

# WHAT COULD HAVE BEEN? THE COMMON LAW DOCTRINE OF NATIVE TITLE IN LAND UNDER SALT WATER IN AUSTRALIA AND AOTEAROA/NEW ZEALAND

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*Once upon a time, the Indigenous peoples of Australia and New Zealand had exclusive occupation and use of their homelands. They did not distinguish between land on dry soil and land under water – it was all considered to be one garden. In recent years, both peoples have attempted to use the courts in their respective countries to reaffirm their connection with this landscape. This article examines the contemporary interpretation of the common law doctrine of native title and its applicability to one part of this space: land under salt water.*

## I INTRODUCTION

In the 21<sup>st</sup> century, Australia and New Zealand have had to consider whether the common law doctrine of native title is capable of recognising customary interests in the foreshore and seabed that equate to ownership. The Australian High Court in a 2001 majority judgment, *Commonwealth v Yarmirr* ('*Yarmirr*'),<sup>1</sup> held that the common law is incapable of recognising such interests. In comparison, the New Zealand Parliament in 2004 enacted legislation that assumed the common law was capable of doing so. The *Foreshore and Seabed Act 2004* (NZ) ('*FSA*') replaced the New Zealand High Court's inherent jurisdiction with a statutory jurisdiction to hear claims concerning 'territorial customary rights'.<sup>2</sup> These rights are defined as a customary or aboriginal title that 'could be recognised at common law and that is founded on the exclusive use and occupation of a particular area of the public foreshore and seabed by the group'.<sup>3</sup> If the group is

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<sup>1</sup> (2001) 208 CLR 1 ('*Yarmirr*').

<sup>2</sup> Parts of the Act came into force 25 November 2004, the rest came into force 17 January 2005.

<sup>3</sup> *Foreshore and Seabed Act 2004* (NZ) s 32(1). The 'foreshore and seabed' is defined as the marine area bounded, on the landward side by the line of mean high water springs, and, on the seaward side, by the outer limits of the territorial sea, and includes the air space and water space above this area, and the subsoil, bedrock, and other matters below these areas: *Foreshore and Seabed Act 2004* s 5 'foreshore and seabed'. The 'public foreshore and seabed' does not include any land that is, for the time being, subject to a specified freehold interest: *Foreshore and Seabed Act 2004* (NZ) s 5 'public foreshore and seabed'.

successful in proving a territorial customary right, they can apply to the High Court to either refer the matter to the Attorney-General and the Minister of Maori Affairs for a redress agreement to be negotiated, or order the establishment of a foreshore and seabed reserve in which the Maori group will be recognised as the guardians of the area.<sup>4</sup>

This article examines whether the *FSA* is correct in its assumption that the common law could have recognised Indigenous exclusive use and occupation of the foreshore and seabed. Essentially, the English-developed doctrine states that upon a transfer of sovereignty, the property rights of the original inhabitants must be fully respected.<sup>5</sup> What this means for Australia and New Zealand in regard to land under salt water is explored in this article. The eminent law academic, Dr Paul McHugh, with support from the Waitangi Tribunal, argues that the New Zealand High Court's inherent jurisdiction would not have allowed it to 'deliver exclusive ownership of the foreshore and seabed'.<sup>6</sup> McHugh believes that if the High Court had been given the opportunity to consider the issue unfettered by statute, it would have adopted the Australian *Yarmirr* majority position. McHugh thus concludes that the *FSA* does more for Maori than the common law would have done in that the Act simply presumes the common law was capable of recognising exclusive ownership in land under salt water when in fact it was not a possibility.

With respect, this article concludes differently. It establishes that New Zealand's case law precedent indicates that the common law in New Zealand could have recognised customary ownership of salt-water covered land. It is argued that if the Court had been given the opportunity to exercise its inherent jurisdiction then it would have adopted, at the very least, a similar position to Kirby J's dissenting judgment in *Yarmirr*. Justice Kirby's position is that the common law is capable of not recognising Indigenous exclusive ownership, but rather qualified ownership, of the foreshore and seabed.

The importance of this article lies in considering the significance of a major divergence in the two countries' understanding of the common law doctrine of native title in land under salt water. In one country, the courts currently allow no argument as to Indigenous ownership, and yet in another country it is a prerequisite for possible redress. That is, on one side of the Tasman Sea, the courts, by majority, have decided that the common law is incapable of recognising ownership; on the other side of the Tasman Sea, Parliament has directed the courts to presume it is possible. This article explores this difference

<sup>4</sup> See *Foreshore and Seabed Act 2004* (NZ) pt 4.

<sup>5</sup> See, eg, *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 407-8. For a discussion of the doctrine see Kent McNeil, *Common Law Aboriginal Title* (1989); Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (2001); Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (2003).

<sup>6</sup> Submission to the Select Committee Hearing of the Foreshore and Seabed Bill, Parliament of New Zealand, Wellington, August 2004, 37 (Paul McHugh). See also Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (2004).

and is particularly interested in considering whether the New Zealand Parliament was correct to make such a presumption about the common law. It considers the significance *Yarmirr* could have had for New Zealand. It concludes that the current legal precedents of *Yarmirr* and the *FSA* require reconsideration.

## II AUSTRALIA'S CURRENT LEGAL ANSWER

The first Australian High Court decision to consider whether the common law doctrine of native title is capable of recognising a customary interest in the foreshore and seabed that equates to ownership was *Yarmirr*, decided in 2001. Australian Indigenous clan groups applied under the *Native Title Act 1993* (Cth) ('*Native Title Act*') for determination of native title in respect of the sea and seabed in the Croker Island region of the Northern Territory. Thus, the case concerned not solely land under water, but the water itself and the right to the resources in that water, i.e., fish. The Court had to decide the issue under its statutory jurisdiction of s 223(1) of the *Native Title Act* which states (emphasis added):

The expression *native title or native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

It was a split decision. Chief Justice Gleeson, Gaudron, Gummow and Hayne JJ (majority) held that there is a 'fundamental difficulty standing in the way of the claimants' assertion of entitlement to exclusive rights of the kind claimed'.<sup>7</sup> According to the majority, the common law public rights of navigation, fishing and the right of innocent passage cannot stand alongside exclusive native title rights and interests: 'the inconsistency lies not just in the competing claims to control who may enter the area but in the expression of that control by the sovereign authority in a way that is antithetical to the continued existence of the asserted *exclusive* rights'.<sup>8</sup> The majority, in interpreting the three-pronged test of s 223(1), accepted that the *Native Title Act* requires the two systems of law – traditional law and common law – to operate together. However, they claimed that the continued recognition of traditional law is dependent on whether the two laws can coexist. They concluded that the starting point for a native title analysis must therefore 'begin by examining what are the sovereign rights and interests

<sup>7</sup> *Yarmirr* (2001) 208 CLR 1, 67.

<sup>8</sup> *Ibid* 68 (emphasis added).

which were and are asserted over territorial sea'.<sup>9</sup> In this case, those rights – public rights to navigate and fish, and the international right to innocent passage – trump traditional law because '[t]hese are rights which cannot co-exist with rights to exclude from any part of the claimed area all others'.<sup>10</sup>

Nonetheless, the majority endorsed the lower Court's finding that the claimants are able to exercise non-exclusive native title rights and interests, in accordance with and subject to their traditional laws and customs, to, for example fish, hunt and gather for personal, domestic or non-commercial communal needs; access the area to visit and protect places which are of cultural or spiritual importance, and access the area to safeguard their cultural and spiritual knowledge.<sup>11</sup> Hence, the majority accepted what has been coined as a 'bundle of rights' – limited rights to take and have access.

The two remaining High Court Justices dissented but for different reasons. Justice Callinan believed that the majority went too far in recognising the possibility of non-exclusive rights, stating there could be no native title at all in the sea and seabed as it would be inconsistent with the Crown's sovereignty. Not only could there be no exclusive native ownership or rights over the sea, there could be no native title rights at all for there was 'certainly no evidence in this case as to any system of law with respect to, or regulation of'<sup>12</sup> enforceable, effective rules to regulate the use, access, and exploitation of the sea and seabed.

At the other end of the spectrum, Kirby J believed that the majority had not gone far enough in recognising the possibility of exclusive ownership. He held that the common law doctrine of native title could, and should, recognise aboriginal exclusive ownership of the sea and seabed but that public rights of navigation, fishing and passage should qualify it. In contrast to Callinan J, Kirby J accepted that the aboriginal people had their own laws:

In the remote and sparsely inhabited north of Australia is a group of Aboriginal Australians living according to their own traditions. Within that group ... they observe their traditional laws and customs as their forebears have done for untold centuries before Australia's modern legal system arrived. They have a 'sea country' and claim to possess it exclusively for the group. They rely on, and extract, resources from the sea and accord particular areas spiritual respect. The sea is essential to their survival as a group.<sup>13</sup>

Justice Kirby emphasised that '[i]n earlier times, they could not fight off the "white man" with his superior arms; but now the "white man's" laws have changed to give them, under certain conditions, the superior arms of legal protection'.<sup>14</sup> He devised a different solution to that of the majority and its

<sup>9</sup> Ibid 51.

<sup>10</sup> Ibid 67.

<sup>11</sup> Ibid 1-2.

<sup>12</sup> Ibid 165.

<sup>13</sup> Ibid 142.

<sup>14</sup> Ibid.

'bundle of rights' approach – qualified exclusivity:

They yield their rights in their 'sea country' to rights to navigation, in and through the area, allowed under international and Australian law, and to licensed fishing, allowed under statute. But, otherwise, they assert a present right under their own laws and customs, now protected by the 'white man's' law, to insist on effective consultation and a power of veto over other fishing, tourism, resource exploration and like activities within their sea country because it is theirs and is now protected by Australian law. If that right is upheld, it will have obvious economic consequences for them to determine – just as the rights of other Australians, in their title holdings, afford them entitlements that they may exercise and exploit or withhold as they decide.<sup>15</sup>

Justice Kirby believed that this type of outcome was 'precisely that for which *Mabo [No 2]* was decided and the [Native Title] Act enacted. The opinion to the contrary is unduly narrow. It should be reversed'.<sup>16</sup> Kirby J observed that the only limitations on recognition of native title rights and interests are those stated in *Mabo v Queensland (No 2)* ('*Mabo*'), 'namely that native title could not be recognised when to do so would "fracture a skeletal principle of our legal system"; or where to do so would be repugnant to the rules of natural justice, equity and good conscience'.<sup>17</sup>

In comparison to Kirby J, the majority in *Yarmirr* read *Mabo* quite differently. Chief Justice Gleeson, Gaudron, Gummow and Hayne JJ stated that the skeletal metaphor could not be used

to obscure the underlying principles that are in issue. There are obvious dangers in attempting to argue from the several elements of the metaphor to an understanding of the principles that lead to the result that is expressed by the metaphor. It is, therefore, not profitable to stay to consider what principles of the legal system are, or are not, part of its 'skeleton'. Rather, attention must be directed to the nature and extent of the inconsistency between the asserted native title rights and interests and the relevant common law principles.<sup>18</sup>

Justice Kirby strongly disagreed with this reasoning, likening the majority judgment to the pre-*Mabo* legal fictions. For example, Kirby J exclaimed:

To press on with a blind adherence only to the adapted rules of the common law of England is not only inconsistent with the essential legal foundation for the step which this Court took in *Mabo [No 2]* as the basis for the new legal reasoning concerning native title. It is also incompatible with the

<sup>15</sup> Ibid.

<sup>16</sup> Ibid 142. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*'), the landmark case to recognise the common law doctrine of native title in Australia, held that the Meriam people's native title in the Murray Islands, Queensland, was effective against the State of Queensland and the whole world because the 'common law of this country would perpetrate injustice if it were to continue to embrace the enlarged notion of terra nullius': at 58 (Brennan J).

<sup>17</sup> *Yarmirr* (2001) 208 CLR 1, 115.

<sup>18</sup> Ibid 68.

independence and self-respect that should today be reflected in the exposition by this Court of the common law of Australia, at least where that law is concerned with vital and peculiar problems of a special Australian character. The rights of the Indigenous peoples of Australia are of that kind.<sup>19</sup>

Justice Kirby therefore approached his judgment in a very different manner to the majority, not accepting that the common law necessarily trumps traditional law. He forcefully argued:

In short, to take a view of the common law of Australia, including as it is given recognition and protection under the Act, that would confine the native title rights of Indigenous peoples solely to those enjoyed by their forebears before European settlement of Australia could itself amount to imposing on them an unjust and discriminatory burden not imposed by the common law on other Australians.<sup>20</sup>

Subsequent cases following *Yarmirr* have illustrated the context of the *Yarmirr*'s majority 'bundle of rights' approach. For example, in *Lardil Peoples v Queensland*,<sup>21</sup> the Federal Court of Australia held that the aboriginal claimants had a right, in respect to the sea water and land, to: access it under their traditional laws and customs; fish, hunt and gather living and plant resources from it for domestic or non-commercial communal consumption in accordance with their traditional laws and customs; take and consume fresh drinking water from the fresh water springs in the inter-tidal zone in accordance with their traditional laws and customs; and access in accordance with their traditional laws and customs for religious or spiritual purposes.<sup>22</sup>

In Australia, s 223(1)(c) of the *Native Title Act* requires that native title rights and interests be recognisable 'by the common law of Australia'. The precedent thus set (albeit by majority opinion) is that the common law doctrine of native title is not capable of recognising a customary interest in the foreshore and seabed, or in seawater, that equates to ownership. Instead, the common law doctrine of native title in Australia recognises a 'bundle of rights' associated with saltwater masses. The rights concern access and fishing for personal consumption. Such rights appear little different to the rights enjoyed by all Australians.

### III NEW ZEALAND'S CURRENT PRESUMPTION

In comparison, no New Zealand court has answered whether the common law doctrine of native title is capable of recognising a customary interest in the foreshore and seabed that equates to ownership. In 2003, the New Zealand Court

<sup>19</sup> Ibid 141.

<sup>20</sup> Ibid 132.

<sup>21</sup> [2004] FCA 298 (Queensland).

<sup>22</sup> Ibid 117-18.

of Appeal, in its *Attorney-General v Ngati Apa* ('*Ngati Apa*')<sup>23</sup> decision, was not asked to answer this question. Although *Ngati Apa* concerned land temporarily and permanently under saltwater, the issue before the Court was whether the Maori Land Court had jurisdiction under the *Te Ture Whenua Maori Act 1993* (NZ) (also titled the *Maori Land Act 1993* (NZ)) ('*TTWMA*') to determine the status of the foreshore and seabed as Maori customary land – land held in accordance with *tikanga* Maori (Maori customary values and practices).<sup>24</sup>

The Maori Land Court was established in the 1860s to issue fee simple titles to land in customary ownership (thereby converting customary land to freehold land).<sup>25</sup> Today the Court continues to have jurisdiction to issue orders declaring the status of land. Hence, the *Ngati Apa* claimants, unlike the *Yarmirr* claimants in Australia, had a choice of courts. They could have pursued their claim of ownership of the foreshore and seabed in the Maori Land Court or the High Court. In the Maori Land Court the argument would have been that the foreshore and seabed is Maori customary land. In the High Court the argument would have been that the foreshore and seabed is land held by them under the common law doctrine of native title. The claimants decided to take the first option.

The case began in the Maori Land Court with an interim decision in favour of the Maori claimants.<sup>26</sup> On appeal, the Maori Appellate Court queried whether it had jurisdiction to issue status orders in relation to land under salt water, and so stated a case for the High Court to answer.<sup>27</sup> The High Court answered no to this question because the foreshore and seabed is Crown land.<sup>28</sup> In contrast, the Court of Appeal unanimously held yes; the Maori Land Court has jurisdiction to investigate and determine, if the evidence warrants, whether the foreshore and seabed is Maori customary land. Thus, the decision was made in relation to the Maori Land Court's land status order jurisdiction, not the High Court's inherent common law native title jurisdiction. However, as is explored in detail later in this article, the justices deciding the *Ngati Apa* case did make numerous comments relating to the common law doctrine of native title. These comments, it is argued, portray a clear insight into how a future court may have exercised its inherent jurisdiction.

Yet, of course, the *FSA* has since been enacted. The High Court's inherent jurisdiction has been replaced by a statutory jurisdiction to hear claims concerning 'territorial customary rights'<sup>29</sup> in the foreshore and seabed. Section

<sup>23</sup> [2003] 3 NZLR 643 ('*Ngati Apa*'). For a more detailed consideration of this case and subsequent Government policy and legislation, see Richard Boast and Paul McHugh 'The Foreshore and Seabed' (New Zealand Law Society Seminar, Wellington, New Zealand, July 2004); Richard Boast, 'Maori Proprietary Claims to the Foreshore and Seabed after *Ngati Apa*' (2004) 21 *New Zealand Universities Law Review* 1; Paul McHugh, 'Aboriginal Title in New Zealand: A Retrospect and Prospect' (2004) 2 *New Zealand Journal of Public and International Law* 1.

<sup>24</sup> *Te Ture Whenua Maori Act 1993* (NZ) ss 129(2)(a), 4 'Tikanga Maori'.

<sup>25</sup> *Te Ture Whenua Maori Act 1993* (NZ) ss 131(1), 129(1).

<sup>26</sup> *In Re Marlborough Sounds Foreshore and Seabed* (1997) 22A Nelson MB 1 (Hingston J).

<sup>27</sup> *Crown Law Office v Maori Land Court (Marlborough Sounds)* (1998) 3 Te Waipounamu ACMB 9 (Durie CJ, Smith, Carter and Isaac JJ).

<sup>28</sup> *Re Marlborough Sounds Foreshore and Seabed Decision* [2002] 2 NZLR 661.

<sup>29</sup> *Foreshore and Seabed Act 2004* (NZ) s 10(1).

32(1) of the *FSA* defines these rights to mean:

a customary title or an aboriginal title that could be recognised at common law and that –

- (a) is founded on the exclusive use and occupation of a particular area of the public foreshore and seabed by the group; and
- (b) entitled the group, until the commencement of this Part, to exclusive use and occupation of that area.

Section 32(2) adds:

a group may be regarded as having had exclusive use and occupation of an area of the public foreshore and seabed only if –

- (a) that area was used and occupied, to the exclusion of all persons who did not belong to the group, by members of the group without substantial interruption in the period that commenced in 1840 and ended with the commencement of this Part; and
- (b) the group had continuous title to contiguous land.

Additionally, in assessing whether a group had exclusive use and occupation of an area, ‘no account may be taken of any spiritual or cultural association with the area, unless that association is manifested in a physical activity or use related to a natural or physical resource’.<sup>30</sup> The exclusive use and occupation requirement will still be met, however, even if the land was occupied or used by others, so long as they were ‘expressly or impliedly permitted by members of the group to occupy or use the area; and recognised the group’s authority to exclude from the area any person who did not belong to the group’.<sup>31</sup> So, New Zealand’s High Court must now determine the rights of a Maori group in accordance with that statutory test – a test which assumes that native title at common law could have been founded on exclusive use and occupation of the foreshore and seabed.

This is a test that goes further than Australia’s s 223 of the *Native Title Act*. At first instance s 223 of the *Native Title Act* and 32(1) of the *FSA* are similar in that they require the native title right or interest (in the Australian context, to land or water; in the New Zealand context, to the public foreshore and seabed) to be recognisable at common law. But the similarity stops there. The *FSA* adds, in a manner that is absent in the *Native Title Act*, that the territorial customary right being claimed must have been recognisable at common law *and* it is a right founded on exclusive use and occupation. Because the Act sets up this test as a prerequisite for possible redress, it must have been Government’s intention that at least some Maori groups could satisfy it. If not, then territorial customary rights are a cruel fiction. It is this assumption then that the common law could

<sup>30</sup> *Foreshore and Seabed Act 2004* (NZ) s 32(3).

<sup>31</sup> *Foreshore and Seabed Act 2004* (NZ) s 32(5).

have recognised exclusive use and occupation of land under salt water that is of interest in this article.

Before turning to analyse this presumption, it is worthwhile stating that despite the different approaches, the result is similar in New Zealand and Australia: Indigenous peoples cannot claim ownership in land under salt water. Such land is Crown land.<sup>32</sup> All that a Maori group can hope for if successful in proving a territorial customary rights claim is for a negotiated redress package<sup>33</sup> or the establishment of a reserve which acknowledges their role as guardians of the area.<sup>34</sup> In order to attain rights more akin to the Australian Indigenous peoples' 'bundle of rights', Maori can apply to the Maori Land Court for 'customary rights orders'. In brief, in order to continue to practice customary activities, uses or practices along the foreshore and seabed, Maori claimant groups must establish that these rights: are integral to *tikanga* Maori; have been carried out in accordance with *tikanga* Maori in a substantially uninterrupted manner since 1840; continue to be exercised in the same area of the foreshore and seabed; and are not prohibited by any rule of law.<sup>35</sup> As at the date of writing, no customary rights orders have been issued.

#### IV THE CRITIQUE OF NEW ZEALAND'S PRESUMPTION

The high profile academic position in New Zealand is that the majority in the Australian *Yarmirr* case are correct. Dr Paul McHugh, an internationally renowned common law native title expert,<sup>36</sup> along with the Waitangi Tribunal, have been most prominent in arguing this position. This part explains why support for *Yarmirr* exists in New Zealand and why the presumption in the *FSA* is thus said to do more for Maori than the common law would have in that it, on McHugh's analysis, incorrectly presumes the common law was capable of recognising exclusive ownership in land under salt water when in fact the common law could never have delivered this.

In January 2004, the Waitangi Tribunal heard, under urgency, the Government's response to the Court of Appeal's *Ngati Apa* decision.<sup>37</sup> Essentially, the Tribunal

<sup>32</sup> For New Zealand, see *Foreshore and Seabed Act 2004* (NZ) s 13 (although note that this only applies to 'public' foreshore and seabed, that land which is subject to a specified freehold interest remains in private ownership). For Australia, see *Yarmirr* (2001) 208 CLR 1.

<sup>33</sup> *Foreshore and Seabed Act 2004* (NZ) ss 36-8.

<sup>34</sup> *Foreshore and Seabed Act 2004* (NZ) ss 36, 40-4. Note that this right does little more than to formalise an existing right under the *Resource Management Act 1991* (NZ) ('RMA'). Section 7 of the RMA states that all persons exercising functions and powers in relation to managing the use, development, and protection of natural and physical resources (including the foreshore and seabed) must have particular regard to *kaitiakitanga*. This Maori word is defined as guardianship and is used in exactly the same way in the *Foreshore and Seabed Act 2004* (NZ). See *Resource Management Act 1991* (NZ) s 2 'Kaitiakitanga' and *Foreshore and Seabed Act 2004* (NZ) s 5 'kaitiakitanga'.

<sup>35</sup> *Foreshore and Seabed Act 2004* (NZ) s 50(1).

<sup>36</sup> And author of the impressive comprehensive publication, Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination* (2004).

<sup>37</sup> For the Government's policy, see New Zealand Government, *Summary of the Foreshore and Seabed Framework* (2003) Beehive <<http://www.govt.nz>> For the Government's policy, see New Zealand

had to consider whether the Government's plan to introduce legislation to annul the possibility provided for in *Ngati Apa* (for the Maori Land Court to hear a Maori customary land status application in relation to the foreshore and seabed) was in breach of the principles of the Treaty of Waitangi ('The Treaty').<sup>38</sup> The Tribunal agreed with the Maori claimants that the Government's policy was in breach of Treaty principles. Part of the Tribunal's considerations concerned the nature and extent of the common law doctrine of native title. Dr Paul McHugh was called as an expert witness by the Crown, but emphasised at the hearing the independence of his views. He presented the most detailed evidence on this issue. He adopted the position that: New Zealand would be likely to follow the recent Australian cases and base native title rights in the fact of continuity of customary property rights upon the Crown's acquisition of sovereignty;<sup>39</sup> the foreshore and seabed is a 'special juridical space' over which the Crown's sovereignty has a special character;<sup>40</sup> and,

at common law, the Crown's sovereignty over the foreshore and seabed amounts to a 'bundle of rights' less than full ownership; therefore, the common law doctrine of aboriginal title, which has effect because of and at the moment of acquisition of sovereignty, cannot recognise customary rights that are greater than those of the sovereign.<sup>41</sup>

McHugh asserted that the Australian 'continuity' approach would be more consistent with the Treaty than the Canadian 'prior occupation' approach.<sup>42</sup> He emphasised that in the Treaty of Waitangi, Maori ceded *kawanatanga* (governorship) to the Crown in return for Crown protection of Maori *tino rangatiratanga* (chieftainship) over their properties.<sup>43</sup> He accepted as correct the majority approach taken in the Australian High Court *Yarmirr* decision. He was not convinced by Justice Kirby's dissenting judgment.<sup>44</sup> McHugh relied on the *Te Wehi v Regional Fisheries Officer* ('*Te Wehi*')<sup>45</sup> case and the Crown-Maori fisheries settlement<sup>46</sup> in support of his conclusion that the 'bundle of rights' analysis would apply in New Zealand. He reasoned that the fishing rights dealt with in New Zealand were regarded as 'non-territorial', thus part of a bundle of customary rights, and therefore it would be inconsistent for a different approach to be taken now whereby fishing rights could be regarded as part of a *hapu's* 'qualified ownership' of the foreshore and seabed.<sup>47</sup> Although McHugh opposed

(footnote 37 cont'd) Government, Summary of the Foreshore and Seabed Framework (2003) Beehive <<http://www.beehive.govt.nz/foreshore/summary.cfm>> at 28 July 2006. For media coverage following the *Ngati Apa* decision, see, eg, 'Law to Confirm Status of Seabed and Foreshore', *Otago Daily Times* (Dunedin), 24 June 2003, 1.

<sup>38</sup> The Tribunal has this jurisdiction under the *Treaty of Waitangi Act 1975* (NZ) s 6.

<sup>39</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, above n 6, 50.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid* 52.

<sup>42</sup> See, eg, *Delgamuukw v British Columbia* SCC [1997] 3 SCR 1010, where the common law doctrine of native title test is framed as arising from the prior occupation of the land.

<sup>43</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, above n 6, 50. For a copy of the Treaty of Waitangi, see, eg, *Treaty of Waitangi Act 1975* (NZ), sch 1.

<sup>44</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, above n 6, 52.

<sup>45</sup> [1986] 1 NZLR 680 ('*Te Wehi*').

<sup>46</sup> See, eg, *Maori Fisheries Act 2004* (NZ).

<sup>47</sup> The Tribunal has this jurisdiction under the *Treaty of Waitangi Act 1975* (NZ) s 6.

the High Court's recognition of Maori customary rights amounting to ownership, he 'acknowledged that there are 'substantial Maori rights over the foreshore and seabed', and that some could be exclusive.<sup>48</sup> In other words, McHugh saw a split between title and rights whereby only rights have the potential to be exclusive.

Claimant counsel at the Tribunal hearing, in their written submissions, challenged McHugh's position and the underlying conclusion of the majority decision in *Yarmirr*. One criticism was that the 'bundle of rights' approach was in effect a 'semantic device',<sup>49</sup> and the Crown's common law rights to the foreshore and seabed 'could equally be conceptualised as full ownership rights that are, however, qualified by the public rights of navigation, fishing and innocent passage'.<sup>50</sup> The significance of this starting point would mean that the 'nature of the Crown's sovereignty could not be raised as a bar to the common law's recognition of customary rights amounting to ownership of the foreshore and seabed'.<sup>51</sup> Another criticism was that the English common law has recognised a wide range of rights in land under water, and in particular, in New Zealand, there is Maori ownership of lakebeds coexisting with public rights to sail on and fish in the lakes.<sup>52</sup>

The Crown endorsed McHugh's position and the majority judgment in *Yarmirr*, adding that 'the common law doctrine of aboriginal title, which aims to "absorb Indigenous property rights in a colonial setting", has a theoretical basis "distinct from the rationalisation of marine property rights in England"'.<sup>53</sup> In the words of the Crown counsel:

The recognition of aboriginal title may only be so far as is consistent with Crown sovereignty. Reception tests relate to the importation of common law rules which apply to those property rights after the assumption of sovereignty. The scope of the recognition may indeed be very broad, but the nature of the Crown's sovereignty is a different question from which rules of common law property enter a colony consequently.<sup>54</sup>

While the Waitangi Tribunal had difficulty with McHugh's reasoning concerning *Te Weehi* and the Crown-Maori fisheries settlement,<sup>55</sup> on the essential point, the Tribunal agreed with McHugh. The Tribunal held that there is 'an internal logic to the "bundle of rights" position'<sup>56</sup> because its logic is that 'the law cannot recognise for Indigenous people what it does not recognise for the sovereign power. It is a variant of the legal maxim: you cannot give what you do not

<sup>48</sup> Ibid 56.

<sup>49</sup> Ibid 53.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid 53-4.

<sup>52</sup> Ibid 54. See, eg, Ngai Tahu Claims Settlement Act 1998 (NZ) ss 168, 184 and 192 which vest the title of the beds of Te Waihora, Muriwai (Coopers Lagoon), and Lake Mahinapua in Te Runanga o Ngai Tahu.

<sup>53</sup> Ibid 54.

<sup>54</sup> Ibid 56.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid 60.

have'.<sup>57</sup> The Tribunal dismissed Kirby J's judgment in *Yarmirr* because the 'statutory context for his argument is, however, significantly different from the common law context in which the New Zealand High Court would be operating'.<sup>58</sup> The Tribunal concluded on this point: 'we are of the view that it would be a *bold* New Zealand High Court judge who would decline to follow the approach of the majority in *Yarmirr*'.<sup>59</sup> Accordingly, the Tribunal stated 'we consider it more likely that a "bundle of rights" approach would be adopted by the High Court to conceptualise the nature of customary rights in the foreshore and seabed'.<sup>60</sup> This conclusion was reached even though the Tribunal earlier in its discussion cautioned 'no one – neither the Crown, claimants, nor this Tribunal – can predict with certainty how the New Zealand High Court would respond to applications to declare the existence, nature and holders of any customary rights in foreshore and seabed areas'.<sup>61</sup>

The Government responded to the Tribunal report by introducing the Foreshore and Seabed Bill 2004 (NZ). It was sent to the Fisheries and Other-Sea Related Legislation Select Committee in May 2004. The Select Committee received written and oral evidence from Dr Paul McHugh in September 2004 where he argued, as he did before the Waitangi Tribunal, that the doctrine of native title cannot recognise ownership in land under saltwater. He stated that the inherent jurisdiction could not deliver exclusive ownership of the foreshore and seabed because 'the common law could not recognise exclusive ownership of the foreshore and seabed'.<sup>62</sup> McHugh's conclusion was based on the majority judgment in *Yarmirr*. He stated, in reference to that Australian case:

This approach can be seen as a balancing one that allows both an aboriginal and public band of interest in the sea and seabed. It is also consistent with the High Court's avowed approach since *Wik* where it emphasised the possibility of the co-existence of aboriginal title and other property rights (private, or in the case of the sea, public). Here the aboriginal title rights in the seabed co-existed with the public interest and the rights (such as fishery licences) carved out from it. In that sense the majority's approach to recognition of aboriginal title over the seabed in *Yarmirr* gave a principled compromise between Callinan and Kirby. It was the 'bundle of rights' approach towards which the Waitangi Tribunal and I believed a New Zealand court would tend in exercise of the inherent jurisdiction.<sup>63</sup>

The Select Committee was 'unable to reach agreement'<sup>64</sup> on whether the

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid (emphasis added).

<sup>60</sup> Ibid.

<sup>61</sup> Ibid 45.

<sup>62</sup> McHugh, 'Submission by Dr PG McHugh to the Select Committee' above n 6, 37.

<sup>63</sup> Ibid 36.

<sup>64</sup> Fisheries and Other Sea-related Legislation Committee, *Foreshore and Seabed Bill (129-1): Report of the Fisheries and Other Sea-related Legislation Committee* (2004) <<http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/Final%20FS%20Report.pdf>> at 16 July 2006.

Foreshore and Seabed Bill 2004 (NZ) should be passed and therefore reported it back to the House with no amendments. There was no consensus on whether the common law doctrine of native title was capable of recognising a customary interest in the foreshore and seabed that equates to ownership.<sup>65</sup>

Thereafter the *FSA* was enacted, creating an interesting division between the two countries. While both Australia and New Zealand conclude that the foreshore and seabed is Crown land (they both reach the same endpoint), on this initial question of whether the common law doctrine of native title is capable of recognising a customary interest in the foreshore and seabed that equates to ownership, Australia's courts answer no; whereas New Zealand's Parliament has treated it as a live possibility. The high profile academic response in New Zealand has been that Australia's majority *Yarmirr* decision is correct and that a similar position would have been adopted in New Zealand by New Zealand's judiciary but for the *FSA*. This article disputes that stance and argues that there are many indicators in New Zealand's case law to suggest that if the High Court had been given the opportunity it might well have used its inherent jurisdiction to recognise Indigenous ownership of the foreshore and seabed.

## V THE POSSIBILITIES OF NEW ZEALAND'S COMMON LAW

### A *New Zealand's Common Law*

The first point is that the New Zealand Court of Appeal, in its *Ngati Apa* decision, explicitly foresaw the possibility of the doctrine recognising exclusive ownership. The justices in writing the *Ngati Apa* decision did not address the issue of the Maori Land Court's jurisdiction in a vacuum devoid of the native title doctrine jurisprudence. For example, Elias CJ stated, '[a]ny property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature',<sup>66</sup> and '[t]he content of such customary interest is a question of fact discoverable, if necessary, by evidence'.<sup>67</sup> Chief Justice Elias explained, '[a]s a matter of custom the burden on the Crown's radical title might be limited to use or occupation rights held as a matter of custom',<sup>68</sup> or, whilst quoting from the Privy Council decision *Amodu Tijani v Secretary, Southern Nigeria*,<sup>69</sup> they might 'be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference'.<sup>70</sup> Chief Justice Elias substantiated this possibility with reference to Canada:

The Supreme Court of Canada has had occasion recently to consider the

<sup>65</sup> However, note that each political party provided a summary of their positions. See *ibid*.

<sup>66</sup> *Ngati Apa* [2003] 3 NZLR 643, 655-6.

<sup>67</sup> *Ibid* 656.

<sup>68</sup> *Ibid*.

<sup>69</sup> [1921] 2 AC 399 (PC).

<sup>70</sup> *Ngati Apa* [2003] 3 NZLR 643, 656.

content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructuary rights to *exclusive ownership* with incidents equivalent to those recognised by fee simple title.<sup>71</sup>

The other four justices discussed the common law doctrine of native title in similar terms. For example, Tipping J began his judgment with the words ‘[w]hen the common law of England came to New Zealand its arrival did not extinguish Maori customary title ... title to it must be lawfully extinguished before it can be regarded as ceasing to exist’.<sup>72</sup> Justices Keith and Anderson, in a joint judgment, emphasised ‘the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain’.<sup>73</sup> Moreover, Gault P expressly recognised the uniqueness of New Zealand in the existence of the common law jurisdiction of native title and the statutory jurisdiction of Maori customary land status, and stated that he prefers to ‘reserve the question of whether it is a real distinction insofar as each is directed to interests of land in the nature of ownership’.<sup>74</sup>

No other New Zealand court has come as close as *Ngati Apa* in providing a hint as to how the courts may have developed a common law precedent in relation to the foreshore and seabed. The discussion in *Ngati Apa* may have had resounding effect but for the *FSA*. In particular, the comments made in *Ngati Apa* poignantly suggest a precedent that would be different to the majority decision in *Yarmirr*. For example, Elias CJ stated:

The common law as received in New Zealand was modified by recognised Maori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.<sup>75</sup>

While this reasoning does not establish that exclusive title would have been recognised in New Zealand, it at least suggests a different approach to the majority in *Yarmirr*. Of the three positions postulated in *Yarmirr* (a ‘bundle of rights’, no rights, and qualified exclusive title), Elias CJ’s reasoning reads most like Kirby J’s dissenting position of qualified ownership. Justice Kirby went to great pains to stress the ‘special character’ of the common law of Australia, emphasising that it is important not to ‘press on with a blind adherence only to the adapted rules of the common law of England’.<sup>76</sup> Australia’s independence and self-respect should mean that the common law of Australia reflects the ‘vital and peculiar problems of a special Australian character. The rights of the Indigenous

<sup>71</sup> *Ibid* (emphasis added). The Canadian case cited was *Delgamuukw v British Columbia* SCC [1997] 3 SCR 1010.

<sup>72</sup> *Ibid* 693.

<sup>73</sup> *Ibid* 684.

<sup>74</sup> *Ibid* 673.

<sup>75</sup> *Ibid* 668.

<sup>76</sup> *Yarmirr* (2001) 208 CLR 1, 100. See also above n 19 and accompanying text.

peoples of Australia are of that kind'.<sup>77</sup>

The reasoning in the *Ngati Apa* decision suggests acceptance of the fact that, just as Kirby J argued for in regard to Australia, the common law of New Zealand is unique. Chief Justice Elias stressed this reality:

In British territories with native populations, the introduced common law adapted to reflect local custom, including property rights. That approach was applied in New Zealand in 1840. The laws of England were applied in New Zealand only 'so far as applicable to the circumstances thereof' ... from the beginning the common law of New Zealand as applied in the Courts differed from the common law of England because it reflected local circumstances.<sup>78</sup>

By reading the *Ngati Apa* decision closely, it is hard to fathom why it has been argued that it would have taken a 'bold'<sup>79</sup> New Zealand court to approach the issue of Indigenous ownership of the foreshore and seabed in a fashion similar to Kirby J. An examination of Gault P's judgment in *Ngati Apa*, for example, suggests that he did not accept the argument that Indigenous ownership would per se be inconsistent with the coastal marine management extolled in the *Resource Management Act 1991* (NZ), for 'those provisions are not wholly inconsistent with some private ownership'.<sup>80</sup> If given the chance, Gault P may well have reached a 'qualified exclusive ownership' decision in a like manner to Kirby J. The joint judgment of Keith and Anderson JJ definitely hinted at this possibility: '[s]ubject to such qualifications arising from the circumstances of New Zealand, property in sea areas could be held by individuals and would in general be subject to public rights such as rights of navigation'.<sup>81</sup> Keith and Anderson JJ, in contrast to the majority in *Yarmirr*, accept that New Zealand's common law has allowed for individual ownership 'under the law of England which became part of the law of New Zealand in 1840 "so far as applicable to the circumstances of New Zealand", private individuals could have property in sea areas including the seabed'.<sup>82</sup> Moreover, Elias CJ expressly rejects the argument that the different qualities in land under water compared to dry land should make private property interests in the foreshore and seabed unthinkable because of the public interest in navigation and recreation. Her Honour agrees with Keith and Anderson's JJ review that 'interests in the soil below low water mark were known under the laws of England' and 'it is difficult to understand why an entirely different property regime would necessarily apply on the one hand to the pipi bank ... and on the other to the hapuka grounds ... or reefs'.<sup>83</sup>

It is therefore argued in this article that there was enough in *Ngati Apa* to suggest that New Zealand would not have followed Australia on this issue of whether the

<sup>77</sup> Ibid 101.

<sup>78</sup> *Ngati Apa* [2003] 3 NZLR 643, [17].

<sup>79</sup> See Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, above n 6.

<sup>80</sup> *Ngati Apa* [2003] 3 NZLR 643, 677.

<sup>81</sup> Ibid 679.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid 660-1.

common law doctrine of native title was capable of recognising Indigenous ownership of land under salt water. The reasoning in *Ngati Apa* consistently stressed the uniqueness of New Zealand, including a history of recognising Maori ownership of land. The reasoning was not premised on a 'skeletal principle' or an inconsistency examination as occurred in the majority judgment in *Yarmirr*. In essence, *Ngati Apa* reads very differently from the majority *Yarmirr* decision. The justices in *Ngati Apa* stressed the importance of extinguishment stemming from clear and plain legislation. The warning in *Ngati Apa* that there may be no remaining customary land in the foreshore and seabed emphasises this point – that is, ownership existed but may not remain because of subsequent developments such as the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* (NZ).<sup>84</sup> In other words, the rights may have been extinguished not because of some inconsistency or inability of two laws to co-exist, but because of a legislative inquiry.

## **B New Zealand's Unique Characteristics**

The second point which was correctly recognised and emphasised in *Ngati Apa* is that two characteristics distinguish New Zealand as unique: the Treaty of Waitangi and Maori land legislation. The Treaty of Waitangi was a document signed between the British Crown and Maori chiefs in 1840. It recognised that Maori owned the land in New Zealand. The second article guarantees to Maori 'their lands, villages and all their treasures',<sup>85</sup> or, as the English version reads, 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession'.<sup>86</sup> The second article then states the Crown has the exclusive right of pre-emption 'over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon'.<sup>87</sup>

The Treaty of Waitangi thus endorsed the position at common law that a change in sovereignty does not extinguish Indigenous peoples' property rights, and specifically, Maori remain the proprietors until they wish to sell to the Crown. Even the English version of the Treaty endorses the position that Maori owned not only the dry land, but also the 'fisheries' and 'other properties' as stated in the text. This was consistent with the Maori worldview, which saw no distinction between land below and above high tide. It was all considered one country, one garden, with, for example, root vegetables in one patch, shellfish and fish in another patch.

The early courts agreed that the Treaty endorsed the common law. In *R v*

<sup>84</sup> See *ibid* 650 (Elias CJ).

<sup>85</sup> This is Professor Sir Hugh Kawharu's English translation of the Maori version of the second article: see Hugh Kawharu, *Waitangi: Maori & Pakeha perspectives of the Treaty of Waitangi* (1989) 319-20. The treaty is also available at State Services Commission, *The Treaty of Waitangi* (2006) <<http://www.treatyofwaitangi.govt.nz/>> at 16 July 2006. See also *Treaty of Waitangi Act 1975* (NZ) sch 1.

<sup>86</sup> Kawharu, above n 85, 319-20 (art 2).

<sup>87</sup> *Ibid*.

*Symonds* ('*Symonds*'),<sup>88</sup> a case decided seven years after the signing of the Treaty of Waitangi in 1847, Chapman J stated:

it cannot be too solemnly asserted that [native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows ... that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi ... does not assert either in doctrine or in practice any thing new and unsettled.<sup>89</sup>

The later courts were not as supportive of the Treaty. In particular, the now infamous *Wi Parata v Bishop of Wellington* ('*Wi Parata*')<sup>90</sup> case, decided in 1877, marked the emergence of a different precedent to *Symonds*. It labelled the Treaty a 'simple nullity',<sup>91</sup> based on the reasoning that '[n]o body politic existed capable of making cession of sovereignty'<sup>92</sup> because Maori were 'primitive barbarians'.<sup>93</sup> Later the Privy Council held that rights conferred by the Treaty could not be enforced in the courts except in so far as a statutory recognition of the rights can be found.<sup>94</sup> Nonetheless, the legal, political and social revival of the Treaty in the 1970s has meant that it has played a cornerstone role in the contemporary emergence of the common law doctrine of native title. The New Zealand Court of Appeal, in 1987, specifically stated that the Treaty could no longer be treated as a 'dead letter'<sup>95</sup> and to do so 'would be unhappily and unacceptably reminiscent of an attitude, now past'.<sup>96</sup> Moreover, in the 1990s, the then President of the Court of Appeal, Cooke P, stated extra-judicially that the Treaty 'is simply the most important document in New Zealand's history',<sup>97</sup> and similarly, Lord Woolf of the Privy Council stated that the Treaty 'is of the greatest constitutional importance to New Zealand'.<sup>98</sup>

In the landmark case to re-introduce the doctrine of native title into New Zealand, *Te Weehi*, decided in 1986, the High Court held that a Maori person has a right to take undersized shellfish, or *paua*, in contravention of the law, on the basis that he was exercising a customary right which the law had not extinguished. Justice Williamson found in favour of *Te Weehi*, recognising that the establishment of British sovereignty had not set aside the local laws and property rights of Maori,<sup>99</sup> thus concluding that because there had been no plain and clear legislative

<sup>88</sup> (1847) NZPCC 387 ('*Symonds*').

<sup>89</sup> *Ibid* 390.

<sup>90</sup> (1877) 3 NZ Jur (NS) 72 ('*Wi Parata*').

<sup>91</sup> *Ibid* 78.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308.

<sup>95</sup> *NZ Maori Council v A-G* [1987] 1 NZLR 641, 660-1 (Cooke P).

<sup>96</sup> *Ibid* 661.

<sup>97</sup> Sir Robin Cooke, 'Introduction' (1990) 14 *New Zealand Universities Law Review* 1, 1.

<sup>98</sup> *New Zealand Maori Council v A-G* [1994] 1 NZLR 513, 516 (PC).

<sup>99</sup> *Te Weehi* [1986] 1 NZLR 680, 687.

extinguishment of the fishing right the right continues to exist: '[i]t is a right limited to the Ngai Tahu tribe and its authorised relatives for personal food supply.'<sup>100</sup> In reaching this decision, Williamson J recognised the significance of the Treaty of Waitangi for New Zealand: 'obviously the rights which were to be protected by it arose by the traditional possession and use enjoyed by Maori tribes prior to 1840'.<sup>101</sup>

In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* ('*Te Runanganui o Te Ika Whenua*')<sup>102</sup> the Court of Appeal, in 1994, concluded that neither under the common law doctrine of native title, nor under the Treaty of Waitangi, do Maori have a right to generate electricity by the use of waterpower.<sup>103</sup> But in discussing the doctrine, and accepting its existence in New Zealand (although not to the extent of electricity generation), Cooke P agreed that the Treaty guaranteed to Maori, subject to British *kawanatanga* (government), their *tino rangatiratanga* (chieftainship) and their *taonga* (tangible and intangible treasures) and '[i]n doing so the treaty must have been intended to preserve for them effectively the Maori customary title'.<sup>104</sup>

Moreover, *Ngati Apa* recognised the unique nature of the common law doctrine of native title in New Zealand in regard to the Treaty of Waitangi. The Court did not divorce the discussion of the common law from the Treaty of Waitangi. The justices ensured a circle back to the 1847 *Symonds* decision, stating similarly to Chapman J in *Symonds* that Maori customary land 'is not the creation of the Treaty of Waitangi or of statute, although it was confirmed by both'.<sup>105</sup> In doing so, the Court of Appeal accepted that the Treaty of Waitangi reflected the common law: a change in sovereignty does not extinguish Indigenous peoples' property rights, and Maori remain the proprietors until they wish to sell to the Crown.

In a like manner to the Treaty of Waitangi, the impact of the Maori land legislation would not have been ignored by a court coming to grips with understanding what the common law doctrine of native title could have meant for New Zealand's foreshore and seabed. The now named Maori Land Court, then named the Native Land Court, was established in the 1860s under statute following the Crown's waiver of its right of pre-emption, which had been guaranteed to Maori in the Treaty of Waitangi. Although the Court's empowering statute, the *Native Land Act 1865* (NZ), still recognised Maori proprietary customs and ownership of land in New Zealand,<sup>106</sup> it allowed for Maori to convert their land into a freehold title – Maori freehold land – and then alienate it (sell, gift, mortgage and so on) as they so desired.

<sup>100</sup> Ibid 692.

<sup>101</sup> Ibid 686.

<sup>102</sup> [1994] 2 NZLR 20.

<sup>103</sup> Ibid 25.

<sup>104</sup> Ibid 24.

<sup>105</sup> *Ngati Apa* [2003] 3 NZLR 643, 651. See above discussion of *Symonds* (1847) NZPCC 387, above n 88-9 and accompanying text.

<sup>106</sup> See the long title of the Act.

But ten years after the establishment of the Maori Land Court, Prendergast CJ, in *Wi Parata*, stated:

On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered, to such extent as may be necessary, by the Courts of the new sovereign. ... But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based.<sup>107</sup>

At the turn of the century, the Privy Council, hearing an appeal from New Zealand in *Nireaha Tamaki v Baker*,<sup>108</sup> retaliated and said the reasoning in *Wi Parata* 'goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court'.<sup>109</sup> Their Lordships recognised that New Zealand's legislation refers to Maori customary law and therefore:

It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence. ... one is rather at a loss to know what is meant by such expressions 'native title', 'native lands', 'owners', and 'proprietors', or the careful provision against sale of Crown lands until the native title has been extinguished, if there be no such title cognisable by the law, and no title therefore to be extinguished.<sup>110</sup>

Even though the Privy Council condemned *Wi Parata*, believing that the existence of customary title was affirmed in statutes, New Zealand's judiciary continued to adhere to the *Wi Parata* reasoning. For example, *In Re the Ninety Mile Beach*,<sup>111</sup> decided in 1963, New Zealand's Court of Appeal held that all foreshore in New Zealand, which lies between the high and low water marks and in respect of which contiguous landward title has been investigated by the Maori Land Court, was land in which Maori customary property had been extinguished. It was because of this case that the issue of whether the Maori Land Court had jurisdiction to determine the status of foreshore and seabed land came before the Court of Appeal in *Ngati Apa*.

While *Te Weehi*, in 1986, reintroduced the doctrine, it did so in regard to native fishing rights, not title. Williamson J did not feel bound by the earlier *Wi Parata* case law, distinguishing those cases from the one he was hearing on the right to take undersized *paua* because it was a 'non-territorial' claim; this case was 'not based upon ownership of land or upon an exclusive right to a foreshore or bank

<sup>107</sup> *Wi Parata* (1877) 3 NZ Jur (NS) 72, 78.

<sup>108</sup> [1901] AC 561.

<sup>109</sup> *Ibid* 577 (Lord Davey).

<sup>110</sup> *Ibid* 577-8 (Lord Davey).

<sup>111</sup> [1963] NZLR 461.

of a river'.<sup>112</sup> It was important for Williamson J to emphasise this aspect otherwise he would have been bound by higher court precedent (namely the Court of Appeal's *In re the Ninety-Mile Beach* decision). It was *Ngati Apa*, a case concerning land (rather than rights to resources such as fish) that conclusively put to an end the *Wi Parata* 'barbarian theory', overruled *In re the Ninety-Mile Beach*, and held that the Maori Land Court has jurisdiction to determine whether the foreshore and seabed has the status of customary land. Therefore, the Waitangi Tribunal was correct to have had difficulty with McHugh's use of *Te Weehi*.<sup>113</sup> Rather than *Te Weehi* lending support for a 'bundle of rights' approach in New Zealand, Williamson J had to emphasise the non-territorial nature of the claim so as to distinguish rights to *paua* from rights to land.

Moreover, if a court had been given the opportunity to consider whether the common law was capable of recognising Maori ownership of the foreshore and seabed, Maori land legislation would not have been ignored in the reasoning. Since 1993, *Te Ture Whenua Maori Act*, in its preamble, explicitly reaffirms that the Treaty of Waitangi guaranteed to Maori protection of *rangatiratanga*, and recognises that 'land is a taonga tuku iho of special significance to Maori people'.<sup>114</sup> The Act is premised on promoting the retention of 'that land in the hands of its owners, their whanau, and their hapu'.<sup>115</sup> Bearing this in mind, the Treaty of Waitangi and Maori land legislation raise at least a semblance of a suggestion that New Zealand's legal history is different to Australia. Thus a New Zealand court would have approached the issue of Indigenous ownership of land under salt water differently to the majority in *Yarmirr*.

### C New Zealand's Judicial Approach

The third point is that it has not been the approach of New Zealand's courts to singularly emphasise the Australian case law. Emphasis has rather been on Canada, and to some extent, on *Mabo*. Williamson J, in *Te Weehi*, alleged 'Canadian Courts have consistently taken the view that customary rights of aboriginal peoples must be preserved and that charters and treaties similar to the Treaty of Waitangi recognise obligations which arise as a result of those customary rights'.<sup>116</sup> He stated that the 'Canadian cases follow the general approach that customary rights of native or aboriginal peoples may not be extinguished except by way of specific legislation that clearly and plainly takes away [that] right'.<sup>117</sup> He endorsed that view, stating that in New Zealand if customary rights have not been extinguished, they are preserved.<sup>118</sup>

<sup>112</sup> *Te Weehi* [1986] 1 NZLR 680, 692.

<sup>113</sup> See above n 55 and accompanying text for the Waitangi Tribunal's reasoning. See also above n 55 and accompanying text for McHugh's arguments.

<sup>114</sup> The expression 'taonga tuku iho' is not defined in *TTWMA*, but essentially it is an expression meaning that land is the absolute treasure.

<sup>115</sup> *TTWMA* preamble. See also ss 2, 17.

<sup>116</sup> *Te Weehi* [1986] 1 NZLR 680, 691.

<sup>117</sup> *Ibid*. For example, some of the Canadian cases cited included: *Calder v A-G of British Columbia* (1973) 34 DLR (3d) 145; *Guerin v R* (1984) 13 DLR (4<sup>th</sup>) 321.

<sup>118</sup> *Ibid* 692.

In *Te Runanga o Muriwhenua Inc v Attorney-General* ('*Te Runanga o Muriwhenua*'),<sup>119</sup> Cooke P made extensive reference to the Canadian case law, describing it as '[a]lthough more advanced than our own ... [which] is still evolving',<sup>120</sup> likely to provide 'major guidance'<sup>121</sup> for New Zealand. He added that New Zealand's courts should give just as much respect to the rights of New Zealand's Indigenous peoples as the Canadian Courts give to their Indigenous peoples.<sup>122</sup> President Cooke saw no reason to distinguish the Canadian jurisprudence on the basis of constitutional differences and emphasised the analogous approaches to the partnership and fiduciary obligations being developed in Canada under the doctrine of native title and in New Zealand under the Treaty of Waitangi. This comparison enabled Cooke P to confidently conclude that '[i]n principle the extinction of customary title to land does not automatically mean the extinction of fishing rights'.<sup>123</sup>

In *Te Runanganui o Te Ika Whenua*, Cooke P referred to the Canadian case law, and *Mabo*, in devising the nature of native title. He explained the doctrine as:

On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights.<sup>124</sup>

President Cooke elaborated on the nature of native title rights stating that: they are usually communal; they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers; they can only be transferred to the Crown while the transfer must be in strict compliance with the provisions of any relevant statutes; it is likely to be in breach of fiduciary duty if an extinguishment occurs by less than fair conduct or on less than fair terms; and if extinguishment is deemed necessary, then free consent may have to yield to compulsory acquisition for recognised specific public purposes (but upon extinguishment proper compensation must be paid).<sup>125</sup> President Cooke then explained the scope of native title in terms of a spectrum:

The nature and incidents of aboriginal title are matters of fact dependent on the evidence in any particular case. ... At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law. At the other extreme they may be treated as at best a mere permissive and apparently arbitrarily revocable occupancy.<sup>126</sup>

119 [1990] 2 NZLR 641 ('*Te Runanga o Muriwhenua*').

120 *Te Runanga o Muriwhenua* [1990] 2 NZLR 641, 645.

121 *Ibid* 655.

122 *Ibid* 655.

123 *Ibid* 655.

124 *Te Runanganui o Te Ika Whenua* [1994] 2 NZLR 20, 23-4.

125 *Ibid* 24.

126 *Ibid*.

With *Te Runanganui o Te Ika Whenua* being decided two years after the Australian High Court decision *Mabo*, Cooke P stated that on the extent of the jurisdiction of the courts the very full discussion in *Mabo* 'would require close study'.<sup>127</sup> But he added '[o]f course nothing said in that case is binding on a New Zealand Court. In New Zealand we would have to be guided by our conception of the strength of the competing arguments and any others relevant to this country's circumstances'.<sup>128</sup>

In *McRitchie v Taranaki Fish and Game Council* ('*McRitchie*')<sup>129</sup> Richardson P, for the majority, discussed the doctrine using the then leading Canadian and Australian cases – *R v Sparrow*<sup>130</sup> and *Mabo* – for support that native rights 'are highly fact specific'.<sup>131</sup> He explained the test as

The existence of a right is determined by considering whether the particular tradition or custom claimed to be an aboriginal rights was rooted in the aboriginal culture of the particular people in question and the nature and incidents of the right must be ascertained as a matter of fact.<sup>132</sup>

Interestingly, Thomas J, in dissent, who had found in favour of a Maori customary right to fish for introduced species, based his decision entirely on New Zealand law; no reference was made to overseas decisions.

In *Ngati Apa*, there is extensive reliance on Canadian case law, and the Australian case *Mabo*. No post-*Mabo* Australian case is cited, including *Yarmirr*. The justices cite with approval the New Zealand cases: *Te Weehi*, *Te Runanga o Muriwhenua*, and *Te Runanganui o Te Ika Whenua*. Justices Keith and Anderson even emphasise the reference made in *Te Runanga o Muriwhenua* that it is 'right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of aboriginal peoples are in North America'.<sup>133</sup> The reasoning in *Ngati Apa* suggests a strong preference for a New Zealand answer, with perhaps some guidance from Canada and *Mabo*, but nothing post-*Mabo* even enters the *Ngati Apa* justices' radar, and arguably correctly so.

New Zealand's judicial approach has consistently emphasised the requirement for clear and plain legislative intent for extinguishment of native title to be effective. Unlike in Australia, there is no hint of an emerging precedent in New Zealand that where an inconsistency may exist in terms of use of the land, the native title will be extinguished.

Turning to the significance of the *Yarmirr* decision for New Zealand, if a New Zealand court had been given the opportunity to consider the extent of Indigenous

<sup>127</sup> Ibid 25.

<sup>128</sup> Ibid.

<sup>129</sup> [1999] 2 NZLR 139 ('*McRitchie*').

<sup>130</sup> [1990] 1 SCR 1075.

<sup>131</sup> *McRitchie* [1999] 2 NZLR 139, 147 (Richardson P).

<sup>132</sup> Ibid.

<sup>133</sup> *Ngati Apa* [2003] 3 NZLR 643, 684. See also above n 122.

property rights in the foreshore and seabed, *Yarmirr* would have been considered to be of, at most, persuasive authority. It is argued here that *Yarmirr* would have been distinguished. The strongest indication for this position is the reasoning in *Ngati Apa*, and New Zealand's legal history, including a legal history of recognising exclusive ownership in land under freshwater. It is doubtful that the New Zealand courts would have introduced the notion that land under salt water constituted a special juridical space. Chief Justice Elias recognised this in *Ngati Apa*, observing that it would be difficult to understand why entirely different property regimes would apply in one area and not another.<sup>134</sup> Moreover, the inconsistency doctrine emphasised by the majority in *Yarmirr* was developed in a context of an inconsistency between native title and public rights to navigate, fish and secure innocent passage, whereby those rights mostly relate to the sea water, not the seabed or foreshore. When the *Yarmirr* Court spoke of a special juridical space, it was considering a native title claim to the seawater *and* the seabed. In New Zealand, the issue would have focused primarily on Maori interests in the land – the foreshore and seabed – for most rights to resources in seawater have been settled in New Zealand under legislation.<sup>135</sup> A native title right in the seabed may not conjure the same special juridical space as seawater, for the public rights to fish and travel over and in the water do not necessarily impact on the land. For example, ownership of the seabed would give ownership to that land space, not necessarily to the water above. A right to land, anchor, or cross the seabed and foreshore might be at issue, or a right to take resources embedded in the seabed and foreshore. But there is a solution just as Kirby J recognised: qualified exclusive ownership. The *Ngati Apa* justices were not hostile to this approach.<sup>136</sup> Additionally, Maori have certainly not stated that if they had been granted native title in the foreshore and seabed that they would have denied public access.<sup>137</sup> Also, there are New Zealand precedents of awarding title in land under water to Maori – lakebeds – and that legislation clearly states that ownership of a lake bed does not confer ownership, management, or control of waters, aquatic life, or structures attached to or in the bed of the lake.<sup>138</sup> A similar precedent could have been applied to the foreshore and seabed.

In regard to the Waitangi Tribunal's comments that it would have taken a 'bold' Court to depart from the approach of the majority in *Yarmirr*, no court is bound by the Tribunal's opinions. While the courts have maintained that the Tribunal's opinions 'are of great value to the Court',<sup>139</sup> and 'are entitled to considerable weight',<sup>140</sup> the courts are free to dismiss such statements. As the Court of Appeal has asserted: '[t]he crucial point is that the Waitangi Tribunal is not a Court and

<sup>134</sup> *Ngati Apa* [2003] 3 NZLR 643, 660. See above n 83 and accompanying text.

<sup>135</sup> See, eg, *Maori Fisheries Act 2004* (NZ).

<sup>136</sup> See, eg, above n 81 and accompanying text.

<sup>137</sup> The Waitangi Tribunal emphasised this fact: see Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, above n 6.

<sup>138</sup> See, eg, *Ngai Tahu Claims Settlement Act 1998* (NZ) s 171. See also above n 52.

<sup>139</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 662.

<sup>140</sup> *Moana Te Aira Te Uri Karaka Te Waero v The Minister of Conservation and Auckland City Council* (HC, Auckland, M360-SW01, 19 February 2002, Harrison J) [59].

has no jurisdiction to determine issues of law or fact conclusively'.<sup>141</sup> Moreover, the Tribunal's foreshore and seabed report was the outcome of an urgent inquiry – it had limited time to hear the claim and write the report: 'we have had four weeks in which to produce the report'.<sup>142</sup> Significantly, the Tribunal stressed '[u]nfortunately, at the Tribunal's hearing, claimant counsel did not take the opportunity to cross-examine Dr McHugh, preferring to treat his evidence as if it was a legal submission to be responded to by their own submissions'.<sup>143</sup>

The Tribunal's observations could have been rebutted. The Tribunal premised its support for the position that it would have taken a bold court to recognise Indigenous ownership in salt covered land because of the maxim 'the law cannot recognise for Indigenous peoples what it does not recognise for the sovereign power'. But this is only true if it is agreed that the starting point is as the majority in *Yarmirr* saw it: what are the sovereign's rights and interests in the territorial sea? But the reasoning in *Ngati Apa* suggests a different approach: '[t]he proper starting point is not with assumptions about the nature of property ... but with the facts as to native property'.<sup>144</sup> *Ngati Apa* stressed, first, 'the entire country was owned by Maori according to their customs and that until sold land continued to belong to them'<sup>145</sup> and, second, the 'common law of New Zealand is different'<sup>146</sup> to the English common law. Applying *Ngati Apa*, the Waitangi Tribunal's maxim may not have significantly influenced a court considering this issue. Besides, the Tribunal itself had qualified its opinion with the observation that no one can predict with certainty how the High Court could have applied the common law doctrine of native title to the foreshore and seabed.

This article has therefore identified considerable disparity on whether New Zealand's common law is capable of recognising Indigenous ownership of land either temporarily or permanently under salt water. While others have held that it would have required a 'bold' New Zealand court to depart from the majority reasoning in *Yarmirr*, it is argued here that *Ngati Apa* had already positioned itself as the 'brave' court to hint at an affirmative answer. Even though the statements in *Ngati Apa* relating to the common law's ability to recognise private ownership could have been dismissed as obiter dicta (the decision the court made related to the Maori Land Court's jurisdiction, not the common law), the observations single out this case as perhaps willing to disturb 'the current political and economic power structure'<sup>147</sup> in a way that courts in other jurisdictions have failed to do. It was a brave decision that has provided much insight into the common law doctrine of native title in New Zealand.

Instead of approaching the issue as *Yarmirr* setting the precedent, in reality, in

<sup>141</sup> *Te Runanga o Muriwhenua Inc v A-G* [1990] 2 NZLR 641 at 651 (Cooke P).

<sup>142</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, above n 6, xi.

<sup>143</sup> *Ibid* 53.

<sup>144</sup> *Ngati Apa* [2003] 3 NZLR 643, 661 (Elias CJ).

<sup>145</sup> *Ibid* 657 (Elias CJ).

<sup>146</sup> *Ibid* 668 (Elias CJ).

<sup>147</sup> Kent McNeil, 'The Vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42 *Osgoode Hall Law Journal* 271, 300. McNeil's statements are discussed in more length below n, 169-70 and accompanying text.

New Zealand, it would have required a 'bold' court to dismiss New Zealand's unique legal history and case law. A future, 'audacious' New Zealand court would have followed the approach in *Ngati Apa*, not *Yarmirr*.

## VI WHERE TO FROM HERE?

### A Australia

Any attempt by Indigenous Australians to exercise ownership of the foreshore and seabed is fettered by a conservative High Court that has, arguably, applied a common law test that is too restrictive. They are stuck with the *Yarmirr* precedent until a braver composition of the Australian High Court emerges. As Maureen Tehan has observed, '[a]s the common law of native title lies dormant, waiting for the common law to revive and reinvigorate it as a set of fuller rights, the promise and process of change and the search for a fair and just relationship will continue'.<sup>148</sup>

However, as *Mabo* has taught, precedent can be overruled. Applying *Mabo* reasoning to *Yarmirr*, a future Court may well overrule the *Yarmirr* precedent. First, as is stated in *Mabo*, the common law can be modified to bring it into conformity with contemporary notions of justice and human rights, so long as the departure does not fracture a skeleton of principle upon which the common law is based: 'no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system'.<sup>149</sup> Second, the old precedent, as espoused for example in *Cooper v Stuart*,<sup>150</sup> a Privy Council decision on appeal from Australia decided in 1889, stating that Australia was 'practically unoccupied, without settled inhabitants or settled law',<sup>151</sup> is today, according to *Mabo*, 'false in fact and unacceptable in our society'.<sup>152</sup> It was a theory that depended on 'a discriminatory denigration of Indigenous inhabitants'.<sup>153</sup> A similar comment in the future could be made about *Yarmirr*. Third, 'a mere change in sovereignty does not extinguish native title to land'.<sup>154</sup> Justice Brennan concluded that the 'common law of this country [Australia] would perpetrate injustice if it were to continue to embrace the enlarged notion of terra nullius',<sup>155</sup> and therefore 'it is right to say that their native title is effective as against the State of Queensland and as against the whole world unless the State, in valid exercise of its legislative or executive power,

<sup>148</sup> Maureen Tehan 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27 *Melbourne University Law Review* 523, 571.

<sup>149</sup> *Mabo* (1992) 175 CLR 1, 30.

<sup>150</sup> (1889) 14 AC 286.

<sup>151</sup> *Ibid* 291 (Lord Watson).

<sup>152</sup> *Mabo* (1992) 175 CLR 1, 40.

<sup>153</sup> *Ibid* 40.

<sup>154</sup> *Ibid* 55.

<sup>155</sup> *Ibid* 58.

extinguishes the title'.<sup>156</sup> By treating the salt water and salt water covered land as a special juridical space, deeming it the property of the Crown upon acquisition of sovereignty, means that *Yarmirr* could be subjected to reasoning like that of Brennan J in the future: *Yarmirr* could be overruled in a similar manner as *Cooper*. Although Kirby J alerted the Court to this in his reasoning in *Yarmirr*, it will be for a future High Court bench to consider the significance of the majority *Yarmirr* decision.

There is some academic support within Australia for the position that the majority judgment in *Yarmirr* is an incorrect interpretation of the common law. For example, Noel Pearson argues that the High Court, post *Mabo* (and *Wik Peoples v Queensland*<sup>157</sup>), has it wrong. He has identified three recent decisions, including *Yarmirr*, and concluded that 'the High Court has misinterpreted the definition of native title under the *Native Title Act 1993* (Cth) and fundamentally misapplied the common law'.<sup>158</sup> Pearson argues that the Court's entire discussion of native title is treated as an exercise in statutory interpretation rather than an articulation of the common law, and in doing this the Court has devised a test that is contrary to how the Court, in *Mabo*, first envisaged the doctrine and how courts overseas (in particular, the Supreme Court of Canada in its 1997 *Delgamuukw v British Columbia*<sup>159</sup> decision), have interpreted the doctrine. He disputes the current test, which focuses on proof of traditional laws and customs, and argues that the more subtle and correct way to answer what continues after the change of sovereignty is 'entitlement to occupy the land ... not the incidents of rights and interests that are established by reference to arcane traditional laws and customs'.<sup>160</sup> He substantiates this approach by reference to what Toohey J said in *Mabo*: '[i]t is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title ... Thus traditional title is rooted in physical presence'.<sup>161</sup> Pearson concludes that the recent High Court justices have 'proceeded with their assumption without grappling with the host of Canadian authorities which emphasise occupation at the time of sovereignty as the foundation of native title'.<sup>162</sup>

In reference to the recent High Court approach, Maureen Tehan similarly argues '[t]en years of the *Native Title Act* has seen the common law of native title emerge, blossom, change and wilt'.<sup>163</sup> She reflects: '[t]he promise engendered by *Mabo* has failed to materialise in the form of a robust and enforceable native title.

<sup>156</sup> Ibid 75.

<sup>157</sup> (1996) 187 CLR 1.

<sup>158</sup> Noel Pearson, 'Land is Susceptible of Ownership' in Marcia Langton et al, *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004) 83. The other two cases criticised were *Western Australia v Ward* (2002) 213 CLR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

<sup>159</sup> [1997] 3 SCR 1010.

<sup>160</sup> Noel Pearson, 'The High Court's Abandonment of "The Time-Honoured Methodology of the Common Law"' in its Interpretation of Native Title in *Mirriuwung Gajerang and Yorta Yorta*' (2003) 7 *Newcastle Law Review* 1, 11. See also Pearson, 'Land is Susceptible to Ownership' above n 158, 100.

<sup>161</sup> Pearson, 'The High Court's Abandonment', above n 160, 11.

<sup>162</sup> Ibid.

<sup>163</sup> Tehan, 'A Hope Disillusioned, An Opportunity Lost?' above n 148, 571.

To that extent, the sun may have set, with native title fatally wounded by the *Native Title Act* and the High Court'.<sup>164</sup>

Richard Bartlett also takes issue with the recent High Court approach, arguing in a similar vein to Pearson that 'the requirement of continuous acknowledgement and observance of traditional laws and customs is unwarranted in principle and a denial of equality'.<sup>165</sup>

Sean Brennan, while not specifically referring to the *Yarmirr* decision, also critiques the High Court's recent approach stating that since 1992 the pendulum 'appears to have swung back against Indigenous interests most dramatically'.<sup>166</sup> Brennan questions the Court's emphasis on the spiritual character of native title over the secular, economic and pragmatic aspects of Indigenous connection to land; the development of relatively harsh common law rules for extinguishment; and, the drawing of tight boundaries around the concepts of tradition, connection and recognition.<sup>167</sup> Brennan concluded that the Court's recent approach has put at stake the human rights of Australian Indigenous peoples.

Professor Kent McNeil from Canada, a world leading authority on the common law doctrine of native title, has recently claimed that Australian (and Canadian) case law, including the often celebrated *Mabo* (and *Delgamuukw v British Columbia*<sup>168</sup>) cases, have ignored the native title extinguishment issue. McNeil has claimed that the cases fail to tell the whole story, for lurking behind the decisions 'are other explanations that relate more to political stability and economic priorities than to legal principle and precedent'.<sup>169</sup> He has asserted:

Regardless of the strengths of legal arguments in favour of Indigenous peoples, there are limits to how far the courts in Australia and Canada are willing to go to correct the injustices caused by colonialism and dispossession. Despite what judges may say about maintaining legal principle, at the end of the day what really seems to determine the outcome in these kinds of cases is the extent to which Indigenous rights can be reconciled with the history of British settlement without disturbing the current political and economic power structure.<sup>170</sup>

McNeil's observation and the Australian academics' positions together suggest real concern with how the Australian courts are interpreting and applying the doctrine of native title.

<sup>164</sup> *Ibid.*

<sup>165</sup> Richard Bartlett 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31 *University of Western Australia Law Review* 35, 35.

<sup>166</sup> Sean Brennan, 'Native title in the High Court of Australia a Decade after *Mabo*' (2003) 14 *Public Law Review* 209, 214.

<sup>167</sup> *Ibid* 214.

<sup>168</sup> [1997] 3 SCR 1010.

<sup>169</sup> McNeil, 'The Vulnerability of Indigenous Land Rights in Australia and Canada' above n 147, 273.

<sup>170</sup> *Ibid* 300-1.

## **B New Zealand**

In comparison, any attempt by the Indigenous New Zealanders to exercise ownership of the foreshore and seabed is fettered by the *FSA* until a braver composition of Members of Parliament agree that the Act needs amending. This scenario seems very unlikely: the Government has the public majority's support on how it handled the foreshore and seabed controversy.<sup>171</sup>

Nonetheless, the United Nations Committee on the Elimination of Racial Discrimination ('CERD') has put the New Zealand Government on notice. The Committee issued a decision in March 2005 stating it is concerned 'at the apparent haste'<sup>172</sup> with which the *FSA* was enacted, and that 'insufficient consideration may have been given to alternative responses to the *Ngati Apa* decision which might have accommodated Maori rights within a framework more acceptable to both the Maori and all other New Zealanders'.<sup>173</sup> Of interest to this article, CERD concluded that the Act appears 'on balance, to contain discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress'.<sup>174</sup> CERD has requested New Zealand's Government to 'monitor closely the implementation of the Foreshore and Seabed Act ... and to take steps to minimize any negative effects, especially by way of a flexible application of the legislation'.<sup>175</sup> Still, it does not appear that CERD's criticism will be enough to convince those in Parliament that the *FSA* requires amending.<sup>176</sup>

In the meantime, in order for the High Court to accept a territorial customary rights claim, it must accept that it was possible for the common law to recognise exclusive use and occupation of the foreshore and seabed by Maori groups. The *FSA* poses this presumption as a prerequisite for possible redress or guardianship opportunities. Even though this stance is at odds with the current Australian position (*Yarmirr*)<sup>177</sup> and a leading native title expert's opinion (Dr Paul McHugh),<sup>178</sup> it has been argued here that the presumption is correctly reflective of New Zealand's common law. There is enough evidence in New Zealand case law to conclude that it would have been possible for a High Court to accept, in accordance with its inherent jurisdiction, that the common law could have recognised Maori exclusive use and occupation of the foreshore and seabed. It is highly likely that if it had been given the chance, New Zealand's High Court

<sup>171</sup> For example, a poll released by Deputy Prime Minister Hon Dr Michael Cullen that showed a majority of New Zealanders believed the *Foreshore and Seabed Act* is fair: see Michael Cullen 'Poll finds foreshore and seabed policy fair' (Press Release, 6 February 2005) [6.2.05].

<sup>172</sup> *Early-warning and Urgent Procedure Regarding the New Zealand Foreshore and Seabed Act 2004*, UN CERD, 66<sup>th</sup> sess, 1680<sup>th</sup> mtg, [4], UN Doc CERD/C/SR.1680 (2005).

<sup>173</sup> *Ibid* [4].

<sup>174</sup> *Ibid* [6] (emphasis added).

<sup>175</sup> *Ibid* [8].

<sup>176</sup> The Government dismissed the report: see, eg, 'Prime Minister Critical of UN Committee's Processes' *New Zealand Herald* (Auckland), 14 March 2005.

<sup>177</sup> See above pt III New Zealand's Current Presumption.

<sup>178</sup> See above pt IV The Critique of New Zealand's Presumption.

would have reached this conclusion. The obiter comments in *Ngati Apa* suggest this.<sup>179</sup> Furthermore, other recent New Zealand native title cases support this.<sup>180</sup> At the very least, the existence of the Treaty of Waitangi, the Maori Land Court, and a history of recognising Maori ownership of land under fresh water would have ensured a very different approach to that taken by the majority in *Yarmirr*. Therefore, the *FSA* does not do more for Maori than the common law. It is not incorrect for the Act to assume that the common law was capable of recognising exclusive ownership in land under salt water. If it had been given the chance, New Zealand's High Court would have held it possible. To conclude otherwise would be a misconception of New Zealand's law.

## V CONCLUSION

Prior to British sovereignty, Indigenous Australians and New Zealanders had property rights in land under water. They did not distinguish between land on dry soil and land under water – it was all considered to be one place. For example, in regard to Maori, the landscape was described as one garden – ‘the *kumara* (root vegetable) bed here, the *pipi* (shellfish) bed there’ – without division between dry and wet land.<sup>181</sup> Indigenous Australians had a similar worldview as Kirby J recognised in his *Yarmirr* decision: ‘[o]f communities such as theirs it has been truly said that they do not observe this cultural distinction between land and sea, constructing land and sea property into a seamless web of cultural landscape’.<sup>182</sup>

Today, the reality is that wet salt land can be exclusively occupied in both countries. It is a sought after space, especially valuable for its marine farms and large scale commercial ports. In recent years the law has been used to guarantee that this landscape is in Crown ownership. In Australia, the instrument has been the courts; in New Zealand, the instrument has been legislation. Even though both countries answer differently on the point of whether the common law doctrine of native title is capable of recognising Indigenous ownership of the foreshore and seabed, because both countries reach the same end result (Crown ownership), the initial difference is negligible. Both countries need to revisit this issue, for the first footsteps into the 21<sup>st</sup> century have left serious questions about the operation of the common law doctrine of native title. In particular, the recent interpretations have left many in both countries wishfully thinking ‘what could have been?’.

<sup>179</sup> See above pt V The Possibilities of New Zealand's Common Law, B New Zealand's Unique Characteristics.

<sup>180</sup> See *ibid*.

<sup>181</sup> See Waitangi Tribunal, *The Foreshore* (1996) 22.

<sup>182</sup> *Yarmirr* (2001) 208 CLR 1, 72. Justice Kirby is quoting Nonie Sharp, ‘Remaining Sea Space: from Grotius to Mabo’, in Peterson and Rigsby (eds), *Customary Marine Tenure in Australia* they found there’: Inga Clendinnen, *Dancing with Strangers* (2003) 1. See Inga's observation of Indigenous fishing rights, eg: ‘[i]t did not occur to Phillip that the Australians thought themselves owners of the fish; that they had been hospitable to these graceless, greedy visitors long enough; that the belated readiness of the British to share their fish was taken to be an (inadequate) recognition of local ownership and visitors' obligations’, at 84.