whether included in the Crown purchase or not, is tidal water and the limits of Native customary title are high water mark. Whatever the title of Natives may be to inland tidal waters they have no title to any part of the sea, whether land-locked or otherwise. This seems to have been determined by the Court of Appeal in *Waipapakura v. Hempton* 33 NZLR 1065.

There is no reason why Mr C.B. Morison should not be allowed to see the plan attached to the Deed and the description of land in the body of the Deed. He should not, however, be permitted to make a copy of the Deed or to make a list of the signatories.

If this case goes to the Native Appellate Court I think it important that the Crown should be represented and I suggest that you should make the necessary arrangements with the Native Department so that the proceedings will not come on for hearing without due notice to the Crown and due opportunity of being heard.

John Salmond,
Solicitor-General.

Crown Law Office,
28th August, 1916. □

4. Extracts from CL 174 [Rotorua Lakes]

4.1. From CL 174/1

extract from Earl KC's argument:

...I suggest that certain clauses in that Bill [Native Lands Act 1909] were drawn for the special purpose of defeating the claim to these Lakes. I refer to the Act of 1909 sections 84 to 100. They were directly intended to affect the claims made by the Arawas for possession of these Lakes.

Also Section 84 has been amended and section 100 which was the most outrageous section of all, I am glad to say has been repealed.

On the opposite page of the transcript, next to the above passage, is the following annotation:

No! Arose out of claims at Napier.

4.2. CL 174/2

Crown's legal argument in Rotorua Lakes case

In *Tamihana Korokai v Solicitor-General* an attempt was made to get the Supreme Court to decide as a matter of law the legal position of the inland lakes and waters of this country. Unsuccessful. The Court decided merely that the Native customary title might exist in respect of such waters but that the question whether it does exist is a matter for the Native Land Court. A question of fact or of mixed law and fact such that the Native Land Court could alone determine it on the facts of each particular case. Hence these proceedings.

Extraordinary nature of claim. A claim by Natives to obtain a grant of the fee simple of the whole of the inland navigable waters of the Dominion. Such a claim was never made in any other country or at any other time. If well-founded it is a national misfortune. If valid it might have been made at any time since the Native Land Act 1865, and it is not surprising that the Natives have had to wait until now to find legal advisers ingenious enough or courageous enough to advance it.

No existing freehold title to Lake Rotorua. This is common ground. The boundary of the freehold titles is the edge of the lakes. The presumption as to *ad medium filum* is merely a presumption and is easily capable of rebuttal. *Taupiri Coal Mines Company v. Mueller*. It may be doubted indeed how far it applies to a lake at all owing to the irregularity in its shape and the impossibility of saying what the *medium filum* is. In any case, however, it is rebutted where the grant of freehold consists of or is based upon a freehold order.¹⁹⁶ The freehold title cannot extend further than the Land investigated by the Court. *Non constat* that if the Lake is owned by the Natives at all it is owned by the same Natives as those who own the adjoining land. It may be taken as admitted therefore that the Lake is either Native customary land or Crown land free from Native ownership.

¹⁹⁶ I.e. a freehold order made in the Maori Land Court.

Native title is not universal. It is not true that the whole of New Zealand, whether land or water, is necessarily the subject of Native title except so far as such title has been extinguished by cession, forfeiture or otherwise. It is not true therefore that Rotorua must be awarded to the Natives unless the Crown succeeds in proving cession or forfeiture.

- I. *Tamihana Korokai's case*. Read Edwards J. as to position of lakes.
- II. *Waipapakura v. Hempton* 33 NZLR 1065 as to tidal waters not being Native land.
- III. Even in the case of dry land, although in general a Native owner can be found for every acre, this is a matter of fact and evidence not law. Read Royal Instructions of 1846. *Tamihana* page 51 of printed case. Read Stout's Judgment in *Tamihana's case*.

There may be areas of land in which no Native title can be shown to exist, No Man's Land.

The burden of proving title is therefore on the claimant. It is not for the Court to assume that the land is Native land if no cession or confiscation proved and then to proceed to award it to the first claimant. If no claimant can prove his title it is not Native land at all.

It is admitted that some waters are the subject of Native title and that freehold orders can be made in respect thereof. The question in issue relates only to navigable waters whether rivers or lakes. Un-navigable waters, small streams, lagoons, or lakes are merely appurtenant to the adjoining land and go with it in title. It does not follow, however, that because some water is the subject of Native title all water is. Navigability is of course a question of degree. Water may be navigable for a canoe but not for a battleship. The test of navigability will be dealt with later. In the meantime it is sufficient to say that contention of the Crown is limited to navigable waters.

It is true that in certain previous cases freehold orders have been made in respect of comparatively large sheets of water such as Lake Wairarapa and Lake Tarawera. This fact in no way, however, determines the question now in issue. It was not until Native claims reached such areas as Rotorua, Taupo, Wakatipu, or the Wanganui River, that the importance of the question was realised and brought up for definite discussion and decision.

No freehold order can be made in respect of mere rights of fishery, navigation, or other incorporeal rights. A freehold order must be based on the Native ownership of the land itself.

A freehold order cannot create a mere incorporeal hereditament. *Waipapakura v. Hempton*, 33 NZLR 1069. Native Land Act 1909, sections 92, 93, 95.

The Natives' right to obtain a freehold order for Lake Rotorua is contested by the Crown on several grounds:

- I. That Native custom does not recognise any exclusive ownership of navigable waters but merely rights of fishery and navigation.
- II. That even if Native custom does recognise such ownership such a claim has not obtained legal recognition and validity under the Native land legislation.

III. That Lake Rotorua has been for more than ten years prior to 1909 in the possession of the Crown free from Native title and therefore that Native claims are barred by Section 87 of the Native Land Act 1909.

IV. That Native title, if it exists at all, is limited to such parts of the Lake as can be proved to have been the subject of exclusive rights of fishery on the part of the Natives.

I. No ownership by Native custom

(1) A question of fact except so far as Native custom may be judicially noticed in this Court. It is for the claimants to produce evidence that Native custom recognises exclusive proprietary rights of ownership in navigable waters.

(2) Opinion of Edwards J. in *Tamihana's case*.

(3) Surprising if Rotorua and Taupo are owned by Natives. They never discovered the fact until a few years ago. It seems to have taken the acumen of their legal advisers to remind them of the fact that by Native custom they have been the owners of these waters from the commencement of the Colony without being aware of the fact.

(4) Ownership involves exclusive possession and use for all purposes. Fishing rights and navigation rights are different from rights of ownership. It may well be that particular parts of Rotorua have been by native custom recognised as being subject to exclusive rights of fishery, but this is a different thing from saying that these parts of the Lake are the exclusive property of the Natives.

(5) The most important fishing rights are in the sea and doubtless by Native custom exclusive rights of fishing in different parts of the sea belonged to different tribes or hapus but did the sea belong to the Natives by Native custom in the sense in which the land belonged to them. No. They owned fishing rights in the sea and not the sea itself. So here they own fishing rights in Rotorua, not Rotorua itself.

(6) Conflict between fishing and navigation. A general right, in all the adjoining tribes to navigate are together with an exclusive right in particular tribes or hapus to fish in certain parts of it. Who then are the owners? Is ownership based on the right of navigation or is it based on fisheries? Are the owners of any part of the Lake the Natives who have an exclusive fishery there subject to a right of navigation on the part of the other tribes, or are the Natives having rights of navigation the owners of the whole Lake subject to their rights of fishery in particular parts? Either answer is absurd because to recognise fisheries as rights of exclusive ownership would destroy the Natives' rights of navigation, and conversely to recognise navigation as a right of ownership would destroy the right of fishery, for a freehold order is absolute and admits of no qualification by way of easement or encumbrance. To give effect to Native rights in the Lakes therefore it must be recognised that these rights are not rights of exclusive ownership but incorporeal rights capable of concurrent exercise by different persons over the same portions of the lake.

(7) It may be suggested that since some waters are admitted to be the subject of Native ownership, it is impossible to draw a line and say that other waters, however extensive, are not in the same position; that this is merely an impracticable distinction of degree. It is a difference in degree but by no means impracticable, the smaller the water the more probable it is that Native custom regards it as merely appurtenant to the adjoining land and as forming part thereof and held in ownership by the same title. The larger the water, on the other hand, the more probable it is that Native custom did not recognise it as part of the land but as distinct from the land just as the sea is and not the subject of exclusive possession and ownership like the land. In particular this is so where the water is so large as to serve as a public navigable highway. Natives on the

shores of Lake Taupo did not think that they owned the Lake anymore than Natives on the shores of the sea thought they owned the Pacific Ocean. In each case what they claimed was a right of fishery and navigation. Each case must be judged on its own merits having regard to the size of the water and its use or utility for the purpose of navigation. If some tribe had claimed to own part of Lake Taupo because they had a right to fish there, the other tribes would dispute such a claim of ownership because they possessed a right of navigation over the same water. So conversely.

II. Even if Native custom did recognise the ownership of inland navigable waters such a claim has not obtained legal recognition or validity under the Native Land legislation.

(1). Native custom has not in itself the force of law. Native title is not in itself entitled to legal recognition. Nor has the Treaty of Waitangi in itself any legal force or efficacy. Native custom, Native title and the Treaty are in force in law only because and only insofar as they have been given legal validity by the Native land legislation of the colony. In the old days prior to the first Native Lands Act, Native title was given legal effect only by voluntary grants from the Crown. Since that Act it has had statutory effect. But the extent of the right depends on the extent to which it has so obtained statutory recognition, and it does not follow that everything that was recognised as the subject of the Native ownership is now the subject of legal title under that legislation. This depends on the true construction of the Acts and with the express or implied limitation existing in these Acts.

(2). This Native title is limited by high water mark. *Waipapakura v Hempton*. This is not a decision as to the extent of ownership as recognised by Native custom. It is a decision that whatever Native custom may be such title has not received legal validity from the statutes. Native title does not therefore extend over the whole of New Zealand. It does not include the foreshore - that is to say the land lying between high and low water mark. Nor does it include bays, harbours, estuaries and other territorial waters. It may be that New Zealand extends for three miles out to sea, but Native title as recognised by law does not. *Adams v Bay of Islands County Council*, [1916] NZLR 65. Yet Native custom might have recognised these waters as the subject of ownership. Why has this form of Native ownership not received statutory recognition? Not because of any express limitation in the legislation. An implied restriction merely. A restriction based on the assumption that it could not have been the intention of the Legislature to destroy public rights of fishing and navigation by granting such waters as the subject of private ownership.

A Crown grant is limited both at common law and by the Crown Grants Act to high water mark, although the Crown's title extends at least to low water mark. A similar restriction has for the same reason been read into the statutory grant on which Native title now depends.

(3). It is submitted that a similar restriction is to be read into the Native land legislation in respect of inland navigable waters. It could never have been the intention of the Legislature to recognise and give effect to any Native claim to the exclusive ownership of the great navigable waters of the Dominion. When Natives had their customary ownership of land recognised by statute, neither they nor the Legislature

supposed that they were obtaining an exclusive title to Wakatipu, Wanganui or Waikato rivers or Lake Taupo or Rotorua.

(4). There is nothing in conflict with the Acts in so excluding navigable waters whether tidal or inland. The Acts confer title to Native land. True that land in its legal sense includes land covered by water. But this is not the popular sense. Land in the popular sense is opposed to water. Lake Taupo would not be described as so many square miles of land. Whether in the Act land is to be read in its popular ordinary sense or in its legal and technical sense, must depend on the nature and purpose of the Act. The nature and purpose of Native land legislation is such that the word must be read in its popular sense as including any such waters as are so small in their extent that they may fittingly and reasonable [sic] be made the subject of private ownership without prejudice to the public interests.

(5). *Taupiri Coal Mines Co. v. Mueller*. A grant of land bounded by a non-tidal river. It is presumed to be *ad medium filum*. This presumption rebutted in the in the case of the Waikato by the fact that such a grant would have destroyed the public interest in navigation. This was not a public right. It was a public interest merely but an interest of such magnitude that the Court held that it could not have been the intention of the Crown to destroy it. Exactly the same principle is applicable to the statutory grant involved in Native land legislation. On this principle, Native land, notwithstanding the ordinary rule that land includes water, should be held not to include those waters in which the public has an interest as the highways of the Colony. Just as the Supreme Court has already decided that land does not include tidal waters, so here it does not include inland navigable waters though not tidal.

(6). It may be objected that this is an impracticable distinction of degree. This, however, is not so any more than in the case of the Waikato River. The question is simply whether the water is so large and the interest of the public navigation and user so great that as to form a reasonable basis for the assumption that the Crown or the Legislature did not intend the word "land" to include such waters. The distinction between navigable and non-navigable inland waters is repeatedly drawn in America and is found quite practicable.

(7). It may be objected that this view is contrary to *Tamihana's case*. This is not so. The decision in that case is merely that the Natives have a right to have their application heard in the Native Land Court and that that Court has an exclusive jurisdiction to determine whether the application is well-founded or not. It is not a decision that Lake Rotorua is Native customary land but merely that it is impossible for the Supreme Court to determine whether it is or not. It is a mixed question of law and fact and not to be determined as a mere question of law in the Supreme Court. Every area of water must be considered in the light of the facts of each case. In *Tamihana's case* Edwards J. alone deals with this matter. 33 NZLR, p 350, 351. This is probably a reference to the first contention made by me, namely, that Native custom does not recognise ownership of navigable waters. It may be suggested, however, that the Judge means to say that if such a custom is proved it has necessarily been given legal validity. That the legislation is in all respects as wide as the Native custom and therefore that this Court could only give effect to that custom by making a freehold order. The Judge, however, does not say so. This would be directly contrary to the subsequent decision of the Court of Appeal in

Waipapakura v. Hempton to which Edwards J. was himself a party. There it was held that whatever Native custom may be it had not been granted legal effect with respect to tidal waters. If there was such a custom or usage the Treaty so far as it is effective is sufficient to preserve it. How far is it effective? Only so far as it has been given effect to by statute.

(8). The question is therefore whether the term “land” in the Native Lands Act includes inland navigable waters of such a description as Taupo, Rotorua or Wakatipu. This must be determined by reference to the purpose and subject-matter of the Native Land legislation. There is in the first place no reason why it should. There is no interest of the Natives save the interest of preventing the public from navigation, recreation, and European fisheries. In the second place there is every reason why it should not.

(a) Because contrary to the interest of the public;

(b) Because contrary to the Native interests themselves

having regard to the conflict between Native rights of fishery and Native rights of navigation. It cannot be doubted that in fact neither the Legislature, nor the Crown, nor the Natives thought that a statutory grant of the waterways of this country was being made to them. If therefore the intention of excluding such waterways can be given effect to by a proper interpretation of the word “land” such an interpretation should be given.

(9). The wording of the Treaty of Waitangi. Fisheries are expressly mentioned and distinguished from lands. This shows that even then their fishing rights were distinguished from the ownership of land and that the Natives considered their fisheries whether inland or sea to be different from their lands. I submit that the land to which they have acquired title by New Zealand legislation is land as distinguished from fisheries and the waters over which such rights of fishery are exercised. The fishing rights of the Natives have been recognised by subsequent statutes apart altogether from Native land. See the Fisheries Act 1909, Section 77. The Fish Protection Act 1877, s 8. This Act provides that the Act is not to repeal, alter or affect any of the provisions of the Treaty of Waitangi or to take away or abridge any of the rights of the aboriginal Natives to any fishery secured to them thereunder. Now this Act expressly provides that it shall not apply to waters the property of any private person. This survey of Native rights therefore does not refer to fisheries in Native land, for this is their property and the Act does not apply. The saving is therefore of the fishing rights preserved by the Treaty of Waitangi over waters which were not the property of the Natives but of the Crown. This is a distinct recognition by statute therefore of the fact that Native fishing rights do not involve ownership of the waters.

III Ten Year's Possession

It is further claimed on behalf of the Crown that this lake has been in possession of the Crown as free from Native title for 10 years before 1910, and therefore that Native title, if any ever existed, has been extinguished by virtue of Section 97 of the Native Land Act 1909. Obtain full particulars as to exercise of rights of ownership by the Crown as, for example: (1) Wharves; (2) Navigation; (3) License fees; (4) Dredging of channels, navigation marks etc; (5) fishing and control of fisheries; (6) Relation between acclimatisation societies and Crown, sale of trout etc.; (7) Disappearance of Native fisheries, Nature of Native fish and where found, Depth of Water etc.

[remainder omitted]

4.3. Ibid, Salmond's opinion, 11 June 1917.

To: Undersecretary of Lands

Re Lakes Rotorua and Waikaremoana

As indicated by me in a previous memorandum, the difficulty which has arisen in these cases is due to the repeal of s. 100 of the Native Lands Act 1909. Until that repeal the transformation of Native customary title into Native freehold title by means of freehold orders of the Native Land Court was not a matter of right but a matter subject to the discretionary power of the Government to prevent such transformation in cases where it was thought to be contrary to the public interests. In 1913, however, an absolute right was conferred upon the Natives to have their customary title converted into freehold by a statutory grant of the fee simple free from any power of control on the part of the government.

In the case of *Tamihana Korokai v. Solicitor-General* 32 NZLR 321 relating to Lake Rotorua, an attempt was made to determine the legal position of the navigable inland waters of this country in relation to Native owners. Unfortunately, however, it was not found possible to obtain any definite decision from that Court on the matter. It was held merely that the question was one for the Native Land Court on applications for freehold orders. It was held that on such applications the Native Land Court had to determine in each case whether land covered with water was Native customary land in respect of which a freehold order could be obtained or whether on the other hand the Natives possessed merely customary fishing rights, in respect of which no order could be made, as opposed to rights of native ownership which were capable of being transformed into freehold.

This being so, the only course is to have these applications in respect of Lake Rotorua and Lake Waikaremoana heard by the Native Land Court. The Crown, however, should be represented at the hearing and should dispute the right of the Natives to obtain freehold orders for the inland navigable waters of the Dominion. The question is of such importance that it would seem desirable that the case should not be heard before a single Judge but before a specially constituted court consisting of the Chief Judge of the Native Land Court and as many of the Puisne Judges as possible. The case should be heard in Wellington so far as regards the preliminary question as to whether freehold orders can be made at all. If this point is decided against the Crown the actual investigation of title can subsequently take place in the ordinary course. It ought to be possible, however, to make some arrangement with the Court by which, if the decision is against the Crown, the making of an actual freehold order should be deferred in order to give the government and parliament an opportunity of considering the whole question and making provision for the compensation of the Natives in lieu of the actual issue of freehold titles to the waters in question.

...

It is clear in the first place that it cannot possibly be contended on behalf of the Crown that Native customary title is limited to dry land and does not include waters. Small unnavigable streams, lagoons, and other waters are undoubtedly merely appurtenant to the adjoining land and subject to customary title and capable of inclusion in freehold orders. It does not follow, however, that because some waters are subject to native title that all waters are so subject. Indeed it has already been decided by the Supreme Court that this is not so and that the tidal waters of New Zealand are not and never have been Native customary land: *Waipapakura v. Hempton* 33 NZLR 1065. There is a great deal to be said in favour of the view that the non-tidal but navigable

waters of the Dominion are equally excepted from Native title. The same reasons which have induced the Supreme Court to except tidal waters from Native title is capable of extension with equal force to inland navigable waters. Native customary title depends for its legal existence on the Treaty of Waitangi as recognised and validated by a grant of legal title by the successive Acts dealing with Native land. The extent of Native title depends therefore on the true construction of that Treaty and the validating legislation. This Treaty and legislation amounts in effect to a statutory grant from the Crown to the Natives and the question is, what are the limits and bounds of this statutory grant. This depends on the express or implied intention of the grantor, namely the Crown and Parliament. The Supreme Court has held that it was not intended to include tidal waters, for example, the harbours, foreshores, and tidal waters of New Zealand. Neither the Treaty nor the statute contains any express exception of such waters but this exception has been held to be implied on the ground that it would be unreasonable to presume an intention on the part of the Crown and the Legislature to destroy the public rights of navigation and access to the sea. Just as a Crown grant described as bounded by the sea goes only to high water mark, although the Crown title extends to low water mark, so the statutory grant on which Native title depends has had the same limit imposed upon it. Even therefore if it could be proved by Native custom the Wellington harbour was the subject of exclusive private ownership, this customary ownership has acquired no legal recognition or validity and no freehold order could be obtained in respect of such waters.

I think that on a reasonable interpretation of the Treaty of Waitangi and subsequent legislation a similar principle is to be applied to inland navigable waters. It is unreasonable to suppose that this Treaty or legislation was intended to vest Lake Taupo or Rotorua or Lake Wakatipu in the Natives as the exclusive owners thereof to the destruction of the interests of the Crown and the public in the navigation of such waters. No such claim could have been in the mind either of the Natives or of the Crown or of Parliament.

A similar implied exclusion of inland navigable waters has already been recognised by the Court of Appeal in the case of Crown grants bounded by a navigable though non-tidal river, namely the Waikato, *Mueller v Taupiri Coal Mines Co* 20 NZLR 89. The general rule is that a Crown grant goes *ad medium filum* except in the case of tidal waters, yet this is a mere presumption capable of rebuttal by facts showing a contrary intention. It was held in the above case by the Court of Appeal that the public interest of de facto navigation was sufficient to limit a Crown Grant to the edge of the Waikato River. *A fortiori* with a Crown Grant bounded by Lake Rotorua or Lake Taupo. If this is so with a Crown Grant I think that it is reasonable to apply the same principle to the statutory grant involved in the Treaty of Waitangi and the Native Land legislation. I am of opinion therefore that the Native customary title must on the true construction of the Treaty and legislation exclude not only tidal waters as already decided by the Supreme Court in *Waipapakura v Hempton* but also inland navigable waters.

An apparent difficulty arises from the fact that navigability is a question of degree merely. It is not an absolute difference in kind as in the case of tidal waters. This difficulty, however, is not serious. As already indicated, the reservation of navigable waters must be based on the presumed intention of the Crown not to destroy the interests of the public in navigation. The question in each case is therefore whether the waters claimed are so extensive and so useful for the purpose of navigation as reasonably to support the presumption that these waters were reserved in the grant. This is the method accepted in the case of the Waikato River and there is no difficulty in applying it to

lakes as well as rivers. In small lakes or streams the public interest is either non-existent or is so small as not to be a sufficient basis...

□

5. Notes of a meeting between the Minister of Marine (G.J. Anderson), Tau Henare M.P., W. Rikihana, Terima Teiki and Tamaho, Marine Department, 29 September 1924, M1, 4/1746, NA Wellington.

Notes of a deputation representing Natives which waited upon the Minister of Marine (Hon G.J. Anderson) at Wellington on the 29th September, 1924.

Mr Tau Henare, M.P.introduced the deputation which comprised the Hon. W. Rikihana

MLC, Terima Teiki and Tamaho.

Speaking through an interpreter, Terima Teiki said they wished to consult the Minister regarding the mangrove flats adjoining their lands and their homes at Waihou and Whakarapa Inlets, Motuti and Wairae. Their trouble was that the Department had already allowed Europeans a portion of the mudflats. Their wish was that they should be allowed to work the mudflats themselves as they realised the flats would be beneficial to them in time to come. They wished to work only those flats which adjoined their lands; they were not referring to the rest of the mudflats along the river. He asked that an inquiry should be held into the request in the interest of the other Natives concerned and himself. The people who occupy the mudflats adjoining the Natives' lands are not Maoris and have farms inland from the Natives. In order to reach the river the Natives have now to trespass over the mudflats when transporting their produce and obtaining goods.

Mr Tau Henare said that a cream stand had been built in the stream near the mudflats at Whakarapa, and the Harbour people were charging them for it. He asked that no charge should be made. He pointed out that the Natives in the district were good farmers and considered it was unfair that they did not have given to them an opportunity to work the mudflats, particularly when they adjoined the Natives' lands. He also asked that the Toheroa beds between Whangape and the entrance to Hokianga Harbour should be protected. At present Europeans took and sold the Toheroas. The Natives were prepared to submit to the Minister the names of those who would act on a Committee for the purpose of looking after the beds and preventing Europeans from taking and selling Toheroas.

The Hon.Mr Rikihana said he was the surviving leader of the Tribe residing in the locality at the present time. They were not greedy and were not claiming the whole of the flats. From time immemorial it was the custom of the Maoris to dig with their hands for Toheroas. When the Pakeha arrived they used spades and so damaged the Toheroas. When damaged ones were left they spoiled the beds for a considerable distance. When the sea receded it is easy to see where the Toheroas are as they make a small hole in the surface. The Pakeha people mark them with a small stick and then dig them out wholesale. The Natives near the coast know how to nurse the Toheroa.

The Minister in reply said he would have inquiries made into their representations. If the mudflats had already been leased he did not think they could do anything until the leases expired. However he would have the matter thoroughly investigated and see if it might be possible to comply with their request. He understood that there were many mudflats in the locality but that they were referring to flats in a particular area. In future when any European applied for mudflats the Department would see that the Natives who are interested therein would be notified so that they could forward objections before any leases were granted. He was of course making that statement on the assumption that they would be prepared to improve the flats on the

same lines as the Europeans proposed to do. With regard to Toheroas, any Pakeha was subject to the law if he took them for sale. If the Natives furnished the names of the culprits, the Department would prosecute them. He would consult with Mr Tau Henare as to the best method of reserving the beds and preserving the Toheroas now there. They would be advised as to what was decided upon. With regard to the cream stand he would consult with the Secretary of the Department and see whether their request could be granted. If it was used by Europeans, they would have to pay.

□

6. Memorandum from the Crown Solicitor to Under-Secretary of Lands, 7 March 1932, re Ngakororo case

...

I. General Law as to tidal waters and foreshore:

The law of England relating to tidal waters is stated briefly in *Halsbury's Laws of England* vol. 28 paras 6533, 654. 655, 656 and 663, as follows:-

653. The soil of the sea between the low-water mark and so far out to sea as is deemed by international law to be within the territorial sovereignty of the Crown is claimed as the property of the Crown although outside the realm. The soil of the bed of all channels, creeks and navigable rivers, bays and estuaries, as far up the same as the tide flows, is prima facie the property of the Crown. The Crown also claims to be entitled to the mines and minerals of the sea within these limits.

654. The Crown can grant, and in many cases has granted, the soil below the ordinary low-water mark to subjects, but such a grant is subject to the public rights of navigation and fishing and rights ancillary thereto existing over the locus of the grant.

655. The seashore or foreshore (for in legal parlance these expressions mean one and the same thing) is that portion of the realm of England which lies between the high-water mark of the ordinary tides and low-water mark.

656. The high-water mark of the ordinary tides is the line of the medium tide between the spring and neap tides throughout the year, that is, the point on the shore which is, about four days every week, reached and covered with the tides. This line is, therefore, the landward limit of the foreshore.

663. De jure communi the Crown is prima facie entitled to every part of the foreshore of this realm between the ordinary high-water mark and the low-water mark.

The Common Law of England relating to these matters has been held to apply in New Zealand from early times, c.f. *Crawford v. Le Cren*, (1868) 1 C.A. 117. The claim of the Crown to the tidal lands of the colony has also been made from the early days of the colony, c.f. Section 2 Public Reserves Act, 1854. Section 144 of the Harbours Act, 1923, provides that no part of the foreshore or any creek, bay etc., shall be disposed of without the authority of a special act and section 146 provides that the section shall apply to lands the property of His Majesty being either foreshore lands between high and low water marks or below low water mark the depth of water on which is not sufficient for navigation. Again in *Waipapakura v. Hempton* 33 N.Z.L.R., Sir John Salmond, Solicitor-General, contended (page 1068) that the tidal waters belonged to the Crown ever since the Crown came to New Zealand and that the principle that tidal waters belong to the Crown is in force here unaffected by the Treaty of Waitangi or Native Land legislation. The Court did not dispute this statement of the law but as the question then at issue was one of fishing rights, the Court was not called upon to make a definite

pronouncement. In *Findlay v. Attorney-General* [1919] N.Z.L.R., 513, the Court held that mud flats covered by tidal waters belonged to the Crown. From the Acts quoted and the references, I think there is no doubt that tidal land in New Zealand is the property of the Crown.

2. Foreshore:

By section 35 of the Crown Grants Act, 1908, it is provided:-

35. Where in any grant the ocean, sea, or any sound, bay, or creek, or any part thereof affected by the ebb and flow of the tide, is described as forming the whole or part of the boundary of the land granted, such boundary or part thereof shall be deemed and taken to be the line of high water mark at ordinary tides.

The method of defining the line of high water is set out in *Findlay v. Attorney-General* (above referred to). In the Harbours Act, 1923, Section 5, tidal lands and foreshore are defined as such parts of the bed, shore or banks of a tidal water as are covered and uncovered by the flow and ebb of the tide at ordinary spring tide. This definition includes land in the mud flat districts that under the Crown Grants Act would be held to be in the title of a riparian owner. I understand that in many cases, however, particularly in surveys of recent years, that sea frontages are definitely fixed so as to exclude questions of accretion etc. There remains, however, this conflict in the law relating to foreshore.

3. Rights of Riparian Owners:

Riparian owners, that is to say, the owners of freehold land adjoining the foreshore have certain rights, for example, right of passage to the water and certain advantages, for example, in many cases a natural boundary not requiring to be fenced, and certain possibilities, for example, addition to their land in the course of years by accretion. In any general scheme dealing with mud flats the rights of riparian owners therefore require to be considered.

4. Claims by Natives

By Section of the Native Land Act, 1931, the definition of *customary land* is land which being vested in the Crown is held by Natives under the customs and usages of the Maori people. The argument heard by the Maori claimants is, therefore, that though tidal lands may be vested in the Crown it is also customary land. It was held in *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321, that it is a question for the Native Land Court in the first instance to determine upon proper evidence whether any particular piece of land is Native customary land or not. There are to some extent safeguards in favour of the Crown in Sections 112 to 115 of the Native Land Act.

5. Present Claim

In the present claim, the position is complicated by reason of the fact that (a) the District Office following the judgement in *Findlay's case* has prepared a plan showing pieces of

land, some adjacent to the Whakapara¹⁹⁷ Block and some in the harbour, that are within the definition of Section 35 of the Crown Grants Act, though mostly covered by high-water spring tides and therefore tidal waters within the meaning of the Harbours Act, (b) that the bulk of this land has already been leased by the Marine Department to Mr Holland, and (c) that whilst the grounds for their claim alleged by the Native owners might support easements or other subsidiary rights over the land claimed, in the Supreme Court, they would be sufficient in the Native Land Court to establish a claim to customary title. The claim was partly heard in 1926 and the Native Land Court gave an interim judgment and held that there was some land belonging to the Natives under their customs and usages and requisitioned for a plan. The plan was supplied and the case was set down for argument at Auckland on 20th January, 1932. I arranged for the Auckland Office to apply for an adjournment till the whole position was investigated. This was granted but in the meantime the Court has heard further evidence at Panguru, Hokianga, on 3rd February. [passage missing from my photocopy]...inclusion in the land being investigated of mud banks that form small islets in the Harbour and are, I presume, of recent origin and covered at spring tide. In view of the plan supplied, the Native case is very strong and the Crown would be forced to rely on Section 114 on the ground that the lease to Holland was granted under the Harbours Act in 1922 prior to any claim being made by the Natives. Whilst it might be contended on behalf of the Crown that Native rights do not extend to tidal waters (vide argument of Sir John Salmond quoted above) the plan supplied shows this land as non-tidal within the meaning of the Crown Grants Act. Further, Section 146 says "lands the property of His Majesty". It would be contended that some tidal lands are not the property of His Majesty. The Act does not expressly vest all tidal lands in the Crown. When dealing with the Lake Omapere claim, I found a judgment of Judge Fenton of the Native Land Court given many years ago in which he held that the Natives had no claim to mud flats at Thames, as tidal lands were vested in the Crown. So far as I know, this is the only decision in favour of the Crown. It would mean a very long search of old records to see if any other claim has ever been made and what was the decision of the Native Land Court.

As the facts stand, I think the Crown has little hope of success in the present case. The presiding Judge has already indicated his views and it would be futile to argue the case in full at this stage.

One course open to the Crown is to make a formal assertion before the Court that the Crown claims this land and then on the decision of the Court to lodge an appeal under Section 61 of the Act, and perhaps, ask the Appellate Court to state a case under Section 71 of the Act for the opinion of the Supreme Court. The adoption of this procedure would hold up a final decision for a period, but I understand the desire is to get the matter settled as soon as possible.

The alternative course is to obtain legislation defining the title of the Crown and providing for compensation for those entitled to claim. A Proclamation could be issued under Section 113 of the Native Land Act, 1931, but such procedure would not bring the issue to finality. A final decision is, I think, essential as other claims are sure to be put forward by Natives in other localities.

The question of compensation should not be a difficult one as, if the present case is taken as an example, most of the land claimed is leased a 1/6d per acres for the first ten years and 2/6d per acre for the second eleven years whilst the cost of survey was stated to be L.170.

¹⁹⁷ Sic., i.e. Whakarapa

I have set out briefly the general position and shall be glad of your instructions as to what action the Crown proposes to take with reference to the present claim. As I understand the Public Works Department is also interested in the matter in connection with reclamation works for unemployed, I suggest that a conference of the three Departments - Lands, Marine and Public Works, should be held so that all aspects of the matter may be considered and a joint report be submitted to the Government.

I am sending a copy of this memorandum to the other Departments.
Crown Solicitor

**7. Extracts from the Legal argument in the Ngakororo case, 1941¹⁹⁸
25 September 1941, p. 36 et. seq. of transcript:**

MR MEREDITH: The question of the Maoris' rights over the foreshore have been considered in *Waipapakura v. Hempton*, (1914) 33 NZLR page 1065:

The right of the Maoris to fish in the sea or tidal waters is the same as the right of Europeans and is governed by the Fisheries Act, 1908; and the Regulations made thereunder...Maoris have such have no communal or individual rights of fishery, territorial, and extra-territorial, in such waters.

JUDGE ACHESON: That does not recognise the Treaty of Waitangi, does it?

MR MEREDITH: No. I would like to adopt the the argument put forward by Sir John Salmond in that case at p. 1067-1068:

In this case the land abutting on the river was Native freehold land. If the Magistrate had no jurisdiction it must be included by some statutory provision. Section 90 of the Native Land Act 1909 gives exclusive jurisdiction to the Native Land Court to make freehold orders in respect of customary land...the customary ownership of land.

Of course that is only argument. I am adopting that. Then in the judgment of Chief Justice Stout. Might I just mention this *Tamihana Korokai v. Solicitor-General* case. - Your Honour mentioned somewhere that the Crown had to prove a title. There was in that case a plea by the Solicitor-General that it was Crown land, and, therefore, the Native Land Court had no jurisdiction, and the Court of Appeal held that that was not so. It went no further than that. It meant that the Solicitor-General could not just say so and that was the end of it. I was wondering whether -

JUDGE ACHESON: I considered that was what you were doing now.

MR MEREDITH: No. That would not preclude the Crown from establishing in evidence that this is foreshore in tidal waters, and saying that being so it is the property of the Crown. Your Honour may disagree with that, but in this *Tamihana* case they just filed a plea that that was Crown land. It was held -

¹⁹⁸ Using transcript found on file CL 193/3, NA Wellington. This file technically has a 'B' restriction but this is presumably not intended to the transcript of a public hearing.

JUDGE ACHESON: You are saying that the presumption of law is that that foreshore land is Crown land?

MR MEREDITH: Yes, we are saying that.

JUDGE ACHESON: Am I then to be bound by that?

MR MEREDITH: Not if you disagree.

JUDGE ACHESON: I would like you to prove that is carried on.

MR MEREDITH: We can only put that proposition up as being the correct position of law. Your Honour may disagree with it, and if you do we have our remedy, but I am not submitting to you that because I say so that is the application.

JUDGE ACHESON: I want proof that that does apply in this case.

MR MEREDITH: I have quoted *Findlay's case* and the proposition from *Halsbury*, and apparently the general acceptance everywhere is that it is so, and that the fact that our legislature legislated on the basis that it is so -

JUDGE ACHESON: That the common law of England applies here?

MR MEREDITH: Yes, and that the foreshore is vested in the Crown.

JUDGE ACHESON: And that [it] has been Crown land immemorial, even before they heard of New Zealand?

MR MEREDITH: No, that could not apply until the British took over the sovereignty.

JUDGE ACHESON: The British took over the sovereignty of [sic] the common law applied that everything under tidal waters was Crown property?

MR MEREDITH: If it is tidal water, mudflats, an arm of the sea - yes.

JUDGE ACHESON: What about the valley of the river entering a drowned bay?

MR MEREDITH: If the tidal flow goes up a valley or whatever you may care to term it - yes.

JUDGE ACHESON: If it bursts through into a valley occupied by Europeans, then all that land goes to the Crown?

MR MEREDITH: If it became part of the foreshore under tidal waters and the sea - yes. That would alter the character of the land underneath it.

JUDGE ACHESON: I would like to get to something more definite than a presumption.

MR MEREDITH: I submit that it is not a presumption, but a statement of law. In that statement in *Halsbury* it says “prima facie” in the Crown. That means it starts off being in the Crown. The discussion on that point in the note in *Halsbury* merely points out that in certain cases the Crown had ceded the foreshore in certain places, and grants had been made on the foreshore to certain people, which the Crown could do. It started off with being in the Crown, and if anyone wished to upset the Crown’s title and claim to it, they or he had to establish that there had been some grant to him or his predecessor in title.

JUDGE ACHESON: Is that the case?

MR MEREDITH: That is the result of the note here.

JUDGE ACHESON: Is that the practice of the Lands Department in New Zealand?

MR MEREDITH: In what way, Sir?

JUDGE ACHESON: That they have to actually prove a grant from the Crown of that foreshore?

MR MEREDITH: If there is any dispute about it, yes they would have to. In most cases, of course, if there had been a grant of the foreshore there would not be a dispute.

JUDGE ACHESON: Aren’t there plenty of cases known to Mr Darby or Mr Wright where the land [is] fronting on to the foreshore, where the foreshore land had been added on to the title of the European and not granted at all - just been proved that he is the plaintiff. Aren’t there any cases of that?

MR MEREDITH: That I do not know.

JUDGE ACHESON: Aren’t there a number of cases in the Lands Department?

MR DARBY: There may be cases, but I would not be dealing with the European side, Sir.

JUDGE ACHESON: I think you will find that there are plenty.

MR DARBY: How have they got them - by accretion?

JUDGE ACHESON: Yes. They have had their land granted to them and have, perhaps, huge areas of mudflat out in front and they have just gone and reclaimed them, and the Crown has contested them, but the other people have won.

MR DARBY: They are now above mean highwater mark?

JUDGE ACHESON: Yes, but as a result of their reclamation on this land that they have contested the claim of the Crown against them and they have won. Isn’t that right?

MR MEREDITH: I do not know. I can understand if there had been accretion they would be entitled to have their title remedied and added to their title.

JUDGE ACHESON: What about these ones of foreshore?

MR MEREDITH: I do not know, but I cannot imagine that the ground would vest in an adjoining foreshore.

MR DARBY: There is a procedure under the Harbours Act for reclamations where title is conferred and title could be obtained for reclaimed land.

JUDGE ACHESON: If it is reclaimed by some land such as a stop bank, am I to understand from you in the argument that that prevents the adjoining owner from claiming that as an accretion?

MR MEREDITH: Who did the stop banking?

JUDGE ACHESON: Holland has no adjoining lands.

MR MEREDITH: But he had authority from the Crown. The Crown under their statutory power of the 1910 Act was given power to lease for the purposes of reclamation of foreshore.

JUDGE ACHESON: What about the adjoining owner?

MR MEREDITH: That is a statutory power. The adjoining owner had no right.

JUDGE ACHESON: That is the very point.

MR MEREDITH: He did not own that foreshore.

JUDGE ACHESON: I think you will find that even to this day they have to respect the rights of the adjoining owner in all their schemes, unless they are Maoris.

MR MEREDITH: They are doing that by the 1932 Act.

JUDGE ACHESON: Unless they are Maoris. If they are Maoris they do not get it.

MR MEREDITH: I do not think that is so. I understand in the 1932 Act, the position there is not of law but of expediency. They work among the adjoining owners and make a scheme of it. That is for expediency.

JUDGE ACHESON: You say the adjoining owners have no right to the foreshore?

MR MEREDITH: That is vested in the Crown, and the Crown has statutory power, and it has taken statutory power in 1910 to lease to Holland, which they did with a view to reclamation, which Holland admitted.

We were dealing with the *Waipapakura* case. Judgment of Stout, Chief Justice (p 1070):

A much wider question has, however, been raised in this appeal. First, it is said that the Fisheries Act 1908...The Maoris have land adjoining but if so the Crown grant would be to highwater mark and would not include the land under the sea or tidal waters.

JUDGE ACHESON: Who owned the bed?

MR MEREDITH: The Crown.

Mueller v. Taupiri Coal Mines Ltd. The Court of Appeal held that even the bed of a navigable river remained vested in the Crown and did not pass to grantees of land facing the river.

JUDGE ACHESON: And not to original Native owners?

MR MEREDITH: No.

Therefore so far as sea fisheries are concerned and the question of fishing rights adjoining Maori lands...even if that Court were to refer the case back to the Magistrate.

...There it is held quite clearly that they have no rights in the foreshore. This Native had owned the land actually down to the highwater mark and it is held there by Sir Robert Stout that the sea only went as far as that, and below highwater mark the land belonged to the Crown.

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8. NATIVE APPELLATE COURT JUDGMENT RE NGA KORORO MUDFLATS: WHAKARAPA ESTUARY

(1942) 12 Auckland NAC MB 137

The decision giving rise to the appeal by the Crown in this case is that of the Native Land Court of 30th September, 1941, in which it gives final judgment in favour of the Natives for the whole of the Ngakororo Mudflats area shown on plans before the Court, on the ground that it is papatupu or Native customary land, and further decides that it is also Native land under the Pakeha law of accretion.

Mr Meredith appeared for the Crown and Mr North for the respondents, the Natives, and we are indebted to them for their very interesting and able arguments as to the difficult matters in issue.

It will be of assistance to set out the facts and the questions of law that arise.

The Whakarapa block was investigated by the Native Land Court in 1906. For the purpose of this investigation it had before it a sketch plan No. 7266, prepared by the Survey Office in that year. This plan showed the boundary of the Block as running to the tidal waters of the Whakarapa River on the south at the point that is material to the present inquiry. The Waihou Block lying mainly to the west of the Whakarapa Block was investigated by the Native Land Court also in 1906. For this purpose a sketch plan No. 7268 was prepared by the Survey Office in that year. This plan also showed that block bounded by the same tidal waters of that River. The Whakarapa River at this point follows a defined channel in wide mud flats which are covered by the sea at high tide. The tide rises above the river level. These mud flats have been gradually built up over the years by the deposit of silt brought down by the river.

Following the orders on investigation, the land became Native freehold land and was subsequently partitioned so that it was held under individual titles and ceased to be Native customary land. No question was raised on investigation as to where mean high-water mark was as the title would run to that mark wherever it might be and it was unnecessary then to define it. None of the plans produced to us by the Survey Office of the land as it then stood show any land above high-water mark in the Whakarapa River at the point where land now exists as the result of accretion or reclamation. Had such land existed at the time of the investigation, it should have appeared on the plans and been included in the investigation as part of the land being investigated by the Court. No special surveys were then made for the purpose of defining high-water mark in relation to these mudflats as no claim was made to them.

In 1922 the Marine Department issued to one Robert Holland a license to reclaim land then lying below high-water mark, under a license dated 24th January, 1922 (See N.Z. Gazette No. 5, 2/2/22 at page 236), in respect of an area of 63 acres shown on Plan No. 5318. This License was issued under Section 39 of the Harbours Amendment Act, 1910 and authorised the licensee for a period of 21 years to occupy the area and execute works for reclamation purposes. The licensee commenced work by erecting stop-banks in the years 1923-24 or thereabouts, and this was the subject of objection by the Native

owners, who made some breaches in the banks. However, as the result of this stopbank work, deposits of a substantial quantity of silt took place and the silt in the reclamation area gradually rose till a considerable part of it was above high-water mark. The deepest deposit of silt took place at the northern end of the reclamation area where Holland had built his stopbank outside the reclamation area by extending it beyond true boundary line so as to reach land above high-water mark on Whakarapa No. 1. This resulted in accretion joining Whakarapa No. 1 with the land in the reclamation area.

To the south of the reclamation area was an area dry at neap tides that was then used as a racecourse and had been so used for many years before 1922. At the southern end of this racecourse area was a small piece of dry land on which had been erected a whare by one Hemi Ru. As the result of silting up, this racecourse and other areas nearby gradually rose above high-water mark and all these lands are now shown on Plan No. 12747 prepared by Surveyor Sheratt in 1931. There is no evidence to show how long the land occupied by Hemi Ru has been above high-water mark, though there is evidence that it has been there for many years and that it was used by the Natives for fishing purposes. Had it been in existence on the establishment of English Sovereignty in New Zealand in 1840, then it would admittedly be Native customary land. If, on the other hand, it has risen from the seabed since that time, it would be land belonging to the Crown. The Crown claims all the land above high-water mark shown on Plan No. 12747 and the Natives claim it as Native customary land or alternatively on the ground that it is accretion.

The Crown's contention is that all this land has either risen from the seabed by natural process or has resulted from the reclamation work done by Holland, and therefore belongs to the Crown. Mr Meredith has quoted authorities in support of this contention. He submits also that the jurisdiction of the Native Land Court is limited to the inquiry in the first place as to whether this land is Crown land or Native customary land and that if it be found it is not Native customary land, the Court has no further jurisdiction to enquire into any question of title.

The submissions supporting these contentions and the authorities quoted in justification are:-

1. That upon the establishment of English Sovereignty in New Zealand in 1840, the common law of England was brought to New Zealand and has since applied - Salmond's *Jurisprudence* 9th Edition (1937) page 717 and app. 5. *Waipapakura v. Hempton* 33 N.Z.L.R. 1071, *King v. Joyce* 25 N.Z.L.R. Page 78.
2. That being so, all land in New Zealand vested in the Crown subject to the rights of the Natives recognised by the municipal law, and this land extended to High-water mark.
3. That by the law of England, all land below high-water mark belonged to the Crown - 33 Halsbury 2nd Edition pp. 521 and 525, *Waipapakura v Hempton, Attorney-General v. Findlay* 1919 N.Z.L.R. 513 at p. 519.

4. That the Crown owns the land between high-water mark and low-water mark. Coulson on Waters 5th Edition pp. 524 and 584. Harbours Act 1923 Section 5 (Vol. 3 Reprint p. 568). *Attorney-General v. Findlay* supra.

5. That accretion by natural process belongs to the owner of the land to which it accretes: *Attorney-General v. Findlay* supra. *Attorney-General of S. Nigeria v. Holt* 1915 A.C. 599.

6. That artificial reclamation of land in tidal waters belongs to the Crown and is different from natural accretion: *Attorney-General of S. Nigeria v. Holt*. Supra. *Brighton Gas Co. V. Hove etc.* 1924 1 Ch.D. 372. 33 *Halsbury* 2nd Edition p. 523 and 533. Harbours Amendment Act, 1910 Section 39.

7. That the Treaty of Waitangi is not enforceable in the Municipal Courts of New Zealand except in so far as it has been incorporated in the municipal law of New Zealand. *Te Heuheu Tukino v. Aotea District Maori Land Board* 1941 N.Z.L.R. 590.

8. That the land in question is Crown land and never was and is not Native customary land and that the Native Land Court has no jurisdiction as to the title to the land if it finds that it is Crown land.

Mr. North for the respondents has contended that it is competent for the Native Land Court to find a title by custom and usage in the foreshore and/or the bed of tidal navigable waters. *Tamihana Korokai v. Solicitor-General*. He points out that the municipal law of New Zealand specially provides in the Native Land Act, 1931 for the preservation to the Natives of land therein defined as Native customary land.

He submits also that the Natives may acquire a title to Crown land by prescription and alternatively that title may be acquired by accretion. He further submits that the Native Land Court has found that the land in question formed part of the customary lands of the Natives and that that finding should not be disturbed as there was ample evidence to justify such a finding.

We find at the outset of our inquiry that we are faced with a question of jurisdiction.

Mr North for appellants submits that this Court has jurisdiction to determine -

- (1) That these lands are papatupu or customary lands.
- (2) That these lands are accretion to Native land.
- (3) Alternatively that the Native respondents have acquired a title against the Crown by prescription.
- (4) That the license granted to Holland infringes riparian rights of the owners of land to which accretion has taken place and that the license granted by the

Marine Department infringes those rights and is therefore bad and gives the Crown no title to the reclamation area.

Mr Meredith for the Crown contends on the contrary that the Native Land Court has jurisdiction only to determine the matter in para. (1) above.

We agree with the Crown's contention.

It seems to us to be clear that the Native Land Court has only jurisdiction to decide if the land in question is Native customary land and that if it be found that it is not, it has no jurisdiction to decide the other difficult and interesting questions raised on this appeal. The reason for our finding is that the Native Land Court is created by statute and its powers must be found in the statute creating it:- *Puhi Maihi v. Mackay* 33 N.Z.L.R. 884. There is power in Part IV of the Native Land Act, 1931 to investigate the title to Native customary land, but there is nothing in Section 27 of that Act, dealing with the jurisdiction of the Court, or elsewhere, that confers on the Court power to investigate the title to or make orders in respect of land resulting from accretion. In so far as any papatupu land may be increased by accretion, the accretion would form part of the land and be included in the scope of the investigation of that papatupu land. But in so far as other Native land, that is Native freehold land, may be increased by accretion, that accretion would, under the common law, attach to and form part of such Native freehold land, and title could be corrected in the ordinary way by application to the Land Transfer Office with evidence by survey of such accretion.

We do not think that Sec. 3 of the Native Purposes Act, 1939, does more than create jurisdiction, if it were not already possessed by the Native Land Court, to determine, in any appropriate proceedings, where a bona fide question is raised, whether land is native or European land.

Nor do we think that the Court has jurisdiction to decide whether a title has been acquired against the Crown by prescription. There is nothing that we can find in the Native Land Acts that would justify the Court in entering upon such an inquiry, and it would require a definite provision to extend the jurisdiction of the Court so far.

Similarly our opinion is that the Native Land Court has no power to decide the matters referred to in paragraph (4) above for the reasons already given.

The matters referred to in paragraphs (2) (3) and (4) above are, we think, matters for the Supreme Court, and this Court can only decide the question referred to in paragraph (1) viz. Is the land Native customary land.

This, then, being the only matter have to consider, we have given careful consideration to Mr North's submission that this land can properly be held to be papatupu land even though it is land formerly below high water mark. This submission, if sound in law, must of course be based on questions of fact, and unless the facts show that the land could be papatupu land it is unnecessary to enter upon a discussion of the law. It was submitted by Mr. North that there was ample evidence in the Court below to justify the Court in finding as it did that this was papatupu land, and it is here that we find ourselves at variance again with Counsel for the respondents. Native customary

land or papatupu land is land held by Natives according to their custom and usages. Now it is accepted by Counsel for the parties, and the authorities show, that upon the establishment of British Sovereignty in 1840, the title to all land in New Zealand and land below high-water mark passed to the Crown. The rights of the Natives provided for in the Treaty of Waitangi as regards Customary land were preserved by the incorporation of statutory provisions therefor in the legislation of New Zealand which now appear in the Native Land Act, 1931. But these rights related to land possessed by them at the date of the Treaty. Clearly any land resulting from accretion between 1840 and the date of investigation of the title would attach to and form part of the customary land. What this Court has to consider then is whether the evidence before the Lower Court shows that this land was in existence in 1840 in such a condition that it was then occupied by the Natives according to their customs and usages, and has since been so occupied, whether above high-water mark or not.

What the lower Court had to determine was whether:-

1. These mudflats existed in such a condition as to form part of Whakarapa block on its investigation of title; or
2. Whether the mudflats although not raised above mean high-water mark so as to amount to accretion could nevertheless be Native customary land.

The Native Land Court's decision as to whether these mud flats are papatupu land must rest upon findings of fact. Just as in the investigation of title to customary land, it is necessary for the claimants to establish their right, and this is done by showing that the land has descended to them from a tribal ancestor and has been in the continual occupation of the claimants and their predecessors prior to 1840 and down to the date of investigation. If the proof offered by the claimants in respect of their claim established that these mud flats have been exclusively occupied by a particular hapu or tribe prior to 1840 and since then to the present day, without attempting to decide the matter we should have thought they might have been able to establish title to the land itself, although it may have lain below high-water mark. In England, the fee simple to land below high-water mark has, in certain circumstances, become vested in the proprietor of the foreshore. If, under the circumstances of the English people, title to the sea-bed can be established in this way, we see no reason why title should not just as well be established by the Maori people of New Zealand.

As before mentioned, this must necessarily be a question of fact, and this is referred to in Judge Fenton's *Kauwaerenga* judgment of 1870. In that case he was investigating a claim to land somewhat similar to this, and the following is an extract from that judgment:-

In the previous case (Whakaharatau), no proof was given in evidence of the exercise by the Maoris of any easement or right of ownership, and the land was claimed simply as land above high-water mark, and the judgment in that case was that the question of ownership of any portion of the foreshore by a Maori must depend simply on a question of fact, and as the claimants have not proved any facts showing ownership or usufructuary occupation the claim was dismissed. In the case now before the Court, consistent and exclusive use of the locus in quo has been clearly shown from time immemorial.

That passage gives a very good indication of the standard of evidence required to support a claim to customary land. Having in mind the possibility that a satisfactory proof might entitle the claimants to an award of these mudflats as papatupu land, we have made a careful examination and analysis of the evidence that was presented to the Court, and approach the matter upon the basis that if the evidence before the Court was sufficient to justify that Court's finding, it is not for the Native Appellate Court to decline to accept that finding, because it might have come to a different conclusion from the Judge in the Court below. If, however, the evidence in the Court below is not, in the opinion of this Court, sufficient to justify the Court's finding, then it must disturb that finding.

We have therefore made a full and careful examination of the evidence given in support of the claim, and find that it is in the most general terms and does not contain that particularity required to support a claim to papatupu land. The only evidence that suggests that any land existed above high water mark in 1906, the date of investigation, is that relating to a very small piece occupied by Hemi Ru. There is, however, nothing at all to suggest that this land existed as dry land in 1840, and if it was not then in existence it must have risen from the sea bed since that date. If that is so it is in the same position as the mudflats the subject of this judgment. In considering evidence in a case such as this it has to be kept in mind that it cannot be contradicted. The natives alone know their tribal history and the Crown is unable to lead evidence in contradiction. The evidence is not by any means to be rejected on this ground but it can only be accepted as convincing when it is so complete and reliable as to compel the conclusion that it is correct. The evidence to our mind falls far short of what is required to support the claim.

As against the claim put forward the evidence shows that the mud flats have been used at low tides by anyone desiring to cross and there is no indication that the claimants have exercised any proprietary rights in respect of the land or of exclusive rights of fishing or otherwise. There is no attempt at the definition of the area and apart from the general statements made, there is nothing one could feel is reliable in the shape of evidence to suggest the continuous and exclusive use of this land by the claimants and their predecessors from time immemorial. The use of it on the other hand appears to be precisely similar to the use of the foreshore by the general public viz. at low tide it was used for the purposes of fishing, for the gathering of shellfish, for boating and in general in precisely the same way as the foreshore would be used. There is no indication that there were any special shellfish beds over which proprietary rights were exercised by any particular section of the people, nor is there any satisfactory evidence that the mudflats existed in 1840 in much the same condition as they appear today. We find it difficult to believe that if the native claimants thought in 1906 that they were entitled to these mudflats as papatupu land under the same ancestor and by virtue of the same occupation under which the title was awarded in the case of the Whakarapa block, they would not have put forward their claim.

The evidence of the Crown witnesses shows, on the other hand, that the height of these flats has been steadily rising by the process of accretion and we know that the forest on the hinterland has been worked and that the higher land is more or less denuded of its forests. Substantial quantities of silt coming down the river leading into this tidal area have been deposited on these mud flats. The surveyors' evidence shows that additional accretion has taken place as the result of the stopbank erected by Holland,

and that accretion has also taken place further down in areas not affected by the works, and it is a proper conclusion on the evidence that in 1840 the level of these mud flats was below high-water mark. At a later stage in its existence it was used for the purpose of horse racing. The fact that the land was so used seems to be quite largely relied on by the claimants, but we do not think it can be suggested that horse racing can be said to be part of Maori custom or usage, and at the best it relates to modern times, as the Maori had no horses.

After a careful examination of the evidence we are strongly of opinion that it does not by any means satisfy the requirements of proof necessary to justify a claim to customary land, and the finding of the Court to the contrary is in the circumstances not justified.

In our opinion the land above high-water mark is not native customary land. We are of opinion also that any such land was not part of the Whakarapa block on investigation of title.

As to whether it is accretion we have already held that the Native Land Court has no jurisdiction to decide this question.

[Appeal allowed]□

9. Memorandum for the Director-General, Department of Lands & Survey, from the Secretary for Marine re Awapuni Lagoon, Gisborne, 31 March 1952. M1, 4/1877, National Archives, Wellington.

Awapuni Lagoon
Your ref: 22/2615

1. With reference to your memorandum of the 29th ultimo and the 19th instant on the above-described subject, I was surprised to learn that the question of the ownership of the bed of the Awapuni Lagoon was still in doubt, as I was under the impression (presumably wrongly) that the Native Land Court in 1928 decided in favour of the Crown.

2. When New Zealand was ceded to Her Majesty, Queen Victoria, in 1840, the English law governing property, with the exception of certain statutes such as the Mortmain Acts which were passed to remedy certain local abuses in England, applied in New Zealand and therefore the law relating to the ownership of the foreshore and bed of tidal rivers applied in New Zealand. "The property in the soil of the shore of the sea, of estuaries and arms of the sea, and of navigable rivers between high and low water mark is prima facie vested of common right in the Crown"; *Gann v. The Free Fishers of Whitstable* (1864) 11 HL 192; 35 LJC 29; 12 LT 150; and other cases quoted in *Coulson and Forbes on Waters and Land Drainage* 5th Edition 1933, but it may belong to a subject by ancient or modern grant or charter from the Crown, or by prescription: *Calmady v. Rowe* (1844) 6 CB 861. The same authority states that the bed of all tidal rivers where the tide flows and re-flows and of all estuaries and arms of the sea is by law prima facie vested in the Crown.

3. This law of England has been reinforced by a statute law in New Zealand as, since the passing of section 147 of the Harbours Act, 1878 (now section 150 of the Harbours Act 1950), no foreshore or bed of the sea or navigable river has been transferred from the Crown except through the medium of a special act. There is also contained in the Harbours Act, 1950, and some of its predecessors authority to reclaim foreshore by Order in Council but as that issue is not involved this time there is no need to dwell on that aspect.

4. While it is true that the Crown could and did make grants of land, I think with the exception of the disposal by grant of the foreshore at Kawau (which was repurchased by this Department in November, 1922, primarily on account of the valuable oyster beds thereon) and possibly another piece near Waiwera, no foreshore or bed of a navigable river has to this Department's knowledge been transferred except by virtue of a special Act, and even then (and this is subject to correction) the foreshore has been parted with only to local authorities and not to individuals. However, if it is material, I think the Lands Department or the Lands and Deeds Department would be able to prove that no titles to the foreshore have passed except in accordance with the provisions of the Harbours Act, 1950, or its predecessors.

5. I think it should also be noted here that by the 53rd section of the Marine Boards Act, 1862, subsequently repealed by the Marine Act, 1866, that plans of any new or

additional wharf or other Harbour work within the port had first to obtain approval of the Marine Board constituted under that act and that from 1866 under the Marine Act of that year under section 28 the approval of the Superintendent of the province was required until 1874 under section 2 of the Harbour Works Act, 1874, when the approval was solely within the province of the Governor.

6. As further evidence of the Crown's unwillingness to readily part with the ownership of the foreshore a reference to section 30 of the Municipal Corporations Act, 1876, says that the Governor may by a proclamation include within the boundaries of a corporation "any part of the foreshore" but it did not authorise the Governor to vest the ownership in the borough. This section remained untouched until it was dropped out of the Municipal Corporations Act, 1900. The section was then restored in the Municipal Corporations Amendment Act, 1903, by section 11 but the reference to foreshore was omitted and that section is now 139 of the Municipal Corporations Act, 1933.

7. Section 12 of the Crown Grants Act, 1866, in describing the seaward boundary of a property states that such a boundary shall be deemed and taken to be the line of high water mark at ordinary tides. This section is now section 35 of the Crown Grants Act, 1908, and this further adds confirmation to the Crown's desire to retain the foreshore as the low water mark could just as easily have been taken as boundary as the high water mark ordinary spring tides.

8. Finally, section 14 of the Coal Mines Amendment Act, 1903, states that "Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and without limiting in any way the rights of the Crown thereto, all minerals, including coal within such bed shall be the absolute property of the Crown." For the purposes of this section, bed means the space of land which the waters of the river cover at its fullest flow without overflowing its banks. Navigable river means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future on its banks, or to the public for the purpose of navigation by boats, barges, punts or rafts, but nothing herein shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers. This section is now section 206 of 1925. This section has therefore removed any doubts, if there were any, even retrospectively as to the ownership of the beds of all navigable rivers that the bed of such rivers is the property of the Crown. I think that the foregoing has established:-

- (1) That all foreshore, which means that part of the bed of the sea which is covered and uncovered by the ebb and flow of the tides at ordinary spring tides
- (2) That the bed of all navigable rivers, and
- (3) That all tidal waters are the property of the Crown.

9. Having thus pointed out the statutory provisions dealing with the question of the ownership of the foreshore, tidal waters and navigable rivers, it now only remains to prove that the Awapuni lagoon is tidal and (I presume) that no grant of ownership to the bed of the lagoon has been made.

Dealing with the second point first, no special act has been passed so far as this Department is aware disposing of the lagoon and I assume that your Department would know if it had ever been the subject of a grant.

10. Dealing with the first question, as to the evidence that the lagoon is tidal and always has been tidal, the earliest reference that this Department has been able to find on the matter is that of a memo of the 14th July, 1936, from the District Engineer, Public Works Department, Gisborne, in which he refers to a map in a paper presented by Archdeacon (later Bishop) W.L. Williams in the *Transactions of the New Zealand Institute*, volume 21, 1888, at page 394, where the lagoon in 1841 is shown as having a mouth further north than at present.

11. Attached hereto are relevant extracts copied from the *New Zealand Pilot* from its First Edition in 1856 to the Tenth Edition in 1930. These *Pilots* can be produced if necessary but for convenience the relative matter was extracted and attached hereto. Strangely enough, the word "lagoon" or "Awapuni" is not mentioned but the names of two rivers, namely the Koputetea and the Waipaoa (or Big) rivers are mentioned. It may be necessary if there is any dispute for both these rivers to be identified as being one and the same and an extra copy of the correspondence is attached for transmission to the Commissioner of Crown Lands at Gisborne so that he may take the necessary steps to do so if you consider it necessary.

12. For convenience, I have underlined the difference in the various extracts as they appear in each Edition and it seems that from 1856 to 1891 the Waipaoa was known as the Koputetea River but as it appears that it is that river into which the Awapuni Lagoon enters and joins the sea it is not material what is the correct name, provided that it can be established that either or both rivers serve the purpose of flooding the lagoon with its waters or with the aid of the tides.

15. Reference to the Turanganui River has no bearing on the subject under discussion, as it is the river on which the Gisborne Harbour Works are built and it does not appear that the Wero-Wero River, which lies further South, has any connection with the Waipaoa or the Koputetea River, although the Admiralty Chart 2528 shows at least an arm of the Wero-Wero travelling North to meet the Koputetea River.

It may be that the Natives have some exclusive fishing rights in Lake Awapuni but I am investigating that aspect and will let you know the result of the enquiries at a later date.

SECRETARY FOR MARINE

31.5.52

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10. Extract from Judge Morison's judgment in the Maori Land Court, re Ninety Mile Beach, (1957) 85 Northern MB 126-7.

[Judge Morison stated that the evidence had clearly established the following points]:

- (a) That the Northern portion [of the beach] was within the territory occupied by Te Aupouri and the Southern portion was within the territory occupied by Te Rarawa.
- (b) That the members of these tribes had their kaingas and their burial grounds scattered inland from the beach at intervals along the whole distance.
- (c) That the two tribes occupied their respective portions of the land to the exclusion of other tribes.
- (d) That the land itself was a major source of food supply for these tribes in that from it the Maoris obtained shell fish, namely toheroa, pipi, tuatua, and tipa from the beach itself, and kutai from the rocks below high water mark at the part known as the Maunganui bluff.
- (e) That the Maoris caught various fish in the sea off the beach, and for this purpose went out in canoes. The fish caught were, mullet, schnapper, flounder, kahawai, parore, herrings, rock cod, yellow-tail, king-fish, and shark.
- (f) That for various reasons from time to time "rahuis" were imposed upon various parts of the beach and the sea itself.
- (g) That the beach was generally used by the members of these tribes.

It is clear beyond doubt that the land was exclusively occupied by the two tribes under their customs and usages, and the further question is whether it can be said to have been owned by them.

In the circumstances existing in New Zealand before the Treaty the various Maori tribes exercised complete dominion over their tribal territories. The boundaries of these territories altered from time to time by reason of inter-tribal wars and conquests, just as the boundaries of the territories owned by nations, large or small, in the Western world have altered from time to time as a result of wars and conquests.

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

Western nations have long asserted ownership to the dry land and to such parts of the sea round their coasts as they could effectively control - by international law an artificial distance of three miles appears to have been generally agreed upon, but in more recent years nations have asserted their rights to areas extending to greater distances. For example the recent claim by Peru to a distance of 200 miles when certain fishing vessels were arrested within this area.

England has long asserted her right to ownership up to three miles from the coast. The whole is owned by the Crown, but by a purely domestic law the ownership of land by the subject does not extend below high water mark except in the case of particular grants.

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

The Maori Tribes must be regarded as states capable of owning territory just as much as any other peoples whether civilized or not: The Court is of the opinion that

these tribes were the owners of their territories over which they were able to exercise exclusive dominion or control. The two parts of this land were immediately before the Treaty of Waitangi within the territories over which Te Aupouri and Te Rarawa respectively exercised exclusive dominion and control and the Court therefore determines that they were owned and occupied by these two tribes respectively according to their customs and usages.

Mr Rosen - I ask for leave to appeal (Sec. 43) against this preliminary determination - The Crown regards it as a matter of importance.

Mr Dragicevich - The only comment I have is that on account of the importance to the Crown - the costs of the applicants in further proceedings should be paid by the Crown.

Court - Leave to appeal is granted provided that a proper notice of appeal shall be lodged with the Registrar at Whangarei on or before January 31st, 1958.

As to [the] question of costs mentioned by Mr Dragicevich, that would appear to be a matter for discussion with the Crown representatives.

Mr Rosen - I formally ask Court to state a case to Supreme Court on Grounds two and three of [the] Crown's submissions.

Court - The Court considers that a case should be stated - The case should be prepared by Counsel for the Crown submitted to Counsel for the applicant and in case of difference between them the case will be settled by the Court.