The Foreshore and Seabed Debate:  
Contrasting Visions of Equality and Rights

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Dedicated in loving memory to
Margaret Morton, Thaddeus Suszko and Dorothy Suszko.

For my parents,
Bruce William Suszko and Robyn Margaret Morton,
who first taught me the importance of equality.
Abstract

This thesis will show that the important Foreshore and Seabed Debate that took place in Aotearoa/New Zealand from 2003 to 2006 was at its heart a conceptual and jurisprudential dispute between contrasting ideas of equality and rights. It will demonstrate that peoples’ arguments were based on deeper presumptions that are not easily identified in their public statements but reflect the foundations for their positions. It will show that different perspectives on equality and rights were found amongst a range of people, both Māori and Pākehā, from all sides of the Debate, and that it is possible to extract from their public remarks competing visions on matters of equality and rights, even if these were expressed in very similar terms.

The thesis is framed within an orthodox legal approach, which incorporates Māori Studies methodologies, to extract the major equality claims made during the Debate. It critically analyses these claims to determine whether or not they support the notion of separate Māori rights to the foreshore and seabed. Where such claims are supported, the sources of those rights are assessed, and this in turn involves some reassessment of the country’s sources of law. This thesis is therefore a specific study of the different perspectives New Zealanders hold concerning the legitimacy of Māori rights, and the proper sources of such rights.

Finally, this thesis will propose a way to settle the Debate. It will show that while the various theories behind the equality and rights arguments possess different dynamics, they also enjoy shared correlates and foundations. In exposing the different claims, a zone of potential compromise can be identified within which a suitable solution could be found. Such a solution is the product of substantive compromise, where the different equality and rights arguments are sufficiently close to allow the outlines of a potential solution to be drawn, wherein participants could trade off less essential equality and rights positions, but retain what is most essential to them. This possible solution is then used as a political yardstick against which to measure the likely success of the National-led Coalition Government’s Marine and Coastal Area (Takutai Moana) Bill 2010 that is currently before Parliament, whose passage seems likely, but at the time of writing is not assured.
I cannot take sole credit for this thesis. It has only been possible due to the assistance and support of many people. Some chose to embark on this process with me, others simply were swept up along the way. It is with the most sincerity that I thank you all.

First and foremost, I would like to express my deepest thanks to my primary supervisor, Professor John Dawson. John, words cannot convey how grateful I am for your guidance, support and tireless dedication to my PhD. You steered me through the haze of ideas, and enabled me to produce something of structure and clarity. You challenged me to expand my conceptual understandings and to write at a higher level, and as a result I have been able to explore subject matter I never imagined. Outside my PhD you provided me with funding, conference, publication and travel opportunities that made this experience productive and stimulating. And perhaps most of all, I want to thank you for sticking with me, even after my continued failure to grasp the correct use of the dreaded apostrophe!

I am also deeply grateful to my other supervisors, Jacinta Ruru and Doctor Jim Williams. I wish to thank you both for your input, help and guidance. Jacinta, thank you for your ‘big picture’ outlook. It enabled me to see the thesis as a whole, and to frame it within a Law and Indigenous Studies paradigm. Jim, you have been with me since my first foray into analysis of the arguments presented in the Foreshore and Seabed Debate. Thank you for setting me on the path that led to my PhD research. And thank you for ensuring the Māori voices didn’t get lost amongst the legal ones.

The financial support of several organisations is gratefully acknowledged. First, I am forever indebted to Professor Mark Henaghan, Dean of the Faculty of Law, who saw the value in my topic, and provided me with fees assistance and work that ensured I was able to start my PhD. I am also grateful to Marie-Louise for making that possible. I also wish to sincerely thank the University of Otago, Freemasons New Zealand and
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I would like to thank the members of the Faculty, Te Roopu Whai Pūtake and PILSA, and my fellow PhD students, for your continued support and encouragement. A huge thank you must go to the Administration Staff. You have been a source of friendship as well as practical and technical support. Matt Hall, I am so grateful for all your help with my computer problems. You saved the day more times than I can count. Another massive thank you must go to the Sir Robert Stout Law Library Staff. Your ability to find the most obscure source never ceased to amaze me, and your willingness to help at a moments notice, especially in the final stages of my PhD, is so greatly appreciated.

To Tofilau Nina Kirifi-Alai, Christine Anesone and Audrey Santana at the University of Otago Pacific Islands Centre. Thank you for all your support and encouragement and for being so welcoming to my parents. It has been an honour to be associated with the Centre and to take part in its many functions. Malo 'aupito.

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It is a pleasure to thank my wonderful proofreaders, Doctor Saskia Righarts, Greer Mundie, Rachel Souness and Carrie Suszko. I really appreciate the hours you have spent pouring over my work.

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academic endeavours. You are both inspirational in all you have achieved. I am grateful also to your boys for welcoming me into your home. I have had the privilege of watching them grow over these few years and they have turned into fine young men to be very proud of.

Michelle, my comrade in arms, we made it out of the trenches! Thank you for all the support, encouragement and clarity. To the sisterhood!

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To my good friends who have stuck with me through thick and thin since what feels like time immemorial, and to the new friends I have made along the way, I truly appreciate all the support you have given me while I was engaged in this project. To my godson Bjorn Kerekere, thank you for all the joy you provide.

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And finally, I owe my loving thanks to my parents, Bruce Suszko and Robyn Morton. You raised me with a love of research and taught me that I could achieve whatever I put my mind to. Mum and Dad, when I’ve been stressed and anxious, you’ve been there. Dad, thank you for the little ways you have helped me out. Mum, thank you so much for taking me in and providing me with all the essentials so that I could focus solely on my PhD. Without you both none of this would have been possible.

Ko āku mihi ki a koutou katoa.
Glossary of Māori words

ahi kā ‘burning fires of occupation’, occupation rights
Aotearoa New Zealand, North Island
atua usually translated as god but, more correctly, ancestors whose mana is extant, usually in a specific domain
awa river
hāngi earth oven
hapū sub-tribe, clan
hāpuku groper, a type of fish
hapūtanga hapū culture, hapū perspective
He iwi tahi tātou ‘We are all one people’, ‘We two peoples together make a nation’, ‘We many peoples together make a nation’
He Wakaputanga o te Rangatiratanga o Nu Tirene A Declaration of Independence 1835
hīkoi march
Hine-ahu-one/Hine-hau-one ‘created from earth/sand’, the first woman according to one creation narrative
hui gathering, meeting
Io the Supreme Being, according to some
Io-wahine the first woman according to one creation narrative
iwi tribe, people, nation
Kahungunutanga Ngāti Kahungunu culture or perspective
kāinga tūturu traditional home
kaitiaki guardian, caretaker
kaitiakitanga guardianship, stewardship
kapa haka performance group, performing Māori songs
kāwana governor
kāwanatanga governmentship, government, complete government
kiwi a flightless bird, native to Aotearoa/New Zealand, the national bird, by extension New Zealanders
kōpua hīnga ika ‘deep sea fishing ground’
mahinga kai cultivation
mana prestige, power
manaakitanga hospitality, kindness
mana atua rights and authority passed down from ancestors whose mana is extant
mana ki te whenua ‘authority, dignity and integrity of mahinga kai, the resources of Papatūānuku and Tangaroa’
mana Māori the Māori way of life
mana moana marine authority, the right to hold responsibility for the sea and its resources
mana o te whenua ‘mana of the land’
mana tangata/mana takata mana power and status accrued through one’s leadership talents, integrity, status, human rights
mana tuku iho inherited right or authority derived in accordance with tikanga
mana tūpuna ancestral mana, rights and authority passed down from ancestors
Manawhenua coastal whānau, hapū, rūnanga/rūnaka and iwi. The people who exercise kaitiakitanga and possess mana whenua in a geo-political area

mana whenua trusteeship of land, the right to hold responsibility for land or resources

Māori Indigeneous individuals and groups, including Manawhenua

marae courtyard, open area in front of the meeting house in a village

mataitai prescribed fishing area

mauri life principle

moana lake, sea

Pākehā New Zealanders of British descent

Papatūānuku/Papa Earth Mother

paru kohinga pipi ‘pipi bed’

paua abalone, a type of shellfish

pipi small cockle, a type of shellfish

pito umbilical cord

pounamu greenstone, a type of jade

pou whenua land post

rāhui embargo, quarantine, ban

rangatira chief, noble

rangatiratanga sovereignty, ultimate chieftainship, chieftainship, right to exercise authority, chiefly autonomy, self-determination, self-management, indigenous rights, mana Māori

Ranginui Sky Father

raupatu seize land, conquest, confiscate land

rohe territory, domain

rohe moana territorial waters

rūnaka/rūnanga tribal collective

taiāpure local fisheries

take ahi kā roa keeping the home fires by means of use and occupation

take raupatu rights obtained by conquest

take taunaha rights obtained from initial discovery

take tuku claim to land by virtue of a gift or grant

take tūpuna inheritance from one’s ancestors

takiwa iwi whānui ‘public domain’

Tāne Mahuta/Tāne atua of the forest

Tangaroa atua of the sea

tangata whenua ‘people of the land’, Indigenous People, local people

tāonga treasure

tāonga tuku iho treasures, both tangible and intangible, handed down from earlier generations

tāonga tūturu real treasure, authentic treasure

tapu under ritual restriction

te ao Māori the Māori world

te ao Pākehā the Pākehā world

Te Oneroa a Tohe ‘The Long Beach of Tohe’, Ninety Mile Beach

te reo Māori the Māori language
<table>
<thead>
<tr>
<th>Māori Term</th>
<th>English Translation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Te Tai Hauāru</td>
<td>The West Coast of the North Island</td>
</tr>
<tr>
<td>Te Tai Tokerau</td>
<td>Northland</td>
</tr>
<tr>
<td>te takutai moana</td>
<td>the foreshore and seabed</td>
</tr>
<tr>
<td>Te Tau Ihu</td>
<td>Eight iwi from the Marlborough Sounds</td>
</tr>
<tr>
<td>Te Te Tau Ihu o te Waka</td>
<td>The Marlborough Sounds</td>
</tr>
<tr>
<td>Te Tiriti</td>
<td>The Treaty</td>
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<tr>
<td>Te Tiriti o Waitangi</td>
<td>The Treaty of Waitangi</td>
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<tr>
<td>Te Tumu</td>
<td>The School of Māori, Pacific and Indigenous Studies at the University of Otago</td>
</tr>
<tr>
<td>Te Ūpoko o te Ika a Māui</td>
<td>The Wellington Region and the Southern Wairarapa</td>
</tr>
<tr>
<td>Te Wāhi Pounamu</td>
<td>‘Greenstone Valley’, the South Island</td>
</tr>
<tr>
<td>Te Waipounamu</td>
<td>‘Greenstone Valley’, the South Island</td>
</tr>
<tr>
<td>Te Whare Wānanga o Otāgo</td>
<td>The University of Otago</td>
</tr>
<tr>
<td>Te Whakapuakinga</td>
<td>The Taranaki Declaration</td>
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<tr>
<td>Tiki-auaha</td>
<td>the first man according to one creation narrative</td>
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<tr>
<td>tipuna/tupuna, tīpuna/tūpuna</td>
<td>ancestor/ancestors</td>
</tr>
<tr>
<td>tika</td>
<td>correct</td>
</tr>
<tr>
<td>tikanga</td>
<td>custom</td>
</tr>
<tr>
<td>tikanga Māori</td>
<td>Māori customary law</td>
</tr>
<tr>
<td>tino rangatiratanga</td>
<td>sovereignty, ultimate chieftainship, chieftainship, right to exercise authority, chiefly autonomy, self-determination, self-management, indigenous rights, mana Māori</td>
</tr>
<tr>
<td>tokā hāpuku</td>
<td>‘hāpuku reef’</td>
</tr>
<tr>
<td>Tūmatauenga/Tū</td>
<td>atua of war and people</td>
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<tr>
<td>ūnga waka</td>
<td>canoe landing place</td>
</tr>
<tr>
<td>wāhi tapu</td>
<td>sacred place</td>
</tr>
<tr>
<td>wai</td>
<td>water</td>
</tr>
<tr>
<td>Waiairiki</td>
<td>The Bay of Plenty region</td>
</tr>
<tr>
<td>waka</td>
<td>canoe</td>
</tr>
<tr>
<td>whakapapa</td>
<td>genealogy</td>
</tr>
<tr>
<td>whānau</td>
<td>family, extended family</td>
</tr>
<tr>
<td>whānui</td>
<td>collective</td>
</tr>
<tr>
<td>whenua</td>
<td>land</td>
</tr>
<tr>
<td>whenua rangatira</td>
<td>‘chiefs of the land’</td>
</tr>
<tr>
<td>whenua tuku iho</td>
<td>land handed down from earlier generations</td>
</tr>
</tbody>
</table>
Preface
Ko Aoraki te maunga,
Ko Waitaki te awa,
Ko Ngāti Pākehā, arā Ko Ngāti Cossack, Ko Ngāti Culling, Ko Ngāti McLeod, Ko Ngāti Mouat, Ko Ngāti Scott, Ko Ngāti Morton, Ko Ngāti McDonald ōku īwi.

I feel it is important to introduce myself at the outset of this thesis. My name is Abby Suszko. I am of Scottish, Ukrainian, Irish, English, French and Tongan descent, and I identify as Pākehā. I have lived my whole life and completed all my schooling in Dunedin. I was awarded my undergraduate degrees in Law and Māori Studies (with First Class Honours) from the University of Otago in 2005. My honours dissertation, “Māori Perspectives on the Foreshore and Seabed Debate: A Dunedin Case Study”, 1 examined the different perspectives Māori in Dunedin held about the Foreshore and Seabed Debate. In particular it showed that Māori in Dunedin held a plethora of views concerning how the Debate was characterised, what the Debate was about and what the main issues and major events were. It compared these views to those held in the wider Māori community, and measured them against the media portrayal of Māori standpoints. It highlighted that while Māori in Dunedin held similar views to those outside Dunedin, they did possess different perspectives, due to the unique history and make up of Dunedin. Moreover, it detailed many reasons why Māori were against the Labour-led Coalition Government’s actions, and in doing so showed the inadequacy of the mainstream media’s portrayal of Māori opposition.

This thesis is also an investigation of perspectives. It seeks to uncover the different equality and rights perspectives that New Zealanders hold. It goes one step further, however. In exposing these different perspectives it aims to identify a zone of potential compromise between the differing views, from which a solution to the Foreshore and Seabed Debate can be found.

Since undertaking this PhD there has been considerable political movement in the Debate. When I began in 2007, the Labour-led Coalition was still the Government, its position remained largely the same as it was in 2004, and the Debate, while not as

1 Abby Suszko “Māori Perspectives on the Foreshore and Seabed Debate: A Dunedin Case Study” (BA (Hons) Dissertation, University of Otago, 2005).
fierce as it had been in 2003 and 2004, continued with polar views dominating. In 2008, a change of Government occurred, and in 2009, the National Party, in coalition with the Māori Party, initiated a review of the Foreshore and Seabed Act 2004. Now, in 2010, there is currently a Bill before Parliament to repeal and replace the Act. The Debate, it seems, has moved towards a middle ground, where compromise between some participants’ positions might be achieved.

**Conventions used**

The style used in this thesis follows that employed in the Faculty of Law at the University of Otago, which is that set out in the New Zealand Law Foundation’s *New Zealand Law Style Guide* (the Law Style Guide).²

Te reo Māori³ will not be treated as ‘another’ language, instead it is given equal status with English as required under the Maori Language Act 1987. Therefore, words in te reo Māori are neither italicised nor underlined. This is in line with the method set out in the Law Style Guide.

Generic te reo Māori is used throughout this thesis, except where sources use dialectical forms. As the Law Style Guide requires, long vowels are denoted by a macron, except titles, proper names and direct quotations, where the original will be copied exactly. English possessives are used with proper names, for example ‘Ngāi Tahu’s’, but elsewhere English plurals are not employed. Thus, for example, ‘Māori’ is both singular and plural.

Throughout this thesis, ‘Aotearoa/New Zealand’ is used, as the most commonly known equivalent of New Zealand. Where the word ‘New Zealand’ is used in an official name, such as the ‘New Zealand Court of Appeal’, I do not attach the word ‘Aotearoa’. It should be noted, however, that for many Kāi/Ngāi Tahu people ‘Aotearoa’ denotes only the North Island. A full equivalent for New Zealand would

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³ The Māori language.
be ‘Aotearoa me Te Waipounamu’ or ‘Aotearoa me Te Wāhi Pounamu’ (The North Island and the South Island).

When first referred to, I also give the Māori and English names of the Treaty of Waitangi as ‘te Tiriti o Waitangi/the Treaty of Waitangi’. However, after the first use this is shortened to ‘the Treaty’. When referring to one specific version, I state either ‘the Māori version’ or ‘the English version’.

The terms ‘Foreshore and Seabed Debate’, ‘te takutai moana’, ‘Manawhenua’, ‘Māori’, ‘Pākehā’ and ‘non-Māori’ are fundamental to this thesis, and therefore are explained in Chapter One, Section 6. Translations of all other Māori words and phrases are provided in footnotes when they first appear in each chapter. Where a Māori word is defined in law, this legal definition is provided as well. In addition, all Māori words used in this thesis are set out in the glossary and given direct English equivalents.

The first reference to Members of Parliament who are or have been members of the Executive Council are accorded the honorific ‘Honourable’ by placing ‘Hon’ before their name. Privy Councillors are accorded the honorific ‘Right Honourable’ in the form of placing ‘Rt Hon’ before their name. From then on in the thesis this title is dropped. All judges are afforded their judicial title in the text, which is abbreviated in the footnotes, except where they are writing extra-judicially, where no title is given in the citation.

Where long legislation titles or names are used several times in the text, I abbreviate them. This is done by giving a shortened name in brackets next to the full name when first used in each chapter. All abbreviated names are set out in the list of abbreviations with the full name.

Footnotes are utilised as the preferred style of referencing. At the start of each chapter, all footnotes are renumbered and referencing begins afresh. If a source has an abbreviated title, this is given instead of its full title, for example ‘NZLR’ instead of

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the ‘New Zealand Law Reports’. For ease of reference, all abbreviated source titles are set out in the list of abbreviations with the full title. In accordance with the Law Style Guide, when the source being cited uses paragraph numbers, these are given as the preferred pinpoint instead of page numbers. Where this occurs, the pinpoint is enclosed in square brackets to indicate that the reference is to a paragraph number. However if the paragraph, or paragraphs, referenced span several pages, page numbers are cited as the most direct reference. When referencing internet materials, if no date is provided, the date when I accessed the material is supplied. Also, I have chosen to give the full url for all internet references. The reason for this is to provide ease of access to the source.

Where the Law Style Guide is silent on exact referencing style, for example in the referencing of television and radio reports, I have adapted some referencing styles from the Australian Guide to Legal Citation. Where this guide also proved inadequate, for example in the referencing of television documentaries, I have adapted the style from The Bluebook: A Uniform System of Citation. Where a paper version of a source is likely to be difficult for the reader to access, I have provided further information for retrieval, in the form of a url address or reference to where the document is held on file.

The style in this thesis, however, departs from that recommended in the Law Style Guide on three fronts. The first is in relation to the headings. I have chosen to start these with a number, then a letter, and then a roman numeral. Where further headings are required, this format repeats itself. The reason for this departure is simply a matter of personal preference. The second is in relation to the naming of authors. Where possible I give the first names of authors in full, even where the form used in the reference is an initial. I chose this in order to maintain consistency through my referencing. Where I have used two or more sources from the same author, and the manner of naming the author is different across the texts, I have chosen to name the author in the manner that gives the most information. For example, I used a book by Richard Boast and a report by the same author, but cited as RP Boast. I changed both

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5 Australian Guide to Legal Citation (3rd ed, Melbourne University Law Review Assoc Inc, Melbourne, 2010).
to Richard P Boast. Finally, the third is in relation to the punctuation of quotations. I have chosen to punctuate all short, in paragraph quotations outside the final quotation mark, except where the quote has used an exclamation or question mark. Again the reason for this is to maintain consistency.
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<tr>
<td>ACT</td>
<td>The ACT New Zealand Party</td>
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<tr>
<td>art</td>
<td>Article</td>
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<td>arts</td>
<td>Articles</td>
</tr>
<tr>
<td>Campbell</td>
<td><em>Campbell v Hall</em> (1774) Lo Ft 538, 98 ER 1045 (KB)</td>
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<tr>
<td>CERD</td>
<td>The United Nations Committee on the Elimination of Racial Discrimination</td>
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<tr>
<td>ch</td>
<td>Chapter</td>
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<tr>
<td>Cherokee Nation</td>
<td><em>The Cherokee Nation v State of Georgia</em> 30 US 1 (1831)</td>
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<tr>
<td>chs</td>
<td>Chapters</td>
</tr>
<tr>
<td>CJ</td>
<td>Chief Justice</td>
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<td>cl</td>
<td>Clause</td>
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<td>cls</td>
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<tr>
<td>Director-General</td>
<td>Director General of Conservation</td>
</tr>
<tr>
<td>FSA</td>
<td>Foreshore and Seabed Act 2004</td>
</tr>
<tr>
<td>FS Bill</td>
<td>Foreshore and Seabed Bill 2004 (129-1)</td>
</tr>
<tr>
<td>Hon</td>
<td>Honourable</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976)</td>
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<tr>
<td>intro</td>
<td>Introduction</td>
</tr>
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<td>J</td>
<td>Justice</td>
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<td>JJ</td>
<td>Justices</td>
</tr>
<tr>
<td>Johnson</td>
<td><em>Johnson v M’Intosh</em> 21 US 543 (1823)</td>
</tr>
<tr>
<td>The Lands Case</td>
<td><em>New Zealand Maori Council v Attorney-General</em> [1987] 1 NZLR 641 (CA)</td>
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<td>LGA</td>
<td>Local Government Act 2002</td>
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<tr>
<td>MCA Act</td>
<td>Marine and Coastal Area (Takutai Maoana) Act 2011</td>
</tr>
<tr>
<td>MCA Bill</td>
<td>Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1)</td>
</tr>
<tr>
<td>MP</td>
<td>Member of Parliament</td>
</tr>
<tr>
<td>MPs</td>
<td>Members of Parliament</td>
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<tr>
<td>NZBORA</td>
<td>New Zealand Bill of Rights Act 1990</td>
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* Added after December 2010.
Ninety Mile Beach

In Re Ninety Mile Beach [1963] NZLR 461 (CA)

Nireaha Tamaki

Nireaha Tamaki v Baker (1901) NZPCC 371, [1901] AC 561

Ngati Apa

Ngati Apa v Attorney-General [2003] 3 NZLR 643 (CA)

Ngāti Porou Bill

Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill 2008 (303-1)

NGO

Non-Governmental Organisation

NZ First

New Zealand First Party

P

President

reg

Regulation

regs

Regulations

Rev

Reverend

RMA

Resource Management Act 1991

RMFSAA


Rt Hon

Right Honourable

s

Section

ss

Sections

Symonds

R v Symonds (1847) NZPCC 387 (SC)

Te Tii Mangonui Declaration

Te Tii Mangonui ki te Tai Tokerau Declaration (signed 23 August 2003)

Te Weehi

Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680 (HC)

The Consultation Document


The Debate

The Foreshore and Seabed Debate

The Discussion Document


The Herald

The New Zealand Herald

The Hīkoi

The Foreshore and Seabed Hīkoi

The Human Rights Commission

The New Zealand Human Rights Commission

The key documents

The four key documents, analysed in Chapter Three, that represent a broad spectrum of views on equality and rights exhibited during the Debate. These key documents are: The Paeroa Declaration; Brash’s “Nationhood” Speech; Cullen’s Article; and the Treaty Tribes Coalition’s Submission
The Law Style Guide


The ODT

The *Otago Daily Times*

The Policy Document


The Report on Submissions

Adele Carpinter and Department of the Prime Minister and Cabinet *The Foreshore and Seabed of New Zealand: Report on the Analysis of Submissions* (Department of Prime Minister and Cabinet, 2003)

The Review Panel

The Ministerial Review Panel on the Ministerial Review of the Foreshore and Seabed Act 2004

The Te Arawa Lakes Act

The Te Arawa Lakes Settlement Act 2006

The Select Committee

The Fisheries and Other Sea-Related Select Committee

The Special Rapporteur

The United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples

The Treaty

Te Tiriti o Waitangi/The Treaty of Waitangi

The Tribunal

The Waitangi Tribunal

The Waikato River Act

The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

TOWA

Treaty of Waitangi Act 1975

TRONT

Te Rūnanga o Ngāi Tahu

TSCZEEZA

Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977

TSFZA

Territorial Sea and Fishing Zone Act 1965

TTWMA

Te Ture Whenua Maori Act/Maori Land Act 1993

UDHR

Universal Declaration of Human Rights 1948

UNDRIP

United Nations Declaration on the Rights of Indigenous Peoples 2007

United Future

United Future New Zealand Party

*Wi Parata*

*Wi Parata v The Bishop of Wellington* (1878) 3 NZ Jur (NS) 72 (SC)

**Source abbreviations:**

AC

Law Reports, Appeal Cases (England and Wales)

Acta Borealia

Acta Borealia: A Nordic Journal of Circumpolar Societies

AENJ

Aotearoa Ethnic Network Journal

AILR

Australian Indigenous Law Reporter

AJHR

Appendix to the Journals of the House of Representatives

AJHR

Australian Journal of Human Rights
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>IWGIA</td>
<td>International Work Group for Indigenous Affairs</td>
</tr>
<tr>
<td>JPS</td>
<td>The Journal of the Polynesian Society</td>
</tr>
<tr>
<td>Jr</td>
<td>Junior</td>
</tr>
<tr>
<td>JRP</td>
<td>Journal of Research Practice</td>
</tr>
<tr>
<td>J South Pac Law</td>
<td>Journal of South Pacific Law</td>
</tr>
<tr>
<td>Listener</td>
<td>The New Zealand Listener</td>
</tr>
<tr>
<td>LLB (Hons)</td>
<td>Bachelor of Laws with Honours</td>
</tr>
<tr>
<td>MA</td>
<td>Masters</td>
</tr>
<tr>
<td>Mana</td>
<td>Mana: the Maori news magazine for all New Zealanders</td>
</tr>
<tr>
<td>Mass</td>
<td>Massachusetts Reports</td>
</tr>
<tr>
<td>MB</td>
<td>Maori Land Court Minute Book</td>
</tr>
<tr>
<td>McGill LJ</td>
<td>McGill Law Journal</td>
</tr>
<tr>
<td>Mich St J Int’l L</td>
<td>Michigan State Journal of International Law</td>
</tr>
<tr>
<td>Mon LR</td>
<td>Monash University Law Review</td>
</tr>
<tr>
<td>NAC</td>
<td>Native Appellate Court</td>
</tr>
<tr>
<td>Nations and Nationalism</td>
<td>Nations and Nationalism: Journal of the Association for the Study of Ethnicity and Nationalism</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>NYU</td>
<td>New York University</td>
</tr>
<tr>
<td>NYU J Int’l L &amp; Pol</td>
<td>New York University Journal of International Law and Politics</td>
</tr>
<tr>
<td>NZ</td>
<td>New Zealand</td>
</tr>
<tr>
<td>NZCA</td>
<td>New Zealand Court of Appeal Reports</td>
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<td>NZ Herald</td>
<td>The New Zealand Herald</td>
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<tr>
<td>NZJA</td>
<td>New Zealand Journal of Archaeology</td>
</tr>
<tr>
<td>NZJEL</td>
<td>New Zealand Journal of Environmental Law</td>
</tr>
<tr>
<td>NZJH</td>
<td>New Zealand Journal of History</td>
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<td>NZJPIL</td>
<td>New Zealand Journal of Public and International Law</td>
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<tr>
<td>NZ Jur (NS)</td>
<td>New Zealand Jurist Reports (New Series)</td>
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<td>New Zealand Law Commission</td>
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<td>New Zealand Law Reports</td>
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<td>NZ L Rev</td>
<td>New Zealand Law Review</td>
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<td>NZLS</td>
<td>New Zealand Law Society</td>
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<td>New Zealand Press Association</td>
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<td>NZPCC</td>
<td>New Zealand Privy Council Cases</td>
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<td>NZPD</td>
<td>New Zealand Parliamentary Debates</td>
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<td>NZULR</td>
<td>New Zealand Universities Law Review</td>
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<td>Otago Daily Times</td>
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<td>Osgoode Hall LJ</td>
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<td>Ohio St LJ</td>
<td>Ohio State Law Journal</td>
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<tr>
<td>Otago LR</td>
<td>Otago Law Review</td>
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PC
PhD
PLR
PP
PRAXIS International
Professional Skipper
Radio NZ
SAJHR
SC
SCC
SCLR (2d)
SCR
SP
Stan L Rev
Syd LR
TAPJA
Te Karaka
Te Karere Maori
The Contemporary Pacific
Transnat’l L & Contemp Probs
TOR
Tū Mai
TVNZ
UBC Law Rev
UBC Press
UCLJR
UN Doc
UNPFII
UNSWLJ
U Pa L Rev
US
UTLJ
Vict
VUWLR
Wai L Rev
WILPF
Wm & Mary L Rev
Yale LJ
YMCA

Privy Council
Doctorate of Philosophy
Public Law Review
Preliminary Paper Series (Law Commission)
PRAXIS International: A Philosophical Journal
Professional Skipper Magazine
Radio New Zealand
South African Journal on Human Rights
New Zealand Supreme Court. Renamed the New Zealand High Court in 1980 by the Judicature Amendment Act 1979, s 2
Supreme Court of Canada
The Supreme Court Law Review Second Series
Canada Supreme Court Reports
Study Paper Series (Law Commission)
Stanford Law Review
Sydney Law Review
The Asia Pacific Journal of Anthropology
Te Karaka: The Ngā Tahu Magazine
Te Karere Maori: Nga Korero o Aotearoa
The Contemporary Pacific: A Journal of Island Affairs
Transnational Law and Contemporary Problems
The Qualitative Report
Tū Mai Magazine - Offering an Indigenous New Zealand Perspective
Te Karaka: The Ngā Tahu Magazine
Te Karere Maori: Nga Korero o Aotearoa
Te Karera Maori: Nga Korero o Aotearoa
Te Karera Maori: Nga Korero o Aotearoa
Te Karera Maori: Nga Korero o Aotearoa
The Contemporary Pacific: A Journal of Island Affairs
Te Karera Maori: Nga Korero o Aotearoa

Te Karera Maori: Nga Korero o Aotearoa

United Nations Document
United Nations Permanent Forum on Indigenous Issues
University of New South Wales Law Journal
University of Pennsylvania Law Review
United States Reporter
University of Toronto Law Journal
Victoria (Regnal year)
Victoria University of Wellington Law Review
Waikato Law Review
Women’s International League for Peace and Freedom (Aotearoa)
William and Mary Law Review
Yale Law Journal
Young Men’s Christian Association
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Chapter One: Introduction

“In law, as with anything else, perspective counts”.¹

This thesis is an examination of the major equality and rights claims made during the debate in Aotearoa/New Zealand from 2003 to 2006 concerning ownership and use of the foreshore and seabed, which I will call the Foreshore and Seabed Debate (the Debate). It uses the Debate as a lens through which to consider different perspectives on equality and rights held by New Zealanders. The Debate is chosen as the context in which to explore these perspectives for three compelling reasons. First, it was one of the most significant points of contention in our recent politics and divided the nation in a way not seen since the Springbok Tour of 1981. Second, it brought perspectives on equality and rights to the fore within mainstream Aotearoa/New Zealand society through the passionate and frank disagreement of those expressing competing visions. Third, it “telescoped into a single burning controversy the issues that had surrounded aboriginal rights-recognition and integration through the previous decade”.² These issues included the growing unease of some people about what they perceived to be the unequal treatment of Māori.³

1. Overarching contentions

It is the main contention of this thesis that the Debate is at heart a conceptual, or jurisprudential one, about contrasting notions of equality and rights. Many might think the recurring theme concerned a dichotomy between opposing Māori and Pākehā conceptions of equality and rights. But this thesis explores a contrary idea: that the Debate involved a complex interplay of arguments about equality and rights that cuts across ethnic lines. I claim peoples’ arguments were often based on deeper presumptions that are not easily identified, and which reflect the underlying

theoretical reasons behind their arguments. No claim is made that those involved in
the Debate have failed in their understandings of the facts. Nonetheless, the claim is
made that in order to understand their different positions, the foundations of their
claims must be explored.

This thesis proposes that different perspectives on equality and rights were found
amongst a range of people, both Māori and Pākehā, and on all sides of the Debate.
Moreover, people often used the same terminology to express divergent equality
claims. For example, the phrase ‘one law for all’ was prominent, and expressed in
many forums, by many people, from politicians to people on the street. But they often
meant different things. This created greater misunderstanding and resulted in people
talking past each other, fuelling the Debate. It is possible to extract the competing
visions that lie beneath their different views.

The Debate raised the question whether any Māori claims of right to the foreshore and
seabed should be recognised in law, or whether the zone should be owned absolutely
by the Crown (that is, by the state). At its core, the Debate was about the legitimacy
of Māori legal rights. As the renowned Māori jurist, Sir Edward Taihākurei Durie,
explained: 4

In this era of indigenous peoples’ rights recognition, states around the globe are
faced with reconciling the pre-existing, inherent rights of indigenous peoples with
those held and asserted by the state. In New Zealand we have made significant
progress but there remain many outstanding and controversial questions about the
status of Māori and their Treaty and customary rights.

This thesis, therefore, is a specific study of the different perspectives New Zealanders
hold concerning the legitimacy of Māori rights. It is hoped that uncovering their
different conceptions will help develop a more informed dialogue around Māori rights
as a whole. In order to maintain a fair dialogue, a better understanding of the various
equality and rights paradigms must be part of the discussion. Otherwise we will
continue to talk past each other, and divisive debates over Māori rights will persist,

4 Eddie Durie “Preface” in Andrew Erueti and Claire Charters (eds) Maori Property Rights and the
not only in the realm of the foreshore and seabed, but over other natural resources, dividing the country and leaving its peoples feeling misunderstood.

In a positive light, it is proposed that while the various theories that lie behind the equality and rights arguments possess different dynamics, they also possess some shared correlates and foundations. So, in exposing the different claims, a zone for potential compromise may be identified from which a suitable solution might be drawn. Such a solution would be the product of substantive compromise, where the different equality and rights arguments are sufficiently close to allow the outlines of a potential solution to be drawn, where participants could trade off less essential equality and rights positions, but retain what is most essential to them.

2. Research questions

The principal question this thesis therefore seeks to answer is: in the context of the Foreshore and Seabed Debate, what were New Zealanders’ visions of equality and rights? The Debate itself and key documents generated within it are studied in light of this question. To adequately address it, further foundational questions are considered. These are: in the contexts of the Debate, which theories of equality were expressed? Do these uphold the notion of separate Māori rights to the foreshore and seabed? And, if so, what are the proper sources of these rights? In particular, I will focus on what people said about the foundations of such rights in law, or about rights they believed should be recognised in law. The answers illustrate the thesis’s overarching contention that the Debate is at heart a conceptual one between contrasting notions of equality and rights.

Once these questions have been answered, Chapter Eight asks: where to from here? The answer is given that a zone of potential compromise can be identified between the various theories to permit a tolerably stable, suitably supported compromise solution to be reached. In that light, the chapter analyses the Government’s latest attempt to settle the Debate, the Marine and Coastal Area (Takutai Moana) Bill 2010 (the MCA Bill), and discusses whether this new legislation is likely to quieten the Debate.

---

5 Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1).
Now, however, to provide the context, an introductory account of the Debate is required.

3. The Foreshore and Seabed Debate

On 19 June 2003, the New Zealand Court of Appeal in *Ngati Apa v Attorney-General* (Ngati Apa) ruled that the Māori Land Court had jurisdiction to determine the status of the foreshore and seabed under Te Ture Whenua Maori Act/Maori Land Act 1993 (TTWMA), and that the High Court had jurisdiction to determine whether Māori common law rights in the foreshore and seabed still existed. The Court ruled that the Crown’s assumption of sovereignty conferred only a radical or paramount title over land in Aotearoa/New Zealand, not beneficial ownership of that land. Thus, the Court held beneficial ownership might remain with Māori, unless specifically conferred on another party through express legislation or by lawful transfer. If no such transfer had occurred, and if the proper evidence was advanced, the Maori Land Court could determine the customary ownership rights of Māori under s 131 TTWMA, or the use and ownership rights of Māori could be recognised in the High Court under the common law doctrine of native title. All these propositions applied to the foreshore and seabed, particularly as no statute expressly conferred general ownership of that resource on the Crown.

The Court’s ruling launched the nation into a fierce debate between those who argued that Māori claims to the zone were legitimate and those who disagreed. These arguments became entwined with political considerations. There was widespread unease from non-Māori that Māori were claiming ownership of the beaches, would restrict public access, alienate the foreshore and seabed, and veto development.

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6 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).
7 A specialist court that hears matters relating to Māori land. The Court derives its jurisdiction from Te Ture Whenua Maori Act 1993 (TTWMA), s 6.
8 *Ngati Apa*, above n 6, at [91] per Elias CJ. TTWMA is an Act relating to the regulation of Māori land. Its guiding principles are to promote the retention of Māori land in the hands of its owners and to facilitate the occupation, development and utilisation of that land for the benefit of its owners. It maintains the Maori Land Court and establishes a mechanism to assist with the implementation of those principles: TTWMA, Preamble and s 2.
10 Ibid, at [34] per Elias CJ, [147]-[148], [154], [162] per Keith and Anderson JJ, [185], [186] and [208] per Tipping J.
11 Elias CJ discusses the nature of the doctrine at ibid, at [31]-[33] and [49]-[54].
In order to quell the Debate, the then Labour-led Coalition Government reacted severely, choosing to announce a policy of changing the law so as to place the foreshore and seabed expressly in Crown ownership. This announcement prompted a strong series of objections from Māori, including Māori members of the Labour Coalition Government.\textsuperscript{12} The policy was also criticised by the Waitangi Tribunal for breaching the principles of te Tiriti o Waitangi/the Treaty of Waitangi (the Treaty), human rights, and certain principles of the rule of law.\textsuperscript{13}

In April 2004, the Government released details of the proposed legislation, in the Foreshore and Seabed Bill 2004 (the FS Bill).\textsuperscript{14} Many Māori were incensed by the Government’s proposed legislation, seeing the Government’s actions as unwillingness to listen to their concerns and the subsequent Bill as an indication of Government intent to ride roughshod over Māori rights.\textsuperscript{15} This anger caused a groundswell of unrest that gave rise to the largest demonstration of opposition seen at the time in the form of the Foreshore and Seabed Hīkoi (the Hīkoi) of 5 March 2004.\textsuperscript{16} The Hīkoi began in the far north, and by the time it reached Wellington its ranks had swelled to upwards of twenty thousand with others from around the country. The Hīkoi made a powerful statement that Māori, united in a way not seen since the 1975 Land March,\textsuperscript{17} viewed the Government’s actions as removing their rights.\textsuperscript{18} The Hīkoi was the
catalyst for the formation of a new political party, the Māori Party, whose primary policy was to oppose the Government’s proposed legislation.

Despite this opposition, on 18 November 2004, the Foreshore and Seabed Act 2004 (the FSA) was passed under urgency. The FSA vested the full legal and beneficial ownership of the public foreshore and seabed in the Crown, and removed the ability of Māori to access the courts to have their ownership rights determined. The FSA has subsequently been criticised both domestically and internationally for being discriminatory against Māori. Due to the persistence of the Debate, in 2009 and 2010 the new National-led Coalition Government conducted a review of the FSA, and on 6 September 2010, announced a new Bill, the MCA Bill, to repeal and replace the FSA.

3.a. The parameters of the Foreshore and Seabed Debate

Some iwi have been petitioning to have their rights recognised in the foreshore and seabed for over a century, and customary claims to the foreshore and seabed have been proceeding through the courts since 1957. However, this thesis will primarily focus on the Debate following the Court of Appeal’s ruling in Ngati Apa until the release of the Report of the United Nation’s Special Rapporteur on the situation of

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19 Foreshore and Seabed Act 2004 (FSA), s 13(1).
20 Ibid, s 10.
21 For example Hauraki Māori first petitioned the Crown to have their rights in the area of foreshore and seabed, called Te Kapa Moana, recognised in 1869. See John McEnteer and Toko Renata “Foreshore & Seabed Government Consultative Hui” (oral submission presented to the Foreshore and Seabed Consultation Hui, Matai Whetu Marae, Thames, 11 September 2003) (speaking points on file with author).
22 In 1957 the Maori Land Court accepted the Te Rarawa and Te Aupōuri claim that they were the traditional owners of Ninety Mile Beach. The Chief Judge of the Court then referred, by way of case stated, to the Supreme Court (now the High Court) two questions of law, concerning whether s 150 of the Harbours Act 1950 prohibited the Maori Land Court from exercising its jurisdiction over the foreshore and whether the Maori Land Court jurisdiction included the power to investigate title to the foreshore under s 161 of the Maori Affairs Act 1953: In re an Application for Investigation of Title to the Ninety Mile Beach (Wharo Oneroa a Tohe) [1960] NZLR 673 (SC). Turner J found that s 150 of the Harbours Act 1950 did restrict the Maori Land Court from exercising its jurisdiction over the foreshore and therefore did not answer the general jurisdiction question: at 678. The applicants appealed to the Court of Appeal. That Court affirmed Turner J’s decision and ruled that the Maori Land Court’s jurisdiction to investigate title to foreshore was removed by s 147 of the Harbours Act 1878, reproduced in s 150 of the Harbours Act 1950: In Re The Ninety-Mile Beach [1963] NZLR 461 (CA) at 472-473, 474 per North J and 479-480 per TA Gresson J. In Re The Ninety-Mile Beach was overturned by Ngati Apa, above n 6.
human rights and the fundamental freedoms of indigenous people in 2006,²³ delivered shortly before this study began. The Debate has not fallen out of national political consciousness since that time, however. To address this, the final two chapters will turn to discuss the latest developments in light of the major equality and rights claims examined in this thesis.

4. Methodology

4.a. Personal placement

… we write about ourselves and position ourselves at the outset of our work because the only thing we can write about with authority is ourselves.²⁴

Although this quote directly relates to Indigenous Peoples’ placement in their research, it must also apply to people like me, who are not Māori, but are conducting research on Māori views. As Kathy Absolon and Cam Willett explained: “When it comes to research by/about Aboriginal peoples, location is an essential part of the research process”.²⁵ This requires me to reveal my identity, where I come from, my experiences, and my intention for this work.²⁶ In the next section I therefore locate myself.

4.a.i. Journey to the PhD

I took the first steps towards formulating my doctoral research while researching my honours dissertation, “Māori Perspectives on the Foreshore and Seabed Debate: A Dunedin Case Study”.²⁷ I noticed that many Māori called for ‘one law for all’ to be applied to the foreshore and seabed. This was the same claim I heard from many

²⁵ Absolon and Willett, above n 24, at 97.
²⁷ Suszko, above n 15.
Pākehā. From my undergraduate study of jurisprudence, it was clear to me that the claim to ‘one law for all’ was a claim to equality. What was not clear, however, was the aspect of law that should be applied equally, and furthermore, who ‘all’ pertained to. This drove me to examine the Debate at a conceptual level and to seek to uncover the different views New Zealanders hold on equality.

As I began to investigate the use of the term ‘one law for all’, I found that it was used to argue for both the recognition and denial of rights. It became apparent, therefore, that different participants relied on different concepts of equality to justify their claims of right or to denounce the claims of others. This led me to enquire into the different sources of these claims of right. I knew I wanted to investigate the different equality theories New Zealanders expressed during the Debate, whether these theories upheld the notion of separate Māori rights, and what sources of right people relied upon. My dilemma was, however, that I might merely highlight conflicting views, a point already well demonstrated throughout media coverage of the Debate. This would hardly be a positive contribution. To make a better contribution I wanted to use my findings to construct a framework for moving forward, and one that might help quell other similar debates over Māori rights to the nation’s resources.

4.a.ii. Bias

The traditional approach to legal study is to try to eliminate bias through objectivity. After all, the objectivity of law is closely related to its legitimacy. The objective character of law is thought by many to be essential to its function as a normative order for a society, a set of common norms binding on all. In this thesis, I have tried to be as objective as possible. However, subjectivity undoubtedly remains. It has been said that:28

Value-free research is not possible and does not occur. Research may be most perniciously biased by the attitudes of the researcher when these attitudes are hidden from the reader or even from the researcher’s own perception. … but value explicit research is more honest research in which scientists express and clarify their own value system.

I concede my subjectivity has arisen through the choice of the sources I rely on, the quotes I use and even the words I employ. I am shaped by my experiences, passions and beliefs, and these must in turn colour my writing. I feel it is only right, in the interests of research integrity, that I explicitly acknowledge this bias.

My bias lies in my belief that the Treaty and tikanga Māori should be implemented as sources of law, and the Māori rights to the foreshore and seabed founded within them should be recognised. As a Pākehā woman, who grew up in Dunedin, a city with the least number of Māori per head of capita in the country, many are surprised about my passion for the Treaty and tikanga Māori, and the rights they uphold. My passion, however, was ignited early, when at Wakari Primary School I was placed into a kapa haka group to perform at the school’s 100-year anniversary celebration. I became fascinated with te ao Māori and actively sought to incorporate it into my life as much as possible. It was therefore natural for me to study Māori and Aotearoa/New Zealand History throughout my time at Otago Girls’ High School. I continued to study these at undergraduate level at the University of Otago, where I also studied Law.

From an early age, I have been incredibly passionate about the Treaty, which I most sincerely believe is the founding document of our nation. I believe that the Treaty established a partnership between two sovereign nations, and therefore the laws of both should be reflected equally in the state system. To me, Māori hold rights due to their indigenous status, which are affirmed and guaranteed in the Treaty. Therefore I believe this indigenous status justifies treating Māori differently to other groups in the foreshore and seabed. This led to my doctoral research, for if I had not had such an interest from such an early age I would not have felt the same sense of injustice.

29 Māori customary law.
31 A performance group, performing Māori songs.
32 The Māori world.
It was while I was an undergraduate that the Court of Appeal released its Ngati Apa decision and the Debate exploded. So, from the second semester 2003, until I graduated in December 2005, I was fortunate to study the Debate in classes, and became educated on the political and legal viewpoints surrounding it. I watched the Debate unfold in the mainstream media and became very disillusioned with the fact that the Labour-led Coalition Government, other politicians, and many Pākehā individuals and groups, failed to understand the Māori arguments and continuously brushed aside their claims as illegitimate. I was disheartened with the passing of the Act, which I viewed as discriminatory against Māori, a denial of due process, and an extinguishment of their potential ownership rights.

I found the mainstream media heightened this lack of understanding by failing to adequately report the different views of Māori. Although they acknowledged the majority of Māori were against the proposed legislation, the reasons for this were never explained. I decided to explore those reasons in my honours dissertation and showed there were a plethora of reasons for Māori dissension. I also demonstrated that, for Māori, the key issues in the Debate were not those portrayed in the mainstream media.

While as an undergraduate I participated in the Debate through discussions with friends, family, classmates, lecturers and even my dissertation interviewees. I attended public lectures on the topic and followed the coverage of the events across several types of media. As part of a group representing Te Tumu: the School of Māori, Pacific and Indigenous Studies, I submitted to the Fisheries and Other Sea-Related Select Committee (the Select Committee) considering the FS Bill. With the latest version of the Debate, in 2009 to 2010, as a postgraduate, I was also personally involved. I submitted to the Ministerial Review Panel on the Ministerial Review of the Foreshore and Seabed Act 2004 (the Review Panel), and on the National-led Coalition Government’s “Reviewing the Foreshore and Seabed Act 2004: Consultation Document” (the Consultation Document).33 Once again, in the interest of research integrity, I feel it is only right that I summarise these submissions.

33 The New Zealand Government “Reviewing the Foreshore and Seabed Act 2004: Consultation Document” (31 March 2010). For a copy of my submission to the Ministerial Review Panel, see Abby Suszko “Submission on the review of the Foreshore and Seabed Act 2004” (20 May 2009) Doc No 7-
To the Review Panel I submitted that the FSA was fundamentally flawed and should be repealed, and that the findings of the Court of Appeal in Ngati Apa should stand as law. Moreover, I argued that the jurisdictions of the Maori Land Court and the High Court should be returned to the 2003 position. I contended that Māori, as Treaty partners with the Crown, deserved equality before the law and that their customary title and use rights deserved the same protection in the courts that other individual titleholders enjoy.

On the Consultation Document I submitted the same, and added that I unequivocally supported the removal of Crown absolute title and the restoration of customary title. I submitted that, should Māori be able to prove rights amounting to full and exclusive ownership, they should be awarded such title. In other words, the law should recognise that Māori could own specific areas of foreshore and seabed. I believe this would create true equality between private and customary titleholders in that each would be afforded equal treatment under the law. I also argued that where full and exclusive customary title was awarded it could be qualified. The title could be subject to public rights of navigation, fishing and access. It could also be made inalienable. I contended that the best option for moving forward was the National-led Coalition Government’s option one: Crown notional title. Where customary interests are investigated and found to amount to customary title, full title should be vested in the applicants. Should it be found that the interests do not to amount to customary title, title should then be vested in the Crown, with the usufructuary and/or management rights of Māori remaining as a fetter on that title.

These submissions illustrate my own views on the matters considered in this thesis.

4.a.iii. A hybrid insider/outside approach

For the most part, this thesis employs a hybrid of the insider and outsider perspectives
on its subject matter, which influences its predominantly orthodox legal methodology. Generally, researchers studying a group to which they belong possess an insider’s view, while researchers studying a group to which they do not belong possess an outsider’s view. The insider perspective can be described as one based on “the intrinsic cultural distinctions meaningful to the members of a cultural group”. Conversely, the outsider perspective is one based on “the extrinsic ideas and categories meaningful for researchers”.

Being an insider conveys a key advantage for a researcher, that of possessing a superior knowledge of the group’s culture, which provides for “a nuanced perspective for observation, interpretation and representation”. However, it also brings disadvantages. It is somewhat subjective, and can lead to bias. Such bias may complicate researchers’ ability to observe and interpret data. Moreover, loss of

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35 The concepts of insider and outsider research are known in anthropology as the terms emic and etic research, although the use of such terms has spread across a variety of social science disciplines. Kenneth Lee Pike, an internationally recognised linguist, educator and Christian thinker, first coined these terms to describe the two standpoints in which an observer can describe human behaviour: Kenneth L Pike Language in Relation to a Unified Theory of the Structure of Human Behaviour (Summer Institute of Linguistics, Glendale (California), 1954). For more information see Thomas N Headland, Kenneth L Pike and Marvin Harris (eds) Emics and Etics: The Insider/Outsider Debate (Sage Publications Inc, London, 1990). For the use of these concepts in Indigenous research see Jim Williams “Towards a Model for Indigenous Research” in Brendon Hokowhitu and others (eds) Indigenous Identity and Resistance: Researching the Diversity of Knowledge (Otago University Press, Dunedin, 2010) 107 at 107-123.

36 My methodology will be discussed in the next section, Section 4.b.


39 Ibid.


42 Williams, above n 35, at 144.

43 Chavez, above n 41, at 478; Mohan and Chambers, above n 37, at 262.
objectivity may result in erroneous assumptions based on prior knowledge, or familiarity may make it difficult to recognise certain patterns.

So, conducting insider research “might raise issues of undue influence of the researcher’s perspective”. Nevertheless, conducting research as an outsider “does not create immunity to the influence of personal perspective”. Moreover, the outsider lacks the particular understanding of an insider, so this perspective can also lead to misinterpretation of data, or omissions in the sources studied. It may also be said that those possessing an outsider perspective “cannot have the necessary sensibilities that can make … empathetic understanding, possible because outsider ethnographers are not initiated in the cultural values of the people they study”. As a result, disadvantaged or disempowered communities have criticised outsider researchers for failing to accurately comprehend or represent their experiences. There is, however, value in possessing an outsider’s view. As an outsider, a researcher can sometimes identify interesting and important cultural meanings that insiders take for granted or neglect.

There are therefore advantages and disadvantages to both perspectives. It has been suggested that a research partnership between insider and outsider researchers

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45 Chavez, above n 41, at 478; Mohan and Chambers, above n 37, at 262.
47 Williams, above n 35, at 109.
balances the advantages of both while minimising the disadvantages of each.\textsuperscript{51} I contend that in adopting a hybrid insider/outsider approach, I have been able to balance the two perspectives and minimise their disadvantages.

This approach is appropriate in this thesis for two reasons: first, because of my own personal placement, and second, because of the sources studied. As a Pākehā New Zealander interpreting Māori concepts I naturally exhibit an outsider’s perspective. However, I speak te reo Māori\textsuperscript{52} and I am educated in te ao Māori, on tikanga Māori, the Treaty, and the doctrine of native title. Thus my perspective here is not purely one of an outsider. Moreover, as a New Zealander and someone who has participated in the Debate personally, I also hold an insider perspective. As a Pākehā interpreting English legal concepts it can be argued that I possess an insider perspective in relation to those sources. However, my education in te ao Māori means I do not possess a purely outsider’s view as my understanding of the Debate is fundamentally different to many Pākehā who have little or no understanding of te ao Māori. As a Law postgraduate student I may possess an insider understanding of the law surrounding the foreshore and seabed and the legal processes involved, but this may foster an outsider’s view of non-legal opinions in the Debate. Thus it is clear I possess both perspectives in relation to the Debate, and therefore a hybrid insider/outsider approach is the most appropriate framework for this thesis.

Many of the primary sources examined in this thesis present insider views on the Debate. However, the extraction of equality and rights paradigms from these sources may require an outsider approach. For example, I analyse the term tino rangatiratanga as encompassing the notion of equality of authority,\textsuperscript{53} whereas it is traditionally expressed in Māori circles as self-determination or sovereignty. Similarly, I have described kaitiakitanga as a duty.\textsuperscript{54} If this term was read only in an orthodox legal

\textsuperscript{52}The Māori language.
\textsuperscript{53}For more discussion see Chapter Four, Section 8. ‘Tino rangatiratanga’ has various meanings, including: sovereignty, ultimate chieftainship, chieftainship, right to exercise authority, chiefly autonomy, self-determination, self-management, indigenous rights, mana Māori (the Māori way of life).
\textsuperscript{54}For more discussion, see Chapter Six, Section 3.b. ‘Kaitiakitanga’ means guardianship, stewardship. In law it has the meaning provided in s 2 of the Resource Management Act 1991:
sense, it would not take into account the reciprocity between humans and Papatūānuku\textsuperscript{55} inherent in Māori views of kaitiakitanga.

So I have, on occasion, taken an outsider’s view of Māori concepts, but I hope I have also made the traditional Māori meanings of those concepts clear. In this manner I have tried to obtain the advantages of both an insider’s and an outsider’s point of view.

4.b. The disciplinary nature of the work

This thesis is a study between Law and Māori Studies. The disciplines employed are:

(a) Orthodox legal analysis of legislation and decisions of the courts, based on sources of law currently recognised within the state legal system.

(b) Legal and political philosophical analysis, concerning the jurisprudence of rights, and concepts of equality.

(c) The methods of the social sciences, involving the selection and analysis of statements made in the media, in submissions to public bodies, and in the published positions taken by a wide range of participants in the Debate.

(d) Some methods drawn from the general discipline of Māori Studies, involving discussion of the manner in which some participants’ views are grounded in Māori-specific values, concepts and political positions.

The last discipline, that of Māori Studies, as a subject, combines aspects of, and borrows methodologies from, a number of other disciplines, such as Anthropology, Archaeology, History, Linguistics and Art History.\textsuperscript{56} From my own personal experience studying within it, Māori Studies also combines aspects of Politics and Law. Māori Studies integrates these borrowed methodologies according to a Māori Worldview.\textsuperscript{57} As Paerau Warbrick noted, Māori Studies:\textsuperscript{58}

… has borrowed techniques from different academic subjects to make up a discipline that is eclectic and more malleable and flexible than other disciplines.

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\textsuperscript{55} Earth Mother.

\textsuperscript{56} Williams, above n 35, at 107.

\textsuperscript{57} Ibid.

However, the major differentiation between narratives for other disciplines and narratives for Māori Studies must be the relative importance of Māori values and principles.

Māori Studies is Aotearoa/New Zealand’s localised Indigenous Studies. Margaret Kovach highlighted three central themes that are reflected in Indigenous methodologies. First, that Indigenous ways of knowing are relational and based in inclusive relationships. Second, that Indigenous ways of knowing are collective, and thus encompass the concept of reciprocity and accountability to others. Third, that Indigenous methodology legitimises alternative methods that capture Indigenous ways of knowing.\(^{59}\)

Of note, some Māori and Indigenous methods advance epistemic challenges to western academia. Under such methods, western research is viewed as embodying imperial and colonial discourses that privilege western ways of knowing. Applications of these methods therefore seek to create space for Indigenous philosophy in academia.\(^{60}\) This type of change is taking place in the legal discipline. For example, James (Sākēj) Youngblood Henderson explained that he engages with Indigenous Studies, which he describes as “Indigenous Humanities”.\(^{61}\)

…to transform Eurocentric legal analysis so that the law may fulfil its primary avocation of creating, sustaining, and protecting an enlightened and democratic society that respects Indigenous peoples and their rights.

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\(^{59}\) Margaret Kovach “Emerging from the Margins: Indigenous Methodologies” in Leslie Brown and Susan Strega (eds) Research As Resistance: Critical, Indigenous, & Anti-oppressive Approaches (Toronto: Canadian Scholars’ Press, 2005) 19 at 30-32. Of note, Brendon Hokowhitu has argued that Indigenous Studies, as a canonical field, does not exist. He explained that the amorphous concept of Indigenous Studies arose out of pre-established local departments, such as Māori Studies in Aotearoa/New Zealand and Native or First Nation Studies in Canada. These departments remain strongholds in their local context, while the discipline of Indigenous Studies is a recent auxiliary to such localised curricula: Brendon Hokowhitu “Indigenous Studies: Research, Identity and Resistance” in Brendon Hokowhitu and others (eds) Indigenous Identity and Resistance: Researching the Diversity of Knowledge (Otago University Press, Dunedin, 2010) 9 at 9. To him [at 9-10]:

Indigenous Studies thus lacks any semblance of a coherent genealogy from which it can build, in large part because it has borrowed multilaterally from various disciplines, while trying to account for a diverse range of Indigenous contexts. This is not to say that local departments necessarily lack a coherent genealogy within their own distinct context. However the broader genealogical incongruence and orphan-like history suggests that the genesis of a universal Indigenous Studies is at best embryonic.


He described the process as comprehending teachings from Indigenous Studies, and in doing so it “generates an alternative intellectual context capable of enhancing core values such as parity, freedom, justice and human rights”.\(^{62}\) Henderson argued that such methodology allows people to learn from Indigenous experiences and offers greater legitimacy for Indigenous Peoples.\(^{63}\)

While I believe in the legitimacy of such methods of change, and even advocate for them, such methods are not employed extensively here. Instead, Māori Studies methods are used at certain points in the thesis to enhance understanding of Māori concepts of equality and rights. In doing so, it seeks to give equal value to perspectives that may sit outside a western legal framework. Additionally, the overwhelmingly political nature of Māori traditions\(^{64}\) incorporated into Māori Studies forces Law to step outside its traditional parameters and engage with politics. This is evident throughout this thesis and lends weight to the contention that it can also be classed as a thesis in political theory.

The different methodologies are therefore interwoven, rather than self-consciously distinguished, or allocated exclusively to certain parts of the thesis. The thesis starts by examining both Māori and English law over the foreshore and seabed before engaging in a doctrinal analysis of the current law surrounding the zone in Aotearoa/New Zealand. It then employs the primary methodological approach adopted, which is to extract the implicit views on equality and rights from the text of primary sources that record what people actually said during the Debate.

The material studied has been selected to illustrate a wide range of views across a range of print media and public documentation. The material includes: legislation, court judgments, reports of international and domestic bodies, newspaper and magazine articles, letters to the editor, television documentaries, internet forums, submissions, speeches, press releases, as well as theses and secondary material containing descriptions and perceptions of the Debate. The selection technique used and its intention are discussed in detail in Chapters Three and Seven. In brief, the

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\(^{62}\) Ibid, at 4.
\(^{63}\) Ibid.
\(^{64}\) See Williams, above n 28, at 3.
material selected was to obtain a broad cross-section of views, from many different participants, with data-gathering continuing until no new approaches were found. It was decided, because of the abundance of written and visual material already available from public statements made during the Debate, that no further interviews were necessary.

Once extracted, the different views on equality and rights are related to the wider philosophical and legal literature on those subjects. Where Māori positions are expressed, these are related to broader elements of a Māori World View. Commonalities, and areas of consensus, in the arguments are then identified, and these are used in turn as conceptual tools for further analysis of legislation: in this case the recent MCA Bill.

Ultimately, the questions being raised in this thesis are both conceptual and empirical. For instance, is there a sufficient consensus on matters of equality and rights among participants in the Debate to provide the foundation for a compromise legislative solution? And has that compromise now been adequately reflected in the MCA Bill’s terms? But these questions are framed by an orthodox treatment of the law: that is, of the history of the state legal system’s approach to property rights in the foreshore and seabed; and of the various legislative proposals that have emerged following the Court of Appeal’s landmark decision in 2003.

5. Order of fare

Chapter Two sets the scene for this study by considering the historical and contemporary law surrounding the foreshore and seabed in Aotearoa/New Zealand. It attempts to undertake a comprehensive overview of the historical evolution of the law relating to property rights in the zone. It explores connections to the zone grounded in tikanga Māori, the Treaty and in the common law before discussing how the legal position evolved under the Aotearoa/New Zealand state. To achieve that, it is at times necessary to discuss native title developments in general property law and fisheries.

Chapter Three exhumes the main equality and rights arguments used in the Debate and their echoes in political and legal philosophy. It does this by analysing four key
documents (the key documents) from the Debate, from which the major equality and rights claims can be drawn. In this manner, the main theories employed by participants in the Debate are immediately put on display. These key documents are the Paeroa Declaration, issued following a large hui of iwi representatives; the then opposition National Party’s Leader Hon Donald Brash’s “Nationhood” Speech; the then Deputy Prime Minister Hon Michael Cullen’s Article, and the Treaty Tribes Coalition’s Submission. Each document was chosen because it embodies distinct views on the issues. Together these key documents represent a broad spectrum of views on equality and rights exhibited during the Debate.

Chapters Four, Five and Six describe in detail the theories and foundations that lie behind the equality and rights claims extracted from the key documents studied in Chapter Three. Chapter Four examines the theories of equality along an ‘Equality Spectrum’ that is first introduced in Chapter Three. This device enables the equality arguments extracted from each of the key documents to be discussed as stand-alone concepts. These arguments concern: formal individual equality; equal consideration of interests; equal application of the law; equal access to the law; and equality of authority. In addition, the usefulness of these theories for oppressed peoples is discussed.

Chapters Five and Six then address the theories of rights employed during the Debate. Chapter Five attempts to untangle the rights claims from the equality claims. It employs Hohfeld’s well-known categorisation of different rights arguments, and focuses on the three most prominent rights arguments uncovered in the key documents considered in Chapter Three. These are claims to property rights, procedural rights and decision-making rights. It then analyses whether such claims

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65 The Paeroa Declaration (signed 12 July 2003) reproduced in Tino Rangatiratanga Te Takutai Moana (2nd ed, prepared as vol 2 of the IRI, Economics, Politics & Colonisation Series, 2003) at 11. For the full text of this Declaration see Appendix Two.
66 Gathering, meeting.
67 Tribe, people, nation.
68 Donald Brash, Leader of the Opposition National Party “Nationhood” (State of the Nation Speech to the Orewa Rotary Club, Orewa, 27 January 2004). For the full text of this Speech see Appendix Three.
69 Michael Cullen “Challenge to find balance on issue of foreshore rights” Opinion, ODT (Dunedin, 18 February 2004) at 19. For the full text of this Article see Appendix Four.
70 Treaty Tribes Coalition One Rule of Law for All New Zealanders: A Submission by the Treaty Tribes Coalition on the Foreshore & Seabed Issue (Treaty Tribes Coalition, Christchurch, 2004). For the full text of this Submission see Appendix Five.
were made in the fundamental or ordinary sense, and what sources such claims of right are based on. As with Chapter Four, the discussion is organised by reference to different kinds of arguments. However, the different rights arguments overlap more than the equality claims, so cannot be usefully analysed along a spectrum.

Chapter Six focuses on how arguments about conflicts between rights should be resolved. It provides more detail on the substance of the various rights claimed, their impact on others, and possible Māori rights that could be recognised in a final resolution of the dispute.

Chapter Seven represents a shift in focus. Having exposed the equality arguments and claims of right embedded in the key documents, this chapter analyses a wider range of empirical data from the Debate. It scrutinises the claim made in Chapter Three that the key documents studied adequately convey the major equality and rights arguments deployed on all sides. It also reveals more fully the range of people who used the various arguments, and debunks the dominant contention that the Debate was simply an expression of opposing Māori and Pākehā views. It highlights the interplay between law and politics during the Debate and brings forth some arguments not represented in the key documents.

Chapter Eight then identifies a zone of potential compromise between different equality and rights claims, where these claims are sufficiently close to enable the outlines of a potential solution to be drawn that would quieten the Debate for a reasonable period of time. In that light, it then examines the MCA Bill to identify whether or not the process and structure of that new legislation, proposed in late 2010, are based on such a synthesis of the different positions, and whether such legislation could settle the Debate.

Chapter Nine reflects on the solution to the Debate, proposed in the MCA Bill. It discusses more fully the political nature of the legislative process needed to enact the Bill. In doing so, it addresses two outstanding political questions: will the Bill be enacted, in something like its current form, and, if so, will its passage quieten the Debate?
6. Terminology employed

It is useful to say something at this point about terminology.

Diagram One: The Foreshore and Seabed

The foreshore is the area next to the beach that is neither always wet nor always dry due to the ebb and flow of the tide. The seabed is permanently covered by water, and commences where the foreshore ends. Its limit is defined by national and international law, where the Crown claim territorial sovereignty to twelve nautical miles from the low water mark, and a more limited control out to two hundred nautical miles. The Māori term for the area is ‘te takutai moana’.

The Foreshore and Seabed Debate is also known varyingly as the Foreshore and Seabed Issue and the Foreshore and Seabed Controversy. In this thesis, the term ‘Debate’ is chosen for two specific reasons. First, that I feel the terms ‘issue’ and

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72 Ibid, at 5 and 6. Section 5 of the FSA defines the foreshore and seabed as:

(a) means the marine area that is bounded,—
   (i) on the landward side by the line of mean high water springs; and
   (ii) on the seaward side, by the outer limits of the territorial sea; and
(b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and
(c) includes the bed of Te Whaanga Lagoon in the Chatham Islands; and
(d) includes the air space and the water space above the areas described in paragraphs (a) to (c); and
(e) includes the subsoil, bedrock, and other matters below the areas described in paragraphs (a) to (c)
‘controversy’ do not convey the significance of the subject matter and the impact the Debate has had on the nation. Second, because I contend that this is at heart a jurisprudential debate over conflicting visions of equality and rights, it is natural to refer to it as such.

In this thesis, the following descriptive decisions have been taken. The term ‘Manawhenua’ is used to inclusively describe coastal whānau, hapū, rūnanga/rūnaka and iwi. The term ‘Māori’ is used to describe both indigenous individuals and groups, including Manawhenua. The term ‘Pākehā’ is used to describe New Zealanders of British descent, while ‘non-Māori’ is used inclusively to describe Pākehā and people of other ethnic origins who are not Māori.

In the interests of clarity, I feel it is important to distinguish the terms ‘Manawhenua’ and ‘mana whenua’. Manawhenua are the people who exercise kaitiakitanga and possess mana whenua in a geo-political territory. Mana whenua operates at various levels and is always local. It is inextricably linked with rangatiratanga, as rangatiratanga pertains to the ability to exercise authority, and those who possess mana whenua over a specific area have the authority over that area. Manawhenua who hold mana whenua in an area that is bordered by the sea may also possess mana moana. Aspects of these terms will be further explained as the thesis proceeds.

73 Family, extended family.
74 Sub-tribe, clan.
75 Tribal collective.
76 Williams, above n 28, at 80-81. ‘Rangatiratanga’ is the shortened form of ‘tino rangatiratanga’, see above n 53.
Chapter Two: The Law of the Foreshore and Seabed

1. Introduction

The law of the Aotearoa/New Zealand foreshore and seabed is a very complex story, like a coastline that has been eroded and reformed with the changing of the tides. The first tide of law that washed over the zone was tikanga Māori, Māori customary law. Under this, coastal Manawhenua groups established their own procedures, which dictated individual and group behaviour in their foreshore and seabed. These procedures were associated with the notions that the natural world was indivisible and that the spiritual and the physical world were one. People were connected to the land and this created a mutual relationship, which culminated in the obligation to protect and care for the earth, known as kaitiakitanga.

The second tide arrived in the form of British common law with the signing of the Treaty and the establishment of Crown Sovereignty in 1840. With the British common law came two conflicting doctrines: the doctrine of Crown ownership of the foreshore and what is now known as the doctrine of native title, which held that the Crown’s sovereignty was burdened by existing Māori property rights, which might include rights to the foreshore and seabed.

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1 Section 4 of Te Ture Whenua Maori Act 1993 (TTWMA) defines ‘tikanga Maori’ as: “Māori customary values and practices”.
2 Guardianship or stewardship. In resource management law it has the meaning provided in s 2 of the Resource Management Act 1991 (RMA):
   Kaitiakitanga means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.
3 Paul McHugh, who has published extensively on common law native rights, argues that although Indigenous Peoples’ customary law and rights existed and were recognised in the early days the Aotearoa/New Zealand colony, the doctrine of native title, as it is articulated today, did not arrive intact in the country in 1840. Instead the doctrine emerged from landmark judgments in the last quarter of the twentieth century in Canada, Australia and Aotearoa/New Zealand. McHugh comments: “From the late nineteenth century there began to grow a body of case-law on aboriginal rights. This begun the formulation of a corpus of law in the modernist sense of the growth of a doctrine”: Paul G McHugh Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination (Oxford University Press, New York and Oxford, 2004) at 179 [Aboriginal Societies and the Common Law]. These ‘landmark judgments’ recognised the inherent ‘rights’ of Indigenous Peoples, including rights to their traditional lands still in occupation and use (the doctrine of native title), and sought to redress the failure of settler political institutions to accommodate Indigenous Peoples. This twentieth century doctrine was thus designed to protect extant Indigenous rights over traditional lands and conceived as a way of recognising customary rights which continued to be exercised in the present. As an argument it was essentially about previously ‘overlooked’ property rights. The purpose of the doctrine, therefore, is not to reconstruct the past, but to resolve Indigenous Peoples’ claims located in
In the early days of the colony, the doctrine of native title won approval in the courts. This saw the emergence of a local common law, where aspects of tikanga Māori were merged with British common law. But within 20 years of such judicial approval, the doctrine of native title began to be eroded by legislation. The New Zealand Parliament sought to alienate Māori customary land by converting it to freehold title through the Native Land legislation.

In 1877, however, the infamous judgment of Chief Justice Prendergast in *Wi Parata v The Bishop of Wellington (Wi Parata)* 4 completely washed away the doctrine of native title. For over a hundred years, the law of the foreshore and seabed in Aotearoa/New Zealand appeared to be that the Crown owned the zone.


4 *Wi Parata v The Bishop of Wellington* (1878) 3 NZ Jur (NS) 72 (SC).
5 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).
6 Tribes, nations, peoples.
Court of Appeal. In 2003 it delivered its unanimous *Ngati Apa*\(^7\) decision, which reinstated the doctrine of native title over the foreshore and seabed and declared this zone was “land” in terms of TTWMA, and thus the Maori Land Court had jurisdiction to investigate title to it.

The story did not end there, however. The tide took a dramatic turn the very next year when Parliament enacted the Foreshore and Seabed Act 2004 (FSA). As of December 2010, the basic legal principles concerning rights in the foreshore and seabed are largely found in this Act. It deems the zone to be the Crown’s ‘absolute property’, and guarantees public access and navigation rights, but it also provides specific mechanisms and tests for the recognition of customary rights that amount to less than full title.

The central legal aspects of this story will now be examined more closely in turn.

2. Tikanga Māori: Māori customary law

Prior to European settlement of Aotearoa/New Zealand, Māori descent groups, who had close ancestral and spiritual connections with the sea,\(^8\) extensively used and controlled the land, including the coastal environment. Land is fundamental to Māori identity. It is much more than a mere resource. It also embodies a substantial part of Māori mana.\(^9\) In a Māori world view, all land is seen as Papatūānuku, the Earth Mother.\(^10\) Accordingly, the relationship between Māori and Papatūānuku is based on whakapapa.\(^11\) Whakapapa defines Māori connection to the land and determines use rights in land. These rights are “sui generis”; that is “They are of their own kind; are subtle and elusive of easy description”.\(^12\) Individuals and families possess various use rights to particular resources. However, as Eddie Durie explains, “while individuals or particular families had use rights of various kinds at several places, the underlying or

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\(^7\) *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).
\(^9\) Prestige, power.
\(^10\) See Waitangi Tribunal, above n 8, at 4.
\(^12\) Ministry of Justice *He Hinātore ki te Ao Māori. A Glimpse into the Māori World: Māori Perspectives on Justice* (Ministry of Justice 2001) at 46.
radical title was vested in the hapu”. The collective group’s right to hold responsibility for land or its resources is an aspect of mana whenua. With this right came duties to the collective and to the land itself. In a Māori world view, because of the whakapapa connection to land, the Manawhenua hold the obligation to protect and care for their earth mother. This stewardship is known as kaitiakitanga, and embodies the requirement that the land be left in the same, or better, condition for future generations.

Importantly, in a Māori world view, because all land is considered Papatūānuku, dry land, tidal land and land under water are not viewed as separate entities. Therefore, although rivers, lakes, foreshore and sea were recognised as having different properties to dry land, there was no distinction made between dry land and land under water in terms of property rights. In 1885, Hōri Ngātai of Ngāi Te Rangi articulated this worldview when he addressed the Native Minister, Hon John Balance, concerning the foreshore and seabed of Tauranga Harbour:

Now with regard to the land below high water mark immediately in front of where I live, I consider that is part and parcel of my own land. … I look upon the land below high-water mark as being part of my own garden.

The tikanga that evolved in these different areas was much the same. Each Manawhenua exercised control over their coastline, foreshore and seabed just as they did over their mountains, valleys, rivers and lakes. As Hone Mohi Tawhai of Waima explained in correspondence to Henare Tomoana, Wi Pere and Henare Mahuta on 5 August 1878: 

Timata i te mutunga tai, tae noa ki nga paru kohinga pipi, ki nga kopua hiinga ika, tae noa ki nga toka hapuku, kei te Maori ano te mana.

14 ‘Mana whenua’ is the trusteeship of land, or the right to hold responsibility for land or resources.
15 Waitangi Tribunal, above n 8, at 4.
16 Different atua (ancestors whose mana is extant) reigned over these areas: Tāne Mahuta (atua of the forest) presided over rivers, lakes and dry land, while Tangaroa (atua of the sea) ruled the sea. The foreshore itself was a place of conflict between these two atua.
17 Hōri Ngātai quoted in John Balance “Notes of Native Meetings” [1885] 2 AJHR G1 at 61.
18 Customs.
19 Translation by Te Matahauriki: Laws and Institutions for Aotearoa/New Zealand. For full quote see Alex Frame and Paul Meredith “Māori Customary Rights: the Hard Yards” (2003) 7 Te Matahauriki Newsletter 2 at 3. ‘Pipi’ are small cockles, a type of shellfish. ‘Hāpuku’ are groper, a type of fish.
The Maori maintains his mana over the areas commencing from the sea shore, to the pipi beds, to the deep water fishing grounds, through to the hapuku reefs.

As with dry land, the foreshore and some seabed were divided amongst Māori collective groups. Ngātai explained this when he stated to Balance that “From time immemorial” he had possessed the foreshore in front of his dwelling, and “The whole of this inland sea has been subdivided by our ancestors, and each proportion belongs to a proper owner”.

3. English common law

At English common law, the feudal doctrine of tenure holds that the Crown was both the sovereign and ultimate landlord. Therefore all title to land derives from a Crown grant or remains in the Crown. However, in England, this is often a fiction, as the original grant frequently cannot be found. The legal reality is that there are freeholders in possession of land, and the presumption of English real property law is that those in possession are presumed to own it by way of a Crown grant that can no longer be located. In Aotearoa/New Zealand, on the other hand, this is not a fiction. The position is that there are actual dated grants that can be easily found.

The foreshore and seabed, however, are in a special position. As Richard Boast explains, upon the colonisation of the country, “These areas were presumed in the absence of evidence to the contrary to belong to the Crown”. Thus the Crown, by prerogative right, was deemed to be the prima facie beneficial owner of all foreshore and seabed. This principle was so well understood in English law that it led Herman Merivale, of the British Colonial Office, to exclaim in 1849:

… it may be taken for granted that according to maxims of English common law the Crown is in strictness owner of the beach between the high and low water

20 Williams, above n 11, at 51-52.
21 Ngātai quoted in Balance, above n 17, at 61.
22 This concept originated in feudal England, where at the Norman Conquest in 1066 King William I obtained radical and beneficial ownership of the kingdom as sole lord of the land. He then proceeded to reward his followers by issuing grants. See Richard P Boast The Foreshore and Seabed (LexisNexis, Wellington, 2005) at 37.
23 Ibid.
24 Quoted in Mark Hickford “Settling some very important principles of colonial law: three ‘forgotten’ cases of the 1840s” (2004) 35 VUWLR 1 at 20.
mark in the colonies as well as in England, subject only to the rights of the public to use it for landing.

Boast concedes that one reason why the foreshore and seabed were in this special position was because it was “the policy of the law to protect public rights of fishing and navigation”.25 As Kent McNeil explains, “The existence of these rights also excludes to a large extent the possibility of exclusive occupation of underlying lands”.26

4. The doctrine of native title

The common law of native rights is the body of common law principles that governed the position of Indigenous Peoples upon the British Crown’s acquisition of sovereignty over their traditional territories.27 The doctrine of native, or aboriginal, title is a branch of this overarching common law of native rights that deals specifically with Indigenous Peoples’ lands.28 Proprietary rights recognised under the doctrine are vested in Indigenous Peoples as tribal polities.29

The doctrine acknowledges, “prior to the introduction of British sovereignty, Indigenous Peoples controlled and occupied their lands and natural resources in accordance with traditional laws and customs”.30 Subsequently, the doctrine holds that upon the transfer of sovereignty the Crown only gains radical title, while

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25 Boast, above n 22, at 38. A number of possible explanations for why the foreshore and seabed is in this special position have been comprehensively analysed in Kent McNeil Common Law Aboriginal Title (Clarendon, Oxford, 1989).
26 McNeil, above n 25, at 105.
30 Mark B Schroder “On the Crest of a Wave: Indigenous Title and Claims to the Water Resource” (2004) 8 NZJEL 1 at 3. As the Privy Council explained in Manu Kapua v Para Haimona [1913] NZPCC 413 at 416-417, in that case:

Prior to the grant and the antecedent proceedings the land in question had been held by the natives under their customs and usages, and these appear not to have been investigated. As the land had never been granted by the Crown, the radical title was, up to the date of the grant, vested in the Crown subject to the burden of the native customary title to occupancy.
beneficial title, and all property rights within, remain with the original inhabitants, until lawfully extinguished by clear and plain legislation.\textsuperscript{31}

At its most basic formulation, the doctrine of native title is founded upon a presumption of legal continuity, which allows the Indigenous Peoples to have their communal rights recognised in the introduced common law system.\textsuperscript{32} It recognises the legal entitlement of Indigenous Peoples over their lands under their customary laws at the time of Crown sovereignty.\textsuperscript{33}

\textsuperscript{31} Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399 (PC) at 407-408, cited with approval in Ngati Apa, above n 7, at [15] per Elias CJ. Mark Hickford and Damen Ward have both argued that in assessing whether Indigenous customary law survived British sovereignty, British thought did not consider all ‘uncivilised’ peoples as being of the same class. The extent to which imperial and colonial officers recognised Indigenous property rights in British colonies was influenced by the application of stadial theory; Hickford, above n 3, at 178; Mark Hickford “‘Decidedly the Most Interesting Savages on the Globe’: An Approach to the Intellectual History of Māori Property Rights” (2006) 27 HPT 122 [“Decidedly the Most Interesting Savages on the Globe”]; Damen Ward “Constructing British Authority in Australasia: Charles Cooper and the Legal Status of Aborigines in the South Australian Supreme Court, c. 1840-60” (2006) 34 Journal of Imperial and Commonwealth History 483 at 486; and Damen Ward “A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia” (2003) 1 History Compass 1 at 5-6 [“A Means and Measure of Civilisation”]. In essence, this theory purported to chart and to explain the transmutation of human societies from uncivilised to civilised through distinct stages. In outline, these stages were: nomadic societies; societies with pastoral economies; agriculturalist societies; and finally, ‘modern’ commercial societies. Thus, this theory was applied to determine levels of civilisation and the existence of property rights. The more an Indigenous group was deemed to be uncivilised on the stadial scale, the less recognition was given to their property rights. For example, nomadic societies were seen to possess no ownership rights in land, whereas agriculturalist societies’ rights were recognised. The use of this theory is one explanation for the marked difference in colonial recognition of Indigenous property rights between Australia and Aotearoa/New Zealand. For a detailed account of how stadial theory was applied in Aotearoa/New Zealand, see Hickford “Decidedly the Most Interesting Savages on the Globe”, above.

\textsuperscript{32} See McHugh “The Property Rights of Tribes”, above n 3, at 436; McHugh “Common Law Aboriginal Title in New Zealand After Ngati Apa”, above n 3, at 26; McHugh “Aboriginal Title in New Zealand”, above n 3, at 142; McHugh, above n 27, at 84-90; Hickford, above n 3, at 177. This principle of continuity was established in English common law as early as 1608. In The Case of Tanistry (1608) Davies 28, 80 ER 516 (KB) at 520, the Court indicated that Indigenous laws of a country, in this case Ireland, survived British sovereignty, so long as they met the test of reasonableness, certainty, immemorial usage and compatibility with Crown sovereignty. In Campbell v Hall (1774) Lo Ft 538, 98 ER 1045 (KB), Lord Mansfield CJ made it clear that non-Christian laws enjoyed the same presumption of continuity as was described in The Case of Tanistry. This continuity was not unqualified, however. It could not support customary laws that were unconscionable to the English common law or breached the universal laws of humanity. For example, in his instructions to Captain William Hobson for the cession of Aotearoa/New Zealand, Lord Normanby directed that the traditional customs of Māori could continue, except where these were incompatible with the universal maxims of humanity and morals: Instructions from Lord Normanby of the Colonial Office to Captain William Hobson regarding accession via treaty (14 August 1839) reproduced in Thomas Lindsay Buiuck The Treaty of Waitangi: How New Zealand became a British Colony (3rd ed, reprinted ed, Capper Press, Christchurch, 1976) at 76.

\textsuperscript{33} See Paul G McHugh “New Dawn to Cold Light: Courts and Common Law Aboriginal Rights” in Rick Bigwood (ed) Public Interest Litigation: New Zealand Experience in International Perspective (LexisNexis NZ Ltd, Wellington, 2006) 25 at 46; and McHugh, above n 27, at 83. However, Ward observed, “even where the existence of local custom was seen as indicating a degree of civilisation, this did not necessarily mean that such customs would be recognised by English common law. In practice,
This principle of continuity is part of a wider set of principles that define and articulate the nature of Crown sovereignty in its colonies. That is, over time, as litigation tests the character of that sovereignty, the common law explains and clarifies it. The doctrine of native title is therefore constitutional, as well as legal, in nature. It is bound with the character of Crown sovereignty.\(^{34}\)

As discussed above, under the feudal doctrine of tenure, at accession the Crown was deemed both sovereign and ultimate property owner. Settlers therefore required a Crown grant to gain title to land. In addition the Crown was authorised to be the sole purchaser of Indigenous Peoples’ lands, under the Crown’s right of pre-emption. This right was explicitly guaranteed in art 2 of the Treaty and in the founding native title judgment of \(R \, v \, Symonds\) (Symonds).\(^{35}\)

The existence of the Crown’s pre-emptive right therefore expressly recognised that Indigenous property rights existed and were a burden on the Crown’s newly acquired underlying title. This pre-emptive right had two major consequences for Indigenous Peoples: first, they could not cede land to other European states, which would have involved a denial of British sovereign rights; and second, they could not sell land to private settlers (nor could the settlers gain title though simple possession). This resulted in native title being categorised as inalienable to all but the Crown. But it must be noted that this inalienability applied only to dealings between Indigenous and non-Indigenous People; it did not prevent Indigenous Peoples from transferring land amongst themselves according to their own legal norms.

There are four main reasons for such inalienability: one, it served to protect Indigenous Peoples from fraudulent dealings with settlers; two, it meant the Crown would reap the financial benefit of sale revenues; three, it ensured that the Crown

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34 For detailed discussion on the conception on sovereignty as it has occurred in relations between Indigenous Peoples and the common law, see McHugh Aboriginal Societies and the Common Law, above n 3, at 61-214. See also McHugh, above n 27, at 70.

35 \(R \, v \, Symonds\) (1847) NZPCC 387 (SC) at 390 per Chapman J, where his Honour observed the practice of extinguishing native title by fair purchase was over two centuries old at that time: a practice long adopted by the governments of British colonies in America and the United States. He then concluded that this practice was “now part of the land”. Both Symonds and the Treaty will be discussed in greater detail in the following sections.
could control the pace of settlement; and last, it ensured the transition of Indigenous land into an orderly Crown-grant based system of tenure for settlers.  

Thus, the principle of continuity inherent in the doctrine of native title was a modified one; it was modified by the rule that Indigenous lands can only be alienated to the Crown. The modification arises out of the particular quality ascribed to native title in the British colonies in America and Australasia. Following the American Revolution, there emerged a strong belief that permanent British colonists held a ‘birthright’ to English law in their internal interactions. Where the British Crown acquired sovereignty over societies that employed European legal systems, this ‘birthright’ held very little sway and there was no need to modify local law. However, the situation in colonies with tribal, or non-Christian, societies was different. Here the Crown had a duty to its British subjects to ensure their birthright, while assuming a special protective position in relation to the Indigenous Peoples.

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36 See McHugh “Common Law Aboriginal Title in New Zealand After Ngati Apa”, above n 3, at 27.
37 See ibid, at 26; McHugh Aboriginal Societies and the Common Law, above n 3, at 39; and McHugh “Aboriginal Title in New Zealand”, above n 3, at 143.
38 See McHugh Aboriginal Societies and the Common Law, above n 3, at 39; McHugh “Common Law Aboriginal Title in New Zealand After Ngati Apa”, above n 3, at 26; and McHugh “Aboriginal Title in New Zealand”, above n 3, at 143; McHugh, above n 27, at 86-87.
39 See McHugh, above n 27, at 85-87. The automatic application of English common law to the legal position of settlers as a ‘birthright’ did not emerge until the case of Blankard v Galdy (1693) 2 Salk 411, 91 ER 356 (KB), which defined a new ‘settled colony’ in which English common law took automatic effect. Prior to that, colonies were defined as either ‘conquered or ceded’ or ‘descent’ [Calvin’s Case (1608) 7 Co Rep 1a, 77 ER 377 (KB)]. In these colonies the common law only applied once the Conqueror declared it so. Although ceded under the Treaty, Aotearoa/New Zealand was ultimately defined as a settled colony, so the English common law applied to interactions amongst settlers. For more discussion, see: Paul G McHugh “The Common-Law Status of Colonies and Aboriginal ‘Rights’: How Lawyers and Historians Treat the Past” (1998) 61 Saskatchewan Law Review 393 at 403-427 (“The Common-Law Status of Colonies and Aboriginal ‘Rights’”); and McHugh, above n 27, at 88-90.
40 See McHugh, above n 27, at 86. For example, in two territories that became British Colonies shortly before Aotearoa/New Zealand, Quebec and Cape Colony, the French seigneurial system and the Roman-Dutch law continued unmodified.  
41 See ibid. The reason for this protective position goes back centuries. Debate around the topic occurred at the time of the Crusades. European exploration of America brought new vigour to the debate, initially concentrated in Spanish theologians who debated the legitimacy of Spanish conduct in Meso-America: for more information see ibid, at 105-106; and McHugh “Legal Reasoning and the Treaty of Waitangi”, above n 3, at 94. Francisco de Vitoria and Bartolomé de Las Casas were two such Spanish theorists in the early sixteenth century, who wrote and lectured on the rights of Indigenous Americans in terms that informed the practice of European nations towards Indigenous Peoples in their colonies ever since: Schroder, above n 30, at 5-7. In 1532, Vitoria argued that the Indigenous Americans were the true owners of their lands, and that they were rational beings who possessed natural legal rights: S James Anaya “Indigenous Rights and Norms in Contemporary International Law” (1991) 8 Arizona Journal of International Comparative Law 1 at 2, cited in Schroder, above n 30, at 5. Las Casas supported this contention, and took the position that indigenous rights encompassed “material security, cultural integrity and political autonomy” and that their title was defensible against European claims: Schroder, above n 30, at 7. As a result, Las Casas believed the Crown should play a
In Aotearoa/New Zealand, by 1840 it was a settled principle of colonial law that the Crown was to protect the land rights of Aboriginal Peoples. Nowhere is the special ‘protective’ role of the Crown made more explicit than in the guarantee of tino rangatiratanga in art 2 of the Treaty.

To conclude, in Aotearoa/New Zealand, therefore, the doctrine acknowledges that Manawhenua extensively occupied and controlled the land prior to British settlement. These rights continued to exist, until lawfully extinguished, and were a burden on the Crown’s title. As a result, it has become recognised that at the proclamation of sovereignty in May 1840 the Crown did not acquire full title over all the country; rather it gained the exclusive right to extinguish Māori customary title and to issue grants.

4.a. The doctrine of native title as ‘intersocietal law’

While there exist two traditional approaches to the source of the doctrine of native title, these being English common law or the Indigenous customary law, a very strong argument has arisen out of Canada that the doctrine of native title emerged fundamentally out of the interaction of colonists and Indigenous Peoples, and therefore forms a body of ‘intersocietal law’. As Brian Slattery argues:


The Treaty will be discussed in greater detail in Section 5.

Of note, Hickford has argued, however, that what is now characterised as the doctrine of native title did not underpin imperial policy on Indigenous property rights in Aotearoa/New Zealand in the 1830s and 1840s, and neither was it accepted as the law that should apply. He explains that the focus of imperial policy was on settlement, and thus the recognition of ill-defined ‘territorial rights of natives’ in Aotearoa/New Zealand was less an attempt to represent Indigenous rights than it was a means for controlling settler conduct with regard to settlement: Mark Hickford “Law and Politics in the Constitutional Delineation of Indigenous Property Rights in 1840s New Zealand” in Shaunnagh Dorsett and Ian Hunter (eds) Law and Politics in British Colonial Thought: Transpositions of Empire (Palgrave Macmillan, New York, 2010) 249 at 252 [“Law and Politics in the Constitutional Delineation of Indigenous Property Rights”]; and Hickford, above n 3, at 175-176, 180 and 196.

Boast, above n 22, at 37. The proclamations will be discussed in Section 5.

Aboriginal title was the creature of a distinctive body of common law that was generated by the policies and practices of the British Crown in its intensive relationship with Indigenous American nations during the seventeenth and eighteenth centuries. Aboriginal title was not known to English common law or any Indigenous system of law; it flowed from the distinctive set of rules that bridged the gap between English and Indigenous legal systems and provided for their interaction. This body of law passed into British colonial law – the largely common law system that governed the Crown’s relations with its overseas colonies and furnished their basic constitutional frameworks. In this manner it came to operate in all nascent British colonies in America, and subsequently Australia, New Zealand and other British possessions. This distinctive or *sui generis* body of law is known as the *common law of Aboriginal rights*.

This interaction began early in the seventeenth century, when British colonists first set foot in North America. There, as in Aotearoa/New Zealand, both Indigenous and non-Indigenous groups possessed their own legal norms. “They constituted autonomous normative universes, without a common justice and indeed without intercommunal norms capable of regulating their relations with each other”. 48 Motivated by a general wish to live together in peace, both groups began to develop a set of expectations and procedures for intercultural interaction. Such practices governed the interface between the colonists and Indigenous Peoples. They recognised Indigenous Peoples’ entitlement to their lands and established an orderly means for land acquisition, embodied in what was to become the doctrine of native title and the Crown’s pre-emptive right. These were therefore part of a law of interface, which was confined to


47 Brian Slattery “The Metamorphosis of Aboriginal Title”, above n 46, at 147. In the Aotearoa/New Zealand context, McHugh notes that the most authoritative source of the legal principles behind the doctrine of native title is the settled, that is historical, practice of the Crown: McHugh, above n 27, at 87. Hickford describes such practices in Aotearoa/New Zealand as being paved by missionaries in the far north, who engaged with Māori in transactions for land transfers as early as 1815. These transactions, he argues, established practices that influenced interactions with Māori and left behavioural markers for imperial policy formulators to address. Māori came to be seen to be have the propensity and capacity to engage in transactions and trade for commodities and land itself, thus they were viewed as possessing property rights: Hickford, above n 3, at 177-178.

48 Webber “Relations of Force and Relations of Justice”, above n 46, at 626.
intersocietal relations between peoples, not the intrasocietal relations of each group. It did not purport to regulate Indigenous landholding, which was left up to each Indigenous group under the their own customary laws. Nor did it settler landholding, which was governed by the imported English common law. This body of intersocietal law was absorbed into colonial common law once sovereignty was declared. Paul McHugh, when discussing the early Canadian practices, concluded: “In retrospect, the doctrine of aboriginal title can be seen as an ingenious way of bringing legal order to what might otherwise have been a chaotic legal situation”. 49

Judicial recognition of this practice occurred in several United States Supreme Court decisions under Chief Justice Marshall in the early nineteenth century, primarily the case of Johnson v M’Intosh in 1823. 50 These decisions were pivotal to the doctrine of native title in Canada as well as the United States. 51 Importantly, Symonds endorsed these cases, thus “introducing the Marshall Court jurisprudence of the United States to imperial New Zealand”. 52

5. Te Tiriti o Waitangi/The Treaty of Waitangi 1840 53

Although the legal source of property rights at issue in the Court of Appeal at 2003 was not the Treaty, the Treaty was immensely significant to the Debate.54 Participants

49 McHugh, above n 27, at 104.
51 These judgments are the foundation for the principal Canadian decisions: St Catherine’s Milling & Lumber Co v R (1887) 13 SCR 577 at 610; Calder v British Columbia (A.G.) [1973] SCR 313 at 320-322, 352 and 380-385; Guerin v R [1984] 2 SCR 335 at 377-378; R v Sparrow [1990] 1 SCR 1075 at 1103; and R v Van der Peet [1996] 2 SCR 507 at [36]-[37], [107] and [267].
52 Hickford, above n 24, at 2. Martin CJ quoted James Kent’s Commentaries on American Law [James Kent 3 Commentaries on American Law 379 (2nd ed, 1832)], which included several passages from Johnson: Symonds, above n 35, at 393–94. Chapman J cited Cherokee Nation, and also cited Kent’s discussion of Johnson and the doctrine of discovery: at 388, 390 and 392. McHugh argues that these American judgments were certainly well known in the Colonial Office and colonial legal circles in the early days of Crown sovereignty in Aotearoa/New Zealand as they were delivered in the years just prior to the Treaty: McHugh, above n 27, at 106. Importantly, shortly after the Treaty, Governor George Gipps, Governor of New South Wales and New Zealand, declared the principles espoused in the American judgments applied to Aotearoa/New Zealand. See McHugh, above n 27, at 109. However, Hickford is careful to point out that there was no consensus amongst imperial policy makers and the Colonial Office as to the extent of Māori rights. He explains that political officers recognised Māori rights according to certain governmental practices and values, as opposed to others: Hickford “Law and Politics in the Constitutional Delineation of Indigenous Property Rights”, above n 44, at 251; and Hickford, above n 3, 175-176 and 183. His observation that the Colonial Office rejected United States judicial sources as determinative or even applicable supports his contentions.
53 For more information on the Treaty and its place in Aotearoa/New Zealand, see Matthew Palmer and McHugh’s seminal works: Matthew SR Palmer The Treaty of Waitangi in New Zealand’s Law and Constitution (Victoria University Press, Wellington, 2008); and McHugh, above n 27.
relied on it as a source of rights and importantly the Waitangi Tribunal (the Tribunal) evoked its principles when inquiring into the prejudicial affect of the Labour-led Government’s foreshore and seabed policy.55

From the late 18th century onwards, European and American explorers, sealers, whalers, traders and settlers began arriving on Aotearoa/New Zealand’s shores. The British Crown was initially reluctant to intervene in the country, preferring instead to exercise limited power through the Governors of New South Wales.56 However, in the late 1830s, a number of factors combined to turn the colonial and imperial authorities towards annexation.57

In 1839, the British sought to annex Aotearoa/New Zealand. Throughout the pre-colonial period, the British Crown had continually and carefully acknowledged the sovereign status of rangatira.58 Under previous practice, and in British policy and international law at the time, recognition of such sovereignty was therefore a reason for the British to formulate a treaty to treat with Māori for the cession of sovereignty and their consent to British rule.59 On 14 August 1839, having outlined that “title to the soil and to the sovereignty of New Zealand is indisputable and has been solemnly

54 Palmer, who has written extensively on Aotearoa/New Zealand’s constitution, and the place of the Treaty within it, notes that one of the reasons that the Court of Appeal’s findings in Ngati Apa came as such a surprise to many people was that the relevant source of legal authority at issue in the Debate was not the Treaty. New Zealanders, it can be argued, were familiar with Māori claims under the Treaty, which, through legislation invoking it, had been the primary focus of Māori legal claims since the 1980s. So to Palmer: “The existence of an alternative, potentially more legally binding, source of Maori claims in the common law came as a surprise to the New Zealand public and also, though less excusably, to politicians”: Matthew SR Palmer “Resolving the Foreshore and Seabed Dispute” in Raymond Miller and Michael Mintrom (eds) Political Leadership in New Zealand (Auckland University Press, Auckland, 2006) 197 at 203. See also Palmer, above n 53, at 230. He states, however, that it is important not to overemphasise the distinction between the common law and the Treaty as the same dynamics underlie both: Palmer “Resolving the Foreshore and Seabed Dispute”, above, at 203. See also Paul G McHugh “What a difference a Treaty makes – the pathway of aboriginal rights jurisprudence in New Zealand public law” (2004) 15 PLR 87.

55 The Tribunal, its role, jurisdiction and report will be discussed in detail in Section 14. The Labour-led Government’s policy will be discussed in Section 13.

56 For a summary of British colonial administration at that time, see Palmer, above n 53, at 36-39.

57 Such factors included concern over lawlessness in the islands, a need to protect established trade interests against other European nations, increasing British settlement and humanitarian concerns for the welfare of Māori. For a good summary of these factors, see ibid, 36-51.

58 Chiefs, nobles. British colonial practice and statements, as well as the international law of the time, made this clear. For more information, see Palmer, above n 53, at 74; McHugh, above n 27, at 25-41; Kenneth Keith “The Treaty of Waitangi in the Courts” (1990) 14 NZULR 37 at 38; and Ian Brownlie in FM (Jock) Brookfield (ed) Treaties and Indigenous Peoples: The Robb Lectures 1991 (Clarendon Press, Oxford 1992) at 8.

59 Palmer, above n 53, at 74-75.
recognised by the British Government”, 60 Lord Henry Normanby, Secretary of State for the Colonies, instructed Captain William Hobson, as he was then, “to treat with the aborigines of New Zealand for the recognition of Her Majesty’s sovereign authority over the whole or any part of those Islands which they may be willing to place under Her Majesty’s dominion”. 61

On 6 February 1840, the Treaty was signed at Waitangi in the Bay of Islands between Lieutenant-Governor Hobson, as the Queen’s representative, and a number of Māori rangatira. 62 It then travelled around the country collecting Māori signatures. All but 39 rangatira signed the Māori version. As Matthew Palmer explains: 63

The Treaty of Waitangi was formulated in 1840 between Māori rangatira, on behalf of their hapū, and representatives of the British Crown. Together, these people had the ability to exercise substantial public power in New Zealand in 1840. Whatever the Treaty of Waitangi said or did or was, it said something about who should exercise public power in New Zealand. The Treaty was clearly a constitutional document in 1840 and its formulation in 1840 was a constitutional event.

The most striking aspect about the Treaty is its length. It comprises of a preamble, three short articles and a postscript. 64 There are at least two versions of the Treaty, one written in English, and the other in te reo Māori. 65 Neither is a direct translation of the other. 66

Its striking conciseness is matched by its considerable ambiguity of meaning. The English version of the preamble refers to the Queen’s desire “to establish a settled form of Civil Government” to protect Māori “Rights and Property”. The Māori

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60 Instructions from Lord Normanby of the Colonial Office to Captain William Hobson regarding accession via treaty, in Buick, above n 32, at 71.
61 Ibid, at 72.
62 The signing of the Treaty is extensively detailed in Claudia Orange’s influential work: Claudia Orange The Treaty of Waitangi (Allen & Unwin, Wellington, 1987) at 43-55. The Bay of Islands is a stretch of coastline on the east coast of Northland that encircles 150 islands.
63 Palmer, above n 53, at 31. ‘Hapū’ are sub-tribes, clans.
64 It has been suggested that there may also be a fourth article, one that guarantees freedom of religion. This article however is not recognised in the official version set out in the first schedule to the Treaty of Waitangi Act 1975 (TOWA), and therefore will not be discussed.
65 The Māori Language.
66 The official version of the Treaty is set out in the First Schedule to the TOWA. This version is reproduced in Appendix One.
version is more brief. It refers to government under the Queen as kāwanatanga, which would preserve to Māori their rangatiratanga, or chieftainship, and their lands.67

The principal purpose of art 1 is to establish legitimate British rule in Aotearoa/New Zealand. In the English version, the rangatira clearly cede sovereignty to the British Crown. However, in the Māori version they cede “kawanatanga”.68 Kāwana is a translation of ‘governor’, thereby kāwanatanga is ‘governorship’ or ‘government’. As a term it was used in the preamble to portray government, and moreover, it had been used to portray the relationship in the bible between Governor Pontius Pilate and the Roman Empire, and had associations with the governors in New South Wales at the time.69 Kāwanatanga, therefore, was unlikely to portray “a precise definition of sovereignty”.70

The ambiguity of art 1 is compounded by art 2. In the first part of art 2 of the English version, the Crown guarantees Māori “the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties” for as long as they wish to possess them. However, the second part outlines that the chiefs yield to the Crown the “exclusive right of Preemption”. Therefore, should they wish to alienate their lands, this can only be to the Crown. This is an articulation of the common law practice of the time.

67 The meanings of the terms ‘kāwanatanga’ and ‘rangatiratanga’ are given by Sir Hugh Kawharu. A copy of this translation is available in Ian Hugh Kawharu “Appendix” in Michael Belgrave, Merata Kawhara and David V Williams (eds) Waitangi Revisited: Perspectives on the Treaty of Waitangi (Oxford University Press, Auckland, 2005) 390 at 392, and online through the Waitangi Tribunal’s (the Tribunal’s) website: “Kawharu Translation” (2010) The Waitangi Tribunal. Te Rōpū Whakamana i te Tīriti o Waitangi <http://www.waitangi-tribunal.govt.nz/treaty/kawharutranslation.asp>. This translation was accepted by the Court of Appeal for the purposes of the case in New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 (CA) at 662-663 per Cooke P [the Lands Case], and the Court has acknowledged that the translation is commonly used in the courts: Ngati Apa, above n 7, at [139] per Elias CJ. ‘Kāwanatanga’ is also translated as governorship. ‘Rangatiratanga’ is also translated as sovereignty, right to exercise authority, chiefly autonomy, self-determination, and self-management, indigenous rights and mana Māori.

68 Kawharu translates this as “complete government”: Kawharu, above n 67, at 392.

69 For more information, see Ruth Ross’s authoritative article: Ruth M Ross “Te Tiriti o Waitangi: Texts and Translations” (1972) 6 NZJH 129 at 140; Orange, above n 62, at 41; Palmer, above n 53, at 62-63; and McHugh, above n 27, at 3.

70 Orange, above n 62, at 40. In a footnote to his literal translation of the Māori text, Kawharu states that “There could be no possibility of the Māori signatories having any understanding of government in the sense of ‘sovereignty’: ie, any understanding on the basis of experience or cultural precedent”: Kawharu, above n 67, at 393.
In art 2 of the Māori version, the Crown guarantees Māori “te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa” [“the unqualified exercise of their chieftainship over their lands, villages and all their treasures”].71 The term “rangatiratanga” means a lot more than ‘possession’; it encompasses both governance and property, and “is an integrated concept tied into the mana of the individual and his tribal community”.72 Rangatiratanga illustrates the customary authority of the rangatira over their people and lands.73 It has been described as “a better approximation to sovereignty than kawanatanga”.74 It was used in He Wakaputanga o te Rangatiratanga o Nu Tirene/A Declaration of Independence 1835,75 which had

71 Kawharu, above n 67, at 392. Kawharu explains: “‘Unqualified exercise’ of the chieftainship – would emphasise to a chief the Queen's intention to give them complete control according to their customs. ‘Tino’ has the connotation of ‘quintessential’”: at 393.
72 McHugh, above n 27, at 9. ‘Mana’ means prestige, power.
73 Ibid, at 3.
74 Orange, above n 62, at 41. Sovereignty itself is a contested notion. The most common Hobbesian understanding holds that sovereignty is asymmetric, with sovereignty residing in one single apex. This sovereignty is unlimited and reaches across all territory and all citizens within. For claims that tino rangatiratanga equates to this form of sovereignty see Ranginui Walker Ka Whawhau Tonu Matou: Struggle Without End (2nd ed, Penguin Books, Wellington, 2004) at 93, where he states that the rangatira who signed the Treaty would have viewed the Governor as a “subordinate ruler” who “governed at the behest and on behalf of the chiefs” who, in effect, were the Governor’s sovereigns. Syd Jackson once claimed that tino rangatiratanga equated to Māori sovereignty over Aotearoa/New Zealand, “where Māori have total and absolute control of everything”: Syd Jackson “Looking Back in Anger” (1988) 25 Mana 32 at 35. Former Māori Affairs Minister Dover Samuels, also explained tino rangatiratanga as such, stating: “Tino means absolute and rangatiratanga means sovereignty - that's absolute sovereignty, which means a separate Māori parliament to determine its future under absolute sovereignty” “Samuels berates Key over flag deal” Local News, The Northern Advocate (online, 16 December 2009) <http://www.northernadvocate.co.nz/local/news/samuels-berates-key-over-flag-deal/3907706>. Another understanding of sovereignty also exists. Such an understanding holds that sovereignty can reside in “co-existent and co-operative polities of equal status within one nation”: Jane Kelsey The New Zealand experiment: A World Model for Structural Adjustment? (2nd ed, Auckland University Press, Auckland, 1997) at 342-343. This less-extensive form only covers the authority to control Māori, and those persons and entities interacting with Māori. It is absolute, but only over that which relates to Māori, their lives and resources: Simon Hope “The Roots and Reach of Rangatiratanga” (2004) 56 Political Science 23 at 42-43. An early statement of the Waitangi Tribunal points to this notion of sovereignty residing in tino rangatiratanga. The Tribunal stated that tino rangatiratanga could mean “the sovereignty of their land”: Waitangi Tribunal Report of the Waitangi Tribunal on the Motomui - Waitara claim (Wai 6) (2nd ed, The Waitangi Tribunal, Wellington, 1989) at [10.2(b)]. For claims that tino rangatiratanga equates to this less extensive form of sovereignty see Wira Gardiner in Hineani Melbourne Māori sovereignty: The Maori perspective (Hodder Moa Beckett, Auckland, 1995) 79 at 81; Apirana Mahuika “Whakapapa is the Heart” in Ken S Coates and Paul G McHugh Living Relationships: kōkiri ngātahi (Victoria University Press, Wellington, 1998) 214 at 216. In terms of the foreshore and seabed, Rata Pue, of Ngāti Maru, submitted that tino rangatiratanga means sovereignty of land, and that his people had sovereignty over their seabed which the Government should accept: Rata Pue “Submission from Rata Pue” (transcript of oral submission) (Undated) Doc No 4-135-1, 4-135-2 at 2 available: <http://www2.justice.govt.nz/ministerial-review/documents/submissions/4-135-1+4-135-2+Rata+Pue.pdf>. Importantly, the strongest commonality between these two notions of tino rangatiratanga as sovereignty is that the exercise of tino rangatiratanga is final and absolute, whether tino rangatiratanga is exercised over the whole of the nation, or only over Māori.
75 He Wakaputanga o te Rangatiratanga o Nu Tirene/A Declaration of Independence 1835 reproduced in Orange, above n 62, at 255-256. The Declaration was signed by 34 Northern rangatira on 28 October
been acknowledged by the Crown, to refer to the rangatira signatories’ independence.\textsuperscript{76} “All sovereign power and authority” was translated as “Ko te Kingitanga ko te mana”.\textsuperscript{77} Today, the meaning of tino rangatiratanga remains contested.\textsuperscript{78} The four most common uses of tino rangatiratanga are: sovereignty; self-determination; indigenous rights; and mana Māori (the Māori way of life).\textsuperscript{79}

Importantly, both versions of the Treaty guaranteed Māori property rights, for as long as they wished to retain them. When they did wish to alienate them, the Treaty said this could only be done to the Crown. While there is debate as to whether the Crown’s pre-emptive right was fully understood by the rangatira signatories,\textsuperscript{80} there is at least consensus that the Crown promised to respect and protect Māori property rights. There is also debate as to what property is to be protected. The Māori version for example goes much further than the English, guaranteeing tāonga\textsuperscript{81} that the Tribunal has found includes both tangible and intangible property,\textsuperscript{82} and importantly the coastal marine area and the foreshore and seabed.\textsuperscript{83}

\textsuperscript{76} He Wakaputanga o te Rangatiratanga o Nu Tirene/\textsuperscript{A} Declaration of Independence 1835, art 2. See generally Palmer, above n 53, at 63-64.

\textsuperscript{77} Palmer, above n 53, at 63.

\textsuperscript{78} See discussion above n 74. See also Roger Maaka and Augie Fleras The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand (University of Otago Press, Dunedin, 2005) at 100; Roger Maaka and Augie Fleras “‘Engaging with Indigeneity’: Tino Rangatiratanga in Aotearoa” in Duncan Ivison, Paul Patton and Will Sanders (eds) Political Theory and the Rights of Indigenous Peoples (Cambridge University Press, Melbourne, 2000) 89 at 99; Hope, above n 74, at 37.

\textsuperscript{79} Hope, above n 74, at 39-50. Hope gives detailed discussion of each of these four claims, and highlights that there are different understandings and arguments as to what each claim means.

\textsuperscript{80} See McHugh, above n 27, at 103.

\textsuperscript{81} Treasures.


\textsuperscript{83} For Tribunal discussion of the marine coastal area as a tāonga, see Waitangi Tribunal Ahu Moana: The Aquaculture and Marine Farming Report (Legislation Direct, Wellington, 2002) at [5.5]. For discussion of the foreshore and seabed as a tāonga, see Waitangi Tribunal, above n 8, at [2.1.8].
Finally, art 3 of the English version promises Māori “all the Rights and Privileges of British Subjects”, and the Māori version promises “nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani” [“the same rights and duties of citizenship as the people of England”]. The rule of law is a primary right of British citizenship. Thus, it can be argued that art 3 guarantees Māori the right of access to the courts, a fundamental tenet of the rule of law.

This ambiguity means that the Treaty cannot be understood simply by reference to its texts. Since 1987, considerable attention has been given to the interpretation of the Treaty. This attention has produced several ‘principles’. The Court of Appeal stressed the mutuality and reciprocally of the Treaty. It was a bargain.

The essential terms of the bargain encompassed in the English version are: Māori cede sovereignty to the Crown, and guarantee the Crown the exclusive right of pre-emption, in return for the guaranteed protection of their property and the rights and privileges of British subjects. In the Māori version the essential terms are: Māori cede governorship to the Crown, and guarantee the Crown the exclusive right of pre-emption, in return for the protection of their continued chieftainship over their people, property and treasures, and the conferral of the same rights and duties of British subjects.

The Tribunal summaries this bargain as: “The Treaty represents the gift [by Māori] of the right to make laws in return for the promise to do so so as to acknowledge and protect the interest of the indigenous inhabitants” and “the promise to do so so as to accord the Maori interest an appropriate priority.”

This bargain, where both the Crown and Māori gain certain benefits while also accepting responsibilities towards each other, forms the basis of the principle of ‘partnership’ and the obligation to ‘act in good faith’ towards each other.

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84 Kawharu, above n 67, at 392.
85 The Lands Case, above n 67.
87 The Lands Case, above n 67, at 664 per Cooke P, 673 and 681 per Richardson J.
There is debate over whether the Treaty is a treaty of cession, in which Māori ceded absolute sovereignty, or one of protection, where Māori ceded external sovereignty to treat with other nations, but retained their internal sovereignty. Palmer argues that the English view would have been that Britain acquired sovereignty, and the Māori view that “they entered into a power sharing arrangement with Britain, but retained ultimate sovereignty”. His personal view is that at 1840 the Treaty was a valid internal treaty of protection. However, he concedes that Māori eventually lost their sovereignty during the 19th century due the actions of the British Crown, which acted on the belief it had acquired sovereignty in 1840.

Acting on this belief, on 21 May 1840 Hobson proclaimed sovereignty over all of New Zealand. His deputy, Major Thomas Bunbury, also made proclamations of sovereignty over Stewart Island on 5 June 1840 and over the South Island on 17 June 1840.

Aotearoa/New Zealand’s most distinguished jurist, Lord Cooke of Thorndon, described the Treaty as “simply the most important document in New Zealand’s

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88 The English version is a clear treaty of cession. A treaty of cession is an agreement whereby one independent sovereign nation relinquishes its sovereignty to another. The Crown recognised the rangatira, through the authority of their hapū, as holding sovereignty, and thus that they possessed the authority to cede such sovereignty. It is here that the ambiguity between the texts has further legal implications. It can be argued that the Māori version is not a treaty of cession, as it cedes only kāwanatanga and not sovereignty, the loss of sovereignty being a hallmark of such treaties. This lends one to consider the possibility that the Māori version is a treaty of protection, where the Indigenous sovereigns retained their sovereignty (rangatiratanga), which the Crown agreed to protect. Consequently the Crown would gain only the external sovereignty to exclude other nations, thus leaving the internal sovereignty of the Indigenous group intact. Such treaties were a feature of European practice in Africa and the Pacific in the late nineteenth and early twentieth centuries. For detailed discussion on the type of treaty the Treaty is, see Palmer, above n 53, at 152-168.
89 Ibid, at 167.
90 Ibid.
91 Ibid, at 166-167.
92 Hobson proclaimed sovereignty over the North Island by cession, and the South and Stewart Islands by right of discovery. The Proclamation of Sovereignty (21 May 1840) was enclosed with Dispatch from Lieutenant-Governor Hobson to the Secretary of State for the Colonies (25 May 1840) at 18-19 cited in Palmer, above n 53, at 393. A printed version of the Proclamation is available online at “Timeframes: New Zealand and the Pacific through Images” Alexander Turnbull Library: National Library of New Zealand. Te Puna Mātauranga o Aotearoa <http://find.natlib.govt.nz/primo_library/libweb/action/dlDisplay.do?vid=TF&docId=nlnz_tapuhi1194219> (accessed 12 December 2010).
93 Declaration of Sovereignty of the Queen of England over Stewart’s Island (5 June 1840) attached to letter from Major Bunbury to Captain Hobson (28 June 1840), enclosed with Dispatch from Governor Hobson to the Secretary of State for the Colonies (15 October 1840) cited in Palmer, above n 53, at 393-394. This he proclaimed by right of discovery.
94 Declaration of Sovereignty over Tavai Poennammoo (Te Wai-Pounamu) (17 June 1840) attached to ibid. This he proclaimed by virtue of cession.
history”. The Treaty constituted Aotearoa/New Zealand as a jurisdiction, and set it on the path of nationhood. It is the constitutional foundation for Crown sovereignty in Aotearoa/New Zealand. Despite this, it is not the legal source of such sovereignty. That was obtained through two legislative acts of the British government in 1840.

The settlers had brought English law with them to Aotearoa/New Zealand as their ‘birthright’. In order to provide for this ‘birthright’ British government had to be established. First, Aotearoa/New Zealand, which was a dependency of New South Wales, had to be severed from that dependency. This was achieved by the New South Wales Continuance Act 1840 (UK) passed on 7 August. Then, by Royal letters patent, known as the ‘Charter’, the Crown, on 16 November 1840, declared Aotearoa/New Zealand to be a British colony, erected courts and established executive and legislative authorities. The courts’ jurisdiction was extended over all inhabitants of the islands. The Charter did not refer to the Treaty; instead its preamble depended solely on the statutory authority. It was publicly read and proclaimed on 3 May 1841.

The Charter was therefore a clear breach of the guarantee of tino rangatiratanga in the Treaty. It was, however, lawful under British law. At 1840, the British understanding of the Treaty was that it was a valid treaty of cession. Thus, its terms limited the Crown’s prerogative right. As McHugh notes, “Treaties of cession bound the Crown in all save its Parliamentary capacity”. Any departure from its terms would have to be authorised by Parliament through legislation, rather than under the Crown’s prerogative powers. The Charter was one such authorised legislation.

But, following Wi Parata, the courts viewed the Treaty as a treaty between foreign nations. Thus any rights it conferred on Māori were not enforceable in the courts.

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95 Robin Cooke “Introduction” (1990) 14 NZULR 1 at 1.
96 New South Wales Continuance Act 1840 (UK) 3 & 4 Vict c 62.
97 Enclosed in Dispatch from Lord John Russell to Governor Hobson (9 December 1840) cited in Palmer, above n 53, at 395. For more information on the Charter, see Palmer, above n 53, at 58-60; and McHugh, above n 27, at 90-92.
98 To what extent was never tested in the courts. McHugh however gives several possible examples in McHugh, above n 27, at 154-155.
99 Ibid, at 149.
100 Wi Parata and its denial of the legitimacy of the Treaty will be discussed below in Section 8.a.
Recognition of such rights required statutory incorporation.\textsuperscript{101} This remains the orthodox legal position today.

To quote Palmer, “The Treaty is foundational, partly obscured, but salient”.\textsuperscript{102} While it is acknowledged to be a founding document, it has never been directly incorporated into New Zealand law with binding force for general purposes. It remains enforceable in the courts only when Parliament incorporates the Treaty in legislation.\textsuperscript{103} Such legislation usually involves the ‘principles of the Treaty’.\textsuperscript{104} The Treaty itself therefore remains “half in and half out of the law”.\textsuperscript{105}

6. Implementing English common law in Aotearoa/New Zealand

6.a. The English Laws Act 1858

Following the signing of the Treaty, English common law was imported into Aotearoa/New Zealand and applied in the courts. The New Zealand Parliament, which had been constituted under the New Zealand Constitution Act 1952 (UK),\textsuperscript{106} then expressly endorsed this position, even retrospectively, when it enacted the English Laws Act 1858, declaring in s 1 that: “the Laws of England, so far as applicable to the circumstances of the Colony” have been in force in the colony since 14 January 1840.

So, from 1840, English common law applied in the courts. But in the realm of law relevant to the foreshore and seabed, two conflicting English common law principles that could support Crown ownership and native title respectively, emerged.

\begin{itemize}
\item \textsuperscript{101} Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] NZLR 590 (PC).
\item \textsuperscript{102} Palmer, above n 53, at 5.
\item \textsuperscript{103} Palmer argues that, in some circumstances, the Treaty is enforceable as a matter of administrative law or during statutory interpretation: Matthew SR Palmer “Constitutional Issues” in New Zealand Law Society Seminar: Treaty of Waitangi (New Zealand Law Society, Wellington, 2002) 65 at 69.
\item \textsuperscript{104} Palmer notes, however, “as ‘part of the fabric of New Zealand society’ [Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188 (HC) at 210], it can be expected to slide into the outlook of the judicial gaze reasonable frequently”: ibid, at 69-70.
\item \textsuperscript{105} Palmer, above n 53, at 25.
\item \textsuperscript{106} New Zealand Constitution Act 1952 (UK) 15 & 16 Vict c 72. Of note, s 71 of that Act held: And Whereas it may be expedient that the Laws, Customs, and Usages of the Aboriginal or Native Inhabitants of New Zealand, so far as they are not repugnant to the general principles of Humanity, should for the present be maintained for the Government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which Laws, Customs, or Usages should be so observed. It should be lawful for Her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom from time to time to make Provisions for the purposes aforesaid, any repugnancy of any such Native's Laws, Customs, or Usages, to the Law of England or to in any part thereof, in any wise notwithstanding. Such separate districts were never set up under this provision.
\end{itemize}
6.b. Recognition of native title and R v Symonds

In Aotearoa/New Zealand, there has been only sparse litigation on native title in the foreshore and seabed. To understand the complexities of the conflict between the principles of native title and Crown ownership, a brief outline of the developments concerning native title in dry land is therefore required.

The doctrine of native title received early authoritative approval in the courts. In 1847, a few short years after the signing of the Treaty, when Māori were still the majority, when the colony was under direct Imperial rule and the systematic individualisation of Māori land was yet to commence, the Supreme Court107 delivered its findings in Symonds.108

The case concerned the validity of Governor Robert Fitzroy’s109 waiver of Crown pre-emption, as stated in art 2 of the Treaty, in proclamations of 26 March and 10 October 1844. Charles McIntosh asserted prior title to an island on the Thames River in the North Island of Aotearoa/New Zealand by purchase from Māori, and petitioned the Court to annul a Crown grant made to John Symonds for ownership of the same land. McIntosh had brought the land after first securing a waiver of the Crown’s exclusive right to pre-emption from Governor Fitzroy in December 1844.110 The Court ruled unanimously that McIntosh did not hold title, and that the Governor’s certificate did not validate the purchase. The Court, however, took this opportunity to consider the character of Māori property rights upon the Crown’s sovereignty.

In separate judgments, Chief Justice Martin and Justice Chapman held that the Crown had feudal title to Aotearoa/New Zealand, and any settler title to land required

107 The Supreme Court was established in 1841 by the Supreme Court Ordinance 1841 5 Vict 1, and renamed the High Court in 1980: Judicature Amendment Act 1979, s 2. It should not be confused with Aotearoa/New Zealand’s current Supreme Court, the country’s final court of appeal, established in 2004: Supreme Court Act 2003.

108 Symonds, above n 35. The Court of Appeal, in Ngati Apa, above n 7, cites Symonds with approval, as do both the leading native title cases in Canada and Australia see: Delgamuukw v British Columbia [1997] 3 SCR 1010 and Mabo v Queensland (No. 2) [1992] HCA 23, (1992) 175 CLR 1.

109 Governor of New Zealand 1843-1845.

110 Hickford argues that this litigation was an attempt by Governor Sir George Grey, Fitzroy’s successor 1845-1853, to enlist the courts to reassert Crown control over purchases, and to partly challenge those advocating ‘free trade’ in purchasing land from Māori. Governor Grey had issued the grant in question to Symonds, his secretary, and also had invited McIntosh to bring a writ of scire facias in the Supreme Court to challenge it: Hickford, above n 3, at 190.
verification by Crown grant, but Māori retained the legal right to use and occupy their land, notwithstanding its inalienability to all but the Crown. Justice Chapman cited with approval the position taken in the Supreme Court of the United States under Chief Justice Marshall as showing “the principles of the common law as applied and adopted from the earliest times by colonial laws”.111 He strongly endorsed the doctrine of native title, holding that:112

Whatever may be the opinion of jurists as to the strengths or weaknesses of the native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present and clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it 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.

Justice Chapman held that this native title constituted a legal right that was discoverable in the Courts and entitled to their protection, coexisting with Crown title, until extinguished by surrender.113 Moreover, he explained that the Crown’s exclusive right to extinguish native title did not affect Māori customary tenure, as Māori remained free to deal amongst themselves as they had traditionally done.114

In obiter, the Justice also discussed the Treaty. He concluded that these principles showed the Treaty was no more than a declaration of common law rules that would have applied in Aotearoa/New Zealand in any event:115

111 Symonds, above n 35, at 388 per Chapman J. Both Chapman J and Martin CJ cited Kent, above n 52, as a convenient text for accessing United States’ law on the legal relations between the proprietary interests of the Indigenous Peoples and the federal government and its legal predecessors: at 393-94 per Martin CJ and 388, 390 and 392 per Chapman J.
112 Ibid, at 390 per Chapman J. This paragraph was later approved by the Privy Council in Nireaha Tamaki v Baker (1901) NZPCC 371 at 384.
113 Symonds, above n 35, at 391 per Chapman J. McHugh observes that the Supreme Court’s recognition of this legal right corresponded with the practice of colonial authorities. Thus: “The Crown’s acquisition of tribal lands for settlement by immigrant English communities took a format which presupposed the tribes had both legal status and something of legal worth to sell”: McHugh, above n 27, at 111.
114 Symonds, above n 35, at 391 per Chapman J.
115 Ibid, at 390 per Chapman J. Hickford argues that the reliance of both Justices on the judicial approach of the United States enabled them “to evade a textual analysis of the treaty and to avoid treating it as giving rise to a unique relationship enforceable in municipal law” which was relied on heavily in counsel submissions to the Court: Hickford, above n 3, at 191. He concludes that: “This single instance did not, however, signal the end of arguments regarding native title founded on the
It follows from what has been said, that in solemnly guaranteeing the native title, and in securing what is called the Queen’s pre-emptive right, the Treaty of Waitangi, confirmed by the charter of the colony, does not assert either in doctrine or in practice anything new and unsettled.

Although not a foreshore and seabed case, Symonds clearly shows that, at 1847, the circumstances of the colony were such that customary Māori title and rights could be recognised in the courts and could impose limits on Crown conduct; some English common law principles might therefore be trumped by the notion of Māori customary rights. The Chief Justice Sian Elias, in the later Ngati Apa case, declared that the judges in Symonds made it clear that the radical title of the Crown is a technical and notional concept; it is not inconsistent with common law recognition of native title. Therefore, the Crown might be considered to acquire the radical or paramount title to all land within the country on the establishment of Crown sovereignty, but the customary rights of Māori owners would still encumber this title. On this view, only when customary title had been lawfully extinguished could a Crown title be granted that was unencumbered by Māori interests.

The common law during this early colonisation period was therefore a form of intercultural law, represented by the doctrine of native title. Under this doctrine, aspects of tikanga Māori could be recognised that went beyond the boundaries of British law, such as rights to land under water. There is also evidence that, outside the courts, early colonists and the Crown considered the foreshore to be Māori property until ceded. This is implicit perhaps in the words of the Native Minister Hon Donald McLean, who acknowledged in 1874 that:

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116 Ngati Apa, above n 7, at [30] per Elias CJ.
117 (11 August 1874) 16 NZPD 508. McLean was responding to a question asked by Hori Kerei Taiaroa about the Crown’s legal right to reclaimed foreshore. Taiaroa asked [(11 August 1874) 16 NZPD 508]: By what authority any land below high watermark has been reclaimed for public purposes on the North Island, and whether such reclamations are not in contravention of the rights reserved as to fisheries to the Native race by the Treaty of Waitangi; and if infringement of the Treaty has taken place, how the Maori people can obtain compensation?

In his answer McLean laid stress on the particular provisions of early pre-emption deeds of cession. For further information, see Richard P Boast The Foreshore (prepared for the Waitangi Tribunal as part of the Rangahaua Whanui Series 1996) at [2.2.1] and [2.2.2]. Boast cites the Ahuriri Deed of 1851 as evidence of these types of deeds at [2.2.2].
… when the lands were ceded, all the rights connected with them were also ceded, such as rivers, streams and whatever was on the surface of the land or under the surface. Almost all the deeds of cession contained a clause to that effect.

Moreover, Boast, who was commissioned by the Tribunal in 1996 to conduct research into the legal history of title to the foreshore, concluded that to early colonists there seemed to be:118

… little objection to the proposition that Maori, if they owned the foreshore and other water bodies, were at liberty to sell them to the Crown if they so chose and may on occasions have intended to do so. The fact that it was judged necessary to insert clauses into the deeds relating to ‘nga moana me nga awa me nga wai’ ['the seas or lakes, and the rivers and the waters']119 indicates that as far as the Crown was concerned such areas (ill-defined as they might be) did not belong to the Crown by mere operation of law. They had to be bought and paid for.

7. Bringing Māori rights under a statutory regime
7.a. The establishment of the Native Land Courts

After these early acknowledgements of native title, the New Zealand Parliament sought to actively convert customary Māori land to a form of tenure based on English legal principles. To achieve this it passed the Native Lands Acts of 1862 and 1865, which established the Native Land Court.120 This court was to investigate Māori customary rights in land, setting in motion a process whereby those rights could be placed on a statutory foundation through the subsequent issue of a statutory freehold title to those lands. The founding object of this legislation was the “assimilation [of Māori land title] as nearly as possible to the ownership of land according to British law” in order to achieve “the peaceful settlement of the Colony”.121 The effect was to individualise Māori title, which led to the alienation of vast tracts of Māori customary

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118 Boast, above n 117, at [2.2.2].
119 The English translation is by Professor Hirini Moko Mead, as given for the Ahuriri Deed in the Tribunal’s Te Whanganui-a-Orotu Report: Waitangi Tribunal Te Whanganui-a-Orotu Report (Brookers, Wellington, 1995) at [4.2].
120 Now known as the Maori Land Court: Maori Purposes Act 1947, s 2.
121 Native Lands Act 1862, Preamble.
land, so much so that today the percentage of dry land in Māori customary ownership is so small it cannot be calculated.¹²²

Alan Ward, who was commissioned by the Tribunal in 1997 to give an overview of the history of Crown dealings with Māori land, deduced that:¹²³

As far as the Native Land Court is concerned, Māori claims to sections of the foreshore were, in fact, considered provable on the same basis as claims to land: proof of descent, exclusive or dominant use, customary management or control.

The jurisdictional provisions of the Native Lands Acts did not prevent judges from investigating title to the foreshore, and, in some places, title to blocks of the foreshore was granted.¹²⁴ However, in 1870, Chief Judge Fenton repudiated this practice in the Kauwaeranga decision.¹²⁵ The Chief Judge embarked on the inquiry, but declined to grant Māori full title to a section of the foreshore, instead recognising lesser fishing rights.¹²⁶ Chief Judge Fenton’s reasoning was that he could not contemplate the “evil consequences which might ensue from judicially declaring that the soil of the foreshore will be vested absolutely with the natives”.¹²⁷

It seems the Crown tried to stop the Kauwaeranga inquiry. So, following the Chief Judge’s findings, the Crown continued to take action to stop the Native Land Court issuing title to foreshore in other areas. In 1872, by way of proclamation, the Fox-Vogel Government suspended the jurisdiction of the Court to investigate title in the

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¹²³ Alan Ward National Overview (prepared for the Waitangi Tribunal as part of the Rangahaua Whanui Series 1997) vol 2 at [13.3].
¹²⁴ Boast, above n 117, at [2.2.3] and [2.2.5].
¹²⁵ Kauwaeranga (1870) 4 Hauraki MB 236. The judgment is reprinted and commented on in Alex Frame “Kauwaeranga Judgment” (1984) 14 VUWLR 227 at 229. Boast notes that Kauwaeranga is often discussed approvingly as early judicial recognition of the Treaty. He concludes, however, that its real point lies in Fenton CJ’s refusal to issue title to the specific foreshore area: Boast, above n 117, at footnote 71.
¹²⁶ The Kauwaeranga approach was followed by the Native Land Court in Parumoana (1883) 1 Wellington MB. The case concerned certain mudflats at Portirua (an area in Wellington at the bottom of the North Island) that traditionally had belonged to Ngāti Toa. Chief Judge MacDonald and Judge Puckey gave the decision of the Court that the applicants were entitled to a right of fishery but not to title of the land.
¹²⁷ See the reprinted version, Frame, above n 125, at 244.
foreshore around Auckland. Interestingly, the Crown also continued to purchase other areas of the foreshore from Māori titleholders. Boast argued that this generally showed that the government accepted that the Native Land Court could previously issue foreshore titles.

7.b. Early codification of the law of the foreshore and seabed

In 1866, the New Zealand Parliament took its first steps in codifying the law concerning the foreshore and seabed. It passed the Crown Grants Act 1866. Section 12 specified that where a land title boundary was specified as “the sea”, the actual boundary was deemed to be the high tide mark. But this applied only to grants of title.

In 1878, the Government enacted its first major statute impacting on the zone: the Harbours Act 1878. Section 147 provided that no part of the foreshore could have title granted over it unless through an Act of Parliament. Boast has claimed that this provision was only a limitation on the Crown’s prerogative powers to grant title in this area. He argued that it did not expressly dismiss Māori claims to the foreshore, nor did it define the legal status of the foreshore.

Furthermore, Boast contends that the Act did not affect the jurisdictional provisions of the Native Lands Acts. In his view, the Native Land Courts were empowered by statute and thus grants under their authority complied with s 147. To support his claim, Boast notes that Judge Frank Acheson continued to investigate and grant titles to sections of the foreshore.

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128 Section 4 of the Native Lands Act 1867 allowed the Governor to suspend the operation of the Native Land Court in any district. The proclamation was issued in the New Zealand Gazette and stated that the Court’s operations were suspended “within the Province of Auckland, being all that proportion of the said Province situate below high water mark”: George Ferguson Bowen, Governor, “A Proclamation” MO No 28 (1872) New Zealand Gazette at 347.

129 Boast, above n 117, at [2.2.3]. For an example of such a purchase, see Boast, above n 117, at footnote 73.

130 Ibid, at [2.2.3].

131 Section 12 later became s 35 Crown Grants Act 1908, which is still in force today.

132 Although this was later repealed.

133 This was later to become s 150 Harbours Act 1950.

134 Boast, above n 117, at [2.2.4].

135 Ibid, at [2.2.5].

136 Boast, above n 22, at [7.2.6]. Judge Acheson sat in the Te Tai Tokerau (Northland) Native Land Court from 1924-1943. Boast notes that Judge Acheson carried out a long courtroom battle with Crown
However, to do something ‘through’ an Act of Parliament is not necessarily the same as doing something ‘under’ or ‘pursuant to’ an Act. Boast’s argument is controversial because Acheson was the only Native Land Court Judge who awarded title to foreshore and seabed to Māori applicants after the enactment of the Harbours Act. He continued to employ the principles of native title, presumed Māori title to all land, and required the Crown to prove lawful extinguishment of native title, at a time when the Crown relied on prerogative claims to the foreshore and when Māori rights to land were otherwise cognisable only when recognised in statute. That the Crown acted on the assumption that it owned the foreshore is shown by the fact that it subsequently granted various areas of foreshore and estuary to harbour boards under special Acts of Parliament.

8. Restructuring the common law doctrine of native title

From the signing of the Treaty until the early 1870s, the courts therefore preferred to apply the doctrine of native title over the principle of Crown ownership of the foreshore and seabed on most occasions. However, this was all to change when, in the late 1870s, a dramatic shift took place: the common law of native title, declared in Symonds, was turned on its head, not to reappear until 1986.

8.a. Wi Parata v The Bishop of Wellington

By 1877, political authority had shifted from the Imperial Government in London to the settlers in the colony, massive land transfers had taken place, the Māori population was decreasing steadily, and the country was in the wake of a civil war. In this milieu, Chief Justice Prendergast delivered the Supreme Court’s findings in Wi Parata.

Solicitor Sir Vincent Meredith over many foreshore cases, where Acheson would make grants in the foreshore and Meredith would appeal to the Native Appellate Court. Boast considers the most significant was over the Ngakororo mudflats on the Hokianga Harbour. In this case, Judge Acheson decided the matter in 1941, which Meredith then appealed to the Native Appellate Court in 1942, who delivered its decision in 1944. In this case, the Native Appellate Court could not see any difference in principle between investigating title to the foreshore and investigating title to dry land. In both situations the findings must rest on fact, and claimants must prove that the land is descended to them and has been in their continued occupation since 1840: Ngakororo (1942) 12 Auckland Appellate MB 137 at 66. This statutory basis requirement will be discussed in more detail in the following sections of this chapter.

137 See Te Weehi, above n 5.

138 Wi Parata, above n 4, at 78 per Prendergast CJ. The background facts alleged in the case were that Ngāti Toa gifted some land to the Bishop of Wellington for the purposes of a school. A Crown grant was issued for the land to be held in trust by the Bishop. The School was never established. Wi Parata,
This decision is widely regarded as a turning towards legal reluctance to recognise native title.\textsuperscript{140}

The case is perhaps most famous for Chief Justice’s infamous characterisation of the Treaty as a “simple nullity”.\textsuperscript{141} This was a denial of the Treaty as a valid treaty of cession; Māori society was ‘uncivilised’ and therefore rangatira lacked the capacity to enter into treaty relations.

Regarding native title, Chief Justice Prendergast held that the principle native customary property survives a change of sovereignty, had no application to Aotearoa/New Zealand. Furthermore, he held that Māori had insufficient social organisation upon which to base a system of customary rights that were capable of discovery or recognition, let alone capable of assertion against a Crown grant.\textsuperscript{142}

In such circumstances, he stated:\textsuperscript{143}

\begin{quote}
… 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.
\end{quote}

Consequently, any rights Māori held to their lands was at the Crown’s pleasure. Any obligations on the Crown in relation to such rights were of a moral, rather than legal, nature.

Thus it was held that the courts were required to assume that the Crown had properly respected its obligations and the Court could not question the Crown’s actions. In other words, the courts had no jurisdiction to review the issuing of a grant, which was declared to be an unreviewable act of state. But it had long been a fundamental

\textsuperscript{140} Law Commission The Treaty of Waitangi and Māori Fisheries – Mataitai: Nga Tikanga Māori me te Tiriti o Waitangi (NZLC PP9, 1989) at 119.
\textsuperscript{141} Wi Parata, above n 4, at 76.
\textsuperscript{142} Wi Parata, above n 4, at 77.
\textsuperscript{143} Ibid, at 78.
constitutional principle that the Crown could not make or claim an ‘act of state’ against its own subjects. As McHugh observes, it was if the Court was: 

... saying to Māori: ‘You never had a tribal sovereignty to relinquish at Waitangi but now, even though you are British subjects, we will treat you legally as though you were a foreign nation and let the Crown deal with you as it pleases’.

The Chief Justice declared that, in Aotearoa/New Zealand law, all title to land must be derived from the Crown. He further proclaimed that the only rights of Māori that were recognisable in the country’s legal system were those specifically affirmed in statute. No Māori customary rights existed that could be recognised under the common law, and mere references to Māori rights in a statute could not call something into being that which did not exist.

*Wi Parata* stands for the view that Māori customary rights cannot be recognised under the Treaty or the common law; they can only be recognised and enforced in the courts when expressly created by statute. In effect, the common law doctrine of native title was repudiated. As McHugh explains:

... the judgment in *Wi Parata* reflected the received position in New Zealand and other British colonies of the same period. It prevented Maori recourse to the courts to vindicate the aboriginal property rights guaranteed under the Treaty of Waitangi, leaving that role to the Crown as their legal protector. ... Whatever rights Maori held subsequent to Crown sovereignty were regarded judicially as arising from statute rather than the common law.

Thereafter, through subsequent enforcement in the courts, and statutory endorsement, the doctrines of *Wi Parata* remained the dominant legal position until Māori customary rights were re-recognised as an aspect of the common law in the fishing context in the 1980s. In the domain of the foreshore and seabed, the British common law notion of Crown ownership was to survive unencumbered by native title for over a hundred years.

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144 *Campbell*, above n 32. See discussion in McHugh, above n 27, at 174.  
145 McHugh, above n 27, at 154.  
146 *Wi Parata*, above n 4, at 77.  
147 Ibid, at 79.  
8.b. Post *Wi Parata* common law developments

The Privy Council was soon to repudiate the doctrines expressed in *Wi Parata*. In 1901, their Lordships delivered the decision in *Nireaha Tamaki v Baker (Nireaha Tamaki)*,\(^{149}\) rejecting the reasoning in *Wi Parata*, holding that it was “rather late in the day” for the argument to be made that native title had no application in the country’s courts.\(^{150}\) The Privy Council held that the courts did have jurisdiction to investigate native title and that Māori customary title to land could be recognised under both common law and statute. Furthermore, the Court found that a Crown grant could not in itself extinguish Native title to land.\(^{151}\) In 1903, the Privy Council continued its departure from *Wi Parata*, in *Wallis v Solicitor-General*,\(^{152}\) where it again agreed with its earlier findings in *Nireaha Tamaki*.

The immediate response of the New Zealand Parliament was to codify the doctrines of *Wi Parata* in legislation, “thereby rendering the contrary common law of the Privy Council null and void, at least in so far as it applied to New Zealand”.\(^{153}\) The common law doctrine of Native Title was overridden in the Land Titles Protection Act 1902 and the Native Land Act 1909.\(^{154}\) The effect of these statutes was that Crown titles could no longer be subject to Native title challenges,\(^{155}\) and furthermore, the Crown could not be subject to the Native Land Court without its own consent.\(^{156}\) The enforcement of customary title against the Crown was also barred.\(^{157}\)

Furthermore, in other cases covering customary rights, which did not concern land and were not covered by the Māori land legislation, the Privy Council’s findings were simply ignored. In 1914, Chief Justice Stout delivered the Supreme Court’s decision of *Waipapakura v Hempton*\(^{158}\) that directly disregarded the precedent established in *Nireaha Tamaki*. The case concerned Mrs Waipapakura setting a fishing net in the seabed in accordance with her customary rights. A Fisheries Officer stopped her

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\(^{149}\) *Nireaha Tamaki*, above n 112.

\(^{150}\) Ibid, at 382.

\(^{151}\) Ibid, at 384 per Lord Davey.

\(^{152}\) *Wallis v Solicitor-General* (1902) NZPCC 23.


\(^{154}\) See also discussion in McHugh, above n 27, at 118 and 120.

\(^{155}\) Land Titles Protection Act 1902, Preamble.

\(^{156}\) Ibid, s 2.

\(^{157}\) Native Land Act 1909, s 84.

\(^{158}\) *Waipapakura v Hempton* (1914) 33 NZLR 1065 (SC).
fishing on the ground that it was contrary to the fisheries regulations under the Fisheries Act 1908. Waipapakura sued in tort. She claimed she was exercising a Māori fishing right which was exempt from the operation of the Act under s77(2). This subsection provided that nothing in Part I of the Act “shall affect any existing Maori fishing rights”. Chief Justice Stout, following the reasoning in Wi Parata, found that no customary fishing rights were recognisable as no statute was their source. Further, the Chief Justice found the Crown owned the foreshore and seabed, and that this was the established common law position imported into Aotearoa/New Zealand in 1840.

8.c. In Re Ninety Mile Beach

The legacy of Wi Parata was so strong that, in 1963, it led to the infamous Court of Appeal decision concerning native title in the foreshore: In Re Ninety Mile Beach (Ninety Mile Beach).\(^{159}\) This case remained the leading precedent for the law of the foreshore and seabed until Ngati Apa.

The major issue in Ninety Mile Beach was whether the Māori Land Court\(^ {160}\) could grant Māori freehold title orders in the foreshore of Te Oneroa a Tohe\(^ {161}\)/Ninety Mile Beach, to the Māori claimants, when grants that had been made to the adjoining land following a Maori Land Court investigation extended only to the high tide mark.\(^ {162}\)

The case was an appeal from a Maori Land Court’s decision in 1957. The northern iwi, Te Rarawa and Te Aupōuri, who had grants of land adjoining the Beach which only extended to the high tide mark, made applications to the Māori Land Court for investigation of the ownership of Te Oneroa a Tohe/Ninety Mile Beach and for issue to them as customary owners of a further Māori freehold title to the foreshore. The Māori Land Court accepted the Te Rarawa and Te Aupōuri claim and declared the beach to be customary land, to which a freehold title might be granted.

On appeal, following the reasoning of Wi Parata, the Court of Appeal held: 1. Customary rights were to be recognised through the Maori Land Court; 2. The

\(^{159}\) In Re Ninety Mile Beach [1963] NZLR 461 (CA).

\(^{160}\) The renamed Native Land Court: Maori Purposes Act 1947, s 2.

\(^{161}\) Translated to mean ‘The Long Beach of Tohe’. Te Oneroa a Tohe/Ninety Mile Beach is situated on the Aupōuri Peninsula in Northland, Aotearoa/New Zealand.

\(^{162}\) See Ninety Mile Beach, above n 159, at 474 per North J and 475 per Gresson J.
English common law rules concerning Crown ownership of the beaches apply, and are not displaced by any colonial common law rules concerning recognition of native title; and 3. Only statutory rights to the foreshore would confer such property entitlements on Māori. The Court then held that when previously the Maori Land Court had investigated title to land adjoining the beach, and granted titles down to the high tide mark, the Crown was deemed thereafter to own the foreshore below high tide in accordance with English common law. As Justice North stated:

… once the Court investigated the title to customary Maori land bounded by the sea, and issued a certificate of title or made a freehold order in respect thereof, the customary title [to the foreshore] was extinguished.

Any other outcome, he said, would have had “startling and inconvenient results”. Consequently, the outcome was that in law:

… only foreshore contiguous to Māori customary land on the shore is thus capable of being Māori customary land. But as the amount of Māori customary land on the dry soil is so little it has never been quantified, the case essentially established that native title in the foreshore had been extinguished, not by clear and plain legislation, but by the granting of title contiguous to the foreshore!

9. Statutory impacts on the law of the foreshore and seabed

9.a. The Territorial Sea Acts

The Territorial Sea and Fishing Zone Act 1965 was the first statutory attempt to clarify the proprietary interests of the Crown in the seabed. This statute was enacted to “make provision with respect to the territorial sea and fishing zone of New Zealand”. It was repealed and replaced by the more elaborate Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act in 1977 (TSCZEEZA).

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163 See ibid, at 473 per North J.
164 Ibid, at 474 per North J.
165 Ibid, at 467 per North J.
167 Territorial Sea and Fishing Zone Act 1965 (TSFZA), Preamble.
168 This section has now been repealed by s 31 of the Foreshore and Seabed Act 2004 (FSA).
In s 7 of both Acts, the bed of the territorial sea was vested in the Crown, “Subject to a grant of any estate or interest therein”.169 Section 7 of TSCZEEZA stated:

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

In Ngati Apa, the Court of Appeal decided that this provision simply gave effect, within domestic law, to Aotearoa/New Zealand’s sovereignty over this area as a matter of international law. It did not vest the area in the Crown’s ownership s a matter of property law.170

At international law, which is reflected in the 1977 Act, the territorial sea is measured from the low water-line of the coast and extends out to 12 nautical miles.171 In international law, states have the full rights of sovereignty to the seabed of their territorial sea.172 Thus, this seabed is part of the sovereign state of Aotearoa/New Zealand and is fully within the purview of the common law and is subject to the jurisdiction of the courts.

International law also defines a state’s exclusive economic zone. Article 57 of the Law of the Sea Convention of 1982173 defines this zone as up to 200 nautical miles from the baseline of the territorial sea zone. Article 56 of the Convention grants to state signatories:

… sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to

169 TSFZA, s 7 and the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 (TSCZEEZA), s 7.
170 Ngati Apa, above n 7, at [63] per Elias CJ, and [159]-[162] per Keith and Anderson JJ.
171 TSCZEEZA, s 3.
other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

At international law, the exclusive economic zone is concerned mainly with fisheries. For Aotearoa/New Zealand domestic law, s 9 of the TSCZEEZA establishes this country’s 200-mile exclusive economic zone. This provision underpins domestic fisheries law and in particular the allocation of transferable fish quota under the Fisheries Act 1996. But the provision did not set aside any Māori customary title to the seabed that might be recognised.

9.b. The Harbours Acts

As well as enacting general Harbours Acts, such as the Harbours Act 1878, discussed above, the legislature began to statutorily constitute harbour boards and vest in them certain lands as an endowment, including some foreshore and seabed. Some of these Acts were consistent with, or made specific provision for, Māori fishing rights or other interests. Chief Justice Elias stated that Thames Harbour Board Act 1876, along with the Goldfields Amendment Act 1868 and the Shortland Beach Act 1869, were examples of legislative acknowledgement that these specific foreshore and seabed areas might be Māori customary lands.

In 1991, as part of the process of converting these boards into port companies, the Foreshore and Seabed Endowment Revesting Act was passed. Section 9A of this Act vested all foreshore and seabed previously vested in the Harbour Boards in the Crown. This Act was amended in 1994 by the Foreshore and Seabed Endowment Revesting Amendment Act. Section 2(2)(b) of the amending statute provided that nothing in s 9A of the parent statute was to limit or affect “any interest in that land held by any person other than the Crown”. In their analysis, the judges of the Court of Appeal in Ngati Apa found that s 9A therefore saved existing property rights, and did not extinguish customary title to the foreshore and seabed.

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174 See Boast, above n 22, at [7.3] for examples of these boards.
175 Ngati Apa, above n 7, at [51] per Elias CJ.
176 See the Foreshore and Seabed Endowment Revesting Act 1991, s 5.
177 Ngati Apa, above n 7, at [72]-[73] per Elias CJ and [170] per Keith and Anderson JJ.
10. The ‘re-emergence’ of the doctrine of native title

While the common law doctrine of native title over land lay dormant, 1986 witnessed a major turning point in its re-acceptance into Aotearoa/New Zealand law with regard to sea fishing. The High Court’s decision in Te Weehi was a significant step in the evolution of the doctrine of native title in this country that eventually led to the Court of Appeal’s decision in Ngati Apa.

10.a. Te Weehi v Regional Fisheries Officer

This case was heard on appeal to the High Court for a conviction in the District Court for taking undersized pāua contrary to the Fishing (Amateur Fishing) Regulations 1983. Section 88(2) of the governing act, the Fisheries Act 1983, provided an exemption from this regime. It stated that: “Nothing in this Act shall affect any Māori fishing rights”. Thus, as a defence, Te Weehi argued that he was exercising a Māori fishing right by taking shellfish in the customary way for personal and family consumption.

178 While McHugh argues that Māori possessed a species of property rights that had been previously overlooked in the courts, he cautions against reading the doctrine of native title as though the tenets of the late twentieth century were a fully formed code in 1840, one that established a ‘true’ set of common law principles that the colonialist legal system should have applied but was spurned for a ‘false’, one that gave the Crown unbridled discretion, enabling it to unlawfully ride roughshod over the tribes property rights. He explains [Paul G McHugh “The Common-Law Status of Colonies and Aboriginal ‘Rights’”, above n 39, at 429]:

A subtle but distinct change occurs, where common-law Aboriginal title is reconstructed as though it were an historical reality – a rule or code that operated in the (late) eighteenth and nineteenth centuries in much the same way it does in the late twentieth century. Judges in contemporary litigation are then involved in the ‘rediscovery’ of a ‘lost’ doctrine or code which they are told actually existed in some coherent and congealed form in the minds of the colonial and imperial authorities. The doctrine of Aboriginal title is thus projected Whiggishly back into the past. Instead of being depicted as a contemporary response to historical principles of Crown conduct, these principles are repackaged with a retrospective coherence. The doctrine thus becomes not only a means of protecting extant tribal use and occupation rights, but also a means of bringing the Crown into account for the historic loss of those rights. The ambit of the common-law doctrine is thus extended to become an historic, as well as contemporary, legal measure.


179 Te Weehi, above n 5.

180 Abalone, a type of shellfish.

181 The area where Te Weehi was collecting pāua was under the mana whenua of Ngāi Tahu, a South Island tribe. Although Te Weehi was not Ngāi Tahu himself, it was accepted that he had asked and received the permission of the local elders to collect pāua under the internal rules of Ngāi Tahu.
The question for Justice Williamson was whether the phrase in s 88(2) included Māori common law rights, and thus rights under the doctrine of native title. Justice Williamson found that the phrase did include Māori customary rights, including rights based in common law.\textsuperscript{182} And, Te Weehi was found to possess customary rights to take pāua.

Furthermore, Justice Williamson outlined the nature of the right recognised. First, it was severable from land.\textsuperscript{183} Thus, if the Crown owned the land, Māori could still possess use rights in it, such as fishing rights. Second, it was a non-commercial right to take fish for personal or ceremonial use only.\textsuperscript{184} Third, it was non-exclusive, so recognition of the customary fishing rights of Māori did not restrict others from using the same area, provided they were fishing according to the regulations.\textsuperscript{185}

When confronted by arguments from the Crown that the recognition of parallel Māori fishing rights was an injustice because it was contrary to equality before the law, Justice Williamson replied that it was not an injustice, it was the opposite: the inequality between Māori and non-Māori fishers indicated an overall justice rather than injustice. It was just to uphold the property rights of the Indigenous People and to respect and uphold the bargain established in the Treaty.\textsuperscript{186} The case therefore re-established the notion that the customary rights of Māori could be recognised under the common law, unless lawfully extinguished.


In addition, in some circumstances, customary rights can be recognised in the Maori Land Court. Like its predecessor, the Native Land Court, the Maori Land Court is a creature of statute. Prior to 1993, it drew its jurisdiction from s 15 of the Maori

\textsuperscript{182} Te Weehi, above n 5, at 693.
\textsuperscript{183} Ibid, at 690.
\textsuperscript{184} Ibid, at 692.
\textsuperscript{185} Ibid, at 690.
\textsuperscript{186} Ibid, at 693.
Affairs Act 1953. Now it derives its jurisdiction from s 18 TTWMA. Section 18(1)(a) states that the Court has jurisdiction:

To hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest.

This Act hailed a new direction for the Maori Land Court. Its guiding objectives are now retention of Māori land and effective utilisation, management and development of that land. Specifically, s 17(1) sets out that the Court’s primary objective in exercising its jurisdiction is:

… to promote and assist in-

(a) the retention of Maori land and General land owned by Maori in the hands of the owners; and

(b) the effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.

Importantly, under TTWMA, the Court has powers to deal with the status of land. “[L]and” was defined by s 4 in a manner that “includes Maori land, General land and Crown land”. Section 129 outlines the different forms of legal status that land can have. This includes the statement in s 129(2)(a), that for the purposes of this Act, “Land that is held by Maori in accordance with tikanga Maori shall have the status of Maori customary land”.

“Maori customary land” is therefore “land that is held by Maori in accordance with tikanga”. Under TTWMA, the Court has the power to declare such land as “Maori customary land”. Section 131(1) provides:

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187 In recent years, the general courts have relied on a contextual analysis of the jurisdictional provisions of TTWMA to confine the Maori Land Court’s jurisdiction strictly to Māori freehold and customary land. See, for example, the Court of Appeal’s finding in Attorney-General v Maori Land Court [1999] 1 NZLR 701 (CA).

188 TTWMA, s 7(1).

189 Section 103(1) of the FSA substituted this section. At 2010, land is now defined as:

- **land**—
  - (a) means—
    - (i) Maori land, General land, and Crown land that is on the landward side of mean high water springs; and
    - (ii) Maori freehold land that is on the seaward side of mean high water springs; but
  - (b) does not include the public foreshore and seabed.
The Maori Land Court shall have jurisdiction to determine and declare, by a status order, the particular status of any parcel of land, whether or not that matter may involve a question of law.

Having found certain land to have the status of customary land, the Court may then change its status to freehold. Section 132 enables the Court to change the status of Māori customary land to Māori freehold land by vesting order. Section 132(4) provides:

On any investigation of title and determination of relative interests under this section, the Court may make an order defining the area dealt with and vesting the land in-

(a) such person or persons as the Court may find to be entitled to the land in such relative shares as the Court thinks fit, or otherwise in accordance with the terms of the application; or

(b) a Maori incorporation or a Maori Trust Board or trustees for or on behalf of such persons, and on such terms of trust, and in such relative shares, as the Court thinks fit.

The issue of whether “land” in s 131 included the foreshore and seabed, and thus whether the Maori Land Court had jurisdiction to determine and declare parcels of it to have customary status, was to be directly considered by the Court of Appeal in Ngati Apa.

12. Ngati Apa v Attorney-General

On 19 June 2003, the Court of Appeal released its unanimous Ngati Apa decision, which sparked the Debate and catapulted the issue of ownership of the foreshore and seabed into the public and political agenda. The issue before the Court was whether the Maori Land Court had the jurisdiction under TTWMA to determine whether specific parts of the foreshore and seabed were Māori customary land, that is “land held in accordance with tikanga”. All five judges held that the Maori Land Court had that jurisdiction.190 The Court deemed the foreshore and seabed land for the purposes

of s 4 of TTWMA. The Justices did not perceive tikanga to exist in a void outside the doctrine of native title, and thus commented extensively on the doctrine’s scope. In doing so, the Court also contended that the Crown’s assumption of sovereignty only conferred a radical, or paramount, title on the Crown, and did not extinguish Māori beneficial title to land. Thus native title might exist in regard to lands under water.

12.a. The litigation

The litigation that led to the Court of Appeal decision commenced originally in 1997 when eight iwi, collectively known as Te Tau Ihu, from Te Tau Ihu o te Waka/the Marlborough Sounds, applied to the Maori Land Court seeking investigation of their customary title in certain areas of foreshore and seabed, under s 132 of TTWMA. The iwi started these proceedings out of frustration at being unable to establish marine farms in certain areas of Te Tau Ihu o te Waka/the Marlborough Sounds. Previously, the Resource Management Act 1991 (RMA) devolved decision making concerning marine-farming permits to regional and local consent authorities. In the 1990s, many non-Māori organisations had been granted marine farming permits in prime locations. Such permits permitted marine farms to be moored to the sea floor in areas in which Te Tau Ihu exercised customary usage. The Marlborough District Council continually declined to grant Te Tau Ihu marine farming permits and ignored

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191 Ibid, at [55] per Elias CJ, [110] per Gault P, [179]-[180] per Keith and Anderson JJ and [187]-[188] per Tipping J. Of note, this was overruled with the passing of the FSA, where s 103 substituted the definition so that it does not include the public foreshore and seabed.
192 Ngati Apa, above n 7, at [21], [29], and [30]-[31] per Elias CJ, [102] per Gault P, [143] per Keith and Anderson JJ and [183] per Tipping J.
193 Ngati Apa, Ngai Koata, Ngati Kuia, Ngai Rarua, Ngati Tama, Ngati Toa, Rangitane and Te Atiawa.
194 Hilary Anne and Maui John Mitchell Foreshore and Seabed Issues: a Te Tau Ihu Perspective on Assertions and Denials of Rangatiratanga (prepared for the Treaty of Waitangi Research Unit at Victoria University of Wellington as no 7 of the Rangatiratanga Series, 2006) at 36-40.
195 RMA, s 396, which was repealed by s 128 of the Resource Management Amendment Act (No 2) 2004. The RMA is the primary legislation governing resource use and development in Aotearoa/New Zealand.
196 For example, from 1991 to 1996, only one iwi trust application was successful in te Tau Ihu o te Waka/the Marlborough Sounds, while in 1996, ten applications by others were granted: Catherine Iorns Magallanes “The Foreshore and Seabed Legislation: Resource- and Marine- Management Issues” in Claire Charters and Andrew Erueti (eds) Māori Property Rights and the Foreshore and Seabed: The Last Frontier (Victoria University Press, Wellington, 2007) 119 at 124.
197 See ibid, at 123-124.
their opposition to non-Māori applications. When it was suggested that the Government consider a tendering process for allocation of coastal space, the iwi sought to challenge this decision by having the Maori Land Court declare the foreshore and seabed customary land. The grant of customary land status would have then given the iwi indirect leverage in the decision-making process.

In the Maori Land Court, the Crown objected to the iwis’ claim that the foreshore and seabed was land at all, in the relevant sense, and could therefore be declared customary land. Relying on Ninety Mile Beach, the Territorial Sea Acts, and s 9A of the Foreshore and Seabed Endowment Revesting Act 1991, the Crown argued that the claim could not succeed as a matter of law. In relation to the seabed, the Crown’s statement of defence claimed there was no recognised Māori customary title to the seabed, and that s 7 of TSCZEEZA prevented the Maori Land Court from declaring the seabed to be Māori customary land. However, the Crown conceded that the maintenance of spiritual and cultural relationships with the foreshore and seabed might give rise to lesser use rights short of full title that might be recognised under the RMA or the Fisheries Act 1996.

In December 1997, in the Maori Land Court, Judge Hingston delivered his initial decision, In Re Marlborough Sounds Foreshore and Seabed. Finding in favour of the claimants, he ruled that neither Ninety Mile Beach, nor s 7 of TSCZEEZA, prevented the Maori Land Court from investigating title to the foreshore and seabed. He held that Ninety Mile Beach did not bind him because the reasoning in that case applied only where the Maori Land Court had investigated title to the adjoining dry lands, which was not the case in Te Tau Ihu o te Waka/the Marlborough Sounds. Moreover, he reasoned that s 7 of TSCZEEZA was only a statutory expression of

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198 See ibid, at 123-125. For example, Ngāti Tama applied for 35 marine-farming permits in the early 1990s and were denied every one: ibid, at 123.
199 See ibid, at 125. The Māori Land Court had jurisdiction to determine and declare the status of land under s 131(1) TTWMA.
200 TTWMA, s 131.
201 Statement of Defence of H Aikman (counsel for the Attorney-General), 1 May 2000 at [3.2].
202 Ibid, at [3.3].
204 Ibid, at 4.
sovereignty, similar to a conferral of radical title. It was simply to outline Aotearoa/New Zealand’s sea boundaries and fishing zones.\(^{205}\)

The Marlborough District Council appealed to the Maori Appellate Court. Because of the implications, that Court elected to state a case for the High Court.\(^{206}\) There, Justice Ellis, holding himself bound by *Ninety Mile Beach*, held that once title to adjacent dry land had been determined, any Māori title to the foreshore was extinguished.\(^{207}\) In regards to the seabed, he stated unequivocally that it could not be, nor had it ever been, Māori customary land.\(^{208}\) He declared this to be so because s 7 of TSCZEEZA applied, which deemed the seabed “to be and always to have been the vested in the Crown”.\(^{209}\)

The iwi and Te Atiawa Manawhenua ki te Tau Ihu Trust appealed to the Court of Appeal. The Court heard the case in July 2002, and just under a year later, on 19 June 2003, delivered its unanimous decision, its most significant so far on native title in Aotearoa/New Zealand.

**12.b. The Court of Appeal decision**

All five judges held that the Maori Land Court had jurisdiction to investigate the foreshore and seabed, and, if the evidence supported it, to declare areas of that land Māori customary land.\(^{210}\) Boast noted that in holding that the Maori Land Court had jurisdiction to investigate the foreshore and seabed, the Court of Appeal determined “that a very large area of land long assumed to belong to the Crown in dominium is in fact at least potentially Maori customary land and might be Maori freehold land”.\(^{211}\) To Boast, “Ostensibly about jurisdiction, the case was really about property rights and native title”.\(^{212}\)

\(^{205}\) Ibid, at 9.

\(^{206}\) *Crown Law Office v Maori Land Court (Marlborough Sounds)* (1998) 3-9 Te Waipounamu Appellate MB.

\(^{207}\) *Attorney-General v Ngati Apa* [2002] 2 NZLR 661 (HC) at [37] and [52].

\(^{208}\) Ibid, at [52].

\(^{209}\) Ibid, at [40]-[41].


\(^{211}\) Ibid.

\(^{212}\) Ibid.
In summary, the Court of Appeal reversed Justice Ellis in the High Court and overruled its own earlier decision in *In Re Ninety Mile Beach*. In doing so, it restated the principles, found in early twentieth century Privy Council rulings, that *Wi Parata* was incorrectly reasoned in law. The Court saw no problem in defining foreshore and seabed as land, and found the legislation presented to it was not sufficiently clear and plain in its intent to extinguish native title in the foreshore and seabed.  

The Court of Appeal read s 7 of TSCZEEZA as pertaining only to the Crown’s sovereignty over the territorial seabed vis-à-vis any other nation, not to beneficial ownership. Justices Keith and Anderson discussed the point in depth and gave three reasons for their conclusion. First, vesting the seabed in the Crown was not inconsistent with the continuing existence of customary Māori property. Second, the principal focus of the Acts was to establish “as against the world the 12-mile fishing zone”, which was “a matter of the exercise of sovereignty, not beneficial ownership”. Lastly, the legislation did not clearly and plainly extinguish native title, which is the standard test in law. Thus, the Judges found that s 7 of both Acts only vested imperium, or sovereignty, in the Crown; the Māori Land was not blocked by this provision from making grants of title in the foreshore and seabed.

Lastly, the Court held that the Maori Land Court should be able to hear evidence from Māori claimants of their association with the foreshore and seabed, and if the evidence merited it, determine the status of that land, under s 131(1), to be Māori customary land held according to tikanga Māori.

The Court of Appeal therefore ruled largely on the scope of the jurisdiction of the Maori Land Court. It did not rule on whether Māori in fact possessed rights in the foreshore and seabed. That was still to be established. However, the Court did discuss the concept of Māori customary rights and the doctrine of native title in our law in some detail. The judges described the doctrine of native title as an established

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213 The legislation presented in argument was: the Foreshore and Seabed Endowment Revesting Act 1991; the Harbours Acts 1878 and 1950; the RMA; the TSFZA; and the TSCZEEZA.

214 *Ngati Apa*, above n 7, at [160] per Keith and Anderson JJ.

215 Ibid, at [161] per Keith and Anderson JJ.

216 Ibid, at [162] Keith and Anderson JJ. Elias CJ stated that the 1965 and 1977 Acts were “principally concerned with matters of sovereignty, not property” and said that she agreed with Keith and Anderson JJ: ibid, at [63].
common law principle, under which any property interest acquired by the Crown in land over which it has sovereignty “depends on any pre-existing customary interest and its nature.” 217 Chief Justice Elias stated that, in Aotearoa/New Zealand, the Crown did not acquire full and absolute dominium at the point of acquisition of sovereignty, and that the English common law rule that the Crown owned the foreshore and seabed did not displace local common law rules that recognised the doctrine of native title and protected Māori customary rights: 218

The common law as received in New Zealand was modified by Māori customary proprietary interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption drawn from English common law. The common law of New Zealand is different.

The Court of Appeal made it clear that Māori customary rights had existed in the foreshore and seabed, and remained after the transfer of sovereignty until extinguished in accordance with the law: for example, through clear and plain legislation or voluntary sale. 219 However, the judges refrained from stating precisely the kinds of Māori customary rights that could be discovered in this legal situation. That required proof of past customary practices. The Court of Appeal also left open the question of exclusivity: could full freehold title, that would exclude others, be granted to Māori in this zone under TTWMA or the doctrine of native title?

The content of such customary rights was said to be discoverable, as a question of fact, through evidence. This would depend in effect on the relevant principles of Māori customary law. Depending on the evidence, the Court conceded that Māori customary rights, as a burden on the Crown’s radical title, might be limited to use or occupation rights, or the customary rights may be so complete that they reduce the radical right of the Crown to limited powers of administrative interference. 220

217 See ibid, at [31] per Elias CJ.
218 Ibid, at [86] per Elias CJ.
219 See ibid, at [13] per Elias CJ.
220 See ibid, at [31] per Elias CJ.

On 23 June 2003, the Prime Minister, Rt Hon Helen Clark, and the Attorney-General, Hon Margaret Wilson, announced that the Government would legislate to reassert Crown ownership over the foreshore and seabed, and to ensure access to the foreshore and seabed was available to all New Zealanders.\textsuperscript{221} The haste of this announcement prompted a strong series of objections from Māori, including the Māori members of the Labour Coalition Government.\textsuperscript{222}

This announcement captured the nation’s attention. Across Aotearoa/New Zealand, people reiterated the right of ‘all New Zealanders’ to “sail, fish, walk on the sand and lounge in the sun on a beach anywhere, anytime.”\textsuperscript{223} Calls for ‘One law for all’, ‘Equality before the law’ and ‘Equal citizenship’ reverberated around the country. A month later, on 28 July 2003, 500 people took to the streets of Nelson to protest the Court’s ruling. They carried signs and chanted the slogans ‘One law for all’ and ‘Whites have rights too’.\textsuperscript{224} The National Party launched a website petition calling for the Government to place the foreshore and seabed under exclusive Crown ownership that accumulated over 40,000 signatures.\textsuperscript{225}

While Māori Labour Members of Parliament urged the Government to investigate Māori customary ownership without prejudice, Māori outside Parliament condemned the Government’s decision to legislate, its haste and the lack of consultation. They commenced hui\textsuperscript{226} to discuss the issue,\textsuperscript{227} drew up declarations outlining their

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views, and initiated their own frameworks for resolution of the issue. The Government, unperturbed by such objections, maintained its desire to legislate.

13.a. The August Discussion Document

On 18 August 2003, the Government released its discussion document on its legislative proposals, “The Foreshore and Seabed of New Zealand. Protecting Public Access and Customary Rights: Government Proposals for Consultation” (the Discussion Document). The document set out four principles that remained central to the Government’s approach right through to the passing of the FSA. These principles were:

**Principle of access**
The foreshore and seabed should be public domain, with open access for all New Zealanders.

**Principle of regulation**
The Crown is responsible for regulating the use of the foreshore and seabed, on behalf of all future generations of New Zealanders.

**Principle of protection**
Processes should exist to enable the customary interests of whanau, hapu and iwi in the foreshore and seabed to be acknowledged and specific rights to be identified and protected.

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229 For example see Te Ope Mana-a-Tai “Discussion Framework on Customary Rights to the Foreshore and Seabed” (August 2003) University of Auckland <http://www.library.auckland.ac.nz/subjects/law/pdfs/Te_Ope_Mana_a_Tai.PDF>.

230 Boast argues that this document was in reality a statement of policy decisions that had already been agreed upon: Boast, above n 22, at 86.

231 See the object and purposes provisions of the Act: FSA, ss 3 and 4.

Principle of certainty

There should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions.

This Discussion Document recognised that there were Māori customary rights in the foreshore and seabed. However, it effectively placed the right of public to access to coastal land above any right Māori might have to exclusive possession of customary property.233 The Document outlined the Government’s intent to remove the jurisdiction of the Maori Land Court to determine the rights of claimants over the foreshore and seabed, and ultimately to ensure that there was no possibility of freehold title being issued:234

First, the Court of Appeal judgment has raised the possibility of new private titles being created over parts of the foreshore and seabed as the result of claims for customary rights, which would give owners the power to sell those spaces and so exclude other people from them. The government has made it clear that such an option is not acceptable as there has been an assumption that, in general, there should be open access and use of the foreshore and seabed for all New Zealanders.

In addition, the Discussion Document stated that it has always been Government policy to “remove private title from the foreshore and seabed, or to regain public access and use over the remaining areas, wherever that is possible and appropriate”.235 Therefore, the Government did not intend “to allow freehold title to be created as a result of Maori customary interests either”.236 Instead, in order to meet its principle of access, and to ensure that the public, including the Māori public, can have the widest possible access and use of the foreshore and seabed, the solution was to place the foreshore and seabed into the public domain.237

233 Prior to the enactment of the FSA, there was no particular Aotearoa/New Zealand legislation that created a public right of access to the whole of this country’s foreshore and seabed. Moreover, English common law held that there was no enforceable general right of public access to the zone. This common law principle was affirmed as part of Aotearoa/New Zealand law though the English Laws Act 1858. In 1868, the principle was further endorsed when the Court of Appeal, in a case about a provincially regulated landing service at the port of Timaru, held that property in the seabed was subject to the common law public rights of navigation and fishing, but was not subject to the public’s right of access as no such right existed: Crawford v Learen (1868) 1 NZCA 117 at 127.
234 The Department of the Prime Minister and Cabinet, above n 232, at 6.
236 Ibid.
237 Ibid, at 10. This proposed public domain would be subject to limitations imposed by law.
In articulating the principle of regulation, the Government also made a statement about sovereignty. The Government pronounced that it possessed the right to make law concerning the foreshore and seabed, and that the law must be obeyed. There was therefore no possibility of recognising other rights, such as mana or tino rangatiratanga rights, that would limit this sovereignty.

Additionally, the Government implicitly asserted that its role was to balance competing interests and demands in the foreshore and seabed, and to make decisions on how those demands were best integrated in the overall public good.\(^\text{238}\)

Embedded in this declaration are therefore specific Government assumptions about Māori rights. As a start, Māori customary rights are given the same (or even lesser) status than other interests, and are treated as just one of many competing interests. Furthermore, in defining its powers to determine the public good, the Government can be seen talking in utilitarian terms; that is, envisaging its role as creating the greatest happiness for the greatest number. In the population, and within the democratic process, Māori are in a minority. Therefore, the interests of the many, the rest of Aotearoa/New Zealand, will often outweigh those of the Indigenous Peoples. And on this view, Māori would have no greater claim to the foreshore and seabed than others.

In proposing the principle of protection, on the other hand, the Government recognised that Māori customary rights existed prior to colonisation, and that the common law recognised such pre-existing rights.\(^\text{239}\) Moreover, the Government explicitly stated that art 2 of the Treaty was a safeguard for Māori customary interests, and that this safeguard may overlap with the legal principles recognised in the courts under the common law.\(^\text{240}\) Moreover, the Government acknowledged that customary rights were one mechanism through which Aotearoa/New Zealand law could recognise and protect Māori customary associations with particular places and activities of historic, cultural or spiritual significance.\(^\text{241}\)

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\(^{238}\) Ibid, at 24.

\(^{239}\) Ibid, at 7.

\(^{240}\) Ibid.

\(^{241}\) Ibid, at 6 and 25.
However, while the Government acknowledged that, as a general proposition, law recognised the possibility of Māori customary rights in the foreshore and seabed, it also suggested that there were few, if any, customary rights that were not already acknowledged and protected under statute.\textsuperscript{242} These current laws were largely considered to provide significant recognition of Māori customary interests, and those customary interests would not amount to full ownership.\textsuperscript{243}

Interestingly, however, the discussion document suggested that a mechanism would be established for the Maori Land Court to declare that there had been customary interests tantamount to full title. If that was established on the evidence, the Government would acknowledge this, and then negotiate a solution with those holding the customary interest.\textsuperscript{244} This seems, however, to contradict the Government’s assertion that there was no exclusive Māori title, because the proposed legislation would actually create a procedure to address interests of that form should they be found to exist.

The Discussion Document’s fourth principle, that of certainty, acknowledged that it was important to provide certainty for those who make administrative decisions in the foreshore and seabed, as well as for third parties. This was necessary to ensure that investment and development would continue.\textsuperscript{245} Here the Government seems to put investment and development interests ahead of those of Māori, as third party development interests would remain unaffected under the policy,\textsuperscript{246} yet Māori would be restricted in their development rights, by limiting their capacity to obtain customary title.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{242} Ibid, at 6.
\item \textsuperscript{243} Ibid, at 9.
\item \textsuperscript{244} Ibid, at 12.
\item \textsuperscript{245} Ibid, at 32.
\item \textsuperscript{246} Ibid.
\end{itemize}
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13.b. The December Policy Document

Then on 17 December 2003, the Government released a more detailed policy document, “Foreshore and Seabed: A Framework” (the Policy Document). This proposed:

… a new framework to provide a clear and unified system for recognising rights in the foreshore and seabed, as well as practical initiatives to develop effective working relationships between whanau, hapu and iwi, who hold mana and ancestral connection over an area of foreshore and seabed, and central and local government decision makers.

This contained the same four principles, and much of the same content, as the earlier Discussion Document. However, there was one major difference. The policy no longer sought to eliminate non-Māori private title from the foreshore and seabed. This left the policy open to critique on an equality basis, in that non-Māori private title remained unaffected, whereas Māori private title could not be recognised. This contradicted the Government’s earlier claim that its policy was to remove all foreshore and seabed from private ownership.

14. The Waitangi Tribunal Report

Māori reacted to the Government’s intervention in a number of ways. At the Government consultation hui, and other hui run by Māori, held throughout the country, Māori overwhelmingly rejected the Government’s proposals. In addition, an application was lodged with the Tribunal. As Boast conceded, “It was inevitable that the Waitangi Tribunal would quickly become involved in the seabed and foreshore affair”.

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247 The Department of the Prime Minister and Cabinet “Foreshore and Seabed: A Framework” (17 December 2003).
248 Ibid, at 1.
249 For evidence of rejection at hui, see The Paeroa Declaration, above n 228; Te Tii Mangonui Declaration, above n 228; Omaka Hui Resolutions, above n 228; and submissions presented at consultation hui: Adele Carpinter and Department of the Prime Minister and Cabinet The Foreshore and Seabed of New Zealand: Report on the Analysis of Submissions (Department of the Prime Minister and Cabinet 2003).
250 Boast, above n 22, at [10.1].
The Tribunal is a permanent commission of inquiry, established under an Act of Parliament, by s 4 of the Treaty of Waitangi Act 1975. It has jurisdiction to inquire into claims by Māori that they are, or are likely to be, prejudicially affected by acts or omissions of the Crown that are inconsistent with the principles of the Treaty. Even proposals for the passage of legislation can be challenged in this way. If the challenge is successful, however, normally only non-binding recommendations can be made.

The Tribunal agreed to hear the claim concerning the foreshore and seabed under urgency. It conducted its inquiry in late January 2004. At this time its investigations were confined to the Crown’s policy papers that had been released the year before. The Tribunal said the focus would be on "the system that recognises, or may recognise, Māori customary rights, rather than on the rights themselves" as the Tribunal only has jurisdiction to inquire into the actions of the Crown. It would concentrate on whether the Crown’s policy breached the principles of the Treaty.

Its report was released on 4 March 2004. The Tribunal began by stating that its role in the situation was:

… to ensure that the Government has before it all the matters it needs to know in order that its decision-making is fair. In the Waitangi Tribunal, consideration of what is fair is always influenced by the agreements and understandings embodied

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251 Thus, as a permanent commission of inquiry, the Tribunal differs from a court in several aspects: generally, it has authority only to make recommendations and its decisions are non-binding on both the Crown and claimants (although in certain limited situations, it does have binding powers). Its process is more inquisitorial and less adversarial than that followed in the courts. In particular, it can conduct its own research, its process is flexible, it is not necessarily required to follow the rules of evidence that generally apply in the courts, and it may adapt its procedures as it thinks fit. The Tribunal does not usually have final authority to decide points of law. However, for the purposes of the TOWA, it has exclusive authority to determine the meaning and effect of the Treaty as it is embodied in both the Māori and the English texts: TOWA, s 5(2). It has a limited power to summon witnesses, require the production of documents, and maintain order at its hearings. It does not have a general power to make orders preventing something from happening or compelling something to happen, and cannot make a party pay costs.

252 While the TOWA is the Tribunal’s governing statute, there are other statutes that regulate its powers. These include: the Commissions of Inquiry Act 1908, the Treaty of Waitangi (State Enterprises) Act 1988, and the various statutes that give effect to Treaty claim settlements.

253 TOWA, s 6(1).

254 Memorandum and Directions of Judge CM Wainwright, 19 September 2003 (transcript of oral decision) WAI 1071 Doc No 2.101.

255 Ibid.

256 Ibid.

257 Waitangi Tribunal, above n 8. The report was produced in just over four weeks and is a detailed analysis of 181 pages.

258 Ibid, at xiii.
in the Treaty, but fairness in Treaty terms is not the only relevant norm. There is a fairness that can be distilled independently of the Crown’s commitments under the Treaty, and we think that wider fairness has relevance in the present situation.

The Tribunal proceeded to describe the principles of good government in a modern, democratic state, including adherence to the rule of law and to the principles of fairness and non-discrimination. In making this link between the rule of law and the principles of non-discrimination, as guides for Crown action, the Tribunal expressly introduced the concept of equality into its report. And later, it would specifically analyse the Crown’s policy in light of equality arguments.

The Tribunal found that the Crown’s policies breached the principles of the Treaty, both art 2, which guarantees certain fundamental Māori rights, and art 3, which defines Māori as possessing the same rights as British subjects.

The report is replete with the language of rights. The Tribunal found that Māori possessed common law property rights in the foreshore and seabed, and:

The policy is expropriatory. It takes away the power of the courts to declare Māori property rights in the foreshore and seabed, which is effectively an expropriation of the rights themselves, and replaces them with enhanced participation in decision-making processes. The proposed customary title, with use rights recorded on it, is not a property right.

It said later that:

… the common law rights of Māori in terms of the foreshore and seabed are to be abolished, and their rights to obtain a status order or fee simple title from the Maori Land Court are also to be abolished. … The owners of the property rights do not consent to their removal.

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259 Ibid, at xiv.
261 Ibid, at 127-128.
262 Ibid, at 129-130.
263 Ibid, at [2.1.8].
264 Ibid, at 121.
265 Ibid, at [5.1.3].
The Tribunal found that the Crown’s policy failed to treat Māori and non-Māori equally, because the proposed legislation would abolish the property rights of Māori and no-one else: 266

In pursuing its proposed course under these circumstances, the Crown is failing to treat Māori and non-Māori citizens equally. The only private property rights abolished by the policy are those of Māori. All other classes of rights are protected by the policy. This breaches Article 3 of the Treaty of Waitangi.

These findings were not binding, however, on the Government or Parliament.

15. The Foreshore and Seabed Act 2004

The Government ignored the Tribunal report and proceeded to legislate its announced policy, in the FSA. Thus, in 2010, property rights to the foreshore and seabed of Aotearoa/New Zealand remain largely codified in a single statute that replaces much of the former common law within a new statutory regime.

The FSA governs title to the foreshore, public rights of access, and limited Māori customary rights in the zone. It vests full legal and beneficial ownership of the public foreshore and seabed in the Crown. 267 This is then overlaid by the guarantee of public access, and other public rights such as navigation, over the zone. 268 The Act creates a statutory regime that replaces the post Ngati Apa conception that Māori customary rights under tikanga and the common law might be recognised, establishing instead processes for Māori to apply for territorial customary rights orders and customary rights orders, under the new regime. 269 Territorial customary rights orders are a newly created type of order that may be made where but for the FSA, applicants could have established customary rights amounting to exclusive title over specific areas of the foreshore and seabed. The order does not grant title, but awards successful applicants the right to negotiate with the Crown for redress over the loss of their title, or to apply for a special foreshore and seabed reserve to be established. In addition, a customary rights order is a new mechanism for recognising non-exclusive use rights in specific

266 Ibid.
267 FSA, s 13.
268 Ibid, ss 7-9, 15-17, and 28.
269 These two newly created types of orders will be explained in detail later in Sections 15.b.i and ii.
foreshore and seabed. Such an order recognises and guarantees special protection of successful applicants' activities, uses or practices under the RMA.

15.a. The legislative process

The Government introduced its Foreshore and Seabed Bill (the FS Bill) on 6 April 2004, ostensibly carrying out its aims, despite the Tribunal finding that its policies breached the principles of the Treaty.\(^{270}\) The day before, twenty thousand New Zealanders voiced their opposition when they marched to Parliament in the Foreshore and Seabed Hīkoi.\(^{271}\)

As required under s 7 of the New Zealand Bill of Rights Act 1990 (NZBORA), the FS Bill was sent to the Attorney-General who considered whether it was consistent with that Act’s statement of rights. The Attorney-General submitted her report on 6 May 2004, concluding that there was no breach of ss 20, 21 or 27(3).\(^{272}\) However, the Attorney-General felt “there is a significant argument for a prima facie breach of section 19”, concerning freedom from discrimination, because it differentiated between categories of right holders on the ground of race.\(^{273}\) With the vesting of the foreshore and seabed in the Crown, Māori stood to lose their customary property

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\(^{270}\) Foreshore and Seabed Bill 2004 (129-1) (FS Bill).

\(^{271}\) ‘Hīkoi’ means march.


Section 20 is:

**Rights of minorities**

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Section 21 is:

**Unreasonable search and seizure**

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

Section 27(3) is:

**Right to justice**

Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

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\(^{273}\) Wilson, above n 272, at [2.1]. The New Zealand Bill of Rights Act 1990 (NZBORA), s 19 states:

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

Race is a prohibited ground of discrimination under the Human Rights Act 1993, s 21(f).
rights. However, those holding existing freehold grants would maintain their rights. This was discrimination, because:

For one group to be deprived of a (potentially significant) existing source of rights or title, yet another not to be similarly deprived, reaches the threshold of a prima facie infringement of section 19 BORA.

Boast noted that, in actuality, what had been taken away was the right of Māori to obtain vesting orders and title grants in the foreshore and seabed, from the Maori Land Court.

However, despite such discrimination, the Attorney-General concluded that the Bill’s provisions were nonetheless “demonstrably justifiable in a free and democratic society”. That is, the Bill met the test in s 5 NZBORA concerning justified limits on rights.

The Attorney-General gave several reasons for this. Her first reason was that the Bill was primarily designed to clarify the law, not to discriminate against Māori. Here she placed weight on the argument that two bodies of jurisprudence concerning customary rights were developing, one in the High Court and the other in the Maori Land Court. The legislation would simply provide one single set of tests for the recognition of such rights, and so clarify the law. Second, she drew attention to the fact that those working in the foreshore and seabed were doing so under the assumption that the Crown owned it. For example, she argued that the RMA had been enacted on that assumption, and this assumption therefore underlay its regime for obtaining resource consents. Third, she stressed the importance of the coastline as a resource, of an economic, social and cultural kind, in the lives of all New Zealanders,

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274 Wilson, above n 272, at [76].
275 Ibid.
276 Boast, above n 22, at 108.
277 Wilson, above n 272, at [2.2].
278 NZBORA, s 5 states:

**Justified Limitation**

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

279 Wilson, above n 272, at [83].
280 Ibid, at [84].
281 Ibid, at [86].

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which needs to be preserved for those activities to continue. Finally, the Attorney-General justified the Bill by stating it expressly recognised Māori customary interests, rather than expropriating these interests, as some claimed.

The Bill was sent to the Fisheries and Other-Sea Related Legislation Select Committee (the Select Committee) which received 3946 written, and 234 oral, submissions. Ninety-four percent of these submissions opposed the Bill in general terms. The Select Committee, however, could not agree on whether the Bill should be passed and reported it back to the House without amendment on 4 November 2004.

The Government, in alliance with the New Zealand First Party, then tabled in the House the FS Bill and a Supplementary Order Paper on 16 November 2004. This Supplementary Order Paper made a number of significant changes, including replacing the concept of vesting ownership ‘in the public domain’ with that of vesting ‘in the Crown’. On 18 November, the Bill was read for the third time and passed by 66 votes to 53. It received the Royal Assent on 24 November 2004 and came fully into force on 17 January 2005.

15.b. The Foreshore and Seabed Act 2004

The Act’s object, as set out in s 3, is:

… to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all people of New Zealand, including the protection of the association of whanau, hapū, and iwi with areas of the public foreshore and seabed.

Interestingly, the Act specifically identifies the need to protect the interests of whānau, hapū and iwi. No other group is so identified.

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282 Ibid, at [87].
283 Ibid, at [93].
284 Foreshore and Seabed Bill 2004 (129-1) (select committee report) at 3.
285 Ibid.
286 Supplementary Order Paper 2004 (302) Foreshore and Seabed Bill 2004 (129-1).
287 Ibid, at 1.
288 Public foreshore is defined as ‘foreshore and seabed that is not in private title’ at the present time: FSA, s 5.
Section 4 outlines the purposes of the FSA, and further explains s 3. It makes the claim that, in order to protect public interests in the foreshore and seabed, title to it must be vested in the Crown. Concerning this, Boast wrote:

Apart from being a large claim, and one on which there is doubtless wide disagreement, there is a certain lack of logic in the statutory language. To preserve a right involves protection of something that already exists. Yet in order to protect these existent public rights the Act in fact takes what is in reality a wholly new step, vesting of full beneficial title in the Crown.

The FSA provides for “customary rights orders”, and so recognises some Māori customary rights, but not others. Thus, the Act’s object, to preserve the association of whānau, hapū and iwi with their foreshore and seabed, cannot be fully realised, as Māori are barred from attaining full beneficial title, which, in some cases, they might have been able to prove.

Section 13(1) then explicitly vests the public foreshore and seabed in the Crown, in definitive terms:

... the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown, so that the public foreshore and seabed is held by the Crown as its absolute property.

But the FSA does not affect privately owned foreshore and seabed that was already the subject of existing title. The Act is concerned with the “public foreshore and seabed”; that is, foreshore and seabed that was not already subject to a specified freehold interest. Any possible Māori customary land that might have been recognised under s 129(1) TTWMA in the Maori Land Court, or under the doctrine of native title in the High Court, is, in effect, enveloped by this zone.

Second, the FSA protects public rights of access and navigation. Thus, not only does the Act recognise and protect already established statutory and common law navigation rights, it also elevates public access to the level of a statutory right

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289 Boast, above n 22, at [13.3].
290 FSA, s 5.
291 Ibid, s 8
where previously no express legal right of this kind was established, even if it had been available in practice.\textsuperscript{292}

Third, the FSA removes the previous jurisdiction of the High Court and the Maori Land Court to hear and determine Māori customary claims relating to the foreshore and seabed.\textsuperscript{293} It does this by changing the definition of land in s 4 of TTWMA to exclude the foreshore and seabed, thus nullifying the finding of the Court of Appeal.

In return, however, the FSA creates new statutory jurisdictions: for the High Court to make territorial customary right orders, and for either the High Court or the Maori Land Court to make ordinary customary rights orders.\textsuperscript{294} Moreover, the High Court can entertain an application from “The authorised representative of a group of natural persons with a distinctive community of interest”,\textsuperscript{295} meaning that both Māori and non-Māori can apply to the High Court to have their customary rights determined, if these rights pertain to an activity, use, or practice that has been integral to the cultural practices of that group, and has been exercised in an uninterrupted manner since 1840.\textsuperscript{296} The Maori Land Court, on the other hand, is restricted to hearing applications from whānau, hapū and iwi.\textsuperscript{297} They have to meet the same legal test, but the activity, use, or practice must be integral to tikanga Māori, and must be exercised in accordance with tikanga Māori since 1840.\textsuperscript{298}

The Act does not therefore extinguish all Māori customary rights to the foreshore and seabed, only rights based in the common law, and those that might have been recognised in the Maori Land Court after Ngati Apa, that fall outside the scope of the new statutory rights regimes.

\begin{itemize}
\item\textsuperscript{292} Ibid, s 7.
\item\textsuperscript{293} Section 10 of the FSA replaces the former jurisdiction of the High Court with the procedures set out in the Act. Section 12 removes the Maori Land Court’s former jurisdiction under TTWMA.
\item\textsuperscript{294} Sections 32-45 of the FSA cover the High Court’s new jurisdiction to make territorial customary rights orders, and ss 66-91 cover its jurisdiction to make customary rights orders. Sections 48-65 cover the Maori Land Court’s new jurisdiction to make customary rights orders.
\item\textsuperscript{295} Ibid, s 68(1).
\item\textsuperscript{296} Ibid, s 74(1).
\item\textsuperscript{297} Ibid, s 48.
\item\textsuperscript{298} Ibid, s 50(1).
\end{itemize}
15.b.i. Territorial Customary Rights Orders

The FSA therefore makes provision territorial customary rights orders, and other customary rights orders. Territorial customary rights orders can only be awarded in the High Court, when applicants can show that, but for the Act, they could have established customary rights amounting to exclusive title. To meet the test under s 32, the group must have title that could have been recognised at common law, is founded on exclusive use and occupation, entitles them to continuous use and occupation, and relates to an area that was used and occupied to the exclusion of all persons outside the group. In addition, the group must show they actually have title to contiguous land; that is, land adjoining the area of foreshore or seabed now claimed.

The enactment of these tests could be seen as an admission that, in some instances, following Ngati Apa, Māori might have been able to establish exclusive title under TTWMA, resulting in the Maori Land Court awarding them exclusive title. However, whether claimants could produce the necessary evidence to establish this was an open question before the FSA was passed, and remains so today.

If an applicant group is successful in obtaining a territorial customary rights order in the High Court, the group can negotiate with the Crown for redress. First, the applicant group must get an order from the High Court referring the matter to the Attorney-General. If the High Court is satisfied that the application is correctly made, it must make the order. Then s 37 directs the Crown into mandatory negotiations with the applicant group, stating that the Attorney-General and the Minister of Māori Affairs “must enter into discussions with the applicant group for the purposes of negotiating an agreement as to the nature and extent of the redress”. Section 38 provides that redress is only available from the Crown and that the applicants cannot return to the High Court for alternative redress should the negotiations fail. Lastly it states that the redress negotiated is unreviewable. The redress available is therefore whatever the Crown thinks is appropriate. Most likely, negotiated redress will be recognised by legislation, a practice that is already

299 Ibid, ss 32 and 33.
300 Ibid, s 36(1)(a).
301 Ibid, s 36(2).
302 Ibid, s 37(1).
occurring in the Treaty settlement process, and may be quite significant in some parts of the country.

Alternatively, if successful territorial customary rights order applicants choose not to negotiate for redress, they can apply for a special foreshore and seabed reserve to be established.\(^{303}\) The purpose of a reserve is to acknowledge the kaitiakitanga of the applicant group and to enable the reserve to be used for the benefit of all people.\(^{304}\) If a reserve is established, the foreshore and seabed remain vested in the Crown and the public continues to have rights of access and navigation.\(^{305}\)

Where a group requests the establishment of a reserve, the High Court will direct the applicant group, the Crown, and the relevant regional council to agree upon a charter and membership for a board to administer it.\(^{306}\) The board’s functions would include the preparation, approval and review of a management plan for the reserve.\(^{307}\) This plan must be prepared in accordance with Part II of the RMA, and must not be inconsistent with the provisions of the New Zealand Coastal Policy Statement, or any relevant national policy statement.\(^{308}\)

Once a management plan has been lodged with the council, local authorities have obligations under the RMA. One important obligation is to recognise and provide for the management plan when preparing or changing any regional policy statements, regional plans or district plans.\(^{309}\) Within six months of the management plan being lodged, the regional council must begin a review of both its regional policy statement and all other plans to determine whether these need to be changed to recognise and provide for the management plan.\(^{310}\) If local authorities decide to change their plans for this purpose, they will need to publicly notify the proposed changes and consider

\(^{303}\) Ibid, ss 40-43. Noticeably, the Act allows an applicant group, who have opted for negotiated redress, to withdraw from negotiations and proceed with the establishment of a reserve instead. The group must formally withdraw from the negotiations and make a separate application to the High Court: ibid, s 37(4). The High Court must make the order sought: s 37(5).

\(^{304}\) Ibid, s 40(1)(a) and (b).

\(^{305}\) Ibid, s 40.

\(^{306}\) Ibid, s 41.

\(^{307}\) Ibid, s 44(1).

\(^{308}\) Ibid, s 44(2).

\(^{309}\) RMA, ss 61, 66 and 74, amended by the Resource Management (Foreshore and Seabed) Amendment Act 2004 (RMFSAA), ss14, 17 and 18.

\(^{310}\) RMA, s 79A(2). Section 79A was inserted by the RMFSAA, s 19. Subsection (2) was substituted by the Resource Management Amendment Act 2005, s 49.
public submissions. Where there is disagreement between the regional council and the board of a foreshore and seabed reserve over such changes, the board can seek a decision from the Environment Court under s 82A.

Catherine Iorns Magallanes notes that since these management plans will most likely provide for Māori customary rights, the rights themselves have the potential to be recognised and protected in regional and local plans and statements. Māori customary rights are already listed as matters of national importance under the RMA. Consequently, authorities making decisions and carrying out their functions and duties under the RMA must recognise these customary rights and provide for their protection. This added recognition in management plans therefore provides another reinforcing avenue for protection of Māori customary rights, perhaps through more specific controls. Bronwyn Arthur suggests that one possible effect is that greater weight will be given to the customary rights recognised in management plans than other matters of national importance.

This added recognition in management plans therefore provides another reinforcing avenue for protection of Māori customary rights, perhaps through more specific controls. Bronwyn Arthur suggests that one possible effect is that greater weight will be given to the customary rights recognised in management plans than other matters of national importance.

Arthur states:

… although a foreshore and seabed reserve itself could have little real impact, if the board does produce an effective management plan then there is the opportunity for the group which held the territorial customary rights to obtain some significant controls through completely new mechanisms.

Section 9 of the Resource Management (Foreshore and Seabed) Amendment Act 2004 changed s 33 of the RMA to provide that a board of a foreshore and seabed reserve is a public authority and therefore local authorities may transfer powers to it. One such power is the ability to issue resource consents for the area. If such power is transferred, it may mean that only development that is consistent with customary rights recognised in the board’s management plan will go ahead.

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311 RMA, s 79B, inserted by the RMFSAA, s 19.
312 Inserted by the RMFSAA, s 20.
313 Iorns Magallanes, above n 196, at 134.
314 RMA, s 6(g), inserted by the RMFSAA, s 4.
315 Ibid.
316 Iorns Magallanes, above n 196, at 134.
318 Ibid.
319 RMA, s 33(2), inserted by the RMFSAA, s 9.
Iorns Magallanes considers such powers important as it illustrates the potential for co-management of specific foreshore and seabed, to a greater degree than previously provided for in the resource management procedures.\textsuperscript{320} However, she notes that iwi authorities already held a similar power under the RMA.\textsuperscript{321} As it is likely that a holder of a territorial customary rights order will be members of a local iwi, the powers of the reserve board may not amount to much more than was previously available.\textsuperscript{322} However, she notes that iwi authorities have not been viewed favourably in public administration, and few powers have been transferred to them in fact.\textsuperscript{323} Therefore, these new reserve boards, with the backing of the High Court and the consultation procedure undertaken over their membership, may be seen in a more favourable light.\textsuperscript{324} Consequently, Iorns Magallanes argues that reserve boards might “find it easier to obtain delegated powers under the Resource Management Act 1991 than iwi authorities do”.\textsuperscript{325}

15.b.ii. Customary Rights Orders

Customary rights orders are quite different from territorial rights orders, and recognise different types of interests, although both territorial and customary rights orders may be made in relation to a single area. Customary rights orders recognise activities, uses and practices in the foreshore and seabed. Essentially, they are the new mechanism to recognise non-exclusive use rights that previously could have been recognised at common law. To meet the test for customary rights under s 50(1), an applicant Manawhenua group must prove that:

(b) the activity, use, or practice for which the applicant seeks a customary rights order—

(i) is, and has been since 1840, integral to tikanga Māori; and

(ii) has been carried on, exercised, or followed in accordance with tikanga Māori in a substantially uninterrupted manner since 1840, in the area of the public foreshore and seabed specified in the application; and

(iii) continues to be carried on, exercised, or followed in the same

\textsuperscript{320} Iorns Magallanes, above n 196, at 134.
\textsuperscript{321} RMA, s 3.
\textsuperscript{322} Iorns Magallanes, above n 196, at 134-135.
\textsuperscript{323} Ibid, at 135.
\textsuperscript{324} Ibid.
\textsuperscript{325} Ibid.
area of the public foreshore and seabed in accordance with tikanga Māori; and

(iv) is not prohibited by any enactment or rule of law; and

(c) the right to carry on, exercise, or follow the activity, use, or practice has not been extinguished as a matter of law.

If a group is awarded a customary rights order, the activity, use or practice receives special protection under the RMA. All persons who exercise functions and powers under the RMA in managing the use, development, and protection of the foreshore and seabed, must protect the customary rights recognised. Any customary rights so recognised may be carried out despite a rule or plan to the contrary.

15.b.iii. Direct negotiation with the Crown

The FSA also establishes an alternative route for obtaining a territorial customary rights order. A customary group may wish to bypass the court process and negotiate directly with the Crown. Section 96(1) states:

The Attorney-General and the Minister of Māori Affairs may enter into an agreement with a group to recognise that, but for the vesting of the full legal and beneficial ownership of the public foreshore and seabed in the Crown by section 13(1), that group (or any members of the group) would have had a claim for territorial customary rights over a specified area of the public foreshore and seabed.

At the time of writing, such negotiations have commenced between the Crown and Ngāti Pahauwera, representing the hapū of Ngāti Pahauwera; Ngāti Porou ki
Hauraki Trust, representing the iwi of Ngāti Porou ki Hauraki;329 Te Rūnanga o Ngāti Porou, representing certain hapū of Ngāti Porou;330 Te Rūnanga o Te Rarawa, representing certain hapū of Te Rarawa;331 and Te Rūnanga o Te Whānau, representing the hapū of Te Whānau a Apanui.332 All negotiations are currently on hold, however, following the announcement of the National-led Coalition Government’s review of the FSA in March 2009.333

So far, Te Rūnanga o Ngāti Porou is the only iwi to enter into a ‘Deed of Agreement’ with the Crown over their customary rights under the FSA.334 The Deed was signed on 31 October 2008. It contains nine instruments that provide legal recognition and


333 This review process will be discussed in detail in Chapter Eight, Section 3.a.

334 Ngā Hapū o Ngāti Porou and Her Majesty the Queen in Right of New Zealand, above n 330.
protection of the mana of the hapū of Ngāti Porou as well as protections and authority where territorial rights are recognised.\textsuperscript{335} To give effect to the contents of this Deed, legislation is required. On 29 September 2008 the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill 2008 (the Ngāti Porou Bill)\textsuperscript{336} was introduced in Parliament, and reinstated on 9 December 2008. It is currently awaiting its first reading.

The regulatory impact statement sets out the Bill’s objectives. These are to:\textsuperscript{337}

(a) recognise the unbroken, inalienable, and enduring mana of the hapū of Ngāti Porou in relation to the public foreshore and seabed in their respective rohe, which is held and exercised as a collective right; and

(b) provide legal mechanisms that support the expression and protection of the mana of the hapū of Ngāti Porou both generally and in those specific areas where territorial customary rights are recognised; and

(c) recognise that the Crown has a responsibility for public access in, on, and over the public foreshore and seabed, and a role in regulating the public foreshore and seabed; and

(d) provide certainty about the use and administration of the public foreshore and seabed.

The Ngāti Porou Bill implements the nine instruments agreed to in the Deed. First it provides for a statutory overlay concerning the relevant areas. This requires that the special status of Ngāti Porou’s foreshore and seabed is recorded in official documents and is taken into account in consent processes under the RMA.\textsuperscript{338} Second, it provides for the hapū of Ngāti Porou to prepare an environmental covenant that identifies issues, objectives, policies, and rules relevant to the promotion of their worldviews, including the promotion of sustainable management of their seaward rohe and the protection of their cultural and spiritual identity.\textsuperscript{339} It will ensure that future Gisborne District Council public documents conform to this environmental covenant.\textsuperscript{340} Third, it provides for customary activities to be protected, which will enable hapū the right to

\textsuperscript{335} Ibid, cls 4-6.
\textsuperscript{337} Ngāti Porou Bill (explanatory note) at 15. ‘Rohe’ is territory, domain.
\textsuperscript{338} Ibid, cls 17-30.
\textsuperscript{339} Ibid, cls 17-20 and 25-30.
\textsuperscript{340} Ibid, cls 17-30.
carry out those activities without resource consent over their foreshore and seabed.\textsuperscript{341} Fourth, it provides for hapū to have the right to restrict or prohibit access to wāhi tapu\textsuperscript{342} in their foreshore and seabed area.\textsuperscript{343} Fifth, it will enable hapū to develop customary fisheries regulations.\textsuperscript{344} Sixth, it will facilitate participation of hapū in the following processes: establishing or extending marine reserves, conservation protected areas, and marine mammal sanctuaries; granting concessions; granting authorisations and permits in relation to wildlife and marine mammal matter; decisions on the management of stranded marine mammals and on applications for marine mammal watching permits; and possession by hapū of wildlife and marine mammal matter.\textsuperscript{345} Seventh, it recognises traditional names and provides for the alteration of names of culturally significant areas.\textsuperscript{346} Eighth, it provides for relationship instruments that set out how hapū and relevant Ministers, their departments and ministries will interact.\textsuperscript{347} Lastly, it provides where specific territorial customary rights areas are recognised, hapū will gain a permission right which gives them the right to approve or withhold approval for resource consent that may have a significant adverse effect on their rights.\textsuperscript{348} This may pose a bar to future development in the area that does not accommodate the recognised customary rights. They would also gain the ability to propose bylaws under customary fisheries regulations.\textsuperscript{349} These bylaws may restrict or prohibit fishing within the territorial customary rights area for sustainability or for cultural reasons such as rāhui.\textsuperscript{350} In addition, key documents that directly affect their territorial customary rights area would be required to recognise and provide for their environmental covenants.\textsuperscript{351}

In these arrangements, Ngāti Porou and the Government have therefore agreed upon the enactment of measures that are very similar to those that would be available to all

\textsuperscript{341} Ibid, cls 31-43.
\textsuperscript{342} Sacred place. ‘Wāhi tapu’ is defined by s 2 of the Historic Places Act 1993 as: “a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense”.
\textsuperscript{343} Ngāti Porou Bill, cls 44-53.
\textsuperscript{344} Ibid, cls 54-56.
\textsuperscript{345} Ibid, cls 57-77.
\textsuperscript{346} Ibid, cls 78-82.
\textsuperscript{347} Ibid, cls 83-88.
\textsuperscript{348} Ibid, cls 89-103.
\textsuperscript{349} Ibid, cl 54(2)(j) and (k).
\textsuperscript{350} Ibid (explanatory note), at 6. ‘Rāhui’ means to embargo, quarantine, or ban.
\textsuperscript{351} Ibid, cl 18.
As a whole, therefore, the FSA constitutes a complex legal package. It deems the zone to be the Crown’s ‘absolute property’, guarantees public access and navigation rights, but also provides specific mechanisms and tests for the recognition of customary rights, both through the courts and via direct negotiations with the Crown.

16. International reviews of the Foreshore and Seabed Act 2004


In July 2004, Te Rūnanga o Ngāi Tahu, the Taranaki Maori Trust Board and the Treaty Tribes Coalition took their opposition to the proposed Foreshore and Seabed legislation to the United Nations Committee on the Elimination of Racial Discrimination (CERD). They requested that CERD invoke its early warning and urgent action procedure to review the FS Bill in light of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). CERD did so, and on 11 March 2005 it released its report.

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352 Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1). This Bill will be considered in detail in Chapter Eight, Section 4.
355 ICERD. In 1994, early warning and urgent procedures became part of CERD’s regular agenda. These are preventative measures that are required to prevent or limit serious violations of the convention. Early warning measures are aimed at preventing existing situations escalating into conflicts, and urgent procedures are aimed at responding to problems requiring immediate attention. For more information, see “Committee on the Elimination of Racial Discrimination” (1996-2007) Office of the United Nations High Commissioner for Human Rights.
The report condemns the FSA as discriminatory against Māori. CERD found that the legislation appeared to extinguish the possibility for Māori to establish customary title over the foreshore and seabed and that it failed to provide a guaranteed right of redress.\textsuperscript{356} CERD noted that this was in contradiction to the Government’s obligations under the ICERD art 5, which requires that all State Parties guarantee everyone equality before the law, and art 6, under which State Parties agree to provide everyone with the right to seek just and fair compensation for any damage suffered as a result of racial discrimination.\textsuperscript{357}

The Labour-led Coalition Government responded angrily to CERD’s decision.\textsuperscript{358} Prime Minister Clark at first misrepresented the report and stated in an interview that she believed there was “nothing in that decision that finds that New Zealand was in breach of any international convention at all”.\textsuperscript{359} She then stated outright that the legislation would not be changed, pointing out that: “The legislation was passed, it has good support from the great majority of New Zealand and the legislation stands”\textsuperscript{360} The Prime Minister then dismissed CERD as unimportant, calling it simply a Committee “on the edges of the UN system”, and implied that the claimants were wrong to seek CERD’s revision of the FSA.\textsuperscript{361} As Claire Charters and Andrew Erueti argue, by rejecting CERD’s decision, the Government sent a message to other states that it is acceptable to dismiss CERD’s decisions.\textsuperscript{362} They highlight the danger in this:\textsuperscript{363}

> When one considers that the Committee also utilised its early warning and urgent action procedure to comment on the situation in Darfur, [sic] Sudan on the same day as it issued its CERD Decision, New Zealand’s response is clearly of grave concern.

\textsuperscript{357} ICERD, arts 5 and 6.
\textsuperscript{358} Quoted in Charters and Erueti, above n 353, at 286.
\textsuperscript{359} Ibid.
\textsuperscript{360} Ibid.
\textsuperscript{361} Ibid.
\textsuperscript{362} Ibid, at 287.
\textsuperscript{363} Ibid.
16.b. The United Nations Special Rapporteur’s Report

From 16 to 25 November 2005, Rodolfo Stavenhagen, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples (the Special Rapporteur), visited Aotearoa/New Zealand. The Government had issued a long-standing invitation for the Special Rapporteur to visit, and after the concerns raised in the CERD report, it was decided that he should. During the visit he meet with politicians, officials and Chief Executives of twelve different Crown agencies, members of the New Zealand Human Rights Commission, the Tribunal, and the Maori Land Court. He was hosted at several hui and met with leaders and representatives of iwi from all over the country. He also met with the Māori Studies Department at the University of Auckland, the Māori Women’s Development Corporation and the Ngāti Whātau Corporation. He issued his report on 13 March 2006.

In the Report the Special Rapporteur described the FSA as “a step backward for Maori”. He concluded the Act “extinguished all Maori extant rights to the foreshore and seabed”. He then, poignantly, recommended that:

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364 In 2001, the Commission on Human Rights appointed a Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, as part of the system of thematic Special Procedures. The Special Rapporteur’s mandate requires that (s)he examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights and fundamental freedoms of Indigenous People, and to identify, exchange and promote best practices; To gather, request, receive and exchange information and communications from all relevant sources, on alleged violations of their human rights and fundamental freedoms; To formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of Indigenous People; To work in close cooperation, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the Human Rights Council, relevant United Nations bodies, the treaty bodies, and human rights regional organizations. In the fulfilment of his or her mandate, the Special Rapporteur: Promotes good practices, including new laws, government programs, and constructive agreements between Indigenous Peoples and states, to implement international standards concerning the rights of Indigenous Peoples; Reports on the overall human rights situations of Indigenous Peoples in selected countries; Addresses specific cases of alleged violations of the rights of Indigenous Peoples through communications with Governments and others; Conducts or contributes to thematic studies on topics of special importance regarding the promotion and protection of the rights of Indigenous Peoples. For more information see “Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people” (1996-2008) Office of the United Nations High Commissioner for Human Rights <http://www2.ohchr.org/english/issues/indigenous/rapporteur/>


366 Stavenhagen, above n 365, at [3]-[5].

367 Ibid, at [55].

368 Ibid, at [79].
The Foreshore and Seabed Act should be repealed or amended by Parliament and the Crown should engage in treaty settlement negotiation with Maori that would recognize the inherent rights of Maori in the foreshore and seabed and establish regulatory mechanisms allowing for the free and full access by the general public to the country’s beaches and coastal area without discrimination of any kind.

Both the Labour-led Coalition Government and the National Party dismissed the report as unimportant, and failing to address the complexity of the Debate.\(^{370}\) The Deputy Prime Minister, Michael Cullen claimed the report was unbalanced, while Hon Gerry Brownlee, the Deputy Leader of the National Party, suggested that the United Nations should not tell this country what to do.\(^{371}\)

### 17. Conclusion

Before *Ngati Apa*, a mixture of common law principles and specific statutes governed title to the foreshore and seabed in Aotearoa/New Zealand. Following *Symonds*, the doctrine of native title was recognised in the early stages of the evolution of our law. However, that doctrine was restructured after the ruling in *Wi Parata*. Thereafter, only Māori rights in the foreshore and seabed that had a statutory basis were justiciable.

To a large extent, the Court of Appeal in *Ngati Apa* clarified the law. It overruled earlier judgments based on *Wi Parata* reasoning, and re-implemented the doctrine of native title. The Court concluded that the Crown’s sovereignty conferred radical title only and did not amount to beneficial title over the whole of Aotearoa/New Zealand. As a result, Māori native title had survived the assertion of Crown sovereignty. Furthermore, the Court found that this native title had not been extinguished by general legislation. The Court determined that the foreshore and seabed were “land” for the purposes of TTWMA, and therefore there was no impediment to the Maori Land Court investigating customary title in the zone.

This clarification was not to the Government’s liking, and it immediately began preparing a legislative response. The outcome was the FSA. This Act essentially

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\(^{369}\) Ibid, at [92].


\(^{371}\) See ibid.
negated the findings of the Court of Appeal. It placed all the public foreshore and seabed directly in Crown beneficial ownership and significantly changed the jurisdiction of the courts. Notably, it removed the jurisdiction of the Maori Land Court to declare the status of foreshore and seabed as customary land. In return, the legislation created two new types of customary rights. Territorial customary rights orders in effect provide a declaration that, but for the vesting of the public foreshore and seabed in the Crown, applicants would have been able to establish native title in specific foreshore and seabed. Customary rights orders replace non-exclusive use rights that might have been recognised under TTWMA or at common law.

Therefore, the FSA returned Māori customary rights in the foreshore and seabed to the post Wi Parata position, whereby only rights recognised in statute are justiciable. While some Māori customary rights are provided for under the Act, those based in the common law are extinguished. The common law doctrine of native title has therefore been overridden once more, and, under the current law, exclusive native title can never be awarded. The jurisdiction of the Maori Land Court to declare parcels of foreshore and seabed as customary land has also been removed. Customary title under TTWMA can also never be awarded. The Act is therefore evidence that Parliament still treats Māori customary property rights as an inferior form of title and a dispensable form of property right.
Chapter Three: Analysis of Key Documents

EQUALITY is the great political issue of our time. Liberty is forgotten: Fraternity never did engage our passions: the maintenance of Law and Order is at a discount: Natural Rights and Natural Justice are outmoded shibboleths. But Equality - there men have something to die for, kill for, agitate about, be miserable about. The demand for Equality obsesses all our political thought. We are not sure what it is - indeed … we are necessarily not sure what it is - but we are sure that whatever it is, we want it: and while we are prepared to look on frustration, injustice or violence with tolerance, as part of the natural order of things, we will work ourselves up into paroxysms of righteous indignation at the bare mention of Inequality.¹

1. Introduction

Although John Lucas was writing over forty years ago, his assessment is pertinent to Aotearoa/New Zealand during the Foreshore and Seabed Debate. Across all sectors of society and from opposing sides, people made claims for equality against what they perceived to be inequality. This chapter is an attempt to outline the main equality and rights arguments used in the Debate. To achieve this, four defining documents will be analysed.

The documents to be examined have been selected because they represent the broad spectrum of views on equality and rights exhibited during the Debate. While they were issued during a short period of time, the arguments within them span millennia, some finding their basis in the teachings of Aristotle, others in more contemporary legal philosophy.

The approach chosen for this chapter regards each document as evocative; equality and rights theories emerge from their texts. These theories will be analysed in detail in the following chapters and will establish the primary structure of the thesis. Many people used the equality and rights claims made in these documents, but to discuss the arguments that every group deployed in turn would lead to confusion and repetition. Thus, it seems preferable to draw all the major arguments employed from an initial set of documents, so the main theories are immediately on display. These competing

¹ John R Lucas “Against Equality” (1965) 40 Philosophy 296 at 296.
theories of equality and rights will then be analysed in more depth in subsequent chapters.

The documents chosen for this initial analysis have been arranged in chronological order. The first is the Paeroa Declaration, which was written and signed in July 2003, shortly after the Government’s announcement that it would legislate to place the foreshore and seabed in Crown ownership following the delivery of the Ngati Apa decision. The second is Don Brash’s “Nationhood” Speech, given in January 2004. Then Michael Cullen’s Article, written in February 2004, is studied. This Article appeared in all four major Aotearoa/New Zealand newspapers, and for all intents and purposes can be viewed as a statement of the Labour-led Coalition Government’s policy. The chapter then concludes with analysis of the Treaty Tribes Coalition’s One Rule of Law for All New Zealanders: A Submission by the Treaty Tribes Coalition on the Foreshore & Seabed Issue, presented to Parliament in late February 2004.

The Paeroa Declaration is included because it represents an important statement from Manawhenua. Brash’s Speech was delivered at a turning point in the Debate. It opened the discussion to wider racial issues, and represented common public views on

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2 The Paeroa Declaration (signed 12 July 2003) reproduced in Tino Rangatiratanga Te Takutai Moana (2nd ed, prepared as vol 2 of the IRI, Economics, Politics & Colonisation Series, 2003) at 11. For the full text of this Declaration see Appendix Two.


4 Donald Brash, Leader of the Opposition National Party “Nationhood” (State of the Nation Speech to the Orewa Rotary Club, Orewa, 27 January 2004). For the full text of this Speech see Appendix Three.

5 Michael Cullen “Challenge to find balance on issue of foreshore rights” Opinion, ODT (Dunedin, 18 February 2004) at 19. For a copy of this Article see Appendix Four.

6 For these other copies of the Article, with its text reproduced verbatim, see Michael Cullen “Happy middle ground” Perspective, The Press (Christchurch, 12 February 2004) at A7; Michael Cullen “Straight down the middle on foreshore and seabed” Perspectives, NZ Herald (Auckland, 12 February 2004) at A13; Michael Cullen “The rocky foreshore” Features, The Dominion Post (Wellington, 12 February 2004) at B7.

7 Treaty Tribes Coalition One Rule of Law for All New Zealanders: A Submission by the Treaty Tribes Coalition on the Foreshore & Seabed Issue (Treaty Tribes Coalition, Christchurch, 2004). For the full text of this Submission see Appendix Five.

8 Moana Jackson stated that, in Māori terms, the hui had mandate to make such a declaration. He noted that “most iwi were represented and many of those unable to be present made written submissions”. He also commented “the fact that over 1000 people attended is further testament to the validity of the views expressed”: Moana Jackson “Backgrounding The Paeroa Declaration” in Tino Rangatiratanga Te Takutai Moana (2nd ed, prepared as vol 2 of the IRI, Economics, Politics & Colonisation Series, 2003) 38 at 40.
the subject. Cullen’s Article was selected because it illuminated the Government’s view, and outlined the structure for the forthcoming legislation, the Foreshore and Seabed Act 2004 (the FSA). The Treaty Tribes Coalition’s Submission is useful for several reasons: first, because it represents the view of Ngāi Tahu, who are the Manawhenua in the region where this thesis is being written, whose voice must be heard; second, because the Treaty Tribes Coalition offers a different perspective to those of the other Manawhenua who signed the Paeroa Declaration; and, finally, because the Coalition wrote its Submission in direct response to Brash, and their views therefore counter his claims.

2. The Paeroa Declaration

Māori were quick to respond to the Government’s enunciated position. On 12 July 2003, Ngāti Maru called a national hui of iwi at Ngahutoitoi Marae in Paeroa. Over a thousand representatives from iwi across the country attended. It was one of the biggest political gatherings of Māori since the hui convened to combat the National Government’s implementation of the fiscal envelope in 1994.

A major concern expressed at the hui was the Government’s decision to legislate without the agreement of Māori. The hui offered an alternative to legislating Crown ownership, and culminated in the Paeroa Declaration. The Declaration was a synthesis of the views of the hui. It was based upon transcripts of the discussions at the hui, as

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9 Evidence that the Speech represented common public views is provided in Chapter Seven, which details empirical data supporting this claim.
10 Ngāi Tahu are the Māori people of the southern islands of New Zealand - Te Waipounamu (the Greenstone Valley) – the South Island. Ngāi Tahu are the iwi comprised of Ngāi Tahu whāmūi (collective); that is, the collective of the individuals who descend from the five primary hāpū of Waitaha, Ngāti Mamoe and Ngāi Tahu, namely Kāti Kurī, Kāti Irakehu, Kāti Huirapa, Ngāi Ūmūhi and Kai Te Ruahikihiki: Te Runanga o Ngai Tahu Act 1996, s 2. They hold authority over 80 per cent of the South Island. Throughout the South Island, there are 18 local Ngāi Tahu rūnanga (tribal collectives): “Home” (1996) Te Rūnanga o Ngāi Tahu <http://www.ngaitahu.iwi.nz/>,
11 A North Island iwi, who are part of the Hauraki cluster of iwi, from the Coromandel Peninsula.
12 Gathering, meeting.
13 Tribes, peoples, nations.
14 A North Island town just south of the Coromandel Peninsula.
16 A policy that established a one billion dollar cap on all Treaty settlements.
17 Walker, above n 15, at 383.
well as the written submissions received from those iwi and hapū who were unable to attend.

The Declaration outlines seven resolutions. In summary, it states that: the foreshore and seabed belong to hapū and iwi under their tino rangatiratanga; the signatories affirm their tūpuna rights to the foreshore and seabed; they direct the Māori Members of Parliament (MPs) to oppose any legislation that would extinguish or redefine customary rights; they support all hapū and iwi who wish to confirm their rights in the courts; and the Government must disclose its proposals to Manawhenua who would have the final decision over the foreshore and seabed.

2.a. The central themes within the Paeroa Declaration

I have identified seven central themes in the Declaration. The first theme is that the foreshore and seabed had always been under the jurisdiction of Manawhenua. Manawhenua had always regarded the zone, within their boundaries, as belonging to them. Such jurisdiction is founded in the tino rangatiratanga of iwi, guaranteed in art 2 of the Treaty. Tino rangatiratanga encompasses both governance and property. Thus, resolution 1, which states, “The foreshore and seabed belong to the Hapu and Iwi under our tino rangatiratanga”, can be viewed as more than a claim to property; it is a claim to authority over the zone, from which their ownership rights are sourced. The signatories emphasised that this ownership claim was not new. They claimed that

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18 Sub-tribes, clans.
19 See the Paeroa Declaration, above n 2. Resolution 1 made clear that Māori claim ownership of the foreshore and seabed. Resolution 2 reaffirmed resolution 1 by stating that these rights pertained to Māori as “whenua rangatira” (chiefs of the land). In resolution 3 the signatories directed the Māori MPs to oppose the legislation. Resolution 4 acknowledged that each Manawhenua was entitled to pursue a solution in the way it thought best. In resolution 5 the signatories required the Government to disclose its proposals to Manawhenua, whose decision to accept or reject would be final. Resolution 6 stated: “The final decision on the foreshore and seabed rests exclusively with whanau, Hapu and Iwi”. In resolution 7 the signatories accepted the invitation of Te Tau Ihu to host the next hui.
20 ‘Tino rangatiratanga’ has varying meanings. These include sovereignty, ultimate chieftainship, chieftainship, right to exercise authority, chiefly autonomy, self-determination, self-management, indigenous rights and mana Māori (the Māori way of life).
21 Ancestors.
22 The Paeroa Declaration, above n 2, resolution 1.
the foreshore and seabed were vested in the authority of rangatira,\textsuperscript{24} called tūpuna rights, an ancestral birthright.\textsuperscript{25}

The second theme is therefore that Māori possessed property rights in the foreshore and seabed. To the signatories, these rights amounted to what would be classed today as full and exclusive title.\textsuperscript{26}

The third theme is that under tikanga\textsuperscript{27} the foreshore, seabed and dry land are all interrelated. The signatories stated that Māori were “whenua rangatira”,\textsuperscript{28} chiefs of not only dry land, but land under water as well. They contended that their rights in the foreshore and seabed were analogous to rights in dry land. These were derived from ancestral precedents.\textsuperscript{29}

The fourth theme is that each Manawhenua hold separate and distinct rangatiratanga\textsuperscript{30} over specific areas of foreshore and seabed. Thus, each Manawhenua were free to pursue their rights in the foreshore and seabed in the way they thought best.\textsuperscript{31} For some, the best resolution would be sought in the courts, while for others another route might be appropriate.

The fifth theme is that Māori were fervently against legislating for Crown ownership. In resolution 3, they directed the Māori MPs to oppose the legislation in accordance with the views of Māori voters. However, as Moana Jackson noted, this resolution went even further:\textsuperscript{32}

Perhaps more importantly it acknowledges that the government authority to extinguish or redefine Iwi and Hapu rights is itself an assumed one with

\textsuperscript{24} Chiefs, nobles.
\textsuperscript{25} The Paeroa Declaration, above n 2, resolution 2.
\textsuperscript{26} This interpretation can be read into resolution 1, which states: “The foreshore and seabed belong to Hapu and Iwi under our tino rangatiratanga”. Jackson contended that this resolution reaffirmed that the foreshore and seabed have always been under the jurisdiction of Manawhenua through their tino rangatiratanga. This in turn was affirmed in the Treaty as part of their “exclusive and undisturbed” possession of land. See Jackson, above n 8, at 38.
\textsuperscript{27} Customs.
\textsuperscript{28} The Paeroa Declaration, above n 2, resolution 2.
\textsuperscript{29} Ibid.
\textsuperscript{30} Shortened form of ‘tino rangatiratanga’. See above n 20.
\textsuperscript{31} The Paeroa Declaration, above n 2, resolution 4.
\textsuperscript{32} Jackson, above n 8, at 38.
precedents based solely on the power taken by colonising States to dispossess
Indigenous Peoples.

Therefore, the sixth theme is that the Government’s power to decide rights in the
foreshore and seabed is an assumed one; the real power lay with individual
Manawhenua who should make the final decision.\textsuperscript{33} This is an exercise of
rangatiratanga, which the Government could not impede. Accordingly, the signatories
meant that rangatiratanga, and the rights associated with it, sat at a higher
constitutional level than is currently recognised in the legal system.

The seventh theme, implicit in the right to make decisions over the foreshore and
seabed, and in the concepts of tūpuna title and rights, is the obligation of
kaitiakitanga.\textsuperscript{34} This meant that with tūpuna title came the obligation to maintain and
manage the foreshore and seabed for generations to come.

In total, as Jackson noted, the Paeroa Declaration “is simply a clear and definitive
synthesis of Maori views that the foreshore and seabed have always belonged to Iwi
and Hapu”.\textsuperscript{35}

\section*{2.b. Equality and right arguments in the Paeroa Declaration}

The Paeroa Declaration was encased in the language of indigenous rights. The
signatories made it clear that they claimed ownership of the foreshore and seabed.
This ownership was sourced in tikanga Māori\textsuperscript{36} and was reaffirmed in art 2 of the
Treaty.\textsuperscript{37} They emphasised that these rights were not new, they existed before the
signing of the Treaty, and had never been relinquished.\textsuperscript{38} The status of Māori as the
Indigenous Peoples of Aotearoa/New Zealand entitled them to these property rights.\textsuperscript{39}

\begin{flushright}
\textsuperscript{33} The Paeroa Declaration, above n 2, resolution 6.
\textsuperscript{34} Jackson, above n 8, at 40. ‘Kaitiakitanga’ means guardianship, stewardship. Section 2 of the
Resource Management Act 1991 defines it as:
… the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori
in relation to natural and physical resources; and includes the ethic of stewardship.
\textsuperscript{35} Jackson, above n 8, at 39.
\textsuperscript{36} Māori customary law. Section 4 of Te Ture Whenua Maori Act 1993 (TTWMA) defines ‘tikanga
Maori’ as: “Maori customary values and practices”.
\textsuperscript{37} The Paeroa Declaration, above n 2, resolution 1.
\textsuperscript{38} Ibid, resolution 2.
\textsuperscript{39} Ibid.
\end{flushright}
These rights were derived from, and take legitimacy, from ancestral precedents.\textsuperscript{40} Thus, in reality, the signatories were arguing that tikanga should be recognised as a legitimate source of law, and their property rights should be recognised in their entirety in the state legal system.\textsuperscript{41}

The signatories note that some Māori prefer to have their rights recognised within the established state system.\textsuperscript{42} On the other hand, they underline that others may wish to reshape more radically the manner in which the legal system recognises their rights, and the structures of the sources of law.

The Declaration also makes several claims to exclusive authority over the resource. The first appears in resolution 1 where the signatories assert their ownership over the resource, and source such rights in the authority of their tino rangatiratanga. As discussed in Chapter Two, the meaning of tino rangatiratanga is contested. It is therefore not clear what precise meaning the signatories attributed to it. In fact different signatories might have held very different views.

The commonality across these different understandings is that tino rangatiratanga is inherently about authority. In terms of the Debate, it encompasses the right to make decisions over the zone. Thus in resolution 1, the signatories might be claiming sovereignty over the resource. Such sovereignty properly resides in the Manawhenua. Acceptance of such a view “means there must be a plurality of Māori ‘sovereigns’ – those who possess and (should be able to) exercise rangatiratanga”.\textsuperscript{43}

In resolution 5, however, Manawhenua authority arguments explicitly appear. That resolution states: “The government must disclose its proposals to whanau, Hapu and Iwi immediately, whose decision to accept or reject will be final”. Jackson acknowledged that this resolution came about from concern that the Government was

\begin{itemize}
\item \textsuperscript{40} Ibid.
\item \textsuperscript{41} The idea that these rights should be upheld in the law was further alluded to in resolution 3 in which the signatories call on the Māori MPs to oppose any legislation that removes or redefines the customary rights and title of Manawhenua: ibid, resolution 3.
\item \textsuperscript{42} Ibid, resolution 4.
\item \textsuperscript{43} Simon Hope “The Roots and Reach of Rangatiratanga” (2004) 56 Political Science 23 at 43. See also Wira Gardiner in Hineani Melbourne Māori sovereignty: The Maori perspective (Hodder Moa Beckett, Auckland, 1995) 79 at 83.
\end{itemize}
proceeding without reference to Māori.\textsuperscript{44} The signatories were talking in Treaty partnership terms, but this goes one step further in stating that Manawhenua should have the last say. This implied that the sovereignty exercised by Parliament is fettered, and that the ultimate authority to determine Māori rights rested with Manawhenua.

Resolution 6 reiterated this, stating, “The final decision on the foreshore and seabed rests exclusively with whanau, Hapu and Iwi”. This not only restates the Manawhenua authority claim made in resolution 5, it implies that the signatories were making a claim to absolute, expansive sovereignty. Such sovereignty would seem to be all-inclusive, covering all citizens, Māori and non-Māori, within the territory.\textsuperscript{45} In other words, the resolution appears to assert Manawhenua predominance: that is, the exclusive authority of Manawhenua to decide all matters with respect to the foreshore and seabed. To the signatories, the Crown cannot impede such exclusive authority.

On one view of it, the claim to Manawhenua sovereignty even contradicts the notion of equality, as does any strong claim to sovereignty, including Brash and Cullen’s claims for parliamentary sovereignty, which will be discussed shortly, because a claim to sovereignty is a claim to exercise paramount authority, an authority not shared with any other group or body. As Patrick Macklem acknowledged, “recognition of special political jurisdictions on the basis of indigenous difference appears to clash with political and ethical, if not constitutional, commitments to equality”.\textsuperscript{46} Such assertions show that, although claims to rights and equality can be complementary, sometimes they conflict.

The Paeroa Declaration therefore contains fundamental assertions concerning indigenous rights and Manawhenua authority, rather than equality arguments.

There are still implied equality claims embedded in the Paeroa Declaration. Jackson noted that resolution 4 acknowledges that “government attempts to pass legislation vesting ownership of the foreshore and seabed in the Crown effectively denies Iwi

\textsuperscript{44} Jackson, above n 8, at 39.
\textsuperscript{45} Hope, above n 43, at 41-42.
and Hapu access to the Courts - they deny the due process of its own law.” 47 Therefore, he saw in this resolution an implicit claim for equal access to the courts, a form of equality under the law.

Furthermore, if the Declaration’s resolutions were to be implemented, this might promote greater substantive equality between Māori and other groups within the state: that is, a more equal distribution of wealth and resources. Were Māori to gain exclusive title over the foreshore and seabed, then those Manawhenua who owned specific sections of it would be able to develop the resource as they saw fit. This could produce economic benefits and put Manawhenua in an equal position with other commercial interests active in the zone, such as marine farmers and tourism companies, leading to greater equality in outcomes. 48 Nevertheless, this is an implicit rather than explicit theme in the Declaration.

Finally, the signatories’ assertion of Manawhenua predominance, might itself be based on an underlying assertion of equality: Manawhenua are just like the Crown, and if the Crown wants to insist on authority based on its law, Manawhenua can too. Those two assertions of authority might contradict one another: they might simply assert inconsistent claims of sovereignty. Nevertheless, it is reasonable to see the notion of equality embedded in the signatories’ authority assertions, perhaps through the concept of equality of peoples. 49 Under this concept of equality, the proper measure of the distribution of sovereignty is equality between peoples, not equality between individuals. 50 That is, while the concept of Manawhenua sovereignty over the foreshore and seabed may deny equality between Māori and non-Māori at the level of the individual distribution of resources, at a higher level it may recognise

47 Jackson, above n 8, at 39.
48 Equality of outcome is a form of egalitarianism that seeks to reduce or eliminate differences in material condition between individuals or people.
49 For a detailed discussion on the concept of equality of peoples, see Macklem, above n 46. Macklem argued that equality of peoples was a form of equality that should be used to assess the justice of Tribal Governments in the United States: at 1350-1366. He holds that from the perspective of equality of peoples, Tribal Governments can “advance powerful claims for a degree of sovereignty over their individual and collective identities”: at 1367. In the United States, Tribes have the status of “domestic dependent nation[s]”: The Cherokee Nation v The State of Georgia 30 US 1 (1831) at 17 per Marshall CJ. This judgment recognised Indigenous nationhood and a restricted sovereignty, but not equality with the Federal Government. Other United States Supreme Court decisions have limited this sovereignty even further. For examples of the limitations of Tribal sovereignty, see Chapter Four, Section 8.a.ii.
50 See Macklem, above n 46, at 1315.
equality between the Crown and Manawhenua as equal but separate sovereign powers, or as equal partners under the Treaty.

Thus, implicitly, what the signatories might be arguing for is what I term equality of authority. This can be viewed as one expression of equality between peoples, and requires equality to be realised between two equal but separate authoritative powers, Manawhenua and the New Zealand Government (or Crown). It would recognise that Manawhenua should have jurisdiction over certain areas and resources, including the foreshore and seabed, on a par with the authority exercised by the Crown over other areas and resources in Aotearoa/New Zealand.

Moreover, in the Declaration, the signatories called for their tikanga to be recognised on a par with English legal norms as a legitimate source of law for the country. All rights arising out of tikanga should be upheld in their entirety. This too could also mean Manawhenua should be recognised as equal sovereigns to the Crown, and as the rightful decision makers over the foreshore and seabed.

While the assertion of authority in the Declaration is made only with respect to the foreshore and seabed, resolution 1 makes that assertion clear, and therefore equality of authority can be read into its text, the signatories certainly do not renounce claims to sovereignty beyond that sphere. The Declaration contains no express concession of another zone in which Parliament has authority and it does not expressly acknowledge any independent authority for governmental institutions. It simply asserts a unilateral final power of determination in the hands of Manawhenua concerning the foreshore and seabed. The signatories might still claim a general sovereignty that contests with that of the Crown. If this is indeed the case, then the signatories might be making a claim that denies equality, in a certain sense.

Moreover, while the signatories accept that the Treaty guarantees their rights in art 2, it is not clear whether they accept that art 1 acknowledges Crown sovereignty or merely some lesser form of governance. If they do accept some form of Crown sovereignty, they might be asserting a unilateral right, under tino rangatiratanga, to determine where that sovereignty begins and ends.
2.c. Why the Paeroa Declaration is important to the Foreshore and Seabed Debate

The mainstream media failed to identify the seriousness of the Declaration, and very little about the hui was reported. The Declaration was a clear affirmation of Manawhenua views, written by Māori on behalf of Māori. It sent a clear message to the Government and to Māori MPs that the signatories believed that the foreshore and seabed belonged to them.

As Ranginui Walker explained, “The Paeroa Declaration put the Government between a rock and a hard place”.51 In order to maintain power they had to appease the general voting public and legislate the foreshore and seabed into Crown ownership. However, by doing so they risked losing the Māori vote that Labour had held, almost continually, since the 1940s. Both John McEnteer, spokesman for the Hauraki Maori Trust Board,52 and Arapeta Tahana, chairman of the Te Arawa Maori Trust Board,53 publicly announced that the Government would be likely to lose Māori support should it continue with its policy.54

The Declaration is also important because it signalled the start of pan-iwi opposition to the Government’s policy for the foreshore and seabed. This was followed by other hui and subsequent declarations, as well as by the establishment of a working group, Te Ope Mana a Tai, which countered the Government’s proposals and issued

51 Walker, above n 15, at 383.
52 The Hauraki Maori Trust Board was created to fulfil the desire of the Hauraki people to collectively and to effectively influence decisions being made about their future and environments. The Board was established under the Hauraki Maori Trust Board Act 1988 and operates under the Maori Trust Boards Act 1955. The Board comprises twelve members who together represent the twelve Hauraki Iwi and form the governing body. The Board operates in the North Island, in a tribal region known as Hauraki, and is based in Paeroa. The Board runs core services and programmes and has subsidiaries to manage the commercial interests of the Board. For more information, see its website “Home” Building the Hauraki Nation, together <http://www.hauraki.iwi.nz/index.htm> (accessed 21 October 2008).
53 The Te Arawa Maori Trust Board was established in 1924, pursuant to s 27 of the Native Land Amendment Act and the Native Land Claims Adjustment Act 1922. It now operates under the Maori Trust Boards Act 1955. Fifteen hapū were represented on the Board as well as one seat allocated for soldiers, totalling 19 representatives. Initial membership of the Board was based on ownership of the fourteen Te Arawa lakes, which surround the Rotorua district, and remained the structure of the Board. The Board’s statutory role was to administer an annual payment of $18,000 from the Crown, for the public use of the lakes. For more information see the Trust’s website: “Welcome to Te Arawa Lakes Trust” (2008) Te Arawa Lakes Trust <http://www.tearawa.iwi.nz/>.
54 Quoted in Ruth Berry “Iwi warning for Maori MPs” Politics, NZ Herald (Auckland, 14 July 2003) at A6.
alternatives. In late 2003, several iwi submitted a claim to the Waitangi Tribunal (the Tribunal) and in May 2004 northern iwi orchestrated a national hīkoi to Parliament, of a kind not seen since the Land March of 1975. In August 2004, the Treaty Tribes Coalition sought international aid and took their opposition to the proposed Foreshore and Seabed legislation to the United Nations Committee on the Elimination of Racial Discrimination (CERD).

### 3. Don Brash’s “Nationhood” Speech

Brash served as the Leader of the National Party, New Zealand’s main opposition party at the time, from 28 October 2003 to 27 November 2006. He was that Party’s Leader throughout the Debate, and managed to capitalise on the public mood surrounding the issue during his “Nationhood” Speech, which propelled the National Party ahead of the governing Labour Party in the public opinion polls for the first time since 2000.

Brash began his career in the 1960s working as an economist for the World Bank after graduating with his Doctorate of Philosophy in Economics. In 1971 he returned to New Zealand to serve first as the general manager of the Broadbank Corporation, then as managing director of the New Zealand Kiwifruit Company, and then as general manager of Trust Bank, before being appointed to the position of Reserve Bank Governor in 1988, a position he held for fourteen years. It was during his time as manager of the Broadbank Corporation that Brash made his first attempts to enter politics. In 1980 the National Party elected him to stand as its candidate in a by-election in the East Coast Bays electorate. His endeavour failed, however, as did his second attempt in the general election of 1981.


56 March.


58 Vernon Small “National’s shock poll surge: Clark plays it cool” The Dominion Post (Wellington, 16 February 2004) at Front Page.
In 2002, shortly before the general election, Brash resigned as Reserve Bank Governor to try his hand at politics for a third time. He stood as a candidate for Parliament on the National Party list. He was ranked fifth on the list, so even though the National Party had its worst performance ever, gaining just twenty one percent of the party vote, his ranking guaranteed him a seat in Parliament. He was appointed the National Party’s spokesperson on finance. After only a year in Parliament, he successfully challenged Hon Bill English for the position of Parliamentary Leader of the National Party.

On 27 January 2004, in front of an audience of National Party supporters at the Orewa Rotary Club, Brash delivered his first state of the nation address, entitled “Nationhood”.59 His Speech focused on what his party perceived as Māori racial separatism and the need to treat all New Zealanders equally under the law. His Speech was a direct response to the Labour-led coalition Government’s foreshore and seabed policy document, “The Foreshore and Seabed of New Zealand: Government Proposals for Consultation”, that was released after Parliament had closed for the year on 17 December 2003.60

Brash’s Speech was framed in the language of equality and pragmatism. This was evident in its opening where he asks:61

… what sort of nation do we want to build?

Is it to be a modern democratic society, embodying the essential notion of one rule for all in a single nation state?

Or is it the racially divided nation, with two sets of laws, and two standards of citizenship … ?

He followed this with Lieutenant Governor William Hobson’s famous words, “He iwi tahi tātou”, spoken at 1840 at the signing of the Treaty, which he translated as the equality statement: “We are all one people”.62

59 Brash, above n 4.
60 Ibid, at 3.
61 Ibid.
He heavily pushed the catch cry ‘need not race’ as the relevant consideration for social and political initiatives. He claimed it was imperative that he speak against a Government whose policies granted Māori “a birthright to the upper hand”. He had to speak on the state of race relations, as the Government’s foreshore and seabed policy was moving New Zealand away from the ideal of a modern democratic society, that embodied the notion of one law for all in a single state, towards a racially divided nation, with two sets of laws, and two standards of citizenship based on race.

Brash supported Crown ownership of the foreshore and seabed. But he argued that the Government’s policy document would still bestow vast powers on Māori, over and above their traditional, limited customary rights. He claimed this would include the ability to veto development in the foreshore and seabed. He argued the Government’s policy would award Māori a new role in the management of the coastline. To him, the customary title that could be recognised would give Māori commercial development rights that would deny public access.

Brash touched a raw nerve among many New Zealanders who believed Māori had derived advantages from the Government that were denied the rest of the population. He was rewarded for his comments with the National Party sustaining a record increase in support in the political polls over the subsequent weeks. A Colmar Brunton poll for Television New Zealand, taken in February 2004 shortly after the speech, showed one of the most dramatic political turnarounds in polling history. For the first time in 6 years the National Party had overtaken the Labour Party in popularity. The National Party gained 17 percentage points, to 45 percent of the

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62 Ibid. Joan Metge has suggested that a better translation of the phrase would be “We two peoples together make a nation” or, to give it a wider interpretation “We many peoples together make a nation”: Joan Metge “Ropeworks - He Taura Whiri” (Waitangi Rua Rau Tau (Waitangi Bicentenary) lecture, 1 February 2004) at 10.
63 Brash, above n 4, at 3 and 14.
64 Ibid, at 3.
65 Ibid.
66 Ibid, at 10.
67 Ibid.
68 Ibid.
69 Ibid, at 11.
70 Ibid.
71 See Walker, above n 15, at 397.
popular vote, to go ahead of the Labour Party on 38 percent. This was the biggest gain by a political party in a single poll in Colmar Brunton’s polling history.\textsuperscript{72}

The Labour-led Coalition Government was quick to denounce Brash’s claims. However, when it became apparent that a number of New Zealanders supported the National Party stance, they changed their tactics. They took up Brash’s ‘need not race’ catch cry and commissioned an audit of all Government programmes to determine if there were race-based programmes in existence, and if so whether need-based programmes would suffice.\textsuperscript{73} The Government also implemented Brash’s call for the foreshore and seabed to be in Crown ownership. At the first reading of the Foreshore and Seabed Bill 2004, on 6 April 2004, the foreshore and seabed was no longer to be designated in the public domain. Rather, it was to be placed under Crown ownership.\textsuperscript{74}

3.a. The central themes within the “Nationhood” Speech

I have identified nine central themes in the “Nationhood” Speech. The underlying theme was that there should be one law for all. Brash claimed New Zealand was a single nation state, and we were all one people, therefore we must all be treated equally.\textsuperscript{75} Māori currently hold special rights and privileges over and above other New Zealanders, he asserted.\textsuperscript{76} This was unacceptable. He advocated that there could be no justification for treating people differently based on race.\textsuperscript{77}

His ancillary theme was that social and political initiatives must be based on need, not race. To Brash, Māori in need were entitled to the same assistance as other New Zealanders, and no more.\textsuperscript{78}

\textsuperscript{72} “One News Colmar Brunton poll: February 04” (14 February 2004) TVNZ <\texttt{http://tvnz.co.nz/content/255490}>, One News had to have the results rechecked by Colmar-Brunton to ensure they were accurate, since the National Party’s turnaround in one poll was so remarkable.


\textsuperscript{74} Foreshore and Seabed Bill 2004 (129-1), cls 3(a) and 11.

\textsuperscript{75} Brash, above n 4, at 3.

\textsuperscript{76} Ibid, at 2-3 and 13.

\textsuperscript{77} Ibid, at 13.

\textsuperscript{78} Ibid, at 14.
The third theme was that the Treaty must not be a basis for giving greater civil, political or democratic rights to any ethnic group. To Brash, the Treaty did not afford Māori any rights over and above the rights other New Zealanders possess.\(^79\)

The fourth theme was that the Treaty was the launching pad for New Zealand as a sovereign nation. In it, Brash claimed, Māori ceded sovereignty to the Crown and received guarantees for their property and equal citizenship rights.\(^80\) It was not a blueprint for building a modern, prosperous state, and it did not create a partnership.\(^81\)

This led to his fifth theme, that the Treaty claims process was divisive. Brash acknowledged that there were injustices, and where there had been a clear breach, such as land being stolen, then it was right to make amends.\(^82\) However, this could only be a gesture at recompense and there was a limit to how much one generation could apologise for the sins of its grandparents.\(^83\)

The sixth theme is that the inclusion of Treaty principles in legislation was divisive. Brash argued that the principles of the Treaty had never been clearly defined and were continually being expanded by an unelected judiciary.\(^84\) To him, the principles of the Treaty were the “thin end of a wedge leading to a racially divided state”.\(^85\)

The key foreshore and seabed theme was that recognising customary title would give Māori veto powers over others and a more dominant role in the use and development of the coastline.\(^86\)

The eighth theme is that if Māori did possess any rights in the foreshore and seabed, these were very limited, and amounted only to traditional use rights.\(^87\) Such rights could only be exercised in a traditional manner.

\(^79\) Ibid, at 13.  
\(^80\) Ibid.  
\(^81\) Ibid.  
\(^82\) Ibid.  
\(^83\) Ibid, at 5-6.  
\(^84\) Ibid, at 7.  
\(^85\) Ibid, at 13.  
\(^86\) Ibid, at 10.  
\(^87\) Ibid.
The final, ninth theme was that citizenship brings obligations as well as rights. Brash argued that Māori must take some responsibility for what is happening in their communities and build their own future with their own hands.\(^{88}\) To Brash, Māori had an obligation to build a culture of aspiration, not of grievance.\(^{89}\)

### 3.b. Equality and right arguments in the “Nationhood” Speech

**3.b.i. ‘One law for all’**

Brash’s language was that of formal equality between individuals, a principle that Aristotle formulated in reference to Plato: ‘Treat like cases alike’.\(^{90}\) When applied to Aotearoa/New Zealand, the principle was that Māori and other New Zealand citizens are all alike, we are all New Zealanders, we are all one people, so we must all be treated the same. As Dominic O’Sullivan contended, the ‘one law for all’ that Brash proposed would remove the ability to account for difference from the liberal democracy practised in New Zealand.\(^{91}\)

Brash approached equality from an egalitarian viewpoint. Egalitarianism can be considered:\(^{92}\)

… a trend of thought in political philosophy. An egalitarian favours equality of some sort: People should get the same, or be treated the same, or be treated as equals, in some respect. Egalitarian doctrines tend to express the idea that all human persons are equal in fundamental worth or moral status.

On the one hand, Brash was much more concerned with similarities between New Zealanders than their differences. That was the egalitarian standpoint; all people are the same. On the other hand, he was concerned that all New Zealanders be treated in

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\(^{88}\) Ibid, at 14-15.

\(^{89}\) Ibid, at 15.


the same manner. That was the formal equality factor; all people should be treated the same.

It follows that if people are being treated differently, there ought to be some relevant difference between them to justify it. This perception of equality can be seen in Brash’s treatment of rights. Brash argued for a severely restricted definition of Māori customary rights: limited traditional use rights. For Brash, the indigenous status of Māori was not a relevant difference to justify recognising different rights of Manawhenua that amount to more than those traditional use rights in the foreshore and seabed. He reiterated this in the conclusion of his Speech:

The indigenous culture of New Zealand will always have a special place in our emerging culture, and will be cherished for that reason.

But we must build a modern, prosperous, democratic nation based on one rule for all. We cannot allow the loose threads of 19th century law and custom to unravel our attempts at nation-building in the 21st century.

Brash therefore articulated a view of equality that cannot accept customary rights or title as recognised sources of law. In his view there was no relevant justification for Manawhenua to possess special modern rights that others cannot possess. Throughout his Speech he claimed that the guarantees within the Treaty are not relevant justifications for Māori to possess different rights. This can be seen in two separate statements: first, that “The Treaty of Waitangi should not be used as the basis for giving greater civil, political or democratic rights to any particular ethnic group”, and the second, in the stronger statement, that:

… the Treaty is not some magical, mystical, document. Lurking behind its words is not a blueprint for building a modern, prosperous, New Zealand. The Treaty did not create a partnership: fundamentally, it was the launching pad for the creation of one sovereign nation.

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93 Brash, above n 4, at 10 and 14.
94 Ibid, at 10-11.
95 Ibid, at 15.
96 Ibid, at 8.
We should not use the Treaty as a basis for creating greater civil, political or democratic rights for Māori than any other New Zealander. In the 21st century, it is unconscionable for us to be taking that separatist path.

Brash was essentially applying the notion of formal equality, which is often the foundation for the universal application of civil or human rights and freedoms, where there are few relevant foundations for treating people differently. "98 Thus, all New Zealanders must have equal rights and duties. These rights and duties must be grounded in laws that apply to everyone. Brash saw no justification for incorporating the principles of the Treaty into legislation, or for acknowledging the existence of customary title in legislation, as the rights guaranteed in art 2 of the Treaty and aboriginal customary rights were not relevant distinctions for treating Māori differently. Brash argued that to incorporate such principles in legislation gave Māori rights over and above other citizens. "99 To him, race-based features in legislation were divisive, "100 and the incorporation of Treaty principles would lead to a "racially divided state". "101 Thus, "102

There can be no basis for special privileges for any race, no basis for government funding based on race, no basis for introducing Māori wards in local authority elections, and no obligation for local governments to consult Māori in preference to other New Zealanders.

Brash’s argument therefore largely ignored the content of art 2 of the Treaty. He denied art 2 was any guarantee of Māori property rights, or that the Crown should feel obliged to honour that guarantee. As Jeffery Sisson explained: "103

The recognition of indigenous rights is, in his [Brash’s] view, creating a form of separatism that is in contradiction to the notion that New Zealanders should be treated as ‘one people’. If he were a Māori, he says, he would view legislation that specifically required consultation with Māori, in addition to consultation with the wider community, as condescending because it assumes Māori are not part of that wider community. Māori need to be liberated from the shackles of separatism.

99 Brash, above n 4, at 2.
100 Ibid, at 13.
101 Ibid.
102 Ibid.
in order to become New Zealand citizens with the same rights as all other citizens.

For O’Sullivan, the ‘one law for all’ that Brash utilised was a form of popular liberalism.104 Like Sisson, he viewed the theoretical legitimacy of Brash’s ‘one law for all’ as giving “priority of the whole over membership of the indigenous community”.105 In that way, Māori were first and foremost New Zealanders. They should not be singled out as a specific group. Their needs would be met best as New Zealanders, not as Māori.

Brash clearly believed that Aotearoa/New Zealand must be a society where everyone is treated equally as New Zealanders. In this way, Brash seems to advocate for an egalitarian liberal position, one that requires equal treatment of all for justice.106 It can be argued that Brash holds a similar view to Brian Barry, a British liberal political philosopher, who advocated that in a just society “the right amount of diversity – and the right amount of assimilation – is that which comes about as a result of free choices within a framework of just institutions”.107 Barry contended that within the liberal framework people are free to make different choices, including the choice to associate with their culture and carry out its practices, this being freedom of association, as long as such cultural practices don’t violate core liberal values such as equal treatment.

Under such a view, it follows that the abstraction of the state from cultural difference allows room for the self-determination of people. Barry claimed “As far as most culturally distinctive groups are concerned, a framework of egalitarian liberal laws leaves them free to pursue their ends either individually or in association with one another”.108 It therefore follows under this reasoning, which Brash applies, in a just society, different groups shouldn’t have different political rights and obligations, and important institutional benefits shouldn’t be available to some and not others, because it is abhorrent to the notion of equal treatment.109 Indeed the “liberal commitment to

104 O’Sullivan, above n 91, at 5.
105 Ibid.
107 Ibid.
109 See ibid, at 71.
civic equality entails that laws must provide equal treatment for those who belong to different religious faiths and different cultures”.

In denying any justification for indigenous rights, Brash viewed Māori primarily as individuals with needs. To him, need was the relevant justification for unequal treatment. The language he used was encased in the language and theory of liberal individualism. The equality he endorsed primarily was between individuals.

Brash went on to state that Māori must: \[112\]

\[\ldots \text{take some responsibility themselves for what is happening in their own communities. Citizenship brings obligations as well as rights. The Maori translation of Article Three was very clear about that. We all have an obligation to make effort to build a culture of aspiration \ldots not a culture of grievance. Like everybody else, Maori must build their own future with their own hands.}\]

The assertion that Māori “must build their own futures with their own hands” implies a classical, Lockean liberal view on equality. To warrant rights in land you must have mixed your labour with it. Essentially, if you are to receive unequal reward, you must deserve it. For Brash, Māori did not deserve special modern rights in the foreshore and seabed, and they had done nothing to warrant special rights over and above other New Zealanders who used the zone.

Viewed in that light, his argument that Māori could only ever possess limited traditional use rights may be because he believed that these were the only rights that had evolved from Māori mixing their labour with their land. Thus, they could only be exercised in a traditional manner, because to exercise them using modern methods would give Māori a greater use of the land than their original mixing of labour had produced.

Such a position holds Māori society as static, with any ‘true’ use rights being only those that are practiced in a traditional manner. Brian Slattery warned that people

\[110\] Ibid, at 24.
should guard against this is a notion. He explained that Indigenous groups are characterised by their ability to adapt to changing circumstances. He argued that the rights available to Indigenous Peoples should reflect this, “subject only to the need to maintain their basic link with the land”.

Pre-European Māori society was dynamic. New developments affected the exercise of rights. Then with the arrival of Europeans, further changes occurred. Brash gives no indication whether his perception of “traditional rights” were pre-European contact, or pre-Treaty. It seems he defined traditional as pre-European though, because in response to contact with European, Māori society adapted to exercise new commercial and development rights. For example, Māori were “capable and competitive entrepreneurs” who actively participated in the commercial trade of produce, flax and timber and developed and cultivated land to grow such commodities on a large scale. Such adaptations did not bring about the abandonment of a group’s fundamental identity.

113 Brian Slattery “The Nature of Aboriginal Title” in Owen Lippert (ed) Beyond the Nass Valley: national Implications of the Supreme Court’s Delgamuukw Decision (Fraser Institute, Vancouver, 2000) 11 at 22.
114 Ibid.
115 Ibid. Slattery makes the same argument in relation to First Nation adaptations during the early contact period with Europeans in North America. Slattery, above n 113, at 22.
117 For example, Ballara noted that it was a feature of Māori horticulture to clear new land as needed. Those who first cleared the land often gained rights within them. These were then passed down to their descendants: ibid, at 197-196.
118 For example, Dean Cowie, in a working paper for the Waitangi Tribunal (the Tribunal), outlined that in the Hawke’s Bay, on the east coast of the North Island, local Māori and whalers participated in a commercial market, where [Dean Cowie Rangahaua Whanui District 11B: Hawke’s Bay (Working Paper: First Release, prepared for the Waitangi Tribunal as part of the Rangahaua Whanui Series 1996) at 22]:

As well as ideas, different work patterns were introduced. Maori were employed on whaling stations, and were also engaged in planting, harvesting and preparing flax for trade. Other foodstuffs were grown to supply the whalers, and husbandry of a variety of introduced animals was carried out.

120 King noted that in fact, the co-operative nature of Māori society and the cultural practices of mutual obligation were an asset to this trade: ibid.
3.c. Why the “Nationhood” Speech is important to the Foreshore and Seabed Debate

Although Brash did not focus his Speech entirely on the prevailing issue of the foreshore and seabed, his Speech is one of the most influential documents in the Debate. It saw the National Party surge ahead in the polls, where it had been languishing after an overwhelming 2002 election defeat. The Speech also catapulted Brash, as the new leader of the National Party, into the public eye, and was instrumental in establishing his public profile.

The Speech created a shift in focus, opening the Debate to wider race relations issues. It signalled a direct challenge to the politics of biculturalism and partnership that had arguably dominated Crown-Māori relations since the late 1980s. As Phillipa Mein Smith explained, Brash:

… presented an article 3 reading of the treaty, which suggested a swing away from article 2 interpretations dominant since the 1980s. This contradicted the Māori view that the treaty enshrined tribal property rights (native title).

For some commentators, Brash’s Speech signalled a change in politics towards the assimilation and integration policies followed before 1975. O’Sullivan noted that the Speech created a shift in elite political interpretation of the public mood. As political commentator Colin James concluded, this shift had to occur on issues of Māori rights because the political elite, in their acceptance of the special status of Māori, had branched ahead of the general population, who had become mystified, puzzled, angry and resentful.

For many of the public, the Speech was important because it made their ideas publicly acceptable, and enabled issues of race to be discussed in the open. Brash himself later

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stated that he had received “an overwhelmingly positive response from the general public, relieved at last that this issue was being put back on the table for discussion”.\textsuperscript{125} He went on to assert that what the public was concerned with was “the way in which racial distinctions are penetrating the institutions and practices that make our society what it is”.\textsuperscript{126}

For Māori across a broad spectrum of society, the Speech was also an important document in the Debate. It was viewed as a major catalyst to Pākehā reaction, spreading misinformation and untruths about Māori and their relationship to the foreshore and seabed, as well as propagating the view that Māori would deny access or veto development in that zone.\textsuperscript{127}

\section*{4. Cullen’s Article}

Cullen was the Deputy Prime Minister throughout the Debate. In this role, he actively portrayed the Government’s position in the media and announced the Government’s policy. During this time, Cullen was also engaged in an effort to reaffirm the full power of Parliament, and made several attacks on ‘judicial activists’ whom he viewed as challenging the supremacy of Parliament. One such ‘activist’ was the Chief Justice Dame Sian Elias.

After receiving his Masters of Arts in History at the University of Canterbury, Cullen completed his Doctorate of Philosophy in Social and Economic History at the University of Edinburgh. Then from 1971 to 1981, Cullen was a Senior Lecturer in History at the University of Otago, with a term as a Visiting Fellow at the Australian National University from 1975 to 1976.

By the time the Debate erupted, Cullen had been in politics for over 20 years. He joined the Labour Party in 1974, and served on the party's Executive and Council between 1976 and 1981. In 1981, he stood and was elected MP for the Dunedin electorate of St Kilda. He maintained that seat until it was abolished in 1996, where

\textsuperscript{126} Ibid.
\textsuperscript{127} Abby Suszko “Māori Perspectives on the Foreshore and Seabed Debate: A Dunedin Case Study” (BA (Hons) Dissertation, University of Otago, 2005) at 27.
he successfully stood for the replacement South Dunedin electorate. When Labour entered government in 1984, Cullen became Senior Whip. After Labour's re-election in 1987, Cullen was made Associate Minister of Finance, Minister of Social Welfare and Minister in Charge of War Pensions. Then he was appointed Associate Minister of Health and Associate Minister of Labour. When the Labour Party lost the 1990 election, Cullen returned to being Labour's spokesperson on social welfare. The following year, he took over as the party’s chief finance spokesperson. In 1996, Cullen took the Deputy Leader's post. While the Labour Party remained in opposition, Cullen made an attempt to oust Helen Clark as Party Leader, but failed.

The Labour Party’s electoral victory in 1999 resulted in Cullen becoming Minister of Revenue and the Minister of Finance. After the 2002 election, Cullen was promoted to Deputy Prime Minister. In 2005, he was made Attorney-General, only the second non-lawyer ever to secure that role. Then in 2007, he took over the portfolio of Minister in Charge of Treaty Negotiations. In 2008, prior to the Labour Party’s loss at the general election, Cullen held several ministerial portfolios: Deputy Prime Minister, Minister of Finance, Minister in Charge of Treaty Negotiations, Attorney-General and Leader of the House.

During the Debate, the courts, the Tribunal, indigenous rights claimants and human rights activists were perceived to be challenging the sovereignty of Parliament. A classic view of the doctrine of parliamentary sovereignty holds that Parliament can enact or repeal any law, and that the validity of its statutes cannot be challenged in the courts. It is therefore a doctrine that permits Parliament to overturn judicial decisions and ignore Waitangi Tribunal recommendations. This is its orthodox legal position, but it can be argued to be more than that. Parliamentary sovereignty is an expression of a democratic ethos: Parliament should be seen to be sovereign because it is through Parliament that the people of Aotearoa/New Zealand hold political sovereignty by means of representative government. It embodies a relationship between government and the governed that is essentially consensual, with representation in Parliament being the means by which the consensual basis of government is recognised and assured. It allows the community to determine the laws affecting them. The exercise

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128 Williams, above n 122, at [56].
of Parliament’s legal powers is therefore inherently linked to the consent of the electorate.

Also during the Debate there were calls from some people for recognition of Māori sovereignty and claims that Parliament’s sovereignty was fettered. Chief Justice Elias said for instance: “We have assumed the application of the doctrine of parliamentary sovereignty in New Zealand. Why, is not clear”,\textsuperscript{129} and “Whether there are limits to the lawmaking power of the New Zealand Parliament has not been authoritatively determined”,\textsuperscript{130} and finally that “An untrammelled freedom of parliament does not exist”.\textsuperscript{131}

In assiduous defence of the doctrine of parliamentary sovereignty, the Deputy Prime Minister made several speeches discrediting the Chief Justice and cited her as a ‘judicial activist’. Indeed, his contribution to the special sitting of Parliament on its 150th anniversary was a response to her argument:\textsuperscript{132}

> In my view, we are approaching the point where Parliament may need to be more assertive in defence of its own sovereignty, not just for its own sake but also for the sake of good order and government. In our tradition the courts are not free to make new law. It is fundamental to our constitution that lawmakers are chosen by the electorate and accountable to the electorate for their decisions. ...

Governments, of whatever stripe, do not favour judicial activism. They almost inevitably favour a strict constructivist approach, because it involves far fewer political or fiscal risks. Activism does not always challenge parliamentary sovereignty, but it often does. And in New Zealand fundamental questions have been raised about that sovereignty. It is almost as if there is an emerging view that sovereignty is to be shared between Parliament and the judiciary, with Parliament being the junior and less-informed partner. That is so because where Parliament's sovereignty is questioned it is usually accompanied by the assertion or implication that it is the courts that have the final say as to the rules.

\textsuperscript{130} Ibid, at 156.
\textsuperscript{131} Ibid, at 163.
\textsuperscript{132} Michael Cullen “Address to Her Excellency the Governor-General” (24 May 2004) 617 NZPD 13191.
The point I make in response is not merely that this is a trend for which there is no democratic mandate, and which has never been part of the political discourse in New Zealand, but that it cannot exist as a one-sided development. It will inevitably lead to the politicisation of the process of judicial appointments and of the judiciary itself - something to be avoided.

This speech also contained a strong attack on Māori who doubted those propositions.\(^\text{133}\) Cullen described it as “settled doctrine” that.\(^\text{134}\)

\[
\text{New Zealand is a sovereign State in which sovereignty is exercised by Parliament as the supreme maker of law, the highest expression of the will of the governed, and the body to which the Government of the day is accountable.}
\]

It was during this period that Cullen announced the Government’s policy in his Article. The Article was embodied in the language of parliamentary sovereignty. It stated that the problem of recognising rights in the foreshore and seabed was one that only the Government could resolve. He made this clear when he declared that the Maori Land Court was “incapable of recognising” use rights in the foreshore and seabed.\(^\text{135}\) For Cullen, the “quandary” created by the Court of Appeal’s decision was one that could only be solved by the Government.\(^\text{136}\)

The Article therefore introduced a framework to achieve that solution. This would be one that “balances the rights we want all New Zealanders to enjoy and finds a secure place for the long-standing customary practices of Maori”.\(^\text{137}\) The solution proposed was a continuation of past government policies that sought to transform Māori customary rights into a western legal framework, through codification.

\section*{4.a. The central themes within the Article}

I have identified eight central themes in this Article. The first was that customary rights were genuine property rights, so where these were established, they should not be taken without just compensation.\(^\text{138}\) However, it was the Government’s view, in the

\(^{133}\) Williams, above n 122, at [56].
\(^{134}\) Cullen, above n 132.
\(^{135}\) Cullen, above n 5.
\(^{136}\) Ibid.
\(^{137}\) Ibid.
\(^{138}\) Ibid.
case of the foreshore and seabed, that these rights were unlikely to amount to full title. Cullen made this clear when he said that in Aotearoa/New Zealand, as in other jurisdictions, like Canada and Australia, “the common law cannot recognise exclusive ownership of the foreshore and seabed”.\textsuperscript{139}

This led to the second theme, that to allow the Court of Appeal’s decision to stand would be wrong in law. The Court of Appeal had found that the Maori Land Court had jurisdiction to hear claims pertaining to specific foreshore and seabed. As Cullen noted, “The quandary this created for the Government was that the Maori Land Court would have had to apply the Te Ture Whenua Maori Act 1993” (TTWMA).\textsuperscript{140} For him, this Act affected dry land only and was “incapable of recognising a property right which does not lead to fee simple title”.\textsuperscript{141} “[L]and” in s 4 TTWMA did not mean land under water.\textsuperscript{142} That would stretch the law in a way that had not been intended.\textsuperscript{143}

In making these claims, Cullen directly countered the arguments of those who alleged that customary rights in the foreshore and seabed did amount to exclusive ownership. He stated that this view “takes little account of the facts”, as legal precedent permits these rights to be recognised only if they had been exercised continuously since annexation.\textsuperscript{144} To Cullen, customary rights did not extend to every rock pool and sand bar. It was unlikely that they extended to anything other than a small proportion of the coast, which had been subject to customary use.\textsuperscript{145} He conceded, however, that although there could be no exclusive ownership, there might be substantial customary Māori use rights in the zone.\textsuperscript{146} Those were property rights nevertheless, and, where established, like all other property rights, they should not be taken without compensation.\textsuperscript{147}
The third theme was that these customary rights pertain to Māori because of their status as the Indigenous Peoples of Aotearoa/New Zealand. They were different from the property rights granted to other New Zealanders as their basis was that of prior occupation and their legitimacy drew its strength from the special constitutional status of Māori.

Fourth, legal precedent permitted these rights to be recognised if they had been exercised continuously since annexation. But, he also asserted these rights were subject to other legal constraints. As he put it: “like any other property right, they must be exercised in the context of other, competing, rights belonging to individuals and to the public”. This is the fifth theme: that Māori rights were one of many competing rights and interests that must be balanced against each other.

Moreover, Cullen specifically addressed Brash’s “Nationhood” Speech, producing the sixth theme. This was that legislation that failed to recognise Māori use rights was “tantamount to theft and treats Maori rights as inferior to the rights of others”. In total, Cullen clearly stated that Māori had legitimate use rights in the foreshore and seabed through their status as the Indigenous Peoples of Aotearoa/New Zealand. These were not inferior to other competing rights and interests, but nor did their indigenous status afford them any more protection than other rights. They were no more important than the rights of the public and must be balanced against all other interests.

It was therefore up to the Government to introduce legislation that found a balance between these competing rights. The seventh theme was therefore that Parliament was the best place to decide rights issues. Cullen stated:

148 Ibid.
149 Ibid.
150 Ibid.
151 Ibid.
152 Ibid.
153 Ibid.
154 Ibid.
155 Ibid.
156 Ibid.
The Government’s policy envisages a vigorous process for recognising and protecting customary rights while also protecting public access by placing the foreshore and seabed unequivocally in the public domain.

Cullen continued with this theme, when he said: 157

What we [the Government] are proposing is a legislative framework for the 21st century which balances the rights we want all New Zealanders to enjoy and finds a secure place for the long-standing customary practices of Maori with respect to the foreshore and seabed. We are confident that there is a middle ground, an equilibrium where the reasonable expectations of all can be accommodated.

His final theme was that the Debate itself was being hijacked by extreme views on both sides. Those on the far right had “excited irrational fears”, and those on the far left had “promoted unrealistic expectations”. 158 The “irrational fears” were claims that the Court of Appeal had found Māori owned the foreshore and seabed, and consequently Māori owners would deny access and stop development. The “unrealistic expectations” were the beliefs that future Māori claimants would succeed in establishing extensive customary property rights through the courts.

4.b. Equality and rights arguments within the Article

Cullen therefore asserted that the Government’s role was to balance competing interests and demands in the foreshore and seabed. 159 It would define which rights New Zealanders should enjoy and defend those rights. The Government meant to codify public access to the foreshore and seabed as a right. Access was previously only an interest at common law, and could therefore be trumped by other rights, including Māori customary rights. However, Cullen clearly stated that the Government’s position was to elevate public access to the position of a statutory right, and to balance this with any customary rights in the foreshore and seabed for the good of all New Zealanders. 160

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157 Ibid.
158 Ibid.
159 Ibid.
160 Ibid.
Cullen also suggested that the Government would “find a secure place for the long standing customary practices of Māori”.161 This showed the Government’s view that henceforth Māori rights would draw their legitimacy from statute. On this view, statutes are the highest form of law.162 They sit at the top of the hierarchy of laws, trumping both regulations and customary law.163 Māori rights that draw their legitimacy from tikanga, or from the common law doctrine of native title, but were not codified, would simply be overridden. The outcome would be, however, that Māori rights under tikanga and the common law that amount to full “ownership” would be extinguished under the Government’s policy.

In finding a place for Māori customary practices, the Government also asserted the power to define those customary practices and to give them a limited content. As Cullen admitted: “It is certainly not envisaged that on large stretches of the coast long dormant practices might be resuscitated and granted status as customary rights”.164 For Cullen, legal precedent indicated that “customary rights are recognised and protected only where they have been exercised more or less continuously”.165 Therefore, the Government was not “interested in trying to turn the clock back … to the period prior to 1840”.166 This was a direct response to Māori who called for full Māori ownership of the foreshore and seabed to be recognised and protected. The Government would only recognise use rights that had been continuously exercised since 1840, and it would only recognise specific use rights that it defined in the impending legislation.167

Embedded in the Article, therefore, were specific Government assumptions about Māori rights and the Government’s authority. Cullen concluded that Māori customary rights were to be given the same statutory status as other rights, and were therefore

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161 Ibid.
163 See Webb, Sanders and Scott, above n 162, at 63 and 71-72; Richard Scragg New Zealand’s Legal System: The Principles of Legal Method (Oxford University Press, Melbourne, 2005) at 4, 5 and 70; and Mulholland, above n 162, at 125-128. See also Critchton, above n 162, at 5.
164 Cullen, above n 5.
165 Ibid.
166 Ibid.
167 Ibid.
just one of many competing sets of rights in the foreshore and seabed.\textsuperscript{168} The unique status of Māori as the Indigenous People of Aotearoa/New Zealand did not justify more differential treatment. In this sense, Māori would have no greater claim to the foreshore and seabed than others. Also implicit in this position is the view that when balancing rights, the interests of the greater public could outweigh the interests of Māori.

Implicit in the very notion of balancing are equality concepts. Here, Cullen articulated a position that can be termed ‘the equal consideration of interests (thesis)’.\textsuperscript{169} This is a type of procedural equality. As Polyvios Polyviou puts it:\textsuperscript{170}

> The prescription that there should be equality of consideration is derivable from the very conception of persons as equals and the notion that human concerns should be approached in an even handed and neutral way, and can be used as meaning that the appropriate decision-maker should take into account and consider impartially all interests, that he should accord equal respect and concern to all, and that burdens can be imposed and benefits allotted only after all claims have been fairly evaluated.

Cullen prescribed that public access and Māori customary rights would have equal status. The Government would evenly evaluate these to find the “middle ground, an equilibrium where the reasonable expectations of all can be accommodated”.\textsuperscript{171}

Thus Cullen directly countered those who argued that the courts should be the ultimate decision-maker over rights in the foreshore and seabed. He stated that the Government was the proper decision-maker for balancing rights, and he invoked the doctrine of parliamentary sovereignty to justify such a determination.

\textsuperscript{168} Ibid.
\textsuperscript{170} Ibid, at 12.
\textsuperscript{171} Cullen, above n 5.
4.c. Why Cullen’s Article is important to the Foreshore and Seabed Debate.

The Article outlined the Government’s final stance on the issue, and indicated the objectives and aims of the impending legislation. Consultation with Māori members of the Government and with members of the public, and criticism from the Waitangi Tribunal, other politicians and Māori groups, had done little to change the Government’s position from that originally announced. It intended to legislate to clarify rights in the foreshore and seabed, and delineate the scope of these rights.

5. The Treaty Tribes Coalition’s Submission

The Treaty Tribes Coalition is an Indigenous Non-Governmental Organisation (NGO) that formed in 1994 to represent the common commitment of its constituent iwi to the principle of mana whenua, mana moana in relation to the allocation to iwi of fisheries settlement assets held by Te Ohu Kai Moana: that is, a commitment to the principle that tribal authority over adjacent land should be reflected in authority over the sea. The Coalition is a Māori organisation, but it claims to be sympathetic to the views and aspirations of all New Zealanders, and seeks their support in the Coalition’s endeavours. During the fisheries quota allocation process, the Coalition sought support from local government, the business community, the media and the public.

The Coalition represents the 12 Hauraki iwi, Ngāti Kahungunu, plus the iwi of Ngāti Tamanuhi and Ngāi Tahu, through their respective governance organisations. Its four constituent members are: the Hauraki Māori Trust Board (representing the iwi of

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172 ‘Mana whenua’ is the trusteeship of land, or the right to hold responsibility for land or resources. ‘Mana moana’ is marine authority, or the right to hold responsibility for the sea and its resources.

173 Te Ohu Kai Moana was formally known as the Treaty of Waitangi Fisheries Commission. The Commission was established by the Maori Fisheries Act 1989 and later became Te Ohu Kai Moana under the Maori Fisheries Act 2004. Its legal name is Te Ohu Kai Moana Trustee Limited. Te Ohu Kai Moana is the corporate trustee of Te Ohu Kai Moana Trust – the trust responsible for advancing the interests of iwi in the development of fisheries, fishing and fisheries-related activities. Te Ohu Kai Moana is thus a statutory organisation dedicated to future advancement of Māori interests in the marine environment. It works with a variety of government, industry and private organisations to advance the interests of Māori in the business and activity of fishing. Its primary roles are to allocate to mandated iwi organisations fisheries assets held in trust through the 1989 and 1992 Māori Commercial Fisheries Settlement and to provide an advisory service to its iwi constituents.

174 Treaty Tribes Coalition, above n 7, at 4.

175 Ibid.
Hauraki); Ngāti Kahungunu Iwi Incorporated; Ngāi Tamanuhiri; and Te Rūnanga o Ngāi Tahu. The Treaty Tribes Coalition therefore represents 15 iwi, who themselves represent 15-20 percent of the Māori population, comprising over 110,000 members according to the 2001 census. The constituent iwi of the Coalition described themselves as having “a strong and active interest, as kaitiaki of their rohe moana, in the integrated sustainable management of their marine resources”. Each iwi considered itself “fundamentally, to be a maritime iwi, for whom the marine environment and its resources are particularly significant elements of its identity, economy and taonga tuku iho”. Together these iwi claim to hold mana whenua and mana moana over almost 60 percent of the coastline and oceans of Aotearoa/New Zealand.

The Treaty Tribes Coalition was actively involved in the Debate right from the date of the Court of Appeal’s decision. Following the Government’s announcement that it would legislate, on 15 July 2003, the Coalition announced in a media statement that they would support a pan-iwi collective initiative over foreshore and seabed issues, to be led by the iwi of Te Tau Ihu, Hauraki and Muriwhenua. Thus, although not all constituent iwi in the Coalition were signatories to the Paeroa Declaration (Ngāi Tahu had not signed it, for instance), the Coalition did pledge its support of that Declaration and those that followed. The Coalition also submitted as a group on the Government’s Discussion Document. They were vocal in the media, releasing several press releases and media statements.

On 26 February 2004, the Coalition released its Submission, *One Rule of Law for all New Zealanders: A Submission by the Treaty Tribes Coalition on the Foreshore and*...
Seabed Issue.\textsuperscript{181} This Submission was prepared for the Prime Minister, the Leader of the Opposition and the Leaders of all Parliamentary Political Parties.\textsuperscript{182} It outlined the Coalition’s perspectives on the Debate and claimed to advance a principled solution that would not leave a “bitter taste in the mouths of Māori”\textsuperscript{183}. The Coalition proposed that the Attorney-General appeal the Ngati Apa decision to the Privy Council rather than implement legislation, and that the Maori Land Court be allowed to hear the cases before it and make a determination concerning Māori claims to rights over specific areas of the foreshore and seabed. Then, argued the Coalition, should the Maori Land Court find that applicants had customary ownership in accordance with tikanga Māori,\textsuperscript{184} or other analogous rights, the Crown and the applicants could enter negotiations informed by that final determination on the law.\textsuperscript{185}

This Submission was rejected outright by both the Labour-led coalition Government and the National Party.\textsuperscript{186} Interestingly, however, both the ACT New Zealand Party and the New Zealand Business Roundtable, two business-oriented groups, whose objectives often clash with those of Māori, supported the Submission’s conclusions.\textsuperscript{187} These two groups are focused on the retention and protection of property rights. So they supported the Māori call for recognition of their property rights.

\begin{footnotesize}
\begin{enumerate}
\item Treaty Tribes Coalition, above n 7.
\item Ibid, at 1 and 2.
\item Ibid, at 2-3.
\item TTWMA, s 129(2)(a).
\item Treaty Tribes Coalition, above n 7, at 13-14. The Treaty Tribes Coalition’s principle based solution was further articulated by the Chair of the Treaty Tribes Coalition, Harry Mikaere, on 15 March 2004: See Harry Mikaere Chair of the Treaty Tribes Coalition “We Must Win for All New Zealanders” (speech to the Hui Taumata, Waipapa Marae, University of Auckland, 15 March 2004).
\item See Treaty Tribes Coalition “Government Unleashes Fury Over Foreshore”, above n 180.
\end{enumerate}
\end{footnotesize}
Importantly, after the Government rejected the Coalition’s solution, and it became clear that the Government was going to legislate despite widespread Māori objection, the Coalition, along with the Taranaki Maori Trust Board and Te Rūnanga o Ngāi Tahu, lobbied CERD, under its early warning procedure, for a decision that the FSA discriminated against Māori. Accordingly, on 31 July and 2 August 2004, they argued before that Committee that the Act unjustifiably treated Māori property rights differently from those of non-Māori. Responding to that argument, the Committee subsequently found that the Act was discriminatory and recommended the Government resume dialogue with Māori “to seek ways of lessening its discriminatory effects, including where necessary through legislative enactment”.  

The Coalition’s involvement in the Debate did not end there. In November 2005, it continued its bid to bring the foreshore and seabed issue to the attention of the international community, and presented its case to Professor Rodolfo Stavenhagen, the United Nations Special Rapporteur on the human rights and fundamental freedoms of Indigenous People, who was visiting Aotearoa/New Zealand to investigate the case.

The Coalition continued to use international legal bodies as a means of highlighting the issue. As late as August 2007, it reported to CERD as a NGO in response to the Government’s consolidated fifteenth, sixteenth and seventeenth periodic report. They argued that:

A lack of substantive commitment to implementing the Committee’s recommendations is apparent in two principal areas; the Government’s response to the Committee’s previous concluding observations and more specifically, the Government’s dismissive response to the Committee’s decision in 2005 in respect of the Foreshore and Seabed Act.


190 Ibid, at [5].
5.a. The central themes within the Treaty Tribes Coalition’s Submission

I have identified numerous central themes in the Treaty Tribes Coalition’s Submission. The first was that the guiding principle for our legal system is the idea of one law for all. The Coalition argued that all New Zealanders, including the New Zealand Parliament, should respect that principle.\(^{191}\) The Coalition made this clear in the opening page:\(^{192}\)

The submission is based on the principles that there should be one law for all New Zealanders, and that all New Zealanders – Māori and Pakeha – and the New Zealand parliament – must respect the rule of law and the proper roles of the different branches of Government.

Māori may well hold rights in the foreshore and seabed, it was argued, so should have the right to go to court to have these rights determined in the same manner as everyone else. There was no justification for removing a person’s right to go to court.\(^{193}\)

A related theme was that Māori were the subject of discrimination in this regard. As the Coalition explained, the process “risks Māori, alone among New Zealanders, having their right to their day in court usurped by Parliament”.\(^{194}\) Only Māori interests were affected. All other titleholders, including those who had already obtained exclusive private title in the foreshore and seabed, would retain their right to go to court. This theme was also expressed in terms of respect the rule of law. The Coalition claimed this was another fundamental principle of the legal system.\(^{195}\) For that reason, it viewed the Government’s proposals, which intended to override possible full title under tikanga Māori and at common law, and remove access to the Maori Land Court to have that determined, as undue political interference.\(^{196}\) To

\(^{191}\) Treaty Tribes Coalition, above n 7, at 2.
\(^{192}\) Ibid.
\(^{193}\) Ibid, at 8-9 and 11.
\(^{194}\) Ibid, at 3.
\(^{195}\) Ibid, at 2, 3, 8-9 and 10.
\(^{196}\) Ibid, at 8-9.
them, this was totally unacceptable and contradicted the concept of good
government: 197

… the very idea of Parliament acting to usurp the proper role of the courts is
outrageous. The rule of law “is the sentinel of constitutional government”. This
means that Parliament must not interfere with the due process and decisions of
the judiciary. To do so is to breach fundamental constitutional principles of the
separation of powers, and that all branches of government are bound by the law.
Parliament should not manipulate, to its own advantage, the outcome of a case
before the courts.

Therefore, a theme present throughout the Submission was that the Courts must be
allowed to perform their constitutional functions. 198

An associated theme therefore was that the Government’s decision to enact the
legislation was unconstitutional. The legislation would violate the principles of the
rule of law and the separation of powers. 199 To the Coalition, no “New Zealander of
goodwill” could respect this course of action. 200 They strongly warned against the
Government’s proposal and stated that: 201

It would be a dangerous example that the Government and Parliament may take
from the courts their proper judicial function and install this power in the Office
of the Deputy Prime Minister and Parliament.

They claimed the legislation would diminish citizens’ respect for constitutional
principles as a whole: 202

It is impossible to see how they [the iwi litigants in the Ngati Apa case] could be
expected to accept and respect any legislation passed by Parliament based on the
Government’s proposal. It is impossible to see how any New Zealander who
cares about the rule of law and our unwritten constitution, could continue to have
the same respect for the law or for our Parliament. Especially given that the
appellants are Māori, it is difficult to see how the Government’s proposal reflects

197 Ibid, at 8-9 citing Philip A Joseph Constitutional and Administrative Law in New Zealand (2nd ed,
198 Treaty Tribes Coalition, above n 7, at 10.
201 Ibid, at 9.
202 Ibid, at 11.
the principles of one law for all New Zealanders and respect for the rule of law. It is a race-based response.

Consequently, a further theme was that the Government’s proposal satisfied no-one. Because of the breach of fundamental principles, the proposal could not be taken in good faith.\(^{203}\) Furthermore the Government’s actions, and its proposed course of action, fuelled racial tension between Māori and Pākehā. In the view of the Coalition, by announcing that they would legislate, the Government:\(^{204}\)

… mistakenly led many to believe that the Court had granted exclusive ownership of the foreshore and seabed to Māori, wrongly fuelling some Māori expectations and outraging many other New Zealanders who mistakenly believed their access to the beach could be in jeopardy.

More time to reach a suitable solution was needed: “Time is needed for the [Ngati Apa] decision to be properly understood and placed in its proper context in the public mind”.\(^{205}\) The reaction to Ngati Apa had caused unrest amongst New Zealanders, so more time was needed for “sober reflection”.\(^{206}\)

The Coalition therefore proposed a solution that it considered would maintain one law for all and the rule of law. The judgment of Ngati Apa should stand and Māori should be able to proceed to the Maori Land Court to have their rights determined.\(^{207}\) Nevertheless, the Coalition did not advocate that the Maori Land Court should have the final say. They foresaw the need for further negotiations that would balance Māori interests and rights with those of the wider community.\(^{208}\) So open dialogue should continue between Māori and the Government, and the Crown’s current proposals could be their opening and not their final position.\(^{209}\)

The Coalition also suggested that for the nation to prosper in the future “Māori and Pakeha must work together to build our country’s economic and social future”.\(^{210}\)

\(^{203}\) Ibid, at 7.
\(^{204}\) Ibid, at 6.
\(^{205}\) Ibid, at 12.
\(^{206}\) Ibid.
\(^{207}\) Ibid, at 2-3 and 13-14.
\(^{208}\) Ibid, at 14.
\(^{209}\) Ibid, at 14-15.
\(^{210}\) Ibid, at 3.
do this, the principles of one law for all and the rule of law must be fully respected. Even if people have different rights, these should be equally protected under the law. As the Coalition explained, “In one sense, New Zealand consists of many peoples but, in another sense, we are all New Zealanders”. This does not make everyone the same, but it entitles everyone to the same protections under the law. The Government’s proposals should be of concern to all New Zealanders, not just Māori. For the Coalition, what was taking place were “worrying developments that should concern all”.

5.b. Equality and Right arguments in the Treaty Tribes Coalition’s Submission

5.b.i. ‘One law for all’

Like Brash, the Treaty Tribes Coalition therefore used the language of ‘one law for all’. However, unlike Brash, the Coalition did not apply the strict, formal notion of equality. On their view, all people do not have to have the same rights, however all people should be equal under the law and be entitled to the equal protection of the law. We are all New Zealanders, so we are all entitled to the same protection regardless of race.

Thus, like Cullen, the Coalition argued for a form of procedural equality, one different version of equality before the law. Specifically they argued for equal application of the law and equal access to the law. The former requires that clear, predetermined, known rules be applied universally to all, the latter that all people have the same opportunity to bring their cases to court to have a fair determination of the rights they may have. These claims would recognise differences, in terms of the rights people may have, but still maintain that all should be treated equally in terms of the protection of those rights in the courts. On this view, customary Māori property rights deserved the same protection as individuals’ property rights.

As O’Sullivan contended:

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212 Ibid, at 4.
213 Ibid, at 11.
214 O’Sullivan, above n 91, at 138-139.
There is no practical reason why an inclusive ‘one law for all’ set of legal arrangements could not recognise that within one community there are different ways of thinking, based on different traditions and experiences, and that social cohesion is more likely maintained when all people perceive that their values carry weight in the political and legal systems.

The ‘one law for all’ that the Coalition called for was a concept of this kind. It would not be inconsistent with the concept that Māori may possess property rights, which come from tikanga of a communal and customary nature, and are recognised in the doctrine of native title. These rights would reflect the concept, found in tikanga, that individuals and groups may possess rights in land under water, and that they may extend to full, exclusive title. This would be a different starting point from that pertaining to most land rights recognised within the legal system, which have their foundations in fee simple title. But Māori customary rights would deserve the same protection under the law.

This version of ‘one law for all’ would create social cohesion. In the view of the Coalition:215

If the case were to proceed through its natural course, and should the Māori Land Court or any subsequent appeal court ultimately rule that the successful appellants do not have rights and interests in the foreshore and seabed, that would have to be accepted by Māori. It would bring the matter to a conclusion that may be welcomed by many New Zealanders, but one which would not leave a bitter taste in the mouths of Māori. It would be a fair and final legal determination reached according to the rule of law.

Should the Māori Land Court or any subsequent appeal court ultimately rule that the successful appellants do have property rights in the foreshore and seabed under dispute, that could lead to negotiations between the Crown and the litigants, based on a determination of the nature and extent of any Māori rights. These negotiations could lead to an outcome that meets the legitimate expectations of Māori and the needs of contemporary New Zealand society.

215 Treaty Tribes Coalition, above n 7, at 2-3.
Thus the Māori litigants would accept either outcome because they would have had
the chance to be heard, and their values would carry weight in the legal system. The
Government’s proposal conveyed the opposite message. Despite widespread Māori
opposition, the Government intended to legislate, demeaning Māori values and beliefs
in the political system.

The notions of equality articulated by the Coalition could accommodate the notion
that there were different sources of rights, and that it was the proper role of the courts
to determine their nature and extent. Under the government’s proposals only Māori
would have their right to due process removed. This was discrimination.

5.c. Why the Treaty Tribes Coalition’s Submission is important to
the Foreshore and Seabed Debate

The Treaty Tribes Coalition’s Submission is important for several reasons. First, it
represented the views of a significant proportion of the Māori population, and of iwi
whose tribal regions covered more than half the coastline. It gave a very clear and
succinct statement that the majority of coastal iwi believed the Government’s plans
were unconstitutional because iwi would be denied access to the courts for the
determination of their rights. It also represented the view of Ngāi Tahu, who are not
only the iwi controlling the longest coastline but also those who hold mana whenua
where this author lives.

In addition, the Coalition’s Submission is important because it approached the Debate
from a completely different viewpoint than that of the Paeroa Declaration. While the
Coalition supported that Declaration’s contention that what the Government was
proposing was fundamentally wrong, and that Māori property rights in the foreshore
and seabed should be respected, it is unlikely that they fully supported all its
resolutions. The Coalition was not challenging the Crown’s sovereignty, and not
necessarily claiming ownership of the foreshore and seabed in its entirety. What they
were proposing was that the principle of Crown sovereignty should not override

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216 Ibid, at 3.
217 Ibid.
218 Ibid, at 9-10.
respect for property rights grounded in recognised sources of law, and should not be used to deny Māori property owners access to the courts.

The Coalition’s Submission is also important because it uses the same language as Brash, and later the Government, though to different effect. It is a direct response to the “Nationhood” Speech and provides a stunning example of how similar equality claims can be made by different people for very different ends.

Perhaps the definitive reason why this Submission is important, however, is because it gave a clear, principled, alternative solution to the Government’s proposals, one that drew its methods from precedents set in the Treaty Settlement process. Māori should be able to have the full extent of their rights determined by the courts, and if the appellants were successful, then they could enter negotiations with the Government “informed by a final determination of existing law and rights”. These negotiations would be more constructive than discussions conducted immediately after the Court of Appeal’s judgment, at which point there was no common understanding of the scope of Māori property rights in the foreshore and seabed. As the Coalition explained, Māori had shown in previous negotiations about Māori rights, in particular the Fisheries Settlement, that they were prepared to seek a solution that created a balance between the needs of contemporary Aotearoa/New Zealand society and the beliefs and expectations of Māori. To the Coalition, that process should be followed here.

6. Conclusion

These four key documents therefore reveal a range of distinct and separate equality theories being used in the Debate. These theories support and legitimise different notions of rights. Some theories support the concept of separate Māori property rights, albeit to varying degrees, and with different legal foundations. Others, however, support the notion of identical property rights for all in the zone. These views sit along a spectrum of equality theories, that I have termed the ‘Equality Spectrum’. At one end are the theories that dispel the legitimacy of separate Māori rights in the

220 Ibid.
221 Ibid.
foreshore and seabed, while at the other are theories that support full and exclusive Māori title. The others fall in between.

At one pole sits the theory of formal equality between individuals, and of the same property rights for all in the foreshore and seabed. It denies the legitimacy of separate Māori rights in this zone, and sees that as discrimination. It is essentially concerned with similarities between people. Its basic premise is that all people are similar human beings, who share a common humanity, therefore all New Zealanders are the same. It follows that all should be treated in the same manner; that is, there must be one law for all. Obviously, there are many areas of the legal system where people are treated differently, but this is only justifiable where there is some relevant difference. Brash saw no such difference here. He argued for formal equality between individuals to be applied in its strictest sense. He could see no justification for recognising tikanga Māori, the doctrine of native title, or the Treaty, nor did he see legitimate sources of law, as the rights guaranteed in art 2 of the Treaty or in notions of customary rights as relevant reasons for treating Māori differently.

When applied in the Debate, this theory upholds the pre-Ngāti Apa status quo: that under the law all New Zealanders should have identical rights and duties in relation to the foreshore and seabed. There can be no exclusive ownership rights, or elusive use rights, granted to Māori, as there are no relevant differences to justify such special treatment.

In contrast, Cullen’s theory of equal consideration is of a different kind. It is a theory of procedural equality that recognises a limited range of Māori rights in the foreshore and seabed. But under the doctrine of parliamentary sovereignty, which Cullen strongly supported, Parliament would be viewed as the ultimate authority over the law. It had the power to enact legislation to determine whose rights in the foreshore and seabed were legitimate, and it was the proper agency to balance rights to reach “an equilibrium where the reasonable expectations of all can be accommodated”.

222 Cullen, above n 5.
Ultimately, this theory of equality prescribes that the appropriate decision-maker should take into account and consider impartially all peoples’ rights, and accord them equal respect and concern. Consequently, burdens can be imposed and benefits allotted only after all claims have been fairly evaluated.

On this view, Māori can possess limited use rights in the foreshore and seabed, and these would be of equal value to public rights of access and navigation. They deserved equal consideration before determining which rights will be recognised, and which rights would be limited or overridden.

The Treaty Tribes Coalition advocated a third version of equality theory that sits somewhat in the centre of the ‘Equality Spectrum’. This recognises that there could be full and exclusive Māori title in the foreshore and seabed, but this should be recognised within the established judicial framework, in a manner that does not fetter the sovereignty of Parliament.

On this view, however, not all people are entitled to the same substantive rights. The notion of one law for all endorsed in the Coalition’s notions of equal application of the law and equal access to the law can accommodate differences between people in the substance of such rights. But they should be treated equally in terms of the procedural protection they receive in the courts. The rule of law demands the adjudication of rights in the courts, and that the separation of powers be strictly maintained. Using these theories, the Coalition argued, in complete contradiction to Brash, Cullen and the Government, that the courts were the proper authority to determine rights, and that Parliament must not interfere with due process and the decisions of the judiciary. The courts may then decide that Māori possess property rights, which come from tikanga, under the doctrine of native title or art 2 of the Treaty, and these might be considered just as legitimate as fee simple title. They deserved the same protection under the law.

Finally, while the signatories to the Paeroa Declaration spoke in indigenous rights terms, and on its face the Declaration does not seem to speak of equality, there is one possible equality theory that can be implied from the text. This is yet another theory that could encompass full and exclusive Māori ownership of the foreshore and seabed.
This notion of equality of authority sits at the other pole of the ‘Equality Spectrum’. It supports Māori rights to a much greater extent than is currently recognised in the legal system. It recognises rights based on tikanga Māori, and disputes the unfettered power of Parliament to displace those rights. It maintains that the proper authority to decide matters of Māori right rests with Manawhenua, not Parliament.

Fundamentally, this notion is concerned with equality between peoples in the public sphere. It requires that Aotearoa/New Zealand’s legal system should equally recognise Māori and Pākehā identities. It sees the Crown and Māori as two equal but separate sovereign powers, or as equal partners under the Treaty. On this view, Manawhenua would determine which rights are legitimate in the foreshore and seabed, because, as the signatories to the Declaration claim, their sovereignty to do so was never ceded even if the Crown also has certain Treaty-based rights. If Manawhenua decided to recognise exclusive title, and to create distinctions in property entitlements at the individual level, this would not be inequality under this theory. Equality would be maintained, as the sovereignty of Manawhenua would be recognised alongside that of the Crown.

The next chapter pulls apart the philosophical foundations of all these equality theories in more depth.
Chapter Four: Theories of Equality

Equality is a central value in modern political theory. Even those who do not think it is our “sovereign virtue” take it seriously.  

1. Introduction

The importance of the concept of equality lies in its historical persistence as a regulating ideal. Equality has been part of the most diverse political ideologies, currents of philosophical thought, and moral and religious beliefs, especially in societies under the influence of Western culture. Equality is supremely ambiguous, radically indeterminate, polysemantic in character, and has the capacity for multiple interpretations. Liberals, socialists and anarchists, believers and atheists, natural law adherents and positivists, and Kantian, utilitarian and sceptical thinkers, have all embraced the concept. Consequently, the debate on equality is not usually about its importance as an ideal, rather about the meaning people cast on the concept.

The Foreshore and Seabed Debate was a definitive example of people debating not the importance of equality, but its meaning. This chapter is an attempt to discuss in detail the major kinds of equality claims made in the Debate that were discussed in Chapter Three. As will be shown, these equality claims have been closely intertwined with historical movements that have been intent on transforming or defending the status quo.

I argue that all the equality notions discussed can be articulated in some respect as aspects of formal equality: that is, as a call for equal treatment of those who are alike. Where the various notions differ is in their definition of who is alike and what equal treatment between alikes entails. Various different equality arguments can therefore be distinguished despite their many similarities.

No universally accepted terminology is available to organise a discussion of these subtly-differing forms of equality argument. In order to discuss them as stand-alone

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At one end of this spectrum sits the equality theory that opposes the recognition of any separate Māori rights in the foreshore and seabed: that of formal equality between individuals. At the other end sits the theory that fully legitimates the concept of separate Māori rights that I have labelled equality of authority. Between these two poles sit notions of procedural equality, of several distinguishable kinds.

I will begin this chapter by discussing the overarching notion of formal equality, and then discuss the variant of it that is most adverse to the concept of separate Māori rights, that of formal equality between individuals. I will then discuss procedural equality and the different notions that fall beneath it that recognise Māori rights to various degrees, before concluding with discussion of equality of authority, and particularly one aspect of it, that might be described as equality of worldview, which lie at the far end of the spectrum I have described.
2. Formal equality

2.a. The philosophical underpinnings of formal equality

The notion of formal equality has a lengthy lineage. The idea was apparently born in Greek political philosophy. Aristotle, building on Plato’s work, first expressed this notion in a way that has influenced Western thought ever since. Aristotle proposed that it is just to treat people who are equal equally and to treat people who are unequal unequally. He conceived that these propositions were self-evident, being universally accepted “even apart from argument”.

Although this principle of formal equality can be attributed to Aristotle on the basis of this statement about justice, he never gave it precisely that label, nor did he advocate full equality between individuals in Greek society. By today’s standards, Ancient Greece was not an equal society. The Greeks condoned slavery and the subjugation of women. Aristotle’s form of equality did not therefore accept that all people were equal or that all people should be treated with equal concern and respect. His formula was never intended to define who should be treated equally. It was simply a statement of what was just, and it allowed for people to be equal in one situation and unequal in another.

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7 Aristotle “Nicomachean Ethics” book 3 at [1131a13] – [1131a14] ibid, at 1785. Aristotle explained that his concept of ‘equal’ meant giving “equal shares” to people who are “equal” and conversely, ‘unequal’ meant giving “unequal shares” to persons who are “not equal”: Aristotle “Nicomachean Ethics” book 3 at [1131a15]-[1131a25] ibid, at 1785. In “Politics”, Aristotle repeated his position: “For example, justice is thought by them to be, and is, equality—not, however, for all, but only for equals. And inequality is thought to be, and is, justice; neither is this for all, but only for unequal(s):” Aristotle “Politics” book 3 at [9 1280a11]-[9 1280a18] translated by Benjamin Jowett in Jonathon Barnes (ed) The Complete Works of Aristotle: The Revised Oxford Translation (Princeton University Press, Princeton (New Jersey), 1984) vol 2, 1986 at 2031; and [at “Politics” book 3 at [12 1282b17]-[12 1282b19] in Barnes (ed) at 2035]:

All men think justice to be a sort of equality; and to a certain extent they agree with what we have said in our philosophical works about ethics. For they say that what is just is just for someone and that it should be equal for equals.

8 Smith, above n 2, at 64.

9 Ibid.
Despite this, the formula ‘to treat likes alike’ became a central principle within the Western legal and philosophical tradition. The term ‘formal equality’, as it came to be known, came to be contrasted with competing notions, namely substantive equality and equality of outcome, that appeared in later discourse. The force of the Aristotelian principle is that if two or more people are equal then it is unjustified to treat them in different ways, and if two or more people are unequal, then it is unjustified to treat them in the same way. It has evolved to include the treatment of groups. It requires that if two or more people are treated differently there should be some relevant differentiating feature. Otherwise it would be wrong to treat the two unequally, or not the same.

Formal equality, therefore, is a principle of equal treatment. It concerns consistency more than substance. It is satisfied whether the parties are treated equally well or equally badly.\(^\text{10}\) It says nothing, however, about how likenesses and dissimilarities are to be discerned. It requires an additional judgment as to when people or groups are relevantly alike. Thus, formal equality’s appearance of neutrality is deceptive in that a value judgment is required to choose when people are alike.\(^\text{11}\) This judgement is substantive, not formal.

The notion is nevertheless described as formal for two reasons. First, it does not provide any measure of sameness; that is, it provides no substantive criteria. Secondly, it goes to inputs, rather than outputs or consequences. That is, it is not focused on the substantive outcomes of dealing with people under the same rule.

When used in legal contexts, formal equality may be considered to have a number of aspects. These involve applying the same rules to like cases, and giving equal consideration to the interests of those who are alike, or similarly situated. These are considered aspects of the rule of law, or of procedural justice. But neither tell us whose interests are alike, nor do they dictate the substantive outcome. For example, when a regional council must decide the site for a new road, to comply with formal


equality we may say it should apply the same rules to all ratepayers, and that it must consider the interests of all ratepayers whose property will be similarly affected. This process, however, does not guarantee equality of outcome. There has to be a balancing of interests and some people’s property rights may be overridden and not others. Formal equality may therefore be adhered to even if substantively unequal results occur.

But, as this example shows, the abstract principle of formal equality also has many specific applications, which may be given their own names. The idea that the same rule should be applied to like cases might also be described as a requirement of equal treatment under the law, and the idea that the same consideration should be given to the interests of all those who are similarly situated might be described as the principle of equal consideration. These and other similar ideas will therefore be dealt with later in this chapter under more specific headings.

2.b. Formal equality in action

2.b.i. The historical use of formal equality

Historically, race, gender, religion, colour, culture and ethnicity were considered relevant differences under the doctrine of formal equality. This perpetuated discrimination and justified unequal treatment. The subjugation of women, for instance, was made consistent with formal equality by relying on differences between men and women. Religious or racial discrimination was also considered consistent with formal equality by highlighting differences between religions or races. During the early twentieth century, for example, the southern states

12 For example, during the suffragette movement in England, two distinct arguments were made against women’s suffrage that relied on differences between men and women. The first was that women were physically different from men. One such argument held that women were more emotional and prone to outbursts of hysteria, and as a result, they shouldn’t be trusted to vote. Almroth Wright expressed this view in a letter to The Times on 28 March 1912. He claimed that women in general were “prone to recurring phases of hypersensitiveness, unreasonableness, and loss of the sense of proportion” that made them inadequate to receive the vote. See the reprinted copy in: Almroth E Wright “Appendix” in Almroth E Wright The Unexpurgated case Against Women’s Suffrage “Appendix” (Paul B Hober, New York, 1913) 167 at 167 and 183. They were also seen as intellectually inferior to men: See for example the arguments collated in Millicent Garrett Fawcett “Electoral disabilities of women 11 March 1871” in Millicent Garrett Fawcett “Electoral disabilities of women 11 March 1871” in Jane Lewis (ed) Before the Vote was Won: Arguments For and Against Women’s Suffrage 1864-1896 (2nd ed, Routledge, London, 2001) 100 at 101. The second argument was that women and men had different roles in society. Men’s roles were in the public sphere, while women’s roles were in the domestic sphere. Fawcett articulated this objection as: “The family is a woman’s proper sphere, and if she entered into politics she would be withdrawn from her domestic duties”: Fawcett, at 101.
of America passed discriminatory laws denying African Americans political and legal equality with White Americans.\textsuperscript{13} African and White Americans were perceived to be different on racial grounds, and because these laws applied equally among African Americans, formal equality was satisfied.\textsuperscript{14} It was viewed as just to treat African and White Americans differently because they were unequal, and all African Americans were considered equal, so it was just that they were subject to the same discriminatory laws.\textsuperscript{15} More recently, the doctrine of formal equality has been used to justify denying homosexual couples the right to marry.\textsuperscript{16} Here the formal equality model represented heterosexuals as the norm.

In Aotearoa/New Zealand history, there are ample instances of the doctrine of formal equality being employed to justify cultural discrimination towards Māori. One example was when old age pensions were first introduced in the late 1930s: Māori received a lesser pension. It was argued that it was unjust to give Māori the same amount as their Pākehā counterparts because Māori lived predominantly in traditional

\textsuperscript{13} These laws came to be known as the Jim Crow Laws.
\textsuperscript{14} Beverley McLachlin “Imaging the other: Legal Rights and Diversity in the Modern World” in Aleksander Peczenik (ed) Justice: Proceedings of the 21st IVR World Congress (Franz Steiner Verlag, Munich, 2004) 15 at 17. See \textit{Plessy v Ferguson} 163 US 537 (1896), which upheld the doctrine ‘separate but equal’. In \textit{Plessy v Ferguson}, the majority of the Supreme Court of the United States dismissed a constitutional challenge to an Act of the General Assembly of Louisiana [Separate Car Act, Acts 1980 No 111 at 152 (Louisiana1890), s 2] requiring the segregation of passenger railway carriages. It was held that:

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races.

The Court also held that:

… the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment.

\textsuperscript{15} In \textit{Roberts v City of Boston} 59 Mass 198 (1849), Shaw CJ delivered the decision of the Massachusetts Supreme Judicial Court which dismissed a constitutional challenge to a segregated primary school by asserting that racial segregation is of benefit to black children. The Court upheld a 1846 report of the primary school committee of the city of Boston (which stated that “the continuance of separate schools for colored children, and the regular attendance of all such children upon the schools, is not only legal and just, but is best adapted to instruct that class of the population”: at 201) and found that [at 209]:

The committee, apparently upon great deliberation, have come to the conclusion, that the good of both classes of schools will be best promoted, by maintaining the separate primary schools for colored and for white children and we can perceive no ground to doubt, that this is the honest result of their experience and judgment.

\textsuperscript{16} In Aotearoa/New Zealand, however, under s 4 of the Civil Union Act 2004, same sex couples are legally able to enter into a civil union, which gives them all the legal protections of marriage, barring a few exceptions.
extended family settings that shared resources between members, which was an unfair advantage over Pākehā who lived in smaller, nuclear families.\textsuperscript{17}

On numerous occasions, disenfranchised groups took up the mantle of formal equality to demand equal treatment in politics and law. These groups argued that characteristics based on race, sex, religion, colour, and ethnic origin should not in themselves constitute relevant differences in order to justify inferior treatment.

\textbf{2.b.ii. The use of formal equality as a means of social and legal change}

Early feminists, for instance, used the doctrine of formal equality to oppose gender discriminatory laws, highlighting similarities between men and women, and arguing that the differences between them, such as in their strength, and childbearing capabilities, were irrelevant.\textsuperscript{18} Essentially they argued that men and women were the same because they were all human beings, so it was unjust to treat them unequally.

Similarly, in the mid-twentieth century, during the American civil rights movement, groups fighting for the equal treatment of African Americans in the southern states of America utilised the notion of formal equality to push for desegregation. Race, it was argued, was not a relevant difference that would justify treating African and White Americans differently. African Americans were the same as White Americans, it was argued, so deserved equal treatment under the law.

Successive arguments based on formal equality brought major advances for these groups.\textsuperscript{19} The feminist movement greatly advanced the position of women in relation to property ownership, and rights within the family, and in employment,\textsuperscript{20} and the American civil rights movement lead to widespread legal reform, including the


\textsuperscript{19} See generally Richard Hudelsey \textit{Modern Political Philosophy} (ME Sharpe, Armonk (New York), 1999) at 125.

desegregation of the southern states,\textsuperscript{21} the banning of discrimination in employment practices, public accommodations, and housing,\textsuperscript{22} and the restoration of African American voting rights.\textsuperscript{23} Despite this, discrimination still exists and significant disadvantages remain,\textsuperscript{24} perhaps due to a weakness in the notion of formal equality itself: that, by overstating the similarities between people, relevant differences that could justify treating people differently in certain situations, such as differences in wealth and power, are ignored.

2.b.iii. The use of formal equality to restrict differential treatment

In many Western countries during the second half of the twentieth century, policies were implemented to alleviate disparities and elevate the position of previously disadvantaged groups. These policies have come under attack as a form of reverse racism. Opponents of affirmative action in the United States, for example, rest their argument on the premise that all Americans are the same and therefore it is unjust to give African Americans preferential treatment. Essentially, the argument is that once a ground for unfavourable discrimination is found irrelevant, it cannot then be considered a relevant difference that would support favourable discrimination.\textsuperscript{25} Alternatively, the argument against affirmative action is that it is unjust to judge applicants on anything other than merit.\textsuperscript{26} This argument fails to acknowledge, however, that the social and economic disparities between African and White Americans, for instance, is a result of past discrimination and so is a relevant difference, and that affirmative action may therefore be a legitimate means to combat those disparities.

\textsuperscript{21} The Supreme Court’s decision in Brown v Board of Education of Topeka 347 U. 483 (1954), that ruled racial segregation of state schools was unconstitutional, abandoned the “separate but equal” principle and made segregation legally impermissible.
\textsuperscript{22} See Civil Rights Act Pub L No 88-352, 78 Stat 241 (1964) (USA) and Fair Housing Act 42 USC §§ 3601-3631 (1968) (USA).
\textsuperscript{24} See generally Hudelson, above n 19, at 125; Barnett, above n 20, at 83.
In Aotearoa/New Zealand, similar arguments appear against policies such as alternative entry for Māori into tertiary study, Māori only scholarships and funding for Māori welfare and health providers. These have been targeted as unjust preferential treatment, unjust racial privilege, reverse racism and even apartheid.\(^{27}\)

2.b.iv. The use of formal equality to maintain the status quo

Arguments based on formal equality between individuals thus presuppose that all persons are equal and inequalities are an aberration that could be eliminated by extending equal treatment to all in accordance with the same “neutral” norm or standard.\(^{28}\) Nevertheless, Robin West notes that contemporary identity theorists have argued that even if the mandate to treat likes alike was coherent and faithfully followed, reliance on formal equality principles may still result in a “reification of the status quo”.\(^{29}\) This may occur by solidifying the standard against which differences are determined to be relevant or irrelevant.\(^{30}\) For example, West observes that if women are to be treated like men, on the ground that they are the same, then men “emerge as a proper model of humanity, as well as a proper basis for comparison, and all the further insulated against any sort of critique”.\(^{31}\)

West also acknowledges that identity theorists have also claimed that in some cases treating two groups alike may undermine attempts to achieve substantive equality between them.\(^{32}\) For example, she argued that if African and White Americans were to be treated the same, then “the very real differences in income, housing quality, basic health, and educational levels will have to be ignored, and ignoring those

\(^{27}\) See for example see the claims of Don Brash: Donald Brash, Leader of the Opposition National Party “Nationhood” (State of the Nation Speech to the Orewa Rotary Club, Orewa, 27 January 2004) at 3-4, and 13. For a full text of this Speech, see Appendix Three. See generally Andrew Sharp *Justice and the Māori: the Philosophy and Practice of Māori Claims in New Zealand since the 1970s* (2nd ed, Oxford University Press, Auckland, 1997) at 194-215; O’Sullivan, above n 17, at 6; Belinda AE Borrell and others “‘It’s Hard at the Top but It’s a Whole Lot Easier than being at the Bottom’ The Role of Privilege in Understanding Disparities in Aotearoa/New Zealand” (2009) 3 Race/Ethnicity: Multidisciplinary Global Perspectives 29 at 30-31; Keith Barber “‘Indigenous Rights’ or ‘Racial Privileges’: The Rhetoric of ‘Race’ in New Zealand Politics” (2008) 9 The Asia Pacific Journal of Anthropology 141 at 149-151; and Mason Durie “Race and Ethnicity in Public Policy: Does it Work?” (2005) 24 Social Policy Journal of New Zealand 1 at 8.


\(^{29}\) West, above n 3, at 125. For an example of identity theorist writing, see Iris Marion Young *Justice and the Politics of Difference* (Princeton University Press, Princeton (New Jersey), 1990).

\(^{30}\) West, above n 3, at 125-126.

\(^{31}\) Ibid, at 126.

\(^{32}\) Ibid.
differences could well adversely impact upon the opportunities for advancement of black citizens”.\textsuperscript{33} So, not only does this interpretation of formal equality deny difference, and in some cases ‘exacerbate inequality’, it may work to maintain traditional power relationships within society. Therefore formal equality may act as a major impediment to egalitarian progress.\textsuperscript{34}

The treatment of Indigenous Australians under the John Howard’s Liberal Government in Australia may be an example of this. Howard promoted a model of formal equality and symmetrical citizenship, under which “Aboriginal Australians are, in effect, treated just like everyone else. They would have neither special claims to land nor special rights to political autonomy”.\textsuperscript{35} It has been argued that this failed to recognise the power imbalance at the core of Aboriginal Australians’ dispossession,\textsuperscript{36} and meant that true reconciliation could not occur.\textsuperscript{37}

Some theorists argue, therefore, that when the dominant norm is applied to formal equality its main impact is to further assimilation.\textsuperscript{38} This is especially the case with Indigenous theorists. They argue it is unjust to treat Indigenous Peoples the same as the dominant culture and deny them recognition of their rights on the basis of their indigenous status.\textsuperscript{39}

\textsuperscript{33} Ibid, at 127.
\textsuperscript{34} Ibid, at 125-126.
\textsuperscript{36} O’Sullivan, above n 17, at 146.
\textsuperscript{38} See for example Fredman, above n 11, at 16; O’Sullivan, above n 17, at 126.
2.c. Concluding remarks on formal equality

The great advantage of formal equality is its simplicity: likes should be treated alike.\textsuperscript{40} It is a principle of equal treatment. Yet formal equality is full of contradictions, enough to “absorb the attention and energies of several deconstructionists”.\textsuperscript{41} It is clear that in some respects it can perpetuate inequalities by masking disparities between people and denying difference. Yet it is an idea that has an internal coherence, contradictions notwithstanding.\textsuperscript{42} It resonates with Aotearoa/New Zealand’s mythological national history of two peoples becoming one nation via treaty, all New Zealanders, and all worthy of equal treatment under the law.

Yet, the law does recognise difference. There are many instances where the law treats different groups unequally: for example, restricting voting and driving ages, or providing disabled parking. In Western societies, such as Aotearoa/New Zealand, age and disability are accepted relevant differences in many situations, which under the doctrine of formal equality require different treatment to be just.

The debates about formal equality, therefore, boil down to debates about what are relevant differences. What limits formal equality’s impact is not that it is an empty notion, but that it does not specify how to discern relevant likenesses and dissimilarities. Moreover, because additional judgement is required as to when people are relevantly alike, formal equality can never reach Aristotle’s claim that it is universally accepted “even apart from argument”.

Despite this, the test, to treat likes alike, has bite and value for the oppressed. But this is limited because everything turns on further substantive concerns. It is therefore not that formal equality is the wrong notion to create equality; it is just that it is insufficient to do the job.

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\textsuperscript{41} West, above n 3, at 8.

\textsuperscript{42} Ibid.
\end{flushright}
This chapter now turns to discussion of the specific notions of equality that were advanced in the Debate. These notions can be viewed as different formulations of the principle of formal equality, when that notion is supplemented by a range of different substantive views as to who is alike and what are relevant distinctions between people.

3. **Formal equality between individuals**

The doctrine of formal equality between individuals that Don Brash expressed in his “Nationhood” Speech\(^\text{43}\) is perhaps most commonly associated with the general idea of formal equality. However, I contend he captured only one aspect of it that sits at one end of the equality spectrum.

Brash called for equal treatment between individuals, and opposed any difference in rights recognition between Māori and Pākehā in the foreshore and seabed.\(^\text{44}\) Brash utilised the basic ideal of formal equality, that likes should be treated alike, and his initial judgement was that all New Zealanders were alike, and should therefore be treated alike, and should have the same rights and duties in relation to the foreshore and seabed.\(^\text{45}\)

Brash heavily pushed ‘need’ as the only relevant factor for treating Māori differently in social and political initiatives.\(^\text{46}\) Thus, the claimed existence of Māori customary rights did not justify treating Māori differently in the foreshore and seabed. To give such different treatment would be to treat like cases differently. This would violate the principle of formal equality and be unjust.

Furthermore, Brash claimed that through previous government policies, that had distinguished Māori on the basis of racial difference, and not need or merit, Māori had received “a birthright to the upper hand” they did not deserve.\(^\text{47}\) This argument

\(^{43}\) Brash, above n 27.
\(^{44}\) See ibid, at 10-11, 13, and 14-15.
\(^{45}\) Ibid, at 3 and 14.
\(^{46}\) Ibid.
\(^{47}\) Ibid at 3.
resonated with many New Zealanders, and led to a wide-ranging review of the Labour-led government’s policies.\(^{48}\)

Brash’s argument can also be seen in another light: that inequalities are an aberration that could be eliminated by extending equal treatment to all in accordance with the same “neutral” standard. However, behind this proposition, it might be said, lies the supposition that Pākehā culture is the norm. To Brash, New Zealanders were all one people,\(^ {49}\) and since Māori were the same as Pākehā, rights that draw their legitimacy from outside Pākehā culture were not legitimate and could not be recognised. To recognise any Māori rights in the foreshore and seabed would be unjust, as Māori would be treated differently to Pākehā, who were, in effect, the norm. Brash therefore advocated Crown ownership of the foreshore and seabed, which would have resulted in a return to the pre- Ngati Apa\(^ {50}\) understanding.\(^ {51}\)

4. **Procedural equality**

Michael Cullen’s notion of equal consideration of interests, and the Treaty Tribes Coalition’s two notions of equal application of the law and equal access to the law, can all be brought under the overarching notion of procedural equality, which can be viewed as a subset of formal equality. Here, I will briefly analyse the principle of procedural equality in general before discussing the specific aspects of it, articulated by Cullen and the Coalition.

4.a. **The philosophical underpinnings of procedural equality**

Procedural equality might be defined as an equal chance to participate in a fair procedure.\(^ {52}\) It encompasses the chance to have your interests fairly considered by decision makers, a chance to participate in the courts or other forums where decisions about your specific interests are made, and the chance to enjoy the universal application of the laws. The notion is also broad enough to include the chance to

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\(^{48}\) For more detail, see Chapter Three, Section 3.

\(^{49}\) Brash, above n 27, at 3.

\(^{50}\) *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

\(^{51}\) Brash, above n 27, at 10.

participate fairly in political processes, such as voting and running for office, the
chance to participate in competitive economic markets, and the right to a fair trial in
criminal proceedings. However, these latter aspects were not features of the Debate.

Procedural equality is generally about treating people according to uniform procedural
criteria, whether or not this produces substantive equality. Therefore procedural
equality, like its parent formal equality, does not guarantee equality of outcome. All it
guarantees is that everyone has the right to enjoy the same process in the
determination of their rights. It does not guarantee their substantive rights will be
upheld at the end of the process. As James Holston concluded, decisions viewed
according to procedural equality “may generate new substantive inequalities”.

While the doctrine of procedural equality can be said to be a subset of formal equality,
it is also similar to equality of opportunity, which guarantees everyone the same
opportunity to participate in a procedure, with the hope that this will produce a fair
outcome. There is room for disagreement, however, as to whether procedural equality
is achieved in particular circumstances. Often disagreements will emerge over
whether people are given an equal chance to participate in a fair process. One of the
claims of the Coalition was that Māori were not given an equal chance to participate
in the court process to determine their property rights. This will be discussed in more
detail when I turn to analyse their call for equal access to the law.

4.a.i. Procedural equality as the procedural element of formal
equality

In its procedural form, formal equality concerns the process of decision-making rather
than the substance of decisions. So Ian Culpitt writes, “Procedural equality is

53 For more information see ibid, at 132.
54 See generally Janneke Gerards “Equality as Legal Argument” (16 April 2009) IVR Encyclopedie
56 Equality of outcome, on the other hand, “demands equality of results along some specific dimension, for instance, rights, happiness, resources, welfare, or income”: Arthur, above n 52, at 132.
57 Ibid, at 133.
essentially a principle of equality of treatment and not one of distribution”. Procedural equality, therefore, permits like cases to be treated alike, whether it be the government in considering similarly situated interests, or judges applying universal legal norms when deciding a case.

4.a.ii. Procedural equality and the inherent equality of persons

Arguments for procedural equality can be grounded in beliefs covering inherent equality of persons: that is, in the idea that all people are equal, and all human concerns should therefore be approached in an even-handed and neutral manner. This abstract belief in the inherent equality of people, or equal human worth, has widespread support. It is a prescriptive notion, not just a description of how all humans are. It is maintained despite enormous factual differences between individuals, often by focusing on human commonality, be it in attributes or needs. It may depend on a belief that all humans are created equal, or possess an equal capacity for reason, or possess innate rights, natural or positive, that are divinely bestowed at birth or adopted by convention. Alternatively, this notion can be held without endorsing metaphysical views of that kind.

The concept of the inherent equality of persons appeared in the law of Ancient Israel, through the belief that through Adam, who was created in God’s image, “equality in all men is implicit”. This has remnants in Jewish, Muslim and Christian theology today. It was imported into medieval Roman theory, through the Stoic maxim of the fundamental equality of men. It was taught by Christian fathers and confirmed by Roman jurists of the Digests. In Rome, Cicero insisted that the law recognise that all

61 See generally Smith, above 2, at 66.
62 See generally ibid.
63 See generally ibid, at 68.
65 Ibid, at 289.
66 Ibid.
men are equal. Cicero’s basis was that all men are equal in their possession of reason, in their psychological make-up, and in their general attitude toward what was honourable. Through the twelfth and thirteenth centuries, the inherent equality of persons was employed in European canon law. The idea that all people possessed a conscience was its basis. This influences modern thought. Renaissance humanists reinstated Classical and Judeo-Christian doctrines into their arguments for distinctive human dignity and worth. They based their belief on the idea that men possessed the central, pivotal position in the Great Chain of Being that led from the simplest organisms to God.

At the end of the eighteenth century, the idea that human beings are equal because they possess innate rights emerged with the French Declaration of Man and of the Citizen 1789, an idea that had a major impact on the development of the concept of human rights. For example, art 1 of the United Nation’s Universal Declaration of Human Rights 1948 (UDHR) states: “All human beings are born free and equal in dignity and rights”. The inherent equality of people is now guaranteed in many parts of the world. Many modern philosophers have cast off the metaphysical and religious foundations of the notion and freely invoke the dignity of mankind, and therefore the inherent equality of persons, without further justification.

Tied into the concept of the inherent equality of persons is the belief that all people deserve respect. This requires their interests to be given the same consideration as

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67 Ibid, at 346.
68 Ibid.
69 Ibid, at 390.
71 Singer, above n 70, at 227. See also Lewis, above n 70, at 94. For an example of such renaissance writing see Giovanni Pico della Mirandola Oration on the Dignity of Man translated by A Robert Caponigri (Gateway Editions, Chicago, 1996).
73 Universal Declaration of Human Rights 1948, art 1.
74 Singer, above n 70, at 227.
others, and that they be subject to the same legal norms, and should have the same recourse to the courts, or equal access to the law. This principle can also be formulated as the negative rule that there can be no first and second-class persons. So no person should be simply used as a tool or instrument, or be treated as more or less expendable, in order to promote the interests of others.75 Significantly, the commitment to equal concern and respect is shared by the followers of many different political philosophies: followers of liberalism, radical egalitarianism, libertarianism, liberal substantive equality theory, socialism and Marxism.76

4.a.iii. Procedural equality as a feature of the rule of law

As with the umbrella notion of formal equality, the idea of procedural equality is related to aspects of the broad notion of the rule of law. So, the rule of law requires that likes be treated alike before the law. This can be achieved through a decision maker giving all parties equality of consideration. It also requires that there is open access to the courts, which should be open to all to resolve disputes, or there should be equal access to the law. Furthermore, the rule of law requires that there be no illegitimate or arbitrary distinctions embedded in legal rules; in other words, there should be universal or equal application of the law.

4.b. Concluding remarks on procedural equality

All these elements of procedural equality could therefore be described as applications of the principle of formal equality: that is, of the precept that like cases should be treated alike, in a procedural sense. The goal is an equal chance to participate in a fair procedure, that would be followed by any governmental or legal institution.

5. Equal consideration of interests

The doctrine of equal consideration of interests that Cullen expressed sits beyond Brash’s notion of formal individual equality somewhere towards the middle of the equality spectrum. This is because the doctrine recognises two propositions: first, that

there are legitimate Māori property interests in the foreshore and seabed; and second, that these need to be considered equally with the interests of other members of the public.

5.a. The philosophical underpinnings of equal consideration

Although equal consideration is not connected with any particular philosophical system Cullen considered it part of the philosophical foundations of Aotearoa/New Zealand’s egalitarian political culture. It is a formula much used by utilitarian philosophers, however, and it is useful here to explore their formulation as, the utilitarian’s goal, to achieve the ‘greatest good for the greatest number’, is essentially what Cullen, and the Labour-led Coalition Government, hoped to achieve. Like the principle of formal equality, the notion of equal consideration has coloured much liberal and democratic thought, but it too is vague, and ambiguous, and has many connotations.

The principle of equal consideration of interests that Cullen employed does not suggest that all people should be equally considered. What it says is that an interest should not be discounted on the basis of whose interest it is. Consequently, the principle does not presuppose any factual equality between persons. Its force is not diminished by the fact that people are different and possess different attributes. The principle simply requires that the decision maker, in this case the government, must equally consider the like interests of all those potentially affected by a decision, regardless of the identity of those persons. The proper objects of this equality doctrine are therefore interests, not people. In terms of the democratic process, the principle provides that, during a process of collective decision-making, the interests of

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77 Will Kymlicka noted that it is an essential part of egalitarian theories, requiring that the government treat its citizens with equal consideration, and each citizen being entitled to equal concern and respect. He also stated that this requirement is found in Robert Nozick’s libertarianism and Karl Marx’s communism: Kymlicka, above n 76, at 4.
80 Ibid, at 484.
81 Ibid; and Jamieson, above n 78, at 114-115.
82 Jamieson, above n 78, at 114.
every person who is subject to the decision and whose interests are therefore affected must (within limits of feasibility) be accurately interpreted and made known.\textsuperscript{83}

Nicholas Smith highlighted the policies of Nazi Germany and Apartheid South Africa as failing to give equal consideration to all citizens.\textsuperscript{84} These policies are so repugnant to New Zealanders that when Māori are treated differently, be it through specific consultation or recognition of Māori cultural practices, there is often a call that this is Apartheid.

5.a.i. Equal consideration as procedural equality on the part of the government

The notion of equal consideration could be described as the procedural element of formal equality at the governmental level. It requires that a government decision maker consider, hear, assess, weigh, and pay respect to the interests of those similarly situated; that is, those whose interests will be similarly affected by the final outcome. Cullen clearly used this notion of equality when he stated that it is the duty of the government to balance people’s interests in the foreshore and seabed.\textsuperscript{85} What he was essentially saying was that the government must consider various people’s interests, and that, in this instance, the existence of Māori customary rights was not a sufficient reason to discount completely other people’s interests in the equation.

The assumption is that the equal treatment of people’s interests needs no justification. What warrants justification is the decision not to treat certain interests equally. Cullen made such a justification when he explained that the customary interests of Māori that amounted to full and exclusive title would not be given equal consideration.\textsuperscript{86} He argued that there is no legal precedent for recognising strong interests of that kind. They were not therefore relevant interests and needed no consideration.\textsuperscript{87} Their full recognition might also prevent adequate consideration of others’ interests.\textsuperscript{88}

\textsuperscript{83} Robert A Dahi Democracy and Its Critics (reissued ed, Yale University Press, New Haven, 1991) at 86.
\textsuperscript{84} Smith, above n 2, at 66.
\textsuperscript{85} Michael Cullen “Challenge to find balance on issue of foreshore rights” Opinion, ODT (Dunedin, 18 February 2004) at 19. For the full text of this Article see Appendix Four.
\textsuperscript{86} Ibid.
\textsuperscript{87} Ibid.
\textsuperscript{88} Ibid.
As a procedural notion, equal consideration of interests is itself formal. It does not specify what should be counted as interests and which interests should be given priority, as the above example shows.\textsuperscript{89} Moreover, equal consideration provides no substantive criteria as to what is a relevant ground for deciding to treat people’s interests differently. For instance, it does not resolve the debate as to whether the existence of Māori customary rights in the foreshore is, or is not, a sufficient reason for treating Māori differently in relation to access to the beaches. It gives a broad indication of how a decision maker should proceed, but gives no indication as to what the final decision should be.\textsuperscript{90} Equal consideration simply holds that “burdens can be imposed and benefits allotted only after all claims have been fairly evaluated [by the decision maker]”.\textsuperscript{91} Equality of consideration therefore does not guarantee equality of outcome at the end of the process.

5.a.ii. Equal consideration as a principle of fairness

Equal consideration rules out favouritism and is associated with the idea of fairness.\textsuperscript{92} The interests of people might be quite similar or quite different, but in fairness a decision maker should give their interests equal consideration where relevant. This is not to say that the decision maker cannot reasonably evaluate one interest as more important than another, but rather that no interests should be discounted unfairly.

A strong principle of equal consideration might claim that all decisions have to be fair in the view of all parties.\textsuperscript{93} This is too strong, however, as there will always be some who will feel a decision is unfair.\textsuperscript{94} It is clear in his Article that Cullen did not advocate this strong principle.

\textsuperscript{90} Polyviou, above n 59, at 12.
\textsuperscript{91} Ibid.
\textsuperscript{92} Benn, above n 75, at 118.
\textsuperscript{93} Ibid.
\textsuperscript{94} Benn argued that in order for equal consideration to work procedurally, it could not be applied in this strong sense. He contended that: “It is not that there are situations in which being unfair would be unobjectionable; rather, it is that one is not always bound to assess all the effects on other people of what one does in terms of fairness”: ibid.
To apply the principle of equal consideration a decision maker must have an understanding of the harm decisions may cause to those affected, but this does not mean a person is necessarily harmed every time a decision maker makes a decision that is not optimal for them. In most situations, opposing interests have to be balanced. Then the decision maker must look for impartial and fair ways to do this. For Cullen, this was the primary aim of the Government’s policy for the foreshore and seabed.

5.a.iii. Equal consideration as a utilitarian decision procedure

Although the notion of equal consideration of interests is not uniquely connected with any one philosophical system, utilitarian philosophers have often used it. Essentially, utilitarianism is the idea that the moral worth of an action is determined by its contribution to happiness or pleasure as summed among all people. The goal of utilitarianism is often described as ‘the greatest good for the greatest number of people’, or ‘the greatest happiness principle’. Will Kymlicka has contended that the first argument for utilitarianism is that:

1. people matter, and matter equally; therefore
2. each person’s interests should be given equal weight; therefore
3. morally right acts will maximize utility.

Jeremy Bentham may have first articulated this principle in his formula: “Everybody to count for one, nobody for more than one”, which implies a principle of impartiality.

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95 Ibid, at 120.
96 Ibid.
97 Cullen, above n 85.
99 Kymlicka, above n 76 at 33.
100 Jeremy Bentham and John Stuart Mill (ed) Rationale of Judicial Evidence, Specifically Applied to English Practice: From the Manuscripts of Jeremy Bentham, Esq (Hunt and Clarke, London, 1827) vol 4 at 475. John Stuart Mill attributed the maxim to Bentham: “Utilitarianism” (1861) at ch 5 in Essays on Ethics, Religion and Society (1833-1874) ch 7 reproduced in John M Robson (ed) Collected Works of John Stuart Mill (University of Toronto Press, Toronto, 2006) vol 10, 203 at 257. Bentham’s actual text reads “Every individual in the country tells for one; no individual for more than one”: There are reasons to trust Mill for attributing to Bentham the maxim as Bentham had been responsible for a large part of Mill’s education. See also Berlin, above n 98; Singer, above n 70, at 220.
101 The only passage where Bentham formulated the rule of impartiality is in Rationale of Judicial Evidence: Bentham and Mill, above n 100, vol 1 at 507.
However, the principle that every person counts equally and for one is not restricted to utilitarian philosophy. It has influenced much of liberal and democratic thought and is a specific application of the egalitarian imperative to treat like cases alike. In fact one of the many critiques of utilitarianism is that it does not treat people as equals because it would permit some people’s interests to be severely limited provided this promotes the general happiness. Nor does utilitarianism’s assumption of equal consideration of interests guarantee substantive equality between people.

5.b. Concluding remarks on equal consideration of interests.

The concept of equal consideration of interests has had a widespread influence on Western jurisprudence. It is an essential part of many philosophical systems, in particular utilitarianism. Like the notion of formal equality, it has coloured much liberal and democratic thought and has changed in connotation in different contexts.

It can be derived from several theories, notably from the principles of formal equality, the inherent equality of persons, the principle of fairness, and from Bentham’s formula that “everybody [is] to count for one, nobody for more than one”. Tied into equal consideration are the principles of equal concern and respect, as well as the principle of impartiality.

Equal consideration of interests does not disregard the fact that people may, in practice, be unequally situated in many respects. It is largely a procedural concept. It prescribes that the appropriate decision maker should consider all affected persons’ interests equally, but it sets no substantive criteria for determining what are to count as interests, which interests are to be given priority, or when people’s interests may be treated differently.

Thus, it is compatible with a great deal of inequality. In the democratic process, it may support adherence to the will of the majority, thus perpetuating inequality for minorities. It does not guarantee equality of outcome, and it requires judgments on the

102 Berlin, above n 98, at 301-302.
103 See Kymlicka, above n 76, at 37; Ronald Dworkin Taking Rights Seriously (Duckworth, London, 1978) at 232-238.
104 Freeman, above n 89, at 103.
part of the decision maker as to what are relevant reasons for treating people differently. Cullen’s initial judgment on certain matters was made clear in his Article: for instance, the remote possibility that the courts might recognise exclusive Māori title over areas of the foreshore and seabed was not a sufficient reason for giving Māori interests an overriding priority in the decision.

Despite this, equal consideration may be a useful tool for the oppressed. It guarantees that their interests should be considered. However, it does not specify that their interests have to be implemented. Like formal equality, it is not that it is the wrong theory to guarantee actual equality, it is just inadequate.

6. Equal application of the law

In their Submission, the Treaty Tribes Coalition made two interrelated equality claims. Both, I argue, may be brought under the broad notion of procedural equality, but they express this notion in two distinct ways: via the concepts of equal application of the law, and of equal access to the law (which I will discuss in the next section).

6.a. Philosophical underpinnings of equal application of the law

Equal application of the law is an aspect of the rule of law. It requires that clear, predetermined, known rules be applied universally to all. This may require the existence of ‘positive law’: that is, predetermined legal rules, that are clearly and publicly available, in order to prevent subjective, discretionary law enforcement.

One foundation of this demand for ‘positive law’ lies in classical, liberal theory, in which individual liberty is accorded the utmost importance, and the individual is considered “the ultimate unit of moral worth”.105 This basic liberty of the individual can only be achieved by ensuring equal rights and equal opportunity for all individuals, which in turn requires that all laws and rules should be known in advance and be universally applied to all individuals.

The Coalition unequivocally called for one law for all to be applied to all New Zealanders.\textsuperscript{106} For them, this required that the courts be allowed to hear cases concerning Māori rights in the foreshore and seabed, and be able to apply the established rules of property law to determine whether or not Māori property rights would be recognised in the zone.\textsuperscript{107} The key to their argument is that these rights are genuine property rights. They may have a different foundation to many other forms of property rights, being grounded in tikanga\textsuperscript{108} and the doctrine of native title, but they were property rights nonetheless. As Sir Tipene O’Regan, a leading member of Ngāi Tahu, part of the Treaty Tribes Coalition, stated: “People are all assuming this is about their barbeque on the beach rights. This is a much more complex issue. It’s about everyone’s property rights”.\textsuperscript{109} Therefore, those rights deserved to be subject to the same legal rules, and enforced through the same judicial processes, as other property rights in this zone.

Furthermore, equal application of the law requires that decisions on rule application be made consistently.\textsuperscript{110} For the Coalition, the Government acted inconsistently by deciding to “unilaterally over-rule the judgment in Ngati Apa to prevent the successful appellants in that case from having their arguments heard by and ruled upon by the Māori Land Court”.\textsuperscript{111}

However, applying the law consistently may not avoid damaging or oppressive results.\textsuperscript{112} The Coalition acknowledged this in their Submission, when they conceded that should a court decide that the Māori appellants did not have rights in specific foreshore and seabed this would have to be accepted by Māori.\textsuperscript{113} From their point of

\textsuperscript{106} Treaty Tribes Coalition \textit{One Rule of Law for All New Zealanders: A Submission by the Treaty Tribes Coalition on the Foreshore & Seabed Issue} (Treaty Tribes Coalition, Christchurch, 2004) at 2 and 3. For the full text of this Submission, see Appendix Five.

\textsuperscript{107} Ibid, at 2-3.

\textsuperscript{108} Custom.


\textsuperscript{111} Treaty Tribes Coalition, above n 106, at 2.

\textsuperscript{112} Koggel, above n 76, at 46. Young Yun Kim goes as far to claim that procedural equality is closely associated with assimilation: Young Yun Kim, “Unum and pluribus: ideologica underpinnings of interethic communication in the United States” (1999) 23 IJIR 591 at 606.

\textsuperscript{113} Treaty Tribes Coalition, above n 106, at 2.
view, equality would still have been maintained, however, because the law would have been applied consistently.

6.a.i. Equal application of the law as a procedural element of formal equality

Equal application of the law also requires that there be no irrelevant distinctions built into legal rules. The Coalition therefore argue that the difference in the foundations of Māori property rights, compared to other property rights in the zone, is not a relevant reason for treating Māori property rights differently. Instead, Māori and non-Māori property-holders should be treated alike in this case.

Put another way, equal application of the law requires there to be no discrimination in legal norms. The Coalition therefore argued that to treat Māori property rights differently from other people’s property rights, by not allowing the courts to conduct a hearing or apply standard legal norms, was discrimination.  

6.b. Concluding remarks on equal application of the law

Equal application of the law can be described as one application of the formal equality principle: it leads to like cases being treated alike. In the Debate, it would lead to all property rights being subject to similar legal standards and norms. It calls for there to be no irrelevant distinctions built into legal rules, and for no discrimination in legal norms.

Thus, equal application can be a useful tool for Indigenous Peoples. It can be used to argue that their property rights should be subject to the same degree of legal protection as other forms of property, irrespective of their different foundation. Acceptance of this notion has meant that many Indigenous groups have been able to pursue court action to determine and protect their property rights with the knowledge that the relevant norms will be applied consistently and universally. They have also

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114 Ibid, at 2, 3, 8, 9 and 11.
been able to utilise other legal mechanisms to have their rights recognised, for example international law institutions such as the United Nations.\textsuperscript{115}

The doctrine of equal application of the law is nevertheless limited for Indigenous Peoples because it requires that their claims be moulded into Western legal concepts, such as the notion of aboriginal rights. Many Indigenous Peoples have taken up the rights mantle, however, and have utilised it to push for greater recognition of their claims. Furthermore, as is the case with the Treaty Tribes Coalition, Indigenous Peoples have often articulated their claims in terms of property rights, or human rights, rather than Indigenous rights, as the latter itself calls for recognition of difference and thus difference in treatment. Taking the formal approach may give greater credence to their claims and sits better with the idea that legal norms should be applied universally. However, it fails to recognise the concept of indigeneity as a legitimate source of rights, and fails to recognise rights that do not fit western legal parameters. As a result, substantive inequalities may remain.

\textbf{7. Equal access to the law}

The second, interrelated equality claim that the Treaty Tribes Coalition made in their Submission was for equal access to the law. This sits beside their claim for equal application of the law. Both are aspects of the demand for procedural equality and adherence to the rule of law. This claim implies no judgment, however, whether Māori possess rights in the foreshore and seabed; it simply requires that Māori and non-Māori have the same opportunity to bring their cases to court to have a fair determination of the rights they may have.

\textbf{7.a. The philosophical underpinnings of equal access to the law}

The notion of equal access to the law, in this sense, maintains that there should be open access for all to the courts. It is a procedural equality claim because it requires

\textsuperscript{115} During the Debate, the Treaty Tribes Coalition took their case against the Government to the United Nations Forum on Human Rights and Permanent Forum on Indigenous Issues, stating, that the Labour-led Coalition Government intended to extinguish Māori property rights, irrevocably severing Māori customary relationships to the foreshore and seabed: Edward Ellison, paraphrased in Tom McKinlay “Ellison to address UN” \textit{General, ODT} (Dunedin, 13 May 2004) at 3, and that the Government’s actions would override the rule of law and breach the principles of non-discrimination and equity: Edward Ellison “Address to the Forum on Human Rights” reported in Howard Keene “Ngāi Tahu goes to the UN” (2004) 25 Te Karaka 20 at 23.
that the courts - a particular process - be open to all people to resolve their disputes. It also incorporates the idea of fairness in the process for resolving disputes, because equal access to the courts is a type of fairness.

This notion is similar to John Rawls’ conception of “pure procedural justice”, which applied in situations where there was no criterion for what constitutes a just outcome other than the procedure itself.116 Thus, to the Coalition, justice did not necessarily require the outcome that Māori had their property rights recognised,117 but rather that Māori be able to access the courts to have their property rights determined, as could others with rights in this zone.118 To deny Māori such access was unjust and discriminatory.119

7.a.i. Equal access to the law as a procedural element of formal equality

Equal access to the law can be described as a further procedural element of formal equality. Enabling open access to the courts permits like cases to be treated alike. It holds that all people are equal and also they should have access to the same procedures for dispute resolution. Again, however, this does not guarantee that there will be equality of outcome.

To put this another way, the principle holds there must be relevant differences for denying a person recourse to the courts. The Treaty Tribes Coalition argued that the customary basis of a claim was not a relevant reason for treating Māori differently in this respect.120 Removing only the ability of the courts to investigate Māori customary title was to deny Māori due process on the basis of race.

The same principle could be described in terms of equality before the law, which requires each individual to be subject to the same laws, with no individual or group

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117 Treaty Tribes Coalition, above n 106, at 2.
118 Ibid, at 3.
119 Ibid.
120 Ibid, at 3 and 11.
having special legal privileges. It can also be described as an aspect of equal protection of the laws.\textsuperscript{121}

The first articulation of equality before the courts was in the French Declaration of the Rights of Man and the Citizen 1789.\textsuperscript{122} The UDHR enshrined it as a fundamental right in art 10.\textsuperscript{123} Article 14 of the International Covenant on Civil and Political Rights declares everyone is equal before the courts and tribunals and people have a substantive right of access to the courts in criminal cases.\textsuperscript{124} The United Nations Human Rights Committee has clarified that art 14 pertains to all courts and tribunals, both criminal and civil, and that equality before the courts includes equal access to the courts.\textsuperscript{125} Section 25(a) New Zealand Bill of Rights Act 1990 states that everyone has a right to access the court when charged with a crime.\textsuperscript{126} Furthermore, s 27(3) guarantees New Zealanders a substantive right of access to the courts for the resolution of civil disputes.\textsuperscript{127}

\textsuperscript{121} However, as Patrick Thornberry conceded [Patrick Thornberry \textit{International Law and the Rights of Minorities} (Clarendon Press, Oxford, 1993) at 285]:

\begin{quote}
  The phrase ‘equal before the law’ is narrower than ‘equal protection of the law’; the former reflects the notion of equality before the courts, whereas the latter incorporates a general prohibition of discrimination on forbidden grounds, not only in court, but wherever it manifests itself in law.
\end{quote}

\textsuperscript{122} See Rhona KM Smith \textit{Textbook on International Human Rights} (3rd ed, Oxford University Press, Oxford, 2007) at 237. The first sentence of art 7 reads: “\textit{Nul homme ne peut être accusé, arrêté, ni détenu que dans les cas déterminés par la Loi, et selon les formes qu’elle a prescrites}”: The Constitution of France 1958, above n 72, at 41. This can be translated to “No man may be accused, arrested, or detained except in cases determined by the law and according to the forms it has prescribed”: Kley, above n 72, at 2.

\textsuperscript{123} Article 10 reads:

\begin{quote}
  Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
\end{quote}

\textsuperscript{124} International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), art 14:

\begin{quote}
  All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
\end{quote}


\textsuperscript{126} New Zealand Bill of Rights Act 1990, s 25(a):

\begin{quote}
  Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
  
  (a) The right to a fair and public hearing by an independent and impartial court:
\end{quote}

\textsuperscript{127} Ibid, s 27:

\begin{quote}
  (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person’s rights, obligations, or interests protected or recognised by law.
  
  (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
  
  (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.
\end{quote}
The United Nations Declaration on the Rights of Indigenous Peoples 2007 also specifically recognises that Indigenous Peoples possess a substantive right of access to the courts for dispute resolution. Article 40 states:

Indigenous Peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or with other parties, as well as to effective remedies for all infringements of their individual and collective rights.

7.a.ii. Equal access to the law as a version of equality of opportunity

Another way of putting this is to say that the Coalition implicitly argued for equality of opportunity in the courts. They called for Māori to have the same opportunity to access the courts as other New Zealanders. Peter Westen has argued that equality of opportunity is:

… a chance of a specified agent or class of agents, X, to obtain a specified goal or set of goals, Y, without the hindrance of a specified obstacle or set of obstacles, Z.

The Coalition’s argument can be broken down, using Westen’s formula, as follows: Māori (X), want to obtain the goal of access to the courts (Y), without the hindrance of laws that prevent Māori from having the same opportunity for recognition of their property rights as other New Zealanders (Z). The goal is therefore equal access, not necessarily equality of results.

The goal for the Treaty Tribes Coalition was not that Māori would necessarily be found to have rights in the foreshore and seabed, which was still to be determined, but simply that they have access to the process that will determine whether or not they possessed these rights. To give Māori the same opportunity as other New Zealanders to have their rights determined would require that the Foreshore and Seabed Act 2004 be repealed, as one section of society should not be prevented from accessing the courts on the basis of race.

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129 Treaty Tribes Coalition, above n 106 at 2, 3, 8 and 9.
130 Westen, above n 5, at 169-170.
8. *Equality of authority*

The notion of equality of authority that the signatories to the Paeroa Declaration seemed to advocate could be said to sit at the far end of the equality spectrum. This is because it calls for a normative shift away from a paradigm based on equality between individuals to one based on equality of peoples. It calls at least for equality to be realised between two equal but separate authoritative powers, Māori and the Aotearoa/New Zealand Government (or Crown). On this view, Manawhenua should, at least, have certain powers to determine individual and collective rights in the foreshore and seabed, just as the Crown, through the courts and Parliament, may determine certain rights over other resources in Aotearoa/New Zealand. Furthermore, on this view, Māori as an equal source of authority would not be limited by the courts’ decisions as to the sources of law they could employ to determine rights, but could determine rights on the basis of tikanga Māori.\(^{131}\)

As noted in Chapter Three, the Paeroa Declaration itself does not speak of equality. At face value it seems to be assert a unilateral right of Manawhenua to determine all matters within the foreshore and seabed.\(^{132}\) There is no express concession of another zone in which the Crown has authority to determine rights over other resources, and there is no express acknowledgement of the authority of Crown institutions.\(^{133}\) The signatories might therefore be prepared to make a general sovereignty claim over more than just the foreshore and seabed. Such a claim to Manawhenua sovereignty would contradict the notion of equality to some extent, as does any strong claim to sovereignty, including Brash and Cullen’s claims for parliamentary sovereignty, because a claim to sovereignty is a claim to exercise paramount authority, an authority not shared with any other group or body. Thus, it must be conceded that the central

\(^{131}\) Māori customary law. Section 4 of Te Ture Whenua Maori Act 1993 defines ‘tikanga Māori’ as: “Māori customary values and practices”.

\(^{132}\) See the Paeroa Declaration (signed 12 July 2003), resolutions 1, 5 and 6 reproduced in *Tino Rangatiratanga Te Takutai Moana* (2nd ed, prepared as vol 2 of the IRI, Economics, Politics & Colonisation Series, 2003) at 11, and discussion in Chapter Three, Section 2.b. For the full text of this Declaration see Appendix Two.

\(^{133}\) In resolution 4, the Paeroa Declaration acknowledges that the courts may have a determinative role, but this is only when Manawhenua, exercising their own rangatiratanga, wish to access them: The Paeroa Declaration, above n 132, resolution 4. This therefore lends weight to the argument that if the courts decided against the applicants, Manawhenua, as the final decision-makers, could still exercise their power and over-rule the courts. This argument will be discussed in more detail in Chapter Five, Section 3.b.ii.
challenge of the Paeroa Declaration is not to individual equality, but to parliamentary sovereignty.

This does not rule out reading more equal notions of sovereignty into the text, however. While the Declaration does not concede another zone in which the Crown would hold equal but separate authority, and while it does not renounce claims of Manawhenua sovereignty outside the foreshore and seabed, the assertion of authority that is made is only with respect to the foreshore and seabed.\textsuperscript{134} One therefore cannot say for certain whether the signatories were arguing only for local sovereignty, and accepted Crown sovereignty in other zones.

This ambiguity leaves room for the notion of equality of authority to be read into the Declaration. The notion therefore requires some analysis.

\textbf{8.a. The philosophical underpinnings of equality of authority}

This concept of equality of authority that the signatories to the Paeroa Declaration might be using is not the same as the Lockean version of equality of authority. John Locke’s version is concerned with equality between individuals, and not between peoples. It holds that all should “be equal amongst another, without subordination or subjection”.\textsuperscript{135} Jeremy Waldron argues that Locke’s equality of authority rests on the premise that “once we acknowledge that no human has a superior status, we have no choice but to treat the needs and desires of others as on a par with our own”.\textsuperscript{136}

That is not the essence of the signatories’ argument. However, their version of equality of authority has one thing in common with Locke’s theory: both can be viewed as expressions of equality of “power and jurisdiction”.\textsuperscript{137} For Locke, all individuals hold equal power and authority, so no one can subvert another’s power nor hold jurisdiction over another.\textsuperscript{138} The implicit notion equality of authority that

\textsuperscript{134} The Paeroa Declaration, above n 132, resolutions 1 and 6.
\textsuperscript{136} Waldron, above n 60, at 155.
\textsuperscript{138} Ibid.
might be present in the Paeroa Declaration applies these notions to relations between collectives. It suggests that Māori and the Crown should have equal power and authority, as equal partners envisioned under the Treaty. The Crown would have no power to subvert the authority of Manawhenua in the foreshore and seabed, nor would the Crown deny their jurisdiction over that region, because the Crown and Māori have separate regions of authority, and it is Manawhenua authority that extends to this zone.

8.a.i. Equality of authority as founded in equality of worldview

The equality of authority that the signatories to the Paeroa Declaration might be calling for may be necessary to give expression to a related concept, that we might call equality of worldview. This notion demands that Indigenous worldviews be validated and legitimised in the same manner as dominant, non-Indigenous worldviews. It calls for Indigenous ideologies and systems of law to be recognised by the state as legitimate. In this sense it is similar to equality of recognition, which is the type of equality colonised minorities claim around the world when they call for state institutional and jurisdictional spaces to be carved out in a way that recognises their right to self-determination. Equality of recognition therefore requires that the institutional and jurisdictional spaces of a state’s public sphere be devoted to the recognition of the indigenous identity as much as they are to the dominant culture’s identity.139

However, it goes further by calling not only for recognition but validation of the Indigenous worldview by the state. It holds that if a Māori way of seeing the world is not validated, there can be no equality because in denying its validation the Pākehā worldview is automatically elevated above that of the Māori, and any rights based in tikanga would automatically be viewed as lesser and subservient to rights based in common law or statute: that is, in non-Māori sources of law.

The demand for equality of worldview therefore justifies the assertion of equality of authority. It holds that because the Māori worldview is as valid as the Pākehā, Māori

authority should be viewed as just as valid as Governmental authority. It recognises that the Māori worldview has a different metaphysical foundation, one that places duties, as well as authority, on Māori, such as the duty to exercise kaitiakitanga over the natural world. It validates the connection that Māori have to the land, as tangata whenua, ‘people of the land’, a connection that is passed down through whakapapa from Papatūānuku. Furthermore, it validates the belief, in the Māori worldview, that dry land and land under water are both Papatūānuku, and deserve the same protection. Manawhenua authority over the foreshore and seabed is therefore a way of upholding obligations under kaitiakitanga, towards Papatūānuku, and a way of ensuring these relationships are maintained for future generations.

Therefore, equality of worldview, it can be said, also requires equality of respect. It requires respect for the Indigenous perspective on the world, and for Indigenous sources of law. In Aotearoa/New Zealand, this requires that tikanga be recognised as a valid source of law. This is implicitly what the signatories were arguing. As a source of law, tikanga would uphold Māori customary property rights based on ancestral title, and on art 2 of the Treaty, as the signatories mention in resolution 2 of the Declaration. It would also uphold the authority of Manawhenua that the signatories allude to in resolutions 5 and 6.

8.a.ii. Equality of authority as a subset of equality of peoples

Equality of authority also has affinities with the notion of equality of peoples. Equality of peoples could be said to exist between sovereign states. In terms of existing within a sovereign state, perhaps the closest example is the form of equality existing in the United States between the Federal Government and Indigenous Tribes. While this relationship does not translate to pure equality of peoples, in the sense that Tribal Governments are not immune from Federal interference, there Tribes have the status of “domestic dependent nation[s]” and have the right to govern their own

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140 Guardianship, stewardship. Section 2 of the Resource Management Act 1991 defines ‘kaitiakitanga’ as:

… the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

141 Genealogy.

142 Earth Mother.

143 See the Paeroa Declaration, above n 132, resolutions 1 and 2.

144 Ibid, resolution 2.

people on their reservations. Indigenous Americans who live on the reservations are considered citizens of their home reservation as well as citizens of the United States.

The United States Federal Government has a unique government-to-government relationship with 565 federally recognised Tribal Governments as provided by the Constitution of the United States, treaties, court decisions and federal statutes. Tribal Governments have sovereignty over their tribal reservations and have the inherent jurisdiction to make law over their internal affairs, although the reservations are also subject to federal law, which limits the sovereignty of Tribal Governments in some areas. These tribal laws pertain to all people on the reservations, both Indigenous and non-Indigenous alike, although the Federal courts have limited the reach of these laws. Despite this, Tribal Governments, in exercising their sovereignty, may pass laws upholding their traditional cultural values even if this may create inequality at the individual level. This opens Tribal Governments to criticism from outsiders who uphold equality between individuals as the proper conception of

146 The Cherokee Nation v The State of Georgia 30 US 1 (1831) at 17 per Marshall CJ: “tribes which reside within the acknowledged boundaries of the United States can … be denominated domestic dependent nations”. The Navajo Nation Government, for example, was established in 1923 by the federal government as a Tribal Council. In 1938, after a failed attempt to pass a constitution, the then Secretary for the Interior issued a simplified set of by-laws entitled “Rules for the Tribal Council”. These ‘rules’ established a new Tribal Council, which over the years evolved into the largest Tribal Government in the United States. Part of this evolution included adopting the Navajo Nation Code in 1962, which consolidated and codified all previous tribal resolutions and federal laws. It contains the general and permanent provisions of the law and resolutions of the Navajo Nation Council. In 1989, Title II of the Code was amended, and at that time the Council re-declared itself the governing body of the Navajo people. See “History” (2005) Welcome to the Navajo Nation Government: Official Site of the Navajo Nation <http://www.navajo.org/history.htm>; David E Wilkins The Navajo Political Experience (revised ed, Rowman & Littlefield, Lanham (Maryland), 2003).

147 For more information, see “What We Do” (24 November 2010) US Department of the Interior: Indian Affairs <http://www.bia.gov/WhatWeDo/index.htm>.

148 For example see Lone Wolf v Hitchcock 187 US 553 (1903) at 565-568 (which recognised congressional plenary power over Tribal Governments in relations to property law); United States v Kagama 118 US 375 (1886) at 383-385 (which recognised congressional plenary power over Tribal Governments in relation to major crimes). For further information on these cases see Nell Jessup Newton “Federal Power over Indians: Its Sources, Scope, and Limitations” (1984) 132 U Pa L Rev 195 at 212-236.

149 See Worcester v The State of Georgia 31 US 515 (1832) at 595-596 where the Court implied that in the absence of federal law, non-Indigenous people on reservations would be subject to tribal law. However, since the late 1970s the Federal courts have begun to limit the extent that Tribal laws can bind non-Indigenous people. See for example Oliphant v Suquamish Indian Tribe 435 US 191 (1978); Montana v United States 450 US 544 (1981); Brendale v Confederated Tribes and Bands of the Yakima Indian Nation 492 US 408 (1989); Duro v Reina 495 US 676 (1990). See also generally David E Wilkins and K Tsiianina Lomawaima Uneven Ground: American Indian Sovereignty and Federal Law (University of Oklahoma Press, Norman (Oklahoma), 2001).

150 For example Tribal Governments have the jurisdiction to determine rules for membership of the Tribe and election or selection. See Santa Clara Pueblo v Martinez 436 US 49 (1978). In this case the Court upheld a tribal membership rule that denies tribal membership to the children of female members who marry outside the tribe.
equality. However, an important form of equality is still maintained because, at a constitutional level, sovereignty (although limited in some areas) is distributed between the United States Federal Government and Tribal Governments.

As Patrick Macklem acknowledged, United States laws authorise “the exercise of Indian governmental authority and provide for extensive differential treatment on the basis of indigenous difference”.\(^\text{151}\) Equality of peoples, and consequently equality of authority exercised by distinct peoples, permits rules to be made that may not guarantee equality at the individual level.

Accordingly, while Tribes are viewed as dependent, domestic nations, they sit outside the State Governments’ authority in the United States, and are one of several forms of authority that share a divided national sovereignty. As discussed in Chapters Two and Three, tino rangatiratanga\(^\text{152}\) can be interpreted as sovereignty, and has been used to make claims for a separate but equal Māori state, similar to the sovereignty exercised by Tribes in the United States of America. While it is not clear whether the signatories to the Paeroa Declaration were claiming general recognition of their sovereign status, what they did claim unequivocally was that Manawhenua were the correct decision makers to determine rights in the foreshore and seabed.\(^\text{153}\) Therefore, they claimed rangatiratanga\(^\text{154}\) was a fetter on parliamentary sovereignty, in this area, and thus, on one view of it, they called for divided sovereignty where Manawhenua would be recognised as the ultimate authority in the realm of the foreshore and seabed. Elements of this can also be seen in resolution 5, where the signatories recognise the role of the Government in preparing policy concerning the foreshore and seabed, but assert that Manawhenua can override this policy.\(^\text{155}\)

\(^{151}\) Patrick Macklem “Distributing Sovereignty: Indian Nations and Equality of Peoples” (1993) 45 Stan L Rev 1311 at 1323. Macklem, in his later work on the situation in Canada, defined ‘indigenous difference’ as constituting “Aboriginal cultural difference, Aboriginal prior occupancy, Aboriginal sovereignty, and Aboriginal participation in a treaty process”: Macklem, above n 39, at 4. Macklem stated that these “social facts” are exclusive to North America, however, these “social facts” are applicable to other Indigenous Peoples, in particular Māori, who signed the Treaty, and therefore meet all four criteria.

\(^{152}\) Sovereignty, ultimate chieftainship, chieftainship, right to exercise authority, chiefly autonomy, self-determination, self-management, indigenous rights, mana Māori (the Māori way of life).

\(^{153}\) The Paeroa Declaration, above n 132, resolution 6.

\(^{154}\) Shortened version of ‘tino rangatiratanga’. See above n 152.

It may be that in making these authority claims, the signatories were calling for the dissolution of the Aotearoa/New Zealand state into several constituent parts that collectively share national sovereignty to the extent found in a federal nation. However, the assertion of authority, in this Declaration, is made only with respect to the foreshore and seabed. They therefore appear to be asserting that they had local sovereignty over this region, of the foreshore and seabed, or over this resource, to the exclusion of Parliament, and that this local sovereignty was a limit on Parliament’s national sovereignty, because it is Manawhenua, not Parliament, who should make the rules in this zone.

In resolution 4, however, the signatories accepted that the courts had jurisdiction to adjudicate rights in the foreshore and seabed should Manawhenua choose to use the courts. It seems here the signatories recognised that some Manawhenua would consent to submitting their authority to the decisions of the courts, although perhaps they were assuming that the courts would decide in their favour. It seems, therefore, that the signatories recognised that different Manawhenua might seek to have their authority over the foreshore and seabed recognised in different ways. That would be for each Manawhenua to decide, perhaps as an aspect of their rangatiratanga.

Essentially, equality of authority is a concept that seeks to reconcile Indigenous claims to self-determination with Crown sovereignty. As Dominic O’Sullivan argued “Tino rangatiratanga embraces ‘the right to self-determination’”. This requires that the Indigenous identity be recognised and accommodated in a new relationship or partnership with the Crown. Thus, the notion of equality of authority may call for equality between peoples to be exercised in specific areas, notably in the foreshore and seabed, which recognises that Māori are a separate and distinct people, within a single nation.

It must be reiterated, however, that it cannot be presumed that this is the exact meaning the signatories ascribed to their claims. Glen Coulthard has argued, in terms of First Nations Peoples’ claims to recognition in Canada, that claims to recognition are fated to reproduce a fundamentally colonial relationship. He has strongly opposed

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156 The Paeroa Declaration, above n 132, resolution 4.
157 O’Sullivan, above n 17, at 123.
the embrace of such claims and argues that First Nations should assert unreconciled self-determination.\textsuperscript{158} The authors of the Paeroa Declaration may very well be adopting a position like Coulthard’s, in which case they were making a stronger assertion of independent authority than a simple demand for recognition.

Interestingly, equality of authority in either sense need not pertain only to authority over Māori people and things Māori. The signatories in this case were not claiming inherent rights to determine only Māori rights in the foreshore and seabed, but to determine the rights of all people in this realm. The signatories were claiming more than just rights to exercise particular cultural activities. They were claiming the right to determine how, when, where, and by whom, such activity could occur. There is therefore the possibility that such decisions could conflict with the equality of individuals. For example, should a hapū\textsuperscript{159} decide to restrict the collection of shellfish in a specific area to a certain family, then, in a formal equality sense, this would constitute inequality as others would be prohibited from collecting shellfish in that area.

This inequality between individuals would be justified, on this view, however, because at the constitutional level there would be greater equality between Māori and the Crown. Essentially, equality of authority would require people to recognise the authority of Manawhenua over the foreshore and seabed in the same way that the authority of the Crown is recognised in other regions. It would require that those exercising jurisdiction over the foreshore and seabed should recognise tikanga Māori as a legitimate source of law, and that any individual inequality produced in applying tikanga would be justified.

Since equality of authority in this case is clearly related to the notion of equality of peoples, many of the latter’s philosophical underpinnings apply equally to the notion of equality of authority.

\textsuperscript{159} Sub-tribe, clan.
8.a.iii. Equality of authority as a form of formal equality

If there is a normative shift in the argument from the level of the individual to the level of the collective, equality of authority, along with the associated theory of equality of peoples, can even be viewed as a kind of formal equality, albeit at a different level.\textsuperscript{160}

Upholding the equality of peoples, and of their authority, prescribes that the correct distribution of sovereignty is between peoples. In the Paeroa Declaration, the signatories clearly made the claim that they never ceded their rangatiratanga over the foreshore and seabed,\textsuperscript{161} so the state should recognise their authority over that zone. This would uphold the formal equality doctrine that likes should be treated alike. However, it is inherently different from the version of formal equality espoused by Brash, different from Cullen’s notion of equality of consideration, and even different from the Treaty Tribes’ Coalition’s notions of equal application of, and equal access to, the law. This is because the ‘likes’ to be treated ‘alike’ are peoples and not individuals. Seen in this light, claims to sovereignty are not necessarily opposed to theories of equality. In fact, they can actively promote equality, although not necessarily at the individual level, but at the constitutional level between peoples.

The two collectives, Crown and Māori, are alike for the same reasons that formal equality deems individuals alike. For example they both demand respect for their inherent dignity. Therefore, switching the language of formal equality from individuals to peoples, as equality of authority requires, also necessitates a switch in the definition of what is ‘alike’. It is also obvious that in Aotearoa/New Zealand today that the Crown and Māori as autonomous collectives are very different in some respects. However, the underlying feature that both possess is inherent sovereignty and dignity. The Crown draws sovereignty from art 1 of the Treaty, while Māori draw sovereignty from their indigeneity, and from rights of prior sovereignty, as affirmed in art 2 of the Treaty.

\textsuperscript{160} Macklem, above n 39, at 119-125. He discussed formal equality here as between peoples without elaborating on the need for a normative shift from the concept of equality between individuals to the concept of equality between peoples. However, in earlier work he spelt this out specifically: Macklem, above n 151, at 1315.

\textsuperscript{161} The Paeroa Declaration, above n 132, resolutions 1 and 2.
The next section will discuss these justifications for equality of authority in turn.

8.a.iv. The justifications for equality of authority of Māori: Prior occupancy and prior sovereignty

Indigenous Peoples themselves, as well as scholars and theorists, both Indigenous and non-Indigenous, often use the fact that Indigenous Peoples occupied lands prior to European colonisation as a justification for recognising Indigenous autonomy and self-determination.162 However, while prior occupancy highlights the difference between Indigenous and non-Indigenous Peoples, it has been said that: “standing alone, this fact provides little justificatory force”.163 In the end, because sceptics, such as those who harbour views similar to Brash, may not accept that prior occupancy has any bearing on the distribution of authority or rights, a deeper theoretical claim is needed to justify equality of authority over an area like the foreshore and seabed.

This deeper claim is exactly what the signatories argued in the Paeroa Declaration. In resolution 1, the signatories unequivocally stated “the foreshore and seabed belong to the Hapu and Iwi under our tino rangatiratanga”.164 Here they showed that ingrained in the claim of prior occupancy is a much deeper theoretical claim, that of prior sovereignty which has not been legitimately set aside. This deeper claim may legitimise the signatories’ claim to authority over the foreshore and seabed.165 It is not just that Māori were the prior occupiers of Aotearoa/New Zealand, it was that they were prior sovereigns who exercised rangatiratanga in their territories, and this sovereignty, in their view, remains.166 It is thus a far greater claim than that of prior

163 Macklem, above n 151, at 1328. In his later work, Macklem argued that the Indigenous Peoples’ in Canada claim to prior occupancy entitled them to have their territorial and proprietary interests legally protected as that accorded to non-Indigenous Peoples’ interests. However, it was the claim to prior sovereignty that entitled Indigenous Peoples to constitutional recognition of their authority: Macklem, above n 39, at 76-131.
164 The Paeroa Declaration, above n 132, resolution 1. ‘Iwi’ means tribes, nations, peoples.
165 Ibid.
166 The Paeroa Declaration, above n 132, resolution 1. See also Jackson, above n 155, at 38. Macklem made a similar claim in relation to the First Nations in Canada and the United States of America:
occupancy, because it cannot simply be overridden by another’s claim to sovereignty. The prior sovereignty must be removed by either conquest or cession.

This position reflects the central ambiguity over the Treaty’s treatment of sovereignty, and in particular the inherent tension between art 1 and art 2 of the two versions. Those, therefore, who are looking to dismiss the claim that Māori never ceded their sovereignty over the foreshore and seabed will turn their heads to the Treaty, in particular art 1 of the English version, in which Māori ceded sovereignty to the British Crown. It is in the Treaty, however, that the strongest basis for the assertion of prior sovereignty can be found. This, as the signatories explicitly asserted, is that the prior sovereignty of Māori is recognised in art 2 of the Treaty in the guarantee to protect their tino rangatiratanga. This recognition dispels any claims that Māori were never prior sovereigns, and those wishing to assert the sovereignty of Parliament cannot do so without acknowledging the prior sovereign status of Māori, which is explicitly guaranteed by the Treaty itself, alongside the cession of certain forms of authority to the Crown.

Therefore, for equality of authority to truly enable Māori to exercise their tino rangatiratanga in the foreshore and seabed, the law surrounding the foreshore and seabed “ought to permit the expression of indigenous identity free from the stultifying effects of colonial practice”. The law ought to recognise that “tino rangatiratanga symbolises a Maori right to exercise authority within a Maori constitutional framework”. Thus the Crown must refrain from dictating the practices of Māori in order to force conformity with its legal norms such as formal equality between individuals or equality of consideration. These norms can be “portrayed as projections of nonindigenous society, disguised as universal, but in fact historically specific and

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Macklem, above n 151, at 1315. He elaborated on this further in relation to First Nations in Canada, where he stated that First Nations Peoples deserve constitutional recognition because of their cultural difference, claims to prior occupancy and sovereignty and because of their involvement in the treaty processes: Macklem, above n 39.

167 For more discussion, see Chapter Two, Section 5.

168 Importantly, prior to the Treaty, the British Colonial Government had continuously recognised Māori sovereignty. See discussion in Chapter Two, Section 5.

169 The Paeroa Declaration, above n 132.

170 Macklem, above n 151, at 1335, when making a similar claim in relation to general legal and jurisdictional spaces. See also Macklem, above n 39, at 45-75.

171 Maaka and Fleras, above n 162, at 102.
contingent on particular social and cultural settings”. It follows then that for true equality of authority to occur it must be Māori who determine what parts of their culture are to be recognised in the legal and jurisdictional spheres of Aotearoa/New Zealand. This claim can be seen in resolutions 1 and 2, where the signatories articulated that they possess rights under tikanga that go beyond the Crown recognised customary rights of Māori. The signatories were calling for their rights to be recognised within a Māori framework, one that they would determine.

This claim is also implicit in the Paeroa Declaration, in resolution 6, where the signatories stated, “The final decision on the foreshore and seabed rests exclusively with whanau, Hapu and Iwi”. Here the signatories called for the law of the foreshore and seabed to recognise that Manawhenua were the correct authority to determine both the manner in which these rights in the foreshore and seabed were decided, and the outcome in rights terms. These decisions should not be subject to overriding non-Māori legal norms. This is an implicit claim to Māori sovereignty, at least in relation to this resource.

8.b. Concluding remarks on equality of authority

Equality of authority provides the underlying normative reason to respect Māori decisions about the foreshore and seabed. It argues that equality between peoples, and not equality between individuals, is the correct conception of equality in this context. Equality of authority does not explicitly call for the dissolution of the Aotearoa/New Zealand state. Instead it holds that the state should recognise the Manawhenua right to authority over this resource.

However, this authority should not be imposed on Māori. Instead, equality of authority calls for it to be defined by Māori. True equality of authority therefore requires that a Māori-defined authority be recognised as legitimate, and that tikanga be recognised as a legitimate source of law regarding the foreshore and seabed.

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172 Macklem, above n 151, at 1341 when discussing the Federal States’ interference in Tribal Governments in the United States of America.
173 The Paeroa Declaration, above n 132, resolutions 1 and 2.
As a tool for the oppressed, equality of authority may be useful in promoting minority rights and having Indigenous self-determination recognised. However, as with equality of recognition, any possible advances would be restricted if the level of authority recognised was imposed on oppressed peoples, rather than self-imposed. But this notion must compete with the dominant norm of equality of the individual, which struggles to accommodate equality between peoples.

9. Conclusion

This chapter has shown that there was a wide range of equality theories employed during the Debate. These theories can be described as sitting along a spectrum, with formal individual equality at one end, and equality of authority at the other. Many different equality theories may be distinguished, despite the overlap between them, and they possess a history that helps explain their use.

Interestingly, however, while these equality theories can be articulated as separate and distinct concepts, they often share similar philosophical underpinnings. In particular, all five major equality theories discussed above can be portrayed in some sense as partaking of the notion of formal equality. The theories that Brash advocated argued for equal treatment between individuals, which is one example of formal equality, as did the Treaty Tribes Coalition’s call for equal application of, and equal access to, the law. For Brash, the equal treatment was in relation to individuals’ substantive rights. Conversely, for the Coalition, the equal treatment required was in access to the courts.

For Cullen, the equal treatment required was that the Government should consider equally all affected interests when deciding which rights were to be upheld in the foreshore and seabed, or when it decided the national interest. He also recognised that the rights and interests to be considered could be collective as well as individual.

The signatories to the Paeroa Declaration, however, called for a greater normative shift. Under the guise of equality of authority, they advocated a shift away from formal equality between individuals to formal equality between peoples. This required that the Crown and Māori be treated at least the same, and that their authority be recognised as equal, albeit operating perhaps in separate spheres.
Whether these theories be conceptualised as distinct or overlapping, and whether or not they can all be brought under the umbrella of formal equality, they point nevertheless to very different outcomes. Only Brash called for all individuals to have the same substantive rights in relation to the foreshore and seabed. In contrast, Cullen’s notion of equal consideration, the Coalition’s advocacy of equal application of, or equal access to, the law, and the signatories to the Paeroa Declaration’s equality of authority, did not purport to guarantee equality of outcome. These theories do not therefore hold that equal rights recognition has to be achieved to guarantee equality.

The equality theories that Brash, Cullen and the Coalition employed could all be encompassed within the current Aotearoa/New Zealand legal system. In particular, all upheld the concept of parliamentary sovereignty. However, the signatories to the Paeroa Declaration directly challenged this notion. The equality theory they employed therefore sits outside the current constitutional order and would require that tikanga Māori be directly recognised as a legitimate source of law along with the rights it secured.

These different equality theories therefore legitimised different notions of rights in the foreshore and seabed. It is to these rights that the next chapter turns.
Chapter Five: Theories of Rights

1. Introduction

Rights dominate modern understandings of what is proper and just, and have come to limit the powers of governments, and the content of laws, both domestic and international, and to shape perceptions of morality. The acceptance of a specific rights claim dictates a distribution of freedom and authority, and endorses a specific view of what can or must be done.

Throughout the Foreshore and Seabed Debate people expressly stated their claims in the language of rights, as well as equality. Some rights claims were simply different ways to make arguments for equality or equal treatment. For example, equal access to the courts could be restated as a right of access, and equal consideration of interests could be reiterated as an aspect of the right to be heard. However, the rights claims did not necessarily correspond with equality claims, and in fact might even subvert equality and run counter to the notion. A strong right to private property, for example, might promote inequality.

Ultimately, it was the complex interplay of arguments about equality and rights, with their different dynamics, and cross-cutting correlatives, that characterised this Debate, and made it so hard to understand. It is therefore the aim of this chapter to unfurl the rights claims from the equality claims made during the Debate and to focus on the distinct and counter-equalitarian rights claims that were expressed at that time. The three most prominent explored here will be claims to property rights, procedural rights and decision-making rights.

To achieve this aim, this chapter will revisit much of the discussion in the previous chapter, albeit briefly, but in a manner that illustrates how claims can be stated in the rhetoric of rights, and shows how this changes the focus, structure, and dynamics of the arguments in the Debate.

In addition, this chapter will focus on three elements of the different claims of right. The first is their constitutional implications. During the Debate claims of right were
made in at least two senses. The first was a claim to ‘fundamental rights’ or ‘human rights’. In essence, this kind of claim is to a fundamental entitlement, of a person or group, that cannot be limited or set aside – even by a legislature – except for compelling reasons. It cannot be displaced simply because it would be popular to do so, or would advance other interests that do not have the status of rights.¹ A rights discourse of this kind has emerged as the dominant language in which many claims to overriding entitlements or permissions are described.

In a way, a claim to a fundamental right is anti-majoritarian, or counter-utilitarian, because legitimate claims of fundamental right should not be trumped solely to suit the interests of the majority, or to promote the general happiness. In this regard, fundamental rights may reflect the long-term values of the community that are to be protected against short-term fluctuations in popular sentiment.

The second kind of claim made was to ‘ordinary rights’ or ‘legal rights’. In effect, this is a claim to an ordinary legal entitlement of a kind that might be guaranteed by a statute or the common law, but not a claim of a superior constitutional kind. This would still be a claim to positive legal rights within New Zealand’s unentrenched constitutional order. But it would be contemplated that such rights could be amended, substituted or removed by legislation.

Distinguishing these two uses of rights helps clarify what is in issue in the Debate: that it is in part over whether, and to what extent, Māori rights should be considered fundamental. Thus, this chapter notes the circumstances in which claims were made for specific rights that were seen to deserve recognition at a higher constitutional level than they are currently afforded.

When analysed carefully, claims of right come in many different forms, as Wesley Newcomb Hohfeld famously demonstrated. He divided them into claims of right, and claims to privileges, powers or immunities, all of which have slightly different characteristics. Thus the second focus of this chapter is on the specific legal

¹ When such rights may be justifiably limited will be discussed in Chapter Six.
implications of the rights claimed, or on the kind of analytical work they work do. A Hohfeldian methodology will be employed to reveal the precise entitlements claimed.

Finally, this chapter will focus on the foundations of the different claims of right. Both legal and non-legal grounds will be examined. In doing so, the question of whether the law should recognise other sources of rights will be explored.

The discussion will therefore be organised by reference to different kinds of rights arguments, as in Chapter Four. These arguments probably overlap more than the equality claims, that could mostly be portrayed along a spectrum illustrated by the contents of the four documents analysed. No ready spectrum of that kind is available here. Instead, in this chapter, the different documents (that include different rights claims) will be discussed under a single set of headings, though this will still permit contrasts to be drawn between opposing points of view.

2. The Hohfeldian system

To disentangle the different rights claims, I have found it useful to employ Hohfeld’s well-known categorisation of different rights arguments. Hohfeld, a law professor at Stanford University and then Yale between 1905 and 1918, had noticed a great error in law: the tendency of lawyers and legal theorists to analyse all legal relations in terms of rights and duties. To Hohfeld, the analysis of all legal relations as rights and duties had led to the situation where the word ‘right’ was employed to articulate several distinct concepts. This inhibited true understanding of the problem and prevented solutions being found.

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2 He outlined this categorisation in a two part article: Wesley Newcomb Hohfeld “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale LJ 16 and Wesley Newcomb Hohfeld “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26 Yale LJ 710. Nigel Simmonds, in his introduction to a 2001 edition of Hohfeld’s articles, noted that: “The analysis of rights that Hohfeld offers is still regularly cited and relied on by both lawyers and philosophers, and it is treated as a source of insight into the nature of moral rights as well as the legal rights that were Hohfeld’s own focus of concern”, and later that “Hohfeld’s systematic and apparently exhaustive (yet concise) treatment is generally regarded as unsurpassed”: Nigel E Simmonds “Introduction” in Wesley Newcomb Hohfeld Fundamental Legal Conceptions as Applied in Judicial Reasoning reprinted in David Campbell and Philip Thomas (eds) (Ashgate, Aldershot, 2001) i at x.

3 Hohfeld “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning”, above n 2, at 19.
Hohfeld’s central point, therefore, was that people use the term ‘right’ in a loose range of ways without being fully aware of the legal implications. This is what I maintain occurred during the Debate. The loose use of the term ‘right’ meant that people were talking past each other, creating misunderstandings and reducing the chance of an amicable solution being found.

Hohfeld therefore sought to clarify the different uses of the term right to aid legal reasoning in the courts. In order to achieve this he broke the term ‘right’ into four distinct entitlements. These were: rights, or more specifically claim-rights; liberties; powers; and immunities. These entitlements pertain to legal relations between people rather than between people and things. Hohfeld termed these relations ‘jural relations’.

Hohfeld’s four distinct entitlements each possess a jural opposite, and a jural correlative, otherwise known as a burden (see Tables One and Two below). These opposites and burdens help describe the composition of each entitlement and the burdens placed on other people.

**Table One: Hohfeld’s Jural Opposites**

<table>
<thead>
<tr>
<th>entitlement</th>
<th>claim-right</th>
<th>liberty</th>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>no-right</td>
<td>duty</td>
<td>disability</td>
<td>liability</td>
<td></td>
</tr>
</tbody>
</table>

**Table Two: Hohfeld’s Jural Correlatives**

<table>
<thead>
<tr>
<th>entitlement</th>
<th>claim-right</th>
<th>liberty</th>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>duty</td>
<td>no-right</td>
<td>liability</td>
<td>disability</td>
<td></td>
</tr>
</tbody>
</table>

Table 1 highlights that to have a claim-right a person cannot have a no-right; to have a liberty a person cannot have a duty; and so on. Table 2, however, represents the Hohfeldian jural relations. The top row contains the four entitlements often grouped loosely under the one term ‘right’, whereas the bottom row indicates the burdens others are placed under in order for the entitlements to be upheld.

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5 Hohfeld used the term ‘privilege’ here. However I will employ the modern usage ‘liberty’. This modern usage began with Hillel Steiner *An Essay on Rights* (Blackwell, Oxford, 1994) at 59-60.
The claim that Manawhenua possess the ‘right’ to own the foreshore and seabed can be analysed as a Hohfeldian claim-right to exercise exclusive physical control over a specific area of the foreshore and seabed, in other words exclusive title. Therefore, if Manawhenua possess this claim-right others have a correlative duty not to interfere with that ownership.

In contrast, the public’s claim to a ‘right’ of access to the foreshore and seabed can be described as a claim to a Hohfeldian liberty. If the public possess a liberty to access the foreshore and seabed then they have no duty not to access the zone and others have a correlative no-right\(^6\) to stop them. But members of the public have no power to exclude others from obtaining similar access.

The claim to the Government’s ‘right’ to make laws regulating the foreshore and seabed can be broken down into a claim to a Hohfeldian power: that is, the ability to alter legal relations. Consequently, if the Government has the power to change the law surrounding the foreshore and seabed, the public, including Māori, are under a correlative liability, in that they are liable to have their claim-rights, duties, liberties, and so on, altered.

The claim that the courts have the ‘right’ not to have their jurisdiction to hear customary claims in the foreshore and seabed removed by the Government can be described as a claim to a Hohfeldian immunity. If the Courts possess this immunity, then the Government is under a correlative disability in that it has no power to alter the courts’ jurisdiction.

The Hohfeldian approach is therefore a useful tool for analysing precisely the entitlements that participants in the Debate were claiming and referring to. It must be noted, however, that Hohfeld’s categorisation does not address the justification of rights. In this sense, his approach is formal in nature, as it provides no substantive criteria for recognition of a right. This does not mean that Hohfeld’s categorisation is of no use in the analysis of rights. His categorisation clearly illustrates that legal rights

\(^6\) Hohfeld coined the term ‘no-right’ to cover the jural relation where a person cannot possess a claim-right and therefore cannot impose a duty on others.
pertain to legal relations between people, and that rights claims may be of several different kinds.

Hohfeld confined his analysis to relations between two parties. Thus X may hold an entitlement against Y but not Z. Nevertheless, it is clear that Hohfeldian entitlements can be held between two parties that have several members. For example, a person’s claim-right not to be assaulted is not held against one specific person, but against every other person. The two parties in this relationship are the individual and the rest of the world. Thus, this thinking can be applied to the Debate, where the relation is often between two groups of people, rather than between individuals.

3. Arguments about rights in the Foreshore and Seabed Debate

As with the arguments about equality, many of the rights claims made during the Debate are multilayered, comprising several different arguments. In some places I will therefore apply Hohfeld’s categorisation, and break down the rights claims into more particular legal arguments.

3.a. The foundations for Indigenous claims of right and their legitimacy

Many arguments about rights appear to state a philosophical position about the foundations for claims of right and their legitimacy. The next section looks at the major claims of this kind made for Indigenous rights.

3.a.i. Race is never a legitimate foundation for claims of right

One major claim of this kind was that ‘race’ is never a legitimate foundation for a claim of right. Don Brash made this claim in his “Nationhood” Speech, where he stated that, “There can be no basis for special privileges for any race”.

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8 Donald Brash, Leader of the Opposition National Party “Nationhood” (State of the Nation Speech to the Orewa Rotary Club, Orewa, 27 January 2004) at 13. For a full text of the Speech see Appendix Three.
This statement can be viewed in equality terms, as the argument that recognising specific race-based rights is contrary to the principle of formal equality between individuals. However, it can also be articulated as an aspect of a claim of right: that is, that the proper bearers of rights are individuals, regardless of race. On this view, the only rights that are legitimate in the realm of the foreshore and seabed are those held by individuals. This contradicts any claim to group or ‘race’ based rights.

Brash was therefore arguing that race is not a legitimate foundation for claim-rights. Thus, Māori, as a race, do not possess claim-rights in the form of exclusive property, in the foreshore and seabed. He was adamant that other New Zealanders should be under no duty to uphold any exclusive title rights. He made this clear when he stated the National Party’s position, which was to:  

... deal with the foreshore issue by legislating to return to the previous status quo – the settled legal situation before the Court of Appeal decision. That is the position where for the most part the Crown owned the foreshore. ... Public ownership leaves room for recognising limited customary rights, but we will not allow customary title.

Furthermore, Brash was also arguing that race is not a legitimate foundation for powers or immunities. Brash stated that the “Government documents make it clear that the proposed “customary title” will allow the development of commercial activity arising from customary use. This “development right” will mean an expansion of “traditional customary rights”. Brash was opposed to this policy. Brash is therefore taking the position that race is not a legitimate foundation for conceding additional powers to Māori, or additional immunities from state regulation. In other words, it is wrong for Māori as a race to be free to develop the foreshore and seabed as they wish, and for the Government and other New Zealanders to have no power to stop this.

Brash would not concede customary title because it “gives Maori a veto power over anyone else’s development, whether commercial or recreational”. This power would mean that others would be placed under new liabilities, such as a liability to have their position in the foreshore and seabed adversely affected by Māori development,

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10 Ibid, at 10.
11 Ibid.
without any remedy. It might also mean that others, wanting to develop the foreshore and seabed, would be under new duties, such as the duty to obtain Māori consent. Brash said “anyone wanting to build a small jetty on a coastal property where customary title has been established will need iwi consent”. Thus, he took the position that race is an inappropriate reason to give one group powers over another.

3.a.ii. Indigeneity as a foundation for claims of right

While Brash argued that race is never a legitimate foundation for a claim of right, others acknowledged it could be. However, this argument was often presented in other terms. Māori might be described as rights bearers because of their indigeneity, rather than because of their race. Essentially, this argument holds that the proper bearers of rights in the foreshore and seabed are Indigenous Māori People. This rights claim deserves further explanation.

3.a.ii.1. The definition of ‘indigeneity’

Indigeneity “is the most recent iteration of a host of roughly synonymous concepts including “autochthonous,” “native,” “aboriginal,” “first nations” and others”. However, as will be shown below, it can be distinguished from aboriginality, which means first or original occupancy.

Indigeneity can be derived from the term “indigenous”, which means “of or pertaining to the original inhabitants of a particular land or region”. Yet no official definition

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12 Ibid, at 10-11. ‘Iwi’ are tribes, nations, peoples.
14 Ibid, at 28 and 29.

(a) priority in time, with respect to the occupation and use of a specific territory;
(b) the voluntary perpetuation of cultural distinctiveness;
(c) self-identification, as well as recognition by other groups and by state authorities, as a distinct collectivity; and
(d) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.
of the term has ever been articulated at the international level. As Native American Studies professor Jace Weaver notes, “Indigeneity is one of the most contentiously debated concepts in postcolonial studies ... Even the term itself is disputed”. Despite this, as Jeremy Waldron notes, it is already a term that is used “in the politics and philosophy of cultural rights and the rights of First Peoples”.

Waldron comments that there are two possible definitions for indigeneity. The first is that “indigenous peoples are the descendants of the first human inhabitants of a land” and second that “indigenous peoples are the descendants of those who inhabited the land at the time of European colonization”. He continues:

Corresponding to these definitions, we find arguments for indigenous rights based on (i) a Principle of First Occupancy, which gives moral recognition to the fact that a people has taken possession of land without disturbing any other occupants; and (ii) a Principle of Prior Occupancy, that is, a conservative principle that commands us (and should have commanded the colonisers) not to disturb established arrangements.

Interestingly, Waldron observes that in Aotearoa/New Zealand some argue that the two definitions overlap.

David Roach and Andrea Egan concur with Waldron on the principle of first occupancy. They note that there have been attempts to define indigeneity at international law, and this has resulted in two distinct features being promoted: “subaltern status and first occupancy”.

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16 Roach and Egan, above n 13, at 26.
17 Jace Weaver “Indigenousness and Indigeneity” in Henry Schwarz and Sanjita Ray (eds) A Companion to Postcolonial Studies (Blackwell Publishers, Malden (Massachusetts) 2000) 221 at 221.
19 Waldron “Indigeneity? First Peoples and Last Occupancy”, above n 18, at 55. See also Waldron “Why is Indigeneity Important?”, above n 18, at 1.
20 Waldron “Indigeneity? First Peoples and Last Occupancy”, above n 18, at 55.
21 Ibid.

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves
There has been a move away from defining Indigenous Peoples as those who were in the territory first to those who were occupying the territory at the time of European contact. As Paul Keal explained, “Indigenous peoples are the prior occupants of lands colonised”.23 This is the definition used at international law.24

It is therefore plausible that a definition of indigeneity will move from requiring “First Occupancy” to “Prior Occupancy”. This can be seen happening already. For example, the Supreme Court of Canada, in its 1996 decision R v Van der Peet,25 observed that prior occupancy leads to rights of indigeneity:26

… when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society, and which mandates their special legal, and now constitutional status.

Dominic O’Sullivan bases the legitimacy of indigeneity on an interconnected notion, that of “ancestral occupation”:27

Thus, the conception of indigeneity is more than one based on the idea of a bicultural partnership or simple ethnic minority status.28 As Dominic O’Sullivan explains:29

Indigeneity assumes a transformative function, allowing Indigenous peoples to think about the terms of their ‘belonging’ to a wider polity, but also about their

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26 Ibid, at [30].
29 O’Sullivan “The Treaty of Waitangi in Contemporary New Zealand Politics”, above n 27, at 326. See also ibid, at 5.
political status as autonomous peoples belonging not just to a national jurisdiction
but to their own communities with independent political status in their own right.

Indigeneity is a concept that distinguishes Indigenous Peoples from other minority
groups and can be said to legitimise special rights for Indigenous Peoples. Where a
state incorporates many minority groups, indigeneity differentiates Indigenous
groups’ claims for resources from those of other groups as it highlights that their
claims are based on more than just need. Indigeneity conceptualises Indigenous
Peoples as groups with rights, rather than individuals with needs. As Nin Tomas
contends:30

... because Aotearoa is the kainga tuuturu of Maori, they can rightfully claim an
important status that other ethnic minorities cannot claim, that of tangata whenua
or indigenous peoples of Aotearoa. It is this status that entitles Maori to have
their collective Maori cultural, social, and economic interests preserved,
protected, and developed as a foundational aspect of Aotearoa New Zealand
society.

However, resting the notion of indigeneity solely on the basis of first or prior
occupancy, while it distinguishes Indigenous groups from other minorities that may
reside within a multicultural state, can serve to contain the rights recognised under
indigeneity to rights possessed at first contact. This often results in the state and
Indigenous Peoples holding very different views on what indigeneity entails, for the
concept of indigeneity that Indigenous Peoples employ is shaped by the events of
colonisation,31 and may support wider rights claims. Thus, indigeneity is a notion
ascribed to, as well as imposed on, Indigenous Peoples,32 but they may accord it a
specific significance.

Mason Durie employs one such perception of indigeneity and links this to rights. He
stated that: “Indigeneity is about a set of rights that Indigenous peoples may

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30 Nin Tomas “Indigenous Peoples and the Maori: The Right to Self-Determination in International
‘Tangata Whenua’ literally translates as ‘the people of the land’. It means Indigenous or local people’.
reasonably expect to exercise in modern times”. As O’Sullivan argued, rights based in indigeneity are collective in nature. Further, as Roach and Egan maintained:

Indigeneity rests on the recognition of “collective” or “group” rights, which can be interpreted as conflicting with individual rights in important ways. Indigenous rights challenge assumptions of the Westphalian emphasis on the primacy of the nation-state, …

O’Sullivan also argued that rights founded in indigeneity encompass political rights. These might be defined as powers under the Hohfeldian categorisation. This is because O’Sullivan defined the purpose of these rights as lying in:

… their capacity to contribute to material, social and cultural satisfaction. For Maori, this means to exercise self-responsibility, and for communities to make decisions against their own criteria and in pursuit of self-defined goals.

Therefore, rights in the foreshore and seabed founded in indigeneity may include powers to manage the resource, to alienate the land, to transfer entitlements to the area, or to make rules governing its use.

States and Indigenous groups may therefore hold different perceptions on indigeneity and on the rights founded in the concept. This can cause misunderstanding and tension between the state and Indigenous groups, with both “claiming intrinsic authority over respective jurisdiction related to rights, resources and recognition”. Recognition of indigeneity may challenge the underlying constitutional orders of a state and require re-formulation of foundational principles for sharing the land.

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35 Roach and Egan, above n 13, at 26.
37 O’Sullivan “Needs, Rights and ‘One Law For All’: Contemporary Debates in New Zealand Maori Politics”, above n 34, at 976.
38 Roger Maaka and Augie Fleras The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand (University of Otago Press, Dunedin, 2005) at 255.
39 See ibid.
Despite this, it is clear that recognition of indigeneity as a concept does not necessitate the dismissal of the rights of others. As O’Sullivan argues, “Indigeneity combines the quest for autonomy with a pragmatic acceptance of the limits of location within the post-colonial nation state. There is, therefore, space within the politics of indigeneity for the legitimate rights of others”.40 In the case of the foreshore and seabed, he concedes this would allow for the recreational use of the area by other New Zealanders.41 However, he argues that indigeneity would not:42

… admit the propriety of private commercial exploitation of a natural resource with which an iwi has had an intimate relationship for hundreds of years, at the expense of the iwi’s own development aspirations.

3.a.ii.2. Indigeneity as a foundation for claims of right in the foreshore and seabed

Both Michael Cullen and the signatories to the Paeroa Declaration made this kind of argument to varying degrees. Cullen acknowledged: “Customary rights pertain to Maori as the indigenous people”.43 They were special rights that pertained to Māori only. He added: “Similar rights pertain to the Australian aborigines and to the native Americans in Canada and are recognised in both those jurisdictions”.44 In his view:45

Although they do not involve “ownership” as such, they are property rights nevertheless. One can draw analogies with any number of rights, such as rights of way and similar modifications to title which place an obligation on the owner of the land to make provision for the interests of other parties.

Like any other property right, customary rights, where they are established, should not be taken without just compensation. And like any other property right, they must be exercised in a context of other, competing, rights belonging to other individuals and to the public.

Thus, Cullen acknowledged that Māori, as a race, due to their indigeneity, possess use rights in the foreshore and seabed. These use rights are proprietary in nature. But he argued these use rights were no more important than other rights in the realm, held by

41 Ibid.
42 Ibid.
43 Michael Cullen “Challenge to find balance on issue of foreshore rights” Opinion, ODT (Dunedin, 18 February 2004) at 19. For a full text of the Article see Appendix Four.
44 Ibid.
45 Ibid.
other individuals and the public. They were ordinary rights. Thus Cullen implied that Māori customary rights must be exercised alongside the public right of access.\textsuperscript{46}

By acknowledging that similar rights relate to the Indigenous Peoples of Canada and Australia, it can be argued that Cullen subscribed to the concept of a ‘spectrum’ of aboriginal rights employed in Canada and endorsed in \textit{Ngati Apa}.\textsuperscript{47} However, by denying from the outset that these property rights amount to full title, Cullen seemed to endorse the narrower Australian approach, which only recognised rights that would sit in the middle of the Canadian spectrum.\textsuperscript{48}

In his description of the rights Māori possess, Cullen noticeably employed the word ‘right’ indiscriminately, as Hohfeld noted was common. Therefore Cullen’s comments can be more carefully analysed in Hohfeldian terms.

Cullen specifically stated that the rights Māori possess do not amount to exclusive title rights. Exclusive title rights can be described as Hohfeldian claim-rights as they give the titleholder the right to exclusively control the land and perhaps to collect an income from the land.\textsuperscript{49} Exclusive title therefore places a duty on others not to interfere with the right of the landowner to control the land, or not to trespass.

\textsuperscript{46} The public ‘right’ of access will be discussed in greater detail later in this chapter under Section 3.b.iii.

\textsuperscript{47} \textit{Ngati Apa v Attorney-General} [2003] 3 NZLR 643 at [31] (CA) per Elias CJ.

\textsuperscript{48} See \textit{Commonwealth v Yarmirr} [2001] HCA 56, (2001) 208 CLR 1. For a good description of the Australian approach, see: Shaunnagh Dorsett “An Australian Comparison on Native Title to the Foreshore and Seabed” in Andrew Erueti and Claire Charters (eds) \textit{Māori Property Rights and the Foreshore and Seabed: The Last Frontier} (Victoria University Press, Wellington, 2007) 59 at 62. It should be noted that Australia has since moved away from that position, and recognised that exclusive title can exist in the foreshore. In \textit{The Northern Territory of Australia v Arnhem Land Aboriginal Land Trust} [2008] HCA 29, (2008) 236 CLR 24 the High Court of Australia, by majority, found that the traditional Aboriginal owners have the right to exclude others from tidal waters within the boundaries of fee simple grant areas under the Aboriginal Lands Rights (Northern Territory) Act 1976 (Cth). This case, however, rested on rights sourced in statute, and not in the common law doctrine of native title. Of note, however, recently, in \textit{Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)} [2010] FCA 643, Justice Finn, sitting in the Federal Court of Australia, found that the Torres Straight applicants have native title rights in the seawater and seabed surrounding their islands. While these rights were non-exclusive, they were extensive in that they included the right to take resources, both from the water and the soil, for commercial use, which extends to Australia’s Exclusive Economic Zone.

In contrast, for Cullen, the Māori rights were more like “rights of way and similar modifications to title which place an obligation on the owner of the land to make provision for the interests of other parties”\textsuperscript{50}. Rights of way can be defined as a liberty. Those possessing this entitlement have a liberty to use the right of way and others have no-right to stop them. Furthermore, rights of way entitle the holders to immunity: that is, they are immune from others altering their liberty, and others are under a disability: that is, they have no power to alter the right of way entitlement. It must be noted, however, as Cullen made it clear in his Article, that the Government through Parliament has the power to alter entitlements in the foreshore and seabed, so right of way holders are under no such immunity from alterations in their entitlement and therefore are under a liability, in this sense.

Here Cullen ascribed to legal positivism, the dominant legal philosophy that is applied in Aotearoa/New Zealand. Legal positivism holds that the law is the product of authoritative state institutions. Thus the only rights that Cullen viewed as real and legitimate were those codified in legislation or articulated in the rulings of the courts. To Cullen, Māori exclusive authority and title rights could not exist; such rights were not detailed in legislation, and according to the advice of Paul McHugh, they would not be pronounced in the courts.\textsuperscript{51} Claims to the existence of these rights based on their inherent fundamental nature had to fail, as positivist approach simply does not recognise the legitimacy of such claims within the Aotearoa/New Zealand legal system.

Legal positivism is intended to address situations where there is conflict within the state over matters of value. The political process is used to resolve those conflicts, at the end of which Parliament lays down a rule, of a clear, specific kind, and that is the law. The conflict is therefore resolved. It is to this process that Cullen ascribed. In passing the Foreshore and Seabed Act 2004 (the FSA) Parliament would resolve the conflict over rights recognition in the foreshore and seabed. In doing so it would overrule the Court of Appeal’s decision, but this was acceptable because the rights of the courts could be subjected to Parliamentary amendment, in Cullen’s view.

\textsuperscript{50} Cullen, above n 43.
\textsuperscript{51} Referred to in Cullen, above n 43.
Importantly, however, Cullen acknowledged that Māori rights in the foreshore and seabed “should not be taken without just compensation”. The ‘right’ to compensation can be categorised as a Hohfeldian claim-right. It places a duty on the Government to provide compensation should established rights be removed.

It must be noted that this claim-right is not protected in legislation. While some enactments do expressly require compensation for the taking of property, such as the Public Works Act 1981, no general statutory right to compensation exists in Aotearoa/New Zealand when one’s rights are altered by Parliament. All that exists is a judicial ‘interpretative’ presumption of compensation for statutory takings of property, and a suggestion by the Legislation Advisory Committee that if a Bill proposes to take property without providing for compensation, the final Act should make this clear.

The signatories to the Paeroa Declaration also base the legitimacy of their rights in the foreshore and seabed on their indigeneity. But instead of justifying their indigeneity on first occupation, they utilise a perception similar to that of O’Sullivan, that of tūpuna, or ancestral, precedent. I will now analyse these claims of right.

3.a.iii. The relevance of spiritual and ancestral connections as a foundation for claims of right

As “whenua rangatira”, the signatories to the Paeroa Declaration take the view that they are spiritually connected to the land. Māori are descendants of Tūmatauenga, an ancestor whose mana is extant over people and war, or Tāne Mahuta, an ancestor whose mana is extant in the forest. Both Tū and Tāne are the sons of Ranginui, the Sky Father, and Papatūānuku, the Earth Mother. Tāne is credited with creating the

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52 Ibid.
54 The Paeroa Declaration (signed 12 July 2003), resolution 2 reproduced in Tino Rangatiratanga Te Takutai Moana (2nd ed, prepared as vol 2 of the IRI, Economics, Politics & Colonisation Series 2003) at 11. For a full text of the Declaration see Appendix Two. Moana Jackson also interpreted the term “tupuna rights” as rights “derived and take legitimacy from ancestral precedents”. Furthermore he argued the term acknowledged that the rights had “never been relinquished”: See Moana Jackson “Backgrounding The Paeroa Declaration” in Tino Rangatiratanga Te Takutai Moana (2nd ed, prepared as vol 2 of the IRI, Economics, Politics & Colonisation Series 2003) 38 at 38.
55 See “Chiefs of the land”.
56 Prestige or power.
first woman out of clay, and having children with her, thus connecting all humans to the Earth. This spiritual connection is passed down from the ancestors to Māori in the present day. The connection to Papa is preserved through the burial of the placenta at the time of birth, and eventually the return to her at death.

So, in resolution 2 of the Paeroa Declaration, the signatories made the additional argument that they are the proper bearers of rights in the foreshore and seabed due to their spiritual connection to the foreshore and seabed, which is reinforced through their ancestral connections. Ancestors not only determined which entitlements to land a person inherited, they were also part of the land itself. This is therefore a different perception from that of Cullen concerning the foundations for claims of rights.

Such rights are not contingent on being written into the law of the state; they exist outside it. Since such rights are sourced in Papatūānuku, at first glance it may seem that they can be classified as natural rights. But further inspection reveals that these rights can also be classified as ordinary rights under the positivist tradition: that is they are the product of the authoritative institutions of tikanga Māori, namely social customs.

Tikanga Māori is the first law of Aotearoa/New Zealand. It survives today, but the impact of colonisation has been significant. For much of Aotearoa/New Zealand’s

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57 In one version of the creation narrative, Tāne moulded a woman out of the Earth, and gave her life by breathing into her nostrils. She was named and became Tāne’s wife, going on to have several daughters with him. It is from them whom humans are descended. In another version, Tāne first created man, Tiki-auaha and then created a woman, Io-wahine, who became Tiki-auaha’s wife. They married and their offspring eventually peopled the world.


59 Briefly, natural rights are rights which individuals are considered to possess by nature: that is, without the intervention of agreement, or in the absence of political and legal institutions. They are not contingent upon the laws, customs, or beliefs of any particular culture or government, and they are considered beyond the authority of any government to dismiss. Natural rights are regarded as universal and they are often described as self evident and inalienable. Perhaps the most famous statement of natural rights in this sense is in the United States Declaration of Independence 1776: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness”.

60 Māori customary law. Section 4 of Te Ture Whenua Maori Act 1993 (TTWMA) defines ‘tikanga Māori’ as: “Māori customary values and practices”.

history, the institutionally dominant system of state law treated tikanga Māori as a secondary system and assumed the jurisdiction to override it. The political and legal institutions of the state achieved this in two ways. One was to regard tikanga Māori as non-legal, and the other was to give tikanga Māori isolated and controlled legal effect through incorporation into the state legal system through legislation or via the common law. Tikanga Māori “remains a powerful legal system, practised and adhered to in matters of regulation and social order” within Māori groups, yet, as Nicole Roughan notes:

… in contrast to the formal separations of jurisdiction that allow indigenous groups in parts of North America and elsewhere to live under their own systems of law, tikanga Māori has been left in a kind of limbo vis-à-vis state law.

It is recognised that referring to tikanga Māori as akin to a Western conception of law detaches it from its other facets. As Roughan explains, tikanga Māori “is broader than positive law, including matters that cross into religious, moral, and spiritual modes of regulation in breach of the codes of the ancestors and creators”. But tikanga Māori is still a system of law, that dictates rights under authoritative social custom.

It is generally agreed that there were five distinct social customs that determined rights to land under tikanga Māori. The first four were: take taunaha (rights obtained from initial discovery); take tūpuna (inheritance from one’s ancestors); take tuku

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62 In Wi Parata v The Bishop of Wellington (1878) 3 NZ Jur (NS) 72 (SC) at 73. Prendergast CJ denied that “any body of law or custom” existed among Māori at the time of the signing of the Treaty. For modern criticism of this approach in the courts see Ngati Apa, above n 47, at [61] per Elias CJ. For discussion see David V Williams “Wi Parata is Dead, Long Live Wi Parata” in Andrew Erueti and Claire Charters (eds) Māori Property Rights and the Foreshore and Seabed: The Last Frontier (Victoria University Press, Wellington, 2007) 31.

63 For a discussion of the use of jurisdiction as a tool of the state’s colonial policy see Nan Seuffert, “Jurisdiction and nation-building: tall tales in nineteenth-century Aotearoa/New Zealand” in Shaun McVeigh (ed) Jurisprudence of Jurisdiction (Routledge-Cavendish, Milton Park, Abingdon (United Kingdom), 2007) 102. A series of statutes in New Zealand’s constitutional canon provided for tikanga Māori to operate in certain areas. See for example New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72, s. 71, which was in force until 1986. Both the common law and specific legislation have allocated a domain to Māori customary law, most notably in relation to property. For analysis see Richard P Boast and others (eds) Māori Land Law (2nd ed, LexisNexis, Wellington, 2004).

64 Nicole Roughan “The Association of State and Indigenous Law: A Case Study in ‘Legal Association’” (2009) 59 UTLJ 135 at 146. See also Law Commission Māori Custom and Values in New Zealand Law (NZLC SP9, 2001) at [116].

65 Roughan, above n 64, at 146.


67 Erueti, above n 66, at [3.3.7].
(claim to land by virtue of a gift or grant); and take raupatu (rights obtained by conquest). While these granted use rights, in order to gain mana whenua in the land, they had to be exercised in conjunction with take ahi kā roa (keeping the home fires by means of use and occupation). As Angela Ballara concluded:

Land ownership in Māori society required that ancestral claims go hand and hand with inherited mana over the land, plus occupation or other use. The evidence is that “The land which a Maori has best claim to is that which [he] has handed down to him from his ancestors to himself”. … Inheritance of land was from that limited group of ancestors known to have first cleared and cultivated or otherwise used the resources of the land, and who had handed down their rights from generation to generation of people who also occupied the land. The concept of ahikāroa (long burning fires) presupposed continuous occupation or use of the land by descendants of ancestors with mana to the land.

It is not clear exactly what these “tupuna rights” in resolution 2 entail. As rights derived from ancestral precedents, and pertaining to Manawhenua groups, who exercised mana whenua and mana moana over separate and distinct areas of the foreshore and seabed, they would have to be determined by applying the specific tikanga of each Manawhenua. Thus the rights may be proprietary in nature, but they may also be management and decision-making rights.

Some argue that tikanga does not support the notion of ownership in a Western legal sense, they focus instead on the kaitiakitanga role that Manawhenua have inherited. This role imposes duties on local Manawhenua to conserve the zone and its resources, in exchange for the power to make decisions in the zone. These kaitiakitanga duties and powers will be discussed in more detail in the next chapter.

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68 Trusteeship of land, or the right to hold responsibility for land or resources.
69 Angela Ballara Iwi: The dynamics of Māori tribal organisation from c. 1769 to c. 1945 (Victoria University Press, Wellington, 1998) at 200. Take raupatu was often supported by marriage with the conquered people, in order to insure that their offspring gained mana whenua.
70 Marine authority, or the right to hold responsibility for the sea and its resources.
71 Customs.
72 Guardianship, stewardship. Section 2 of the Resource Management Act 1991 defines ‘kaitiakitanga’ as:

… the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.
Furthermore, others contend that Māori possess a certain kind of relationship with the land: they belong to it, and cannot own it. As Hirini Moko Mead explained:73

The net effect of various cultural bonding mechanisms and traditional tikanga practices was to develop a relationship with the land. This relationship is about bonding to the land and having a place upon which one’s feet can be placed with confidence. The relationship is not about owning the land and being master of it, to dispose of as the owner sees fit. The land has been handed down the whakapapa line from generation to generation and the descendant fortunate enough to inherit the land does not really ‘own’ it. That person did not buy it. The land cannot be regarded as a personal asset to be traded.

Despite this, different groups traditionally held entitlements analogous to use rights over specific resources. For example, in the south of the South Island, it was common for rights over resources in a particular area to be divided among several different groups. In a single area, the descendants of one ancestor might hold the liberty to hunt birds, while descendants from another may have the liberty to harvest fern roots growing under trees, whereas the liberty to cut down the trees may rest with descendants of yet another ancestor.74

While some argue that traditional Māori land tenure did not encompass ownership (that is, the claim-right to exclusive physical control of the area and the power to exclude others from it), others argue that tikanga can recognise these rights, and in fact Māori groups did exercise them prior to European contact. As noted in Chapter Two, Eddie Durie has contended that the “underlying or radical title” was vested in the collective group.75 Durie’s contention stipulates the Māori conception of ownership within the categories of the Western legal tradition. Others argue that Māori ownership can exist within a Māori framework. For example, while Blair Ante Keown argues that the Western notion of ownership did not exist in traditional Māori

73 Mead, above n 58, at 272-273. ‘Whakapapa’ means genealogy.
74 Atholl Anderson “Towards an Explanation of Protohistoric Social Organisation and Settlement Patterns Amongst the Southern Ngai Tahu” (1980) 2 NZJA 3 paraphrased in Williams, above n 58, at 54.
society, he maintains that rangatiratanga\(^{76}\) is broad enough to encompass an analogous concept of ownership within its ambit.\(^{77}\) He argues that.\(^{78}\)

Maori ownership was based on the communality of Maori society and therefore provided for a host of use, management, occupation and access rights to reflect the multiplicity of uses land could be put to and the multiplicity of persons that may require such uses.

Thus members of outside groups could be restricted from entering specific foreshore and seabed areas. This would place a duty on outsiders not to enter. Outsiders would therefore have no-right to stop the local group from using the area, placing them under a disability, having had no power to change that situation.

The rangatira\(^{79}\) of the local group would then hold the power to make decisions over specific areas on behalf of the collective group. This power could enable a rangatira to impose a rāhui,\(^{80}\) that is a temporary prohibition or closed season, on a place or resource. This would impose a disability on members of the collective as they would be restricted from using the resource. The power also enabled a rangatira to gift or cede the land, known as take tuku. Holders of use rights also possessed this power to transfer their entitlements in the land and its resources.

Effectively, therefore, the “tupuna rights” the signatories to the Paeroa Declaration allude to could include the full range of entitlements expressed in Hohfeld’s categorisation: exclusive title claim-rights against others using the foreshore and seabed; liberties to use the area and its resources; the power to make decisions over the area and its resource; and an immunity to having their position adversely altered by others. Jackson also contends that resolution 2 “recognises that in Maori law and philosophy the foreshore, seabed, and the land are all interrelated”.\(^{81}\)

\(^{76}\) Shortened version of ‘tino rangatiratanga’, which means: sovereignty, ultimate chieftainship, chieftainship, right to exercise authority, chiefly autonomy, self-determination, self-management, indigenous rights, mana Māori (the Māori way of life).

\(^{77}\) Blair Ante Keown “Ownership, Kaitiakitanga and Rangatiratanga in Aotearoa/New Zealand” (2006) 2 Journal of Māori Legal Writing 64 at 75-77.

\(^{78}\) Ibid.

\(^{79}\) Chief, noble.

\(^{80}\) Embargo, quarantine, ban.

\(^{81}\) Jackson, above n 54, at 38.
3. a. iv. Kingsbury’s five structures of Indigenous Rights

Benedict Kingsbury\textsuperscript{82} has sought to clarify the debate surrounding Indigenous rights by differentiating “five fundamentally different conceptual structures employed in claims brought by indigenous peoples or members of such groups”.\textsuperscript{83} Kingsbury’s five structures are:\textsuperscript{84}

1. human rights and non discrimination claims;
2. minority claims;
3. self determination claims;
4. historic sovereignty claims; and
5. claims as indigenous peoples, including claims based on treaties or other agreements between indigenous peoples and states.

As will be shown, during the Debate claims of Māori rights were based on Kingsbury’s structures (1), (3), (4) and (5). Minority claims did not feature in the Debate, as those claiming the legitimacy of Māori rights in the foreshore and seabed used justifications that highlighted the difference of Māori from other minority groups present in Aotearoa/New Zealand, and these justifications were not based on the fact that Māori constitute a minority of the total Aotearoa/New Zealand population.

Kingsbury argues that each of these structures is determinative, has its own manner of argument, its own historical explanation and legitimacy, institutions that adhere to its principles, and advocates and disbelievers, as well as its own limits.\textsuperscript{85} Moreover, he observes that in Aotearoa/New Zealand, arguments based on the Treaty are overlaid and incorporated into each of his five structures.\textsuperscript{86}

\textsuperscript{82} For more information on Benedict Kingsbury and his research and publications, see his profile on the New York University website: “Benedict Kingsbury” (2010) NYU: Law <https://its.law.nyu.edu/facultyprofiles/profile.cfm?personID=20046>.

\textsuperscript{83} Benedict Kingsbury “Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law” (2002) 34 NYU J Int’l L & Pol 189. For the normative structure and background of these five structures, see Benedict Kingsbury “Claims by Non-State Groups in International Law” (1992) 25 Cornell Int’l LJ 481.


\textsuperscript{85} Kingsbury “Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law”, above n 83, at 190. See also Kingsbury “Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law”, above n 84, at 101.

\textsuperscript{86} Kingsbury “Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law”, above n 84, at 102.
The next four sections detail arguments made in Cullen’s Article, the Coalition’s Submission and the Paeroa Declaration that base their legitimacy on one or more of Kingsbury’s structures of argument.

3.a.iv.1. Human rights and non-discrimination claims

Cullen, when he stated that, “Like any other property right, customary rights, where they are established, should not be taken without just compensation”\(^{87}\), was making a non-discrimination claim. Regardless of the foundation for the property right, whether it be Crown grant, private fee simple title, a common law native title right, or a customary right, the right holders deserve the same treatment as other right holders in the zone. Thus Māori should not be discriminated against, in matters of compensation, just because their rights may have a different basis to other rights in the foreshore and seabed. For the reasons discussed above in Section 3.a.ii.2, Cullen views these rights of compensation as ordinary rights, a position that ultimately could be altered by Parliament\(^{88}\).

The Treaty Tribes Coalition made a similar claim. They argued that: “No people can be expected to accept the legitimacy of a Parliament or law that would confiscate their property without compensation”\(^{89}\). It stands to reason therefore that although the Coalition make no judgment on whether or not Māori possess property rights in the foreshore and seabed, if in fact they did, these would be ordinary rights that could be regulated, qualified or removed. But when removed, the owners would gain a right of compensation.

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\(^{87}\) Cullen, above n 43.

\(^{88}\) Notably, a right to compensation for the loss of land and natural resources could also be argued as a fundamental right of Indigenous Peoples. It is upheld as a fundamental human right of Indigenous Peoples in art 28 of the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP), for which Aotearoa/New Zealand is now a signatory, but was not at the time of Cullen’s Article. It is also recognised as a fundamental right under the International Labour Organization’s Convention 169 [Convention concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991)], arts 15 (for loss of natural resources pertaining to their land, which includes the concept of territories, and covers the total environment of the areas which the peoples occupy or otherwise use) and 17 (for removal from their land). Significantly, this convention is the only legally binding international instrument related to the rights of Indigenous Peoples. Aotearoa/New Zealand, however, is not a State Party to it, and is therefore not bound by it.

\(^{89}\) Treaty Tribes Coalition *One Rule of Law for All New Zealanders: A Submission by the Treaty Tribes Coalition on the Foreshore & Seabed Issue* (Treaty Tribes Coalition, Christchurch, 2004) at 8. For the full text of the Submission see Appendix Five.
It is not clear here whether the Coalition regarded this right of compensation as an ordinary right, or a fundamental one. Of note, art 28 of the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) outlines that:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Such rights, whether ordinary or fundamental, can be viewed as claim-rights in the Hohfeldian categorisation. They come into existence once property rights are removed. Such an action therefore places the Government under a duty to pay just compensation. A difference of treatment can occur, however, depending on whether this right is viewed as fundamental or ordinary. As a fundamental right, the Government’s duty to pay compensation must be fulfilled, except in very limited, justifiable, situations. The Government is therefore under a disability, and the Māori property owners immune to having their right to compensation altered. However, if the right to compensation is merely an ordinary right, the Government has the power to limit this right, or remove it altogether by legislation, thus altering the claim-rights of the Māori property owners.

Elsewhere in their Submission, however, the Coalition clearly made right claims in the fundamental sense. They claimed the law should apply equally to Māori and other

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90 Aotearoa/New Zealand signed this on 20 April 2010. Earlier, in 1997, the Committee on the Elimination of Racial Discrimination (CERD) issued a general recommendation for State Parties to International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) (ICERD) in similar terms. Where Indigenous Peoples had been deprived of their lands without their consent, CERD called on State Parties “to take steps to return these lands and territories” and “Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories”: Committee on the Elimination of Racial Discrimination General Recommendation No 23: Indigenous Peoples at [5], UN Doc A/52/18, annex V (1997) in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies at 212, UN Doc HRI/GEN/1/Rev.6 (2003). Aotearoa/New Zealand ratified the ICERD on 22 November 1972.
New Zealanders,\(^91\) and that there should be equal access for all to the law.\(^92\) Their non-discrimination claim has been extensively discussed in equality terms in Chapter Four, Sections 6 and 7. I will not re-iterate the arguments here. In summary, the Coalition argued that Māori should not be discriminated against by being prevented from going to court to have their rights determined because the rights they seek have a different foundation to other rights in the zone. Māori rights in the foreshore and seabed should be subject to the same rules as all other rights in the zone and Māori should have the same access to the courts as other right holders.

The Coalition based this right to non-discrimination in the rule of law, which may be viewed as a set of fundamental principles that should be upheld by positive law in all societies.\(^93\) One such fundamental principle is the idea that the law should not allow unfair discrimination.\(^94\) This can be seen when they stated:\(^95\)

> We do not believe today’s Government and parliament would treat non-Māori this way and we do not believe that they should treat any New Zealander this way. We believe that the Government and Parliament must respect the rule of law, and the due process of the judiciary.

And later:\(^96\)

> It is impossible to see how any New Zealander who cares about the rule of law and our unwritten constitution, could continue to have the same respect for the law or for out Parliament. Especially given that the appellants are Māori, it is difficult to see how the Government’s proposal reflects the principles of one rule of law for all New Zealanders and respect for the rule of law. It is a race-based response.

As a fundamental right protected under the rule of law, this right can be described as a Hohfeldian claim-right. As such, it places a duty on the Government to protect it in law. Moreover, because the Coalition argued that Parliament must respect the rule of

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\(^{91}\) Treaty Tribes Coalition, above n 89, at 2 and 3.

\(^{92}\) Ibid, at 2, 3, 8, 9 and 11.

\(^{93}\) For more discussion on the rule of law, see Chapter Four, Section 4.a.iii.


\(^{95}\) Treaty Tribes Coalition, above n 89, at 2, 3, 4, and 9-10.

\(^{96}\) It is important to note here that the law should not allow unjust discrimination. Justified discrimination, or justified unequal treatment as discussed in Chapter Four, Section 2.c, is recognised in many instances in the law.
law, this aspect of it, the right of non-discrimination, is immune from Parliamentary alteration, and Parliament is therefore placed under a corresponding disability.

The right to non-discrimination is also recognised as a human right. The Coalition might have been making this claim in their Submission. This view is supported by the actions of the Coalition in bringing a claim against the Government under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The United Nation’s Committee on the Elimination of Racial Discrimination (CERD) accepted the Coalition’s argument that they were subjected to discrimination. In its decision on 11 March 2005, the Committee acknowledged that the FSA contained “discriminatory aspects” against Māori, especially the legislation’s “extinguishment of the possibility of establishing Māori customary title over the foreshore and seabed”.

The right to non-discrimination is one of the founding principles of the United Nations, aimed at “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or

97 Treaty Tribes Coalition, above n 89, at 9–10.
98 The Treaty Tribe Coalition’s request to CERD is discussed in Chapter Two, Section 16.a.
99 The Committee, it’s composition and roles are discussed in ibid.
Several United Nation instruments uphold this as a specific right guaranteeing non-discrimination in different declarations and treaties. Under art 2(1) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992, persons belonging to minority groups have the specific right to non-discrimination in the enjoyment of their culture, religion and language. Moreover, the right to non-discrimination is also recognised as a general right. Women are guaranteed a general right to non-discrimination, as are Indigenous Peoples under art 2 of the UNDRIP.

Article 1(1) of the ICERD guarantees all people the general right not to be discriminated against in the public sphere on the basis of race, colour, descent, or national or ethnic origin. While Article 26 of the International Covenant on Civil and Political Rights (ICCPR) is the cornerstone of protection against discrimination. It reads:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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101 Charter of the United Nations, art 1(3).
102 For example, see the Universal Declaration of Human Rights 1948 (UDHR), arts 2 and 7; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR), art 2(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR), art 2(2); and Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), art 2(1). Aotearoa/New Zealand is a signatory to the UDHR, and has ratified all the above treaties.
103 Aotearoa/New Zealand signed this on 18 December 1992.
105 It is also important to note that the right to non-discrimination is guaranteed to Indigenous Peoples under art 3(1) of the Convention concerning Indigenous and Tribal Peoples in Independent Countries. However, Aotearoa/New Zealand is not a party to this convention.
106 ICERD, art 1(1). Moreover, CERD has issued a general recommendation that calls upon State Parties, which includes Aotearoa/New Zealand, to: “Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity” and “Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent”: Committee on the Elimination of Racial Discrimination, above n 90, at [4.b] and [4.d].
107 Aotearoa/New Zealand ratified the ICCPR on 28 December 1978.
This is said to provide all people with “an autonomous right” of equality and “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.\textsuperscript{108}

This right has been incorporated into Aotearoa/New Zealand law through s 19 of the New Zealand Bill of Rights Act 1990:

**Freedom from discrimination**

1. Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
2. Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

In addition, the Coalition made other fundamental human right claims in their Submission. These were the claim to the right to equality before the courts and the right to access the courts, which were discussed in Chapter Four. In summary, the right to equality before the courts is recognised as a human right in a number of international human rights treaties. It is specifically recognised in the ICCPR\textsuperscript{109} and Aotearoa/New Zealand has incorporated this into domestic law through ss 25(a) and 27(3) of the NZBORA. Furthermore, art 40 of the UNDRIP recognises that this right of access to the courts can apply to groups as well as individuals, as it identifies that Indigenous Peoples have a substantive right of access to the courts.\textsuperscript{110}

These human rights to non-discrimination, equality before the courts and access to the courts can be described as claim-rights in the Hohfeldian categorisation. Human rights as a rule tend to be claim-rights. For example, the right to life places a duty on all others not to kill, and the right to an education places a duty on the state to provide adequate education facilities. Here the jural relationship is between the state and its citizens. If Māori possess claim-rights to non-discrimination, equality before the courts and access to the courts, then the state is under a duty to ensure through its laws


\textsuperscript{109} ICCPR, art 14.

\textsuperscript{110} UNDRIP, art 40.
and institutions that this is made possible. Thus, it is under a duty to enact laws that universally apply to all, and to ensure all can access the courts. The court is then under a duty to fairly apply these laws.

It can also be argued that Māori possess an immunity against others altering their claim-right to go to court. This would be a limited immunity, however, if the Government holds the power to change the law and alter this right.

The right of access can also be described as a claim-right for Māori against the courts who have a duty to provide a procedure through which this can be realised, and as an immunity against the abolition of this entitlement by the Government.

It must be noted, however, that a right to be heard does not guarantee that the complainant’s requests must be followed. It simply means that the decision maker must listen to their argument and consider it in their deliberations. The right to be heard therefore does not guarantee any substantive outcome. The right is a procedural entitlement when decisions are being made that affect a person’s substantive rights, such as property rights. If these substantive rights are not in existence, however, then no right to be heard may exist.

Although the Paeroa Declaration does not make non-discrimination claims, it might embody human rights claims. Resolution 1 of the Declaration explicitly states that the foreshore and seabed belong to Manawhenua under their tino rangatiratanga.111 In making this claim, the signatories could be espousing claims to fundamental human rights. Tino rangatiratanga can be translated as self-determination, which is an inalienable right of all peoples.112 As such, it is best discussed under Kingsbury’s third heading, and will be discussed in more detail in the next section.

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111 The Paeroa Declaration, above n 54, resolution 1.
112 ICCPR, art 1; ICESCR, art 1.
The second type of human right claim that can be read into resolution 1 is the right of Indigenous Peoples to property.\textsuperscript{113} Articles 25 to 27 of the UNDRIP expressly recognise this right:\textsuperscript{114}

\textbf{Article 25}
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

\textbf{Article 26}
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

\textbf{Article 27}
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Over the years, Indigenous groups have approached international legal institutions to protect their rights over traditional territories. This has resulted in the emergence of a significant body of international human rights law regarding Indigenous Peoples’ land rights. An important aspect of this emerging law is that it is based on recognition of the cultural value of land rights for Indigenous Peoples.

\textsuperscript{113} There is significant protection for individuals’ rights to property at international law. However, this section will just focus on the group right afforded Indigenous Peoples.
\textsuperscript{114} Although not binding on Aotearoa/New Zealand, it is important to note that the Convention concerning Indigenous and Tribal Peoples in Independent Countries also recognises the fundamental property rights of Indigenous Peoples: arts 13-19.
Article 27 of the ICCPR sets out an obligation on State Parties, which includes Aotearoa/New Zealand, to respect the cultural practices of minority groups. This is implemented into domestic law through s 20 of the NZBORA.\textsuperscript{115}

Under this article, the Human Rights Committee, an independent body of experts that monitors the implementation of the ICCPR by its State Parties,\textsuperscript{116} has developed a specific protection for Indigenous Peoples’ land rights based on the idea that for Indigenous Peoples a particular way of life is associated with the use of their land. So while art 27 does not protect Indigenous Peoples’ land rights per se, the Committee has established a link between cultural protection and land rights for Indigenous Peoples. It found:\textsuperscript{117}

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples.

In addition, the Committee has held that the rights guaranteed under art 27 not only protect traditional means of livelihood, but also allow for adaption.\textsuperscript{118} Moreover, CERD has issued a general recommendation that countries, such as Aotearoa/New Zealand, “recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources”.\textsuperscript{119}

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{115} ICCPR, art 27:
        In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
    
    New Zealand Bill of Rights Act 1990, s 20:
        A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.
    
    \textsuperscript{116} The Human Rights Committee is established under art 28 of the ICCPR. In addition to monitoring the implementation of the ICCPR, the Committee has the power under the First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) to examine individual complaints with regard to alleged violations of the ICCPR by State Parties to the Protocol. Aotearoa/New Zealand ratified the Protocol on 26 May 1989. Furthermore, the Committee also publishes general its interpretations of the content of human rights provisions as general comments. For more information, see its website: “Human Rights Committee” (1996-2010) Office for the United Nations High Commissioner for Human Rights <http://www2.ohchr.org/english/bodies/hrc>.
    
    \textsuperscript{117} Human Rights Committee General Comment No 23: Article 27 at [7], (1994) in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies at 147 UN Doc HRI/GEN/1/Rev.5 (2001).
    
    \textsuperscript{118} Human Rights Committee Apirana Mahuika et al v New Zealand, Communication No 547/1993 at [9.4], UN Doc CCPR/C/70/D/547/1993 (2000).
    
    \textsuperscript{119} Committee on the Elimination of Racial Discrimination, above n 90, at [5].
\end{itemize}
\end{footnotesize}
Like the human rights claims made by the Coalition, the human right of Māori to property is made in the fundamental sense. It is a claim-right, which places duties on the Government, not only to positively ensure that laws and policies are put in place to uphold this right, but also to refrain from interfering with the exercise of the right.\textsuperscript{120}

The United Nations Permanent Forum on Indigenous Issues\textsuperscript{121} explained the reasons why the right of Indigenous Peoples to their property should be upheld by nation states.\textsuperscript{122}

Land is the foundation of the lives and cultures of Indigenous Peoples all over the world. … Without access to and respect for their rights over their lands, territories and natural resources, the survival of indigenous peoples’ particular distinct cultures is threatened.

Thus, the Forum acknowledged that Indigenous Peoples’ rights to land represent much more than the usual commercial value attached to land; they are deeply engrained with cultural and identity values. Thus, these rights deserve a special, fundamental status, and should be afforded the highest protection in law, because without access to their land, Indigenous cultures are in danger of extinguishment.

3.a.iv.2. Self-determination claims

It may be that in resolution 1 of the Paeroa Declaration the signatories were claiming a fundamental right to self-determination when they asserted that the foreshore and seabed belong to Manawhenua under their respective tino rangatiratanga.\textsuperscript{123} The signatories explicitly based their claim to tino rangatiratanga in the Treaty. As such they expressed this right in a fundamental sense. As a claim founded in the Treaty, this

\textsuperscript{120} As a human right, it can be limited, but there is a high level of justification required for doing so. See the UNDRIP, art 46(2). The justifications for limiting such rights will be discussed in Chapter Six.
\textsuperscript{123} The Paeroa Declaration, above n 54, resolution 1.
aspect of the signatories’ claim will be discussed later in the chapter under Kingsbury’s fifth structure.

Self-determination is a fundamental tenet of international human rights law.\textsuperscript{124} Thus, in resolution 1, the signatories might have been making a claim to this human right. While it was noted in earlier chapters that tino rangatiratanga can be interpreted as sovereignty, there are also times where it has been employed to mean self-determination. As Mason Durie observed, “self-determination is the English equivalent of ‘tino rangatiratanga’”.\textsuperscript{125} O’Sullivan went further and contended that a right to self-determination for Māori is embraced within the notion of tino rangatiratanga.\textsuperscript{126} For Durie, the term ‘self-determination’ “captures a sense of Māori ownership and active control over the future and is less dependent on the narrow constructs of colonial assumptions [than the term ‘sovereignty’]”.\textsuperscript{127}

At international law, the basic application of a right to self-determination affords to a people from a specific geographical territory the right to determine the political future of that land, although it does not specify who the people may be.\textsuperscript{128} Furthermore, a people’s right to self-determination is well established in international human rights law. It is enshrined as an inalienable human right in the United Nation’s ICCPR and International Covenant on Economic, Social and Cultural Rights.\textsuperscript{129} Article 1 of both Covenants read:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

\textsuperscript{124} Tomas, above n 30.
\textsuperscript{125} Mason Durie \textit{Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination} (Oxford University Press, Auckland, 1998) at 220.
\textsuperscript{126} O’Sullivan \textit{Beyond Biculturalism: The Politics of an Indigenous Minority}, above n 27, at 123.
\textsuperscript{127} Durie, above n 125, at 220.
\textsuperscript{128} Kingsbury “Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law”, above n 83, at 217.
\textsuperscript{129} ICESCR. Aotearoa/New Zealand ratified this covenant on 28 December 1978.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Thus the Covenants recognise self-determination as a collective, group right.\textsuperscript{130} Despite this, the reasoning behind recognition of the right to self-determination is to uphold and strengthen individual rights, thus maintaining the aim of international human rights law, which is to protect the fundamental rights of individuals.\textsuperscript{131}

The right to self-determination can therefore be viewed as a claim-right in the Hohfeldian sense. It places corresponding duties on State Parties to provide for the realisation of self-determination by peoples seeking it, and to respect and not interfere with the self-determination of other established states.

The right to self-determination arose out of the decolonisation process that occurred following World War Two, where different countries gained their independence from their European colonisers.\textsuperscript{132} Prior to that, self-determination had been in effect a political principle. Thus, decolonisation transformed the notion of self-determination from a political principle into a legal right.\textsuperscript{133} Consequently, as Elena Cirkovic puts it, the international law of self-determination “emerged from and justified a state-centred international legal order, where human rights applied to individuals or groups that were entitled to become independent states”.\textsuperscript{134}

\textsuperscript{130} Traditionally, only individuals held human rights: see the UDHR. The Convention concerning Indigenous and Tribal Peoples in Independent Countries is really the only other international instrument to recognise group rights, however limited group rights have also been recognised in the Declaration on the Right to Development 1986.


\textsuperscript{132} Kingsbury “Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law”, above n 83, at 219.

\textsuperscript{133} Ibid.

\textsuperscript{134} Elena Cirkovic “Self-Determination and Indigenous Peoples in International Law” (2007) 31 Am Indian L Rev 375 at 382.
Therefore, in its strongest sense, the right to self-determination could encompass a right to establish a separate sovereign state. However, Kingsbury suggests that secession is itself an “extraordinary remedy” that may be used only where groups are suffering major human rights violations from the governing polity, as in the case of Bangladesh’s secession from Pakistan.

Despite that, it has been argued in Chapters Three and Four that the Paeroa Declaration signatories may have been making this strong rights claim here. It can also be argued that they were implying a relational rights claim. Such a claim calls not for separation from, but a continued relationship of a special kind with, the state. This claim can be read in here because, even though the signatories stated that the final decision on the foreshore and seabed rested with Manawhenua, which Moana Jackson argued was a reaffirmation of tino rangatiratanga, or Māori self-determination, they did not expressly deny a place for the Crown and its institutions. Thus they may recognise some Crown authority, albeit of a lesser level than Manawhenua authority.

For example, the signatories recognised the Government when they directed Māori Members of Parliament to oppose legislation that could change their property rights in the foreshore and seabed. This resolution, however, only recognises that there will be contestation in Parliament. It does not recognise the authority of Parliament in the zone. But, in resolution 5, they recognised the Government when they called for it to disclose its proposals to Manawhenua. This contemplates more than Manawhenua participation in the policy process. It is a requirement that the Government disclose its plans and defer to Manawhenua authority (see also resolution 6). So, while resolution 5 may be read as recognising the place of the Government to make policy, Manawhenua would have the last say.

135 See Kingsbury “Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law”, above n 83, at 219-220.
136 Ibid, at 220.
137 See ibid, at 221-222, 223 and 225.
138 The Paeroa Declaration, above n 54, resolution 6. See also Jackson, above n 54, at 39.
139 The Paeroa Declaration, above n 54, resolution 3.
140 Ibid, resolution 5.
Furthermore, the signatories acknowledged the place of the courts by supporting those Manawhenua who wished to utilise the courts to pursue their claims.\textsuperscript{141} Taken, however, together with the exclusive Manawhenua authority claims, there is the implication that as Manawhenua have the final say, should a court rule against them, Manawhenua have the power to overrule that decision.

Nevertheless, it might be said that the signatories desired to have their self-determination recognised within the state, not outside it. Thus, they might have wished to maintain a relationship with the Crown, albeit a constitutionally different one from that exercised in Aotearoa/New Zealand today. For that reason such a right to self-determination is much more in line with the notion of relational self-determination expressed in the UNDRIP.

On 13 September 2007, the United Nation General Assembly adopted the UNDRIP. Although Aotearoa/New Zealand originally voted against it, on 20 April 2010 it became a signatory. The Declaration is of huge importance to Māori as it specifically states that Indigenous Peoples have a right to self-determination:

\begin{itemize}
  \item \textbf{Article 3} Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
  \item \textbf{Article 4} Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
\end{itemize}

Article 3 recognises that Indigenous Peoples have a right to self-determination within a country. This might be what the signatories were claiming. Furthermore, art 4 establishes that, when exercising their right, Indigenous Peoples also possess a right to self-government and autonomy.

In Aotearoa/New Zealand, the term ‘self-determination’ can be defined as “a people’s right to determine its future development, cultural priorities, etc”.\textsuperscript{142} Mason Durie

\textsuperscript{141} Ibid, resolution 4.
\textsuperscript{142} Deverson and Kennedy, above n 15, at 1022.
offered a definition of Māori self-determination in 1998 that has been applied by O’Sullivan in recent years. He proposed that Māori self-determination “is about the advancement of Māori people” and is “practical and intimately bound to the aspirations and hopes within which contemporary Māori live”.143 This advancement takes three forms: “economic standing, social well-being, and cultural identity”; “power and control”, equating to better self-management of natural resources, greater productivity of Māori land, the active promotion by Māori of good health, a sound education, enhanced usage of Māori language, and decision-making that reflects Māori realities and aspirations”; and finally cultural change.144

Thus, in following Durie’s conception of self-determination and Jackson’s understanding of the Paeroa Declaration,145 we might say the signatories were claiming a fundamental Māori right to self-determination as a Hohfeldian power to make decisions over the management of the foreshore and seabed as a natural resource or as Māori land.146 This power is exercised by a distinct people, within the state system. It places a liability on the Crown to abide by the rules set by Manawhenua. Thus, self-determination may be another foundation for the claim that Manawhenua are the correct decision-makers over the foreshore and seabed.

3.a.iv.3. Historic sovereignty claims

Kingsbury explained that claims of this nature are made by Indigenous Peoples hoping to revive their previous sovereignty.147 A claim to sovereignty is a claim to ultimate authority, a right to sovereignty. In the Aotearoa/New Zealand tradition, sovereignty cannot be limited and claims to it are therefore made in the fundamental sense.

145 Jackson argues that resolution 6 is “a reaffirmation that decision-making on this issue is properly an exercise of rangatiratanga”: Jackson, above n 54, at 39.
146 See the Paeroa Declaration, above n 54, resolutions 1 and 6. The claim that the foreshore and seabed is Māori land will be further discussed under the next section.
Prior to the signing of the Treaty in 1840, rangatira exercised sovereignty in their territories. The British imperial authorities explicitly acknowledged this sovereign status.\textsuperscript{148} It was this acknowledgement that meant at English common law, British imperial practice and international law, rangatira possessed the power to cede their sovereignty in art 1 of the English version of the Treaty.\textsuperscript{149} Under such an understanding of the Treaty, rangatira were the historic sovereigns of Aotearoa/New Zealand, but no longer possess any sovereign status.

As has been discussed, there is a central ambiguity over the Treaty’s treatment of sovereignty. The Māori version ceded “kawanatanga”\textsuperscript{150} or “complete government”\textsuperscript{151} in art 1, a concept less than sovereignty.\textsuperscript{152} Thus some argue that Māori retained their sovereignty, guaranteed to them as their tino rangatiratanga in art 2.\textsuperscript{153} The signatories explicitly stated “the foreshore and seabed belong to the Hapu and Iwi under our tino rangatiratanga”.\textsuperscript{154} As discussed in Chapter Four, Section 8.a.iv, this resolution embodies a claim to rights based on prior sovereignty that had never been legitimately set aside. So, while the signatories maintained their rights to the foreshore and seabed had never been ceded, they might also have been making the claim to be returned to their original sovereign position in the same resolution.

It seems likely that the call to revive historic sovereignty underlies resolutions 5 and 6. These resolutions assert that Manawhenua have the final say on decisions concerning the foreshore and seabed.\textsuperscript{155} These resolutions call for a constitutional change, where, in the realm of the foreshore and seabed at least, the authority of Manawhenua would

\textsuperscript{148} See discussion in Chapter Two, Section 5.
\textsuperscript{149} See discussion in ibid. The official version of the Treaty reproduced in Treaty of Waitangi Act 1975 (TOWA), schedule 1. For a full text of the Treaty see Appendix One.
\textsuperscript{150} The Treaty, art 1 (English Version).
\textsuperscript{151} Sir Hugh Kawharu’s translation. A copy of this translation is available in Ian Hugh Kawharu “Appendix” in Michael Belgrave, Merata Kawharu and David V Williams (eds) Waitangi Revisited: Perspectives on the Treaty of Waitangi (Oxford University Press, Auckland, 2005) 390 at 392, and online through the Waitangi Tribunal’s website: “Kawharu Translation” (2010) The Waitangi Tribunal. Te Rōpū Whakamana i te Tiriti o Waitangi <http://www.waitangi-tribunal.govt.nz/treaty/kawharutranslation.asp>. This translation was accepted by the Court of Appeal for the purposes of the case in New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 (CA) at 662-663 per Cooke P [the Lands Case], and the Court has acknowledged that the translation is commonly used in the courts.
\textsuperscript{152} See discussion in Chapter Two, Section 5.
\textsuperscript{153} See discussion in ibid.
\textsuperscript{154} The Paeroa Declaration, above n 54, resolution 1. ‘Hapū’ are sub-tribes, clans.
\textsuperscript{155} Ibid, resolutions 5 and 6.
sit higher than that of the Crown. This would return Manawhenua to the position they held prior to Crown acquisition of sovereignty. In a Hohfeldian sense, it would award Manawhenua the power to determine rights within the zone. Moreover, Manawhenua would remain immune from having their decisions and rights changed, and the Crown would conversely be placed under a liability, in that they would have to abide by such decisions.

3.a.iv.4. Claims as Indigenous Peoples, including claims based on treaties or other agreements between Indigenous Peoples and states

An express claim that the signatories to the Paeroa Declaration made was to property and decision-making rights founded in the Treaty. As discussed in Chapter Two, the Treaty is a valid international treaty, which is binding on the Crown at international law and as a matter of honour. However, it is currently unenforceable in the courts unless incorporated in statute. Despite this, its foundational status, and the fact that it guarantees rights that are recognised as existing outside the authoritative declarations of the state, means claims of right sourced in the Treaty are made in a fundamental sense.

The Treaty has been utilised as the source of Māori claims to rights since its inception. It is the key for much of the jurisprudence on Māori rights in Aotearoa/New Zealand. The signatories continued this tradition when they specifically stated: “The foreshore and seabed belong to Hapu and Iwi under our tino rangatiratanga”. Tino rangatiratanga is explicitly guaranteed under art 2 of the Treaty, the English version of which reads:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests.

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156 The Paeroa Declaration is silent as to whether the signatories would also claim such authority outside that sphere.


158 While the Treaty is not directly enforceable in the courts, since 1975, when the principles of the Treaty were first incorporated into the TOWA, a Treaty jurisprudence has emerged from the courts and the Waitangi Tribunal’s (the Tribunal’s) interpretation of these principles.

159 The Paeroa Declaration above n 54, resolution 1.
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.

Article 2 of the Māori version reads:

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.

[The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures].

The Waitangi Tribunal (the Tribunal) has described these rights as fundamental, and it is in that sense that the Paeroa Declaration signatories made their claims.

In Hohfeldian terms, the signatories made it clear that they perceived themselves to possess the Treaty claim-right to the continuance of their tino rangatiratanga. Therefore, it can be argued that the signatories believed the Crown was under a duty to guarantee their tino rangatiratanga.

As canvassed in Chapter Two, tino rangatiratanga is more than mere “exclusive and undisturbed possession”; it encompasses a governance element, be it “unqualified chieftainship”, self-determination or even sovereignty. As Jackson explained, resolution 1 “simply reaffirms that the foreshore and seabed have always been under the jurisdiction of Iwi and Hapu as part of the authority of tino rangatiratanga”. The Paeroa Declaration signatories’ precise understanding of tino rangatiratanga is unclear, however it is clear they looked to the Treaty to assert their continued power

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160 Kawharu’s translation: Kawharu, above n 151, at 392. Here, Kawharu notes that [at 393 at note 9]: ‘Unqualified exercise’ of the chieftainship – would emphasise to a chief the Queen's intention to give them complete control according to their customs. ‘Tino’ has the connotation of ‘quintessential’.

And [at 393 at note 10]:
‘Treasures’: ‘taonga’. As submissions to the Waitangi Tribunal concerning the Māori language have made clear, ‘taonga’ refers to all dimensions of a tribal group's estate, material and non-material – heirlooms and wahi tapu, ancestral lore and whakapapa, etc: at footnote 7 and 8.
‘Wāhi tapu’ are sacred places. ‘Wāhi tapu’ is defined by s 2 of the Historic Places Act 1993 as: “a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense”. Whakapapa means genealogy.


162 Jackson, above n 54, at 38.
to make decisions over the foreshore and seabed.

Importantly, both versions of the Treaty guaranteed Māori property rights. Following the Court of Appeal’s *Ngati Apa* decision, the foreshore and seabed can be said to fit under “Land” in both versions. However, even if this were denied, tikanga Māori holds there is no distinction in terms of property rights between dry land and the land under water.\(^{163}\) Therefore, in the Māori version, “wenua” includes the foreshore and seabed. Moreover, the foreshore and seabed could also fit under “other properties” in the English, and “taonga” in the Māori, text. Thus the signatories are claiming a claim-right to have their property rights in the zone protected, which places the Crown under a duty not to remove such rights without their consent.

The property rights that the signatories claimed should be respected and protected include the notion of exclusive title. The signatories deliberately chose not to use the word ‘ownership’, however. This may be because, as Mead acknowledged:\(^ {164}\)

> The land belonged to a collective group and its members used it, lived upon it, named various parts of it and established relationships with it. There was no concept of ownership and clear title as in the western case.

Despite this, it can be argued that the signatories were claiming that particular Manawhenua owned specific parts of the foreshore and seabed, based on the proposition perhaps that in the Treaty tino rangatiratanga includes such a right. This ownership right could afford Manawhenua a range of rights, including: the claim-right to exclusively control specific areas of foreshore and seabed; the liberty to use the realm; the power to exclusively manage it; the claim-right to derive benefits from it through development or rent; the liberty to modify the resource; the power to alienate it through sale or gift; the power to transmit it to others; and an immunity from having the property unlawfully seized.\(^ {165}\) Furthermore, Manawhenua could be under a duty not to use the land in a way harmful to others, and under a liability to having the land taken in payments for debt.\(^ {166}\)

\(^{163}\) See discussion on this in Chapter Two, Section 2.

\(^{164}\) Mead, above n 58, at 275.

\(^{165}\) For a more detailed description of the bundle of rights that make up ownership in Hohfeldian terms, please see Becker, above n 49, at 190-192.

\(^{166}\) See ibid, at 191.
While authors such as McHugh argue that the Treaty simply declares common law rules that would have arisen in any respect,167 others argue that it goes further and generates rights. For example, Andrew Sharp maintained that in guaranteeing tino rangatiratanga, the Treaty affords a right of development to Māori. He stated that rangatiratanga:168

... implied a far wider range of activities than aboriginal rights. It was not simply a right to continue unmolested in the old ways. It was a right to development. For the purpose and function of rangatiratanga was, among other things, ‘the maintenance of the tribal base for succeeding generations.

Sharp said that “the guarantee of rangatiratanga given by the Crown was a guarantee to that maintenance and consequently to the support of changes and developments that would support it”.169 He based this conclusion in the findings of the Tribunal, which stated that: “A Treaty that denied a developmental right to the Maori would not have been signed”.170

The Tribunal held that “it is the inherent right of all people to progress and develop in all areas”.171 Thus, in claiming property rights under art 2 of the Treaty, the signatories might have been making a claim of right, in a fundamental sense, to develop the resource for their economic and social enhancement. This right of development is upheld as an inalienable individual and group right in art 1(1) of the Declaration on the Right to Development 1986.172 It is intrinsically connected with group right to self-determination.173 Moreover, the UNDRIP recognises it as a specific group right

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169 Ibid.

170 Waitangi Tribunal Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (The Waitangi Tribunal, Wellington, 1988) at [11.6.6(c)]. See also discussion at [11.6.5]-[11.6.10].

171 Ibid, at [11.6.6(d)].

172 Aotearoa/New Zealand signed this on 4 December 1986. Aotearoa/New Zealand has also adopted other United Nation non-binding declarations that recognise the right to development. See Rio Declaration on Environment and Development 1992, principle 3; Vienna Declaration and Programme of Action 1993, art 10.

173 Declaration on the Right to Development, art 1(2).
pertaining to Indigenous Peoples. Like the other claims made to human rights, discussed above under Kingsbury’s third structure, a fundamental claim to the right to development can be classed as a Hohfeldian claim-right, which places a duty on the Government to actively accommodate in its laws and policies affecting Māori land.

In addition, it can be inferred that the signatories recognise that, connected to their entitlements, are the duties associated with the exercise of kaitiakitanga. Under kaitiakitanga, those in control of the foreshore and seabed are under an obligation to maintain the resource in as good, if not, better condition than before. As a Ngāi Tahu elder underlined in a tribal meeting in 1997, “We did not inherit the land: we have it on loan from our grandchildren”. Thus, under the Hohfeldian categorisation, Manawhenua have a duty to maintain the resource for future generations; in other words, the future generations hold a claim-right to receive the land in good condition.

It can also be argued that the Treaty Tribes Coalition’s calls for the rule of law to be respected and for Māori to be heard in the courts were claims based in the Treaty. Such calls might be based in art 3 or art 1. I will deal with each article in turn.

Article 3 of the English version guarantees Māori the “royal protection” of the Crown and “imparts to them all the Rights and Privileges of British Subjects”. In the Māori version, “Ka tiakina … nga tangata maori katoa” “ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani” the Crown [“will protect”] Māori and [“will give them the same rights and duties of citizenship as the people of England”]. Article 3 therefore guarantees Māori the rights of equal citizenship.

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174 The UNDRIP states in its preamble that the General Assembly is “Concerned that indigenous peoples have suffered from historic injustices as a result of … colonization and dispossession of their lands, territories and resources”, which has prevented their exercise of “their right to development in accordance with their own needs and interests”. Article 23 elaborates:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

175 Quoted in Williams, above n 58, at 52.

176 The Treaty Tribes Coalition, above n 89, at 2, 3, 8-10 and 11.

177 Kawharu’s translation: Kawharu, above n 151, at 392.

178 See Waitangi Tribunal Te Whanau o Waipareira Report (GP Publications, Wellington, 1998) at [8.2.4].
The rule of law is a fundamental tenet of citizenship. As such it is guaranteed to Māori under art 3. In Chapter Four it was noted that the rule of law requires that there is open access to the courts, or there should be equal access to the law. As discussed above in Section 3.a.iv.1, the rights to equality before the courts and to access the courts, which the Coalition argued for, are encompassed in the right to be heard. This right to be heard is contained within the rule of law, and thus is guaranteed in art 3. The Tribunal expressly recognised this in its Report on the Crown’s Foreshore and Seabed Policy:

180 The rule of law is a fundamental tenet of the citizenship guaranteed by article 3.

And:

181 Maori have a genuine right, both at law and under the Treaty, to go to court for declaration of their property rights. As we see it, that right is comprised in the rule of law, and should only be displaced if absolutely necessary.

Moreover, the Coalition’s claim that the Government should respect the rule of law could be viewed as a claim for the Crown to act within the constraints contained within art 1. This speculation requires unpacking. First, the Coalition recognise the sovereignty of the Crown. As such, it can be inferred that they hold that Māori ceded sovereignty in art 1 of the Treaty. But this sovereignty was subject to two key constraints: one, the guarantees made in arts 2 and 3; and two, the rules of the constitution, brought to Aotearoa/New Zealand with the British Imperial Crown, and introduced to the nation under art 1. Principal among these rules of the constitution “was that the Crown, as the embodiment of executive government, is subject to the law and has no power to act outside it. That is, the Crown both rules in accordance with the law, and is itself ruled by the law”. Thus when the Coalition called for the Government and even Parliament to respect the rule of law, this can be seen as a claim that the Crown, or New Zealand Government, has to abide by the constraints it agreed to in art 1.

179 See Waitangi Tribunal, above n 161, at [5.2.1].
180 Ibid, at xiv. See also discussion at [5.1.3(b)] and [5.2.1].
181 Ibid, at [4.3.2]. See also discussion at [4.2.1.5], [4.3.2(4)(a)], [4.4.4(a)] and [5.1.3(b)].
183 Ibid.
It has been shown that Kingsbury’s framework is a useful tool in clarifying the claims made by Māori during the Debate. The justifications used for the different claims become clear. Moreover, it becomes evident that Māori justified their claims across a range of Kingsbury’s structures, and furthermore, that their claims could have more than one justification.

3.b. Rights of others in the foreshore and seabed: powers, authority, sovereignty and immunity stated in the language of rights

During the Debate, other individuals and groups also claimed to possess rights in the zone that were acknowledged or disputed. This section considers those claims of right.

3.b.i. The ‘rights’ of the government, and the majority through Parliament

Brash, Cullen (or the Labour-led Coalition Government), and the Treaty Tribes Coalition all contended that the Government was a right bearer in the realm of the foreshore and seabed. They held that the Government is a proper bearer of powers and immunities, and of sovereignty and authority.

All three asserted that the Government had rights in the sense of powers. For Brash, the Crown was sovereign, as established under the Treaty, which “was the launching pad for a sovereign nation”. Moreover, he dismissed any claims to the contrary as fiction:

There are a few radicals who claim that sovereignty never properly passed from Māori into the hands of the Crown, and thus ultimately into the hands of all New Zealanders, Māori and non-Māori. They are living in a fantasy world.

Thus, like the claims of the Paeroa Declaration to tino rangatiratanga, discussed above, Brash’s claim to parliamentary sovereignty, as a Treaty right, is made in the fundamental sense.

184 Brash, above n 8, at 13.
185 Ibid, at 6.
Brash contended that prior to the Court of Appeal’s ruling, the Crown for the most part had ownership over the area.\(^{186}\) Thus, implicitly, with ownership came the power to manage the resource, and to alienate and transmit parts of it to others.\(^{187}\)

Cullen specifically discussed what the Government intended to do, as an aspect of its rightful power to determine a legislative framework for the application of rights in the foreshore and seabed.\(^{188}\) The Government drew legitimacy for this power from the doctrine of parliamentary sovereignty, under which the New Zealand Parliament is viewed as the supreme lawmaker, with the power to change the position of people and their claim-rights. On a strong view of it, this is an absolute Parliamentary power, which others, like Māori, cannot change. Cullen asserted such a fundamental view.\(^{189}\)

The Treaty Tribes Coalition also acknowledged that the Government had the power to make legislative decisions over the foreshore and seabed. But they saw this power guaranteed not so much in the doctrine of parliamentary sovereignty as in the notions of the rule of law and the separation of powers. But they argued that the Government’s legislative power was limited because it was not permitted could not be used to prevent cases that were already lodged in court from being heard.\(^{190}\) As they asserted:\(^{191}\)

> … the very idea of Parliament acting to usurp the proper role of the courts is outrageous. The rule of law “is the sentinel of constitutional government”. This means that Parliament must not interfere with the due process and decisions of the judiciary. To do so is to breach fundamental constitutional principles of the separation of powers, and that all branches of government are bound by the law.

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\(^{186}\) Ibid, at 14.

\(^{187}\) See Becker’s thirteen elements of property ownership: Becker, above n 49, at 190-191 cited in MacDonald, above n 49, at 24.

\(^{188}\) Cullen, above n 43.


\(^{190}\) Treaty Tribes Coalition, above n 89, at 2, 3, 8-9, 10, 11 and 12.

\(^{191}\) Ibid, at 8-9, citing Joseph, above n 189.
Parliament should not manipulate, to its own advantage, the outcome of a case before the courts.

Thus, the sovereignty that the Coalition conceded the Government possessed was limited and constrained by the rule of law. Even Parliament, from which the Cabinet is drawn, is under a disability in that it does not have the power to affect the court in its deliberations. Thus the courts would possess an immunity of that kind from the Government altering their decision-making powers. I will now turn to discuss these rights of the courts.

3.b.ii. The ‘rights’ of the courts to determine the rules

The Treaty Tribes Coalition and the signatories to the Paeroa Declaration argued that the courts as an institution had power entitlements in the zone. While the signatories to the Declaration accepted that the courts had the power to determine the rights of Manawhenua who enter the court process, they did so because they recognised the authority of each Manawhenua to pursue the identification of their rights in the way each thought best. Moreover, as discussed earlier, the signatories made it clear that the proper bearers of rights in the realm were Manawhenua, who each possessed the power to determine the rules over their specific piece of the resource. This therefore lends weight to the argument that although the signatories accepted that the courts had the power to determine rights, this was limited, and if the courts decided against the applicants, Manawhenua, as the final decision-makers, could still exercise their power and over-rule the courts. In other words, essentially Manawhenua were immune from the courts deciding against them and the courts were therefore under a disability of this kind. The signatories therefore saw the courts’ right to determine the rules as a simple, ordinary right that could be overridden by the fundamental decision-making rights of Manawhenua.

The Treaty Tribes Coalition, however, argued that the courts as an institution were the proper bearers of decision-making powers: that is, that the courts had the right to

\[192\] The Paeroa Declaration, above n 54 resolution 4.
\[193\] See Jackson, above n 54, at 39.
\[194\] The Paeroa Declaration, above n 54, resolutions 5 and 6.
determine the rules in the foreshore and seabed.\textsuperscript{195} To the Coalition, this was a fundamental right, founded in the rule of law. The Coalition therefore conceded that even if the courts rule against Māori litigants and found they did not possess property rights in the realm, that would have to be accepted by all, as “It would be a fair and final legal determination reached according to the rule of law”.\textsuperscript{196} So this power in the courts placed Manawhenua under a disability as they would have no power to change the outcome.

3.b.iii. The ‘rights’ of other New Zealanders in the foreshore and seabed

Brash claimed that other New Zealanders possessed development rights in the foreshore and seabed.\textsuperscript{197} These development rights, he contended, could be recreational or commercial. The development right bearers may be individuals, or groups such as local councils, or clubs that used the foreshore, such as yachting clubs. The rights were limited ordinary property rights and might include the liberty to modify the area, as well as a claim-right to income from any development.\textsuperscript{198}

Cullen argued, in addition, that both individuals and the public held ordinary property rights in the foreshore and seabed.\textsuperscript{199} These rights could cover all of Hohfeld’s entitlements, placing different limitations on others. But they were not superior to any Māori rights in the realm, and had to be balanced with Māori customary rights.\textsuperscript{200}

In his Article, Cullen argued that public access had to be protected.\textsuperscript{201} He was comfortable using the term ‘right’ when talking about Māori customary rights and the property of individuals and the public, but he did not use the term when referring to public access. This is an interesting omission. It can be inferred that the Government did not believe public access was a claim-right but merely a liberty, or privilege.\textsuperscript{202}

\textsuperscript{195} Treaty Tribes Coalition, above n 89, at 2-3, 6, 8-10, 11 and 12.
\textsuperscript{196} Ibid, at 3.
\textsuperscript{197} Brash, above n 8, at 10.
\textsuperscript{198} See Becker, above n 49, at 190-191,cited in MacDonald, above n 49, at 24.
\textsuperscript{199} Cullen, above n 43.
\textsuperscript{200} Ibid.
\textsuperscript{201} Ibid.
\textsuperscript{202} As discussed in Chapter Two, Section 13.a, the common law did not recognise access to the foreshore and seabed as a right and it was not codified as one in any previous statute.
Therefore, to protect public access the Government felt it necessary to elevate it to the status of a right through legislation, thereby placing a duty on everyone else to permit it to proceed.203

4. The non-legal nature of some right claims

A claim of right relies implicitly on some source as the foundation for the right, be it moral, legal, customary or otherwise. As already discussed, legal rights are recognised in a country’s legal system and founded in authoritative legal sources, such as statute or a constitution. They are afforded greater protection than rights sourced outside the law because the law provides for the enforcement of legal rights and also remedies for rights violations. For example, should public access to the foreshore and seabed be recognised as a legal right, denial of this would incur legal sanctions. If it is not recognised as a legal right, those denied may call for an apology, but they would have no legal recourse.

Despite this, during the Debate, people made claims to rights that might not be recognised within our legal system at present. This produced the deeper implication: that the law should recognise these different sources of rights as legitimate sources of law. This section considers those kinds of claims.

Both the Paeroa Declaration signatories and the Treaty Tribes Coalition invoked wider sources than are currently recognised in our legal system as legitimate sources for legal rights. These sources were the Treaty, an expanded doctrine of native title that may go beyond the principles currently recognised at common law, and tikanga Māori. I will deal briefly with claims made on the first two foundations by the signatories to the Declaration, before discussing claims of right sourced in tikanga Māori as a primary example of such claims that go beyond the current legal order.

The signatories to the Paeroa Declaration expressly founded some claims to property and decision-making rights in art 2 of the Treaty, which the courts have not directly enforced. This is evidenced in resolution 1 where the signatories stated unequivocally: “The foreshore and seabed belong to the Hapu and Iwi under our tino rangatiratanga”.

203 This right was codified the FSA, s 7.
In addition, the parties to the declaration may be relying here on a wider notion of the common law doctrine of native title, one that would recognise Māori title to the whole foreshore and seabed. This premise might rest on the view that the Treaty simply confirmed the common law.204 In either case they would be calling for expansion of the country is recognised sources of law.

In addition, Tikanga has been described as a normative legal system, that is the rules preserving order, as well as the values behind those norms.205 Prior to the introduction of English law, tikanga existed as the legal system in Aotearoa/New Zealand.206 The use, management and authority over the foreshore and seabed were sourced in tikanga.207 Tikanga, importantly, also dictated the actions of early Pākehā settlers in the foreshore and seabed.208 In some places in Aotearoa/New Zealand today, tikanga is still the legal system followed.209 Significantly, it must be made clear that tikanga is not static or frozen in the past. It has a contemporary focus, and, like any law, is capable of changing to meet contemporary requirements.210 As Judge Caren Wickliffe

204 This was the view Chapman J took in the founding case on native title in Aotearoa/New Zealand. See his obiter comments in R v Symonds (1847) NZPCC 387 (SC) at 391. Paul McHugh argues the Treaty is merely declaratory of common law rules that would have arisen in any event. See McHugh, The Māori Magna Carta, above n 167, at 68-98, 145; McHugh “Aboriginal Title in New Zealand”, above n 167, at 144; and McHugh “Common Law Aboriginal Title in New Zealand After Ngāti Apa”, above n 167, at 27.


206 Waitangi Tribunal, above n 161, at 19; Roughan, above n 64, at 136. See also Durie, above n 75; Law Commission, above n 64, at [76]-[79].

207 Waitangi Tribunal, above n 161, at [2.2.8]. See discussion in Chapter Two, Section 2.

208 Ibid.

209 For example at the marae (courtyard, open area in front of the meeting house in a village) and during hui (meetings, gatherings), in a number of Māori homes and surrounds the management of many natural resources, including the forest and coast: Law Commission, above n 64, at [117] citing Joan Metge. Moreover, the Commission noted that over the last twenty years there has been a push for tikanga to be applied in family law, criminal justice and the administration of land: at [117].

210 In its first determination case under ss 131 and 132 of TTWMA, the Maori Land Court held that under the Act “tikanga is now contemporary rather than ancient”: John da Silva v Aotea Maori Committee and Hauraki Maori Trust Board (1998) 25 Tai Tokerau MB 212 at 238 per Spencer J. See also: Law Commission, above n 64, at [10]; Stephens, above n 205, at 863; Eddie Durie “Constituting Maori” in Grant Huscroft and Paul Rishworth (eds) Litigating Rights: Perspectives from Domestic and International Law (Hart Publishing, Portland (Oregon), 2002) 241 at 259; Mead, above n 58, at 21; and Jacinta Ruru “Finding Solutions for the Legislative Gaps in Determining Rights to the Family Home on Colonially Defined Indigenous Lands” 41 UBC Law Rev 315 and 344.
explained, tikanga is the “law that determined and still determines Māori proprietary customary law”.\textsuperscript{211}

A closer reading of the Paeroa Declaration reveals that the signatories were applying tikanga as a source of their rights. In resolution 1, the signatories stated that the foreshore and seabed belonged to them under their tino rangatiratanga.\textsuperscript{212} This resolution is calling for recognition of Māori rights under art 2 of the Treaty, but tino rangatiratanga is exercised according to tikanga. Thus, rights recognised under tino rangatiratanga are also rights sourced in tikanga Māori.\textsuperscript{213}

Furthermore, it can be argued that the signatories applied tikanga Māori as a source of law in resolution 2, when they reaffirmed that their rights were based on ancestral precedent, and were exercised prior to colonisation under tikanga, \textit{which was} the law at the time.\textsuperscript{214} In the same resolution, the signatories described themselves as “whenua rangatira”, acknowledging the connection of Māori to the land, and invoking the principle of tikanga that all land, both dry and under water, is interrelated.\textsuperscript{215}

Additionally, resolutions 5 and 6, which decreed the authority of Manawhenua over their specific foreshore and seabed, and resolution 4, that recognised the authority of each Manawhenua to pursue the matter in the way it thought best, can also be seen to affirm the norms of tikanga.\textsuperscript{216} These resolutions recognise the customary principle that each Manawhenua governs their land and has the authority to determine what happens to it. In that manner, the signatories viewed tikanga as the correct law for the foreshore and seabed.

\textsuperscript{212} The Paeroa Declaration, above n 54, resolution 1.
\textsuperscript{213} For example, the Tribunal acknowledged this when they outlined that [Waitangi Tribunal, above n 161, at 3]:

\begin{quote}
Tikanga informs our Treaty analysis too. article [sic] 2 guarantees te tino rangatiratanga. The exercise of mana by rangatira was underpinned and sustained by adherence to tikanga. The chief whose thoughts and actions lacked that essential and recognisable quality of being ‘tika’ would not be sustained in his leadership.

‘Tika’ means correct.
\end{quote}

\textsuperscript{214} See Jackson, above n 54, resolution 2. See also Jackson, above n 54, at 38.
\textsuperscript{215} See Jackson, above n 54, at 38.
\textsuperscript{216} The Paeroa Declaration, above n 54, resolutions 4,6 and 6.
The Treaty Tribes Coalition did not take such a strong position. They did not argue directly that tikanga was the law governing the zone, but did argue that the Maori Land Court should retain its jurisdiction to determine the status of Māori land in the zone, and to do so, the Court would be required by Te Ture Whenua Maori Act 1993 to apply the norms of tikanga to determine whether or not such land was customary land “according to tikanga Maori”.  

On the other hand, neither Cullen nor Brash acknowledged tikanga Māori as a source of law. Cullen, however, may have been somewhat confused on this point. He explicitly stated that the Government was “not interested in trying to turn the clock back … to the period prior to 1840”. That is, the Government did not wish to apply pre-colonisation tikanga norms to the zone. But Cullen also acknowledged that the doctrine of native title was a relevant source of use rights, and this doctrine holds that the Māori rights are to be assessed according to their own customs, prior to 1840. The customs that were exercised were tikanga, so they were incorporated into the doctrine. On this point, therefore, Cullen’s position remains unclear.

For tikanga Māori to be fully recognised as a stand alone source of legal rights in Aotearoa/New Zealand law would require a separate, alternative system of law. The Paeroa Declaration signatories may have been calling for this, but they did not explicitly go that far, however, on this occasion.

5. Conclusion

What this material shows, therefore, is that many of the arguments in the Debate can be stated either in the language of equality or in the rhetoric of rights, but the change in the terms employed changes somewhat the structure and dynamics of the arguments. In particular, stating claims in the language of fundamental rights reveals more clearly their counter-majoritarian emphasis, and the need for special justifications to be advanced for their limitation. Moreover, the need to point to explicit legal sources for claims of right puts the spotlight on the fact that only limited

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217 TTWMA, s 132(2). See Treaty Tribes Coalition, above n 89, at 2, 3 6, 12 and 13.
218 Cullen, above n 43.
219 Ibid.
sources of law are currently recognised within our courts, which may not include the Treaty or tikanga Māori directly.

This chapter has shown that Hohfeld’s central point certainly applies to the Debate. The term ‘right’ was used in a loose range of ways, without awareness of the precise implications for legal relationships. This meant that people talked past each other, and greater misunderstandings were created.

A range of different types of right claims were articulated across the four documents. Such claims were made in both the fundamental and ordinary sense. The most prominent were property, procedural and decision-making rights claims. Applying a Hohfeldian analysis to these claims helps disentangle their meanings and reveals the precise nature of the entitlements asserted. Some could be described as claim-rights in the strict sense, that is rights that place corresponding duties on others, while others would be better described as liberties, powers or immunities. All these have slightly different characteristics.

Numerous sources were also advanced for these claims of right. Claims to Māori property and authority were sourced in tikanga Māori, the Treaty and the common law. They were based in the philosophical concepts of indigeneity, and spiritual and ancestral connection, as well as in four of Kingsbury’s five structures of argument for Indigenous Peoples’ rights: human rights and non-discrimination; self-determination; historical sovereignty; and recognition in treaties with the state. Moreover, claims concerning the decision-making rights of the Crown were founded in the notions of parliamentary sovereignty and the rule of law, and the decision-making rights of the courts in the notions of the separation of powers and the rule of law. Finally, claims that other New Zealanders had rights found support in the idea that rights based solely on race were unacceptable.

This thesis now turns to the methods proposed by participants for resolving conflicts between those rights, or for regulating their impact on other parties.
Chapter Six: Conflict of Rights

1. Introduction
Throughout the Foreshore and Seabed Debate people expressly stated their claims in the language of rights. Many of these claims were stated in absolute terms and clashed with one another, sparking serious reactions from those with opposing points of view. At other times, differing rights claims were dismissed as illegitimate, further inciting those who believed they possessed legitimate entitlements.

Many different approaches were then articulated to resolve the conflict between rights, or to determine the substance or strength of various rights, to see which would take priority. It was clear that in claiming strong rights there would be implications for others, who might be aggrieved. This chapter focuses on how the authors of the four key documents handle these issues.

2. What happens when rights clash?
In the dominant positivist notion of law practised in Aotearoa/New Zealand, it is well established that legal rights emanating from the authoritative institutions of the state will trump claims of right that are not grounded in recognised sources of law. Thus, had the Government not legislated to elevate public access to the level of a legal right, then that access would be overridden by legal recognition of strong Māori property rights. However, the exact position is complicated when legal rights clash. Must one then be set aside, or must a compromise occur? If so, on the basis of what considerations?

2.a. The contest between different rights
For Don Brash there was no contest between different rights. Any Māori customary rights in the foreshore and seabed were so limited that they did not clash with the ability of the public to access the zone, and certainly did not limit the Government’s right to make law. So Brash disputed any Māori claim that their rights were being

1 Foreshore and Seabed Act 2004 (FSA), s 7.
2 Brash alluded to this point in his discussion about what the National Party would do were it in Government. See Donald Brash, Leader of the Opposition National Party “Nationhood” (State of the
violated, because to him there were no legitimate Māori development or title rights in competition with the rights of the public or the Government. In his eyes, if the law was returned to the pre- Ngati Apa status quo, Māori could simply maintain the limited traditional use rights they previously possessed. However, others did not share Brash’s view. To find a resolution, some were prepared to recognise there were clashes between rights, and to set priorities, and to see one set of rights prevail. Both Michael Cullen and the signatories to the Paeroa Declaration argued that certain rights trumped others in the foreshore and seabed. These were the rights (or powers) of the Government and Manawhenua respectively to determine the rules in zone.

But were there any absolute rights? It seems Cullen thought so. He emphasised the supreme right of Parliament to make law under its sovereignty. Thus Parliament’s powers were absolute.

The signatories to the Paeroa Declaration also seemed to consider the powers of Manawhenua to determine the law in their local area to be absolute. However, they recognised there was a limited place for the Government and the courts in the decision making process. They argued that this place was clearly below that of Manawhenua who had the ultimate determinative authority over the zone.

The signatories of the Declaration did not renounce claims to absolute authority beyond the foreshore and seabed. Therefore a root-and-branch contestation of Crown sovereignty cannot be ruled out. Viewed this way, the signatories might be making a

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Nation Speech to the Orewa Rotary Club, Orewa, 27 January 2004) at 14. For the full text of the Speech see Appendix Three.
4 Brash, above n 2, at 14.
5 Michael Cullen “Challenge to find balance on issue of foreshore rights” Opinion, ODT (Dunedin, 18 February 2004) at 19, and the Paeroa Declaration (signed 12 July 2003) resolutions 5 and 6 reproduced in Tino Rangatiratanga Te Takutai Moana (2nd ed, prepared as vol 2 of the IRI, Economics, Politics & Colonisation Series 2003) at 11. For a full text of the Article and the Paeroa Declaration see Appendices Four and Two.
6 See Chapter Three, Section 4.
7 The Paeroa Declaration, above n 5, resolutions 4 and 5.
8 Ibid, resolutions 5 and 6.
claim to sovereignty over the whole nation that is the equivalent of Brash and Cullen’s assertions of parliamentary sovereignty.

Such an assertion may be made for rhetorical effect. It may be primarily a reaction, a response to assertions of absolute parliamentary sovereignty. So the signatories may be making a counter-assertion largely to assert an equality of status between Manawhenua and the Crown. Once that equality is conceded, the signatories may be willing to negotiate some division or sharing of responsibility. But the text of the Declaration itself is not so qualified.

On the other hand, while the signatories did not renounce claims beyond the foreshore and seabed, their assertion of ultimate control was made only in relation to this zone. It can be argued, therefore, that they might have been taking a view that could be described as specification. Specificationism is the position that all rights are absolute within a defined “space”. However, these rights contain qualifications that limit the space in which they apply. The signatories saw the rights of Manawhenua as absolute in the space of the foreshore and seabed. However, the signatories make no express challenge to the sovereignty of Parliament outside that zone, so their rights might still be restricted there. Moreover, the rights of the Government and the courts may be absolute in those other spaces, even if qualified in the foreshore and seabed.

If the signatories were employing such a view, the clash of rights or powers might be minimised. There would be only one decision-making authority in the relevant space, and that would determine which other rights might be permitted, forbidden or recognised. In the words of Hillel Steiner, who is a proponent of specificationism, rights never clash in such circumstances: they are always “compossible”. This is what the signatories to the Declaration argued when they claimed to make final

9 This can be seen when resolutions 1, 5 and 6 are read together: The Paeroa Declaration, above n 5, resolutions 1, 5 and 6.
11 Wenar, above n 10; Rainbolt, above n 10, at 162. See also Shafer-Landau, above n 10.
decisions about the foreshore and seabed: that they possessed the absolute right to alter all other entitlements in that zone.  

The Treaty Tribes Coalition did not take that kind of view. They perceived the right to be heard as absolute and fundamental. They did not believe this right should be compromised, even when it clashed with the rights of the Government as the supreme maker of law. They argued that the courts’ rights and the right of Māori to be heard outweighed the right of Parliament to legislate.

2.b. The proper institutions to solve the clash of rights and the process required

Implicit in the key documents are the authors’ perceptions as to which institutions have the authority to resolve the clash between conflicting rights. Even though for Brash no conflict of rights occurred, his Speech still revealed the institution he held as proper to rectify such conflicts should they occur. Like Cullen, he held that Parliament was the proper institution to solve any rights conflict. As both Brash and Cullen subscribe to the positivist tradition, both subscribe to using the political process to find a resolution, at the end of which a clear solution should be laid down in legislation.

Cullen discussed what this process would entail: it required a balancing of rights. But it was the Government that would conduct this balancing through legislation. In determining such a solution, the Government would possess the power to adjust Māori rights against the national interest.

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13 The Paeroa Declaration, above n 5, resolution 6.
14 See Treaty Tribes Coalition One Rule of Law for All New Zealanders: A Submission by the Treaty Tribes Coalition on the Foreshore & Seabed Issue (Treaty Tribes Coalition, Christchurch, 2004) at 8-10 and 11. For a full text of the Submission, see Appendix Five.
15 Brash’s view can be inferred from his statements objecting to the Labour-led Government’s solution, and his comments as to the position the National Party would take: Brash, above n 2, at 10-11 and 14. Cullen was more explicit. “The Government’s policy envisages a vigorous process for recognising and protecting customary rights while also protecting public access by placing the foreshore and seabed unequivocally in the public domain”: Cullen, above n 5.
16 See Brash, above n 2, at 14: “We will deal with the foreshore issue by legislating to return to the previous status quo”; and Cullen, above n 5: “What we are proposing is a legislative framework for the 21st century”.
17 Cullen, above n 5.
18 Ibid.
19 Cullen, above n 5.
The concept of balancing rights in conflict is most commonly associated with the work of Ronald Dworkin. He famously described rights as trumps that override any non-right. However, in cases where two rights come into conflict, he also noted that rights must be balanced against one another, with the decision maker estimating the merits of competing rights claims.²⁰

It is clear that Cullen viewed Māori rights and the rights of the public as rights in the ordinary, legal sense, as he argued that both could be compromised through balancing.²¹ On this view, when rights conflict, a decision maker must weigh their status to determine which is ultimately overridden.²²

Like Brash and Cullen, the Treaty Tribes Coalition clearly supported the pre-eminence of authoritatively-established positive law. Where they differed is that in the case of articulating rights in the foreshore and seabed, they hold the courts to be the ultimate authoritative state institution to articulate the law. The Coalition, therefore, viewed the courts as the proper institution to resolve matters of rights conflict.²³ To them, the Labour-led Coalition had stepped outside its proper role when it set about balancing rights and proposed to enact legislation to solve the matter. This led them to exclaim: “In effect, the Office of the Deputy Prime Minister took over the role of the courts”²⁴

Explicitly, throughout their Submission, the Coalition called for the rule of law to be respected by all.²⁵ Moreover, to the Coalition, any ruling of the court would be “a fair and final legal determination reached according to the rule of law”.²⁶ For the Coalition, therefore, the rule of law dictated a specific process of resolution. This

²¹ This is implied in Cullen’s Article: Cullen, above n 5.
²² Rainbolt, above n 10, at 161. The justification for overriding rights in this manner will be discussed in the next section.
²³ The Coalition explicitly held that it was the proper role of the courts to conclude matters of ownership and property rights over the foreshore and seabed: Treaty Tribes Coalition, above n 14, at 2-3. They held that all New Zealanders must respect this proper role of the courts: at 2, 3, 4 and 7. Moreover, they explicitly stated that the Government must also respect “the due process of the judiciary”: at 9-10; and that “the very idea of Parliament acting to usurp the proper role of the courts is outrageous”: at 8. In addition, they argued, “that the courts must be allowed to do their job while time is allowed for more sober reflection”: at 12.
²⁴ Treaty Tribes Coalition, above n 14, at 7.
²⁵ Ibid, at 2, 3, 4, 8-10, 11, and 13.
required the judiciary to apply general, predetermined rules (either expressed in statute or in the precedent of the common law) to all applicants, and not to engage in bias or rely on irrelevant considerations. At the end of this process the court would make a declaration, and that would be the law.

The court’s declaration of the existing law could provide a common understanding of Māori rights in the foreshore and seabed, which could form the basis for negotiated solutions. As the Coalition suggested:

Should the Māori Land Court or any subsequent appeal court ultimately rule that the successful applicants do have property rights in the foreshore and seabed under dispute, that could lead to negotiations between the Crown and the litigants, based on a determination of the nature and extent of any Māori rights. These negotiations could lead to an outcome that meets the legitimate expectations of Māori and the needs of contemporary New Zealand society.

So the Coalition envisaged here a very different process of conflict resolution from Cullen. While Cullen located the authority to determine such solutions squarely in the Crown, the Coalition required that the Crown sit down with local Manawhenua to work out a solution at that level, rather than unilaterally impose a national solution on all. For them, negotiated and jointly determined solutions were the appropriate mechanism to resolve conflict over recognition of rights.

As the Coalition observed:

Māori have shown in previous negotiations with governments over property rights to be prepared to seek win-win solutions that meet the needs of contemporary New Zealand society while reflecting Māori beliefs and expectations.

In complete contrast to the other authors, the signatories to the Paeroa Declaration held that specific Manawhenua groups were the legitimate institution to resolve rights conflicts in their respective foreshore and seabed. The process to solve clashes of

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27 See the Coalition’s recommendation (c): ibid, at 14.
28 Ibid, at 3. See also their recommendation (c) at 14.
30 This can be inferred from resolutions 4, 5 and 6: the Paeroa Declaration, above n 5, resolutions 4, 5 and 6. See also discussion in Chapter Five, Section 4.
right would be determined according to the tikanga Māori\textsuperscript{31} exercised by the different Manawhenua.\textsuperscript{32} Such a solution would bind both Māori and non-Māori.\textsuperscript{33}

This highlights the difference between the Paeroa Declaration signatories and the Treaty Tribes Coalition. Both recognised Manawhenua possessed decision-making rights. The Coalition did so when they proposed the Crown sit down with individual Manawhenua to work out a solution at the local level and thus acknowledged that Manawhenua had the authority to determine “Māori beliefs and expectations”.\textsuperscript{34} Both may therefore be arguing for equality of status between Manawhenua and the Crown, but the difference is that the Coalition expressly embraced a commitment to reconciliation, as opposed to unilateral Manawhenua determination. It was willing to acknowledge Crown authority over the zone and to countenance a role for the courts as broker of the relationship between the Manawhenua and the Crown, as well as joint determination through negotiations as the final mechanism of decision.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{31} Māori customary law. Section 4 of Te Ture Whenua Māori Act 1993 defines ‘tikanga Māori’ as: “Māori customary values and practices”.
\item \textsuperscript{32} This can be inferred from reading resolutions 1, 2 and 6 together: the Paeroa Declaration, above n 5, resolutions 1,2 and 6. See also discussion in Chapter Five, Sections 3.a.iii and 4. Tikanga Māori continues to be practised today within Māori groups, despite being severely impacted by colonisation, and limited to state recognition through incorporation via statute or the common law: See Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David V Williams (eds) Waitangi Revisited: Perspectives on the Treaty of Waitangi (Oxford University Press, Auckland, 2005) 330 at 330; Nicole Roughan “The Association of State and Indigenous Law: A Case Study in ‘Legal Association’” (2009) 59 UTLJ 135 at 146; and Law Commission Māori Custom and Values in New Zealand Law (NZLC SP9, 2001) at [116].
\item \textsuperscript{33} This is implicit in resolution 6: “The final decision on the foreshore and seabed rests exclusively with whanau, Hapu and Iwi”: the Paeroa Declaration, above n 5, resolution 6. Moreover, as noted in Chapter Five, Section 4, tikanga Māori at one time dictated the actions of Pākehā settlers in the foreshore and seabed. It is therefore likely the signatories believed it should do so again.
\item \textsuperscript{34} Treaty Tribes Coalition, above n 14, at 14.
\item In negotiations, however, there is no guarantee of procedural equality in the process in the same way that there is in adjudication. There is certainly no guarantee of equal outcome. Negotiations are necessarily party-specific, and the parties themselves may have unequal negotiating power. The Treaty settlement negotiations have been criticised for this very reason: see Crown Forestry Rental Trust Māori Experiences of the Direct Negotiation Process: Case studies and personal experiences of various negotiators on the negotiation process with the Crown to settle claims under the Treaty of Waitangi (Crown Forestry Rental Trust, Wellington, 2003) at 61. Of note, the Coalition have also made this claim: Treaty Tribes Coalition “NGO ‘Alternative Report’ to the Committee on the Elimination of Racial Discrimination: Submission in response to the consolidated fifteenth, sixteenth and seventeenth periodic report of NEW ZEALAND: To be considered at the 71st session August 2007” (2007) at [53] and [55] available: <http://www2.ohchr.org/english/bodies/cedr/docs/ngos/TTC_New_zealand.pdf>. Moreover, these negotiations will be Crown controlled. In the Treaty settlement negotiations, this has lead to claims that the process is unbalanced and impartial: see the concerns reported the Special Rapporteur on the rights of indigenous peoples in James Anaya Report of the Special Rapporteur on the rights of indigenous peoples: The situation of Māori People in New Zealand at [35]-[42], UN Doc A/HRC/18/XX/Add.Y (2011).
\end{itemize}
2.c. The legitimate justifications (or reasons) for trumping Māori rights claims

During the Debate there were several competing reasons given for trumping rights claims. Chapter Five highlighted that during the Debate, claims of right were made in two senses: fundamental and ordinary. As will be shown, the sense in which a rights claim was made dictated the level of justification imposed for trumping such rights. This section will begin by discussing the justifications for trumping ordinary rights, before moving on to discuss those employed for fundamental rights.

Ordinary rights, even ordinary property rights, can be regulated, limited or removed without requiring a demanding level of justification. This is because, under the positivist theory, these rights are state created, and can therefore be infringed by the institutions of the state. Moreover, as Chapter Five detailed, those possessing Hohfeldian powers, as Brash, Cullen and the Treaty Tribes argued the Government did, can alter claim-rights, even strong property claim-rights such as ownership, liberties and immunities. There are many instances where such alteration has occurred in Aotearoa/New Zealand law.36

For Brash, there was no justification needed for overriding Māori property rights because no legitimate Māori rights were being overridden. To Brash, the claims of Māori to development or title rights were illegitimate. Māori rights in the foreshore and seabed, he asserted, were, at most, traditional limited use rights.37 These rights would remain in their limited form under Crown ownership.38 Therefore, the legitimate claims of all New Zealanders trumped absolute, illegitimate Māori claims.

To Brash, the rights of Māori must give way to the wider public interest. He stated outright that if the Government legislated to recognise customary title over the

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36 See for example the Resource Management Act 1991, ss 9-15C. Wolfgang Kasper terms this “regulatory expropriation”. In his view, throughout western capitalist societies [Wolfgang Kasper In Defence of Secure Property Rights (Centre for Independent Studies, Sydney, 2003) at 24]:
Parliaments and bureaucrats busy themselves decreeing regulations which extinguish long-existing private property rights. They do so ostensibly for good causes – to improve safety, public health, environmental conservation, social equity (however defined), the national culture and much more.

37 Brash, above n 2, at 10, 11 and 14.

38 Ibid, at 14.
foreshore and seabed, an incoming National Government would revoke it. Interests, in particular the public interest, are often used as a reason to quality or remove ordinary property rights, even claim-rights to ownership. For example, the public interest in environmental protection is viewed as a legitimate reason for incursion on property rights in a planning and environmental context.\(^{40}\) In this case, Brash perceived the legitimate public interest as a desire for the public to be able to continue to develop the zone without onerous delays and costs, and to stop the inevitable emergence of corrupt practices, should Māori be granted development and management rights in the bundle of rights associated with exclusive title.\(^{41}\)

Brash need not have worried because Cullen also made it clear that the Labour-led Government would not fully recognise customary title rights.\(^{42}\) He justified this position with two arguments. The first was that when Te Ture Whenua Maori Act 1993 was enacted it was intended to apply only to dry land so should not be applied to claims to land under the sea.\(^{43}\) The second was that if the issue was left to run through the courts, it was likely that they would be swayed by comparable overseas cases that had found the common law doctrine of native title did not recognise full and exclusive title in the foreshore and seabed.\(^{44}\)

However, Cullen did recognise that Māori use rights did exist in the zone, which needed to be balanced against the rights of other New Zealanders. However, as Jeremy Waldron states, this results in trade-offs.\(^{45}\)

What is to be balanced are the legitimate rights of Māori against other competing legitimate rights in the foreshore and seabed, not the legitimate rights of Māori against the “perceived” rights of the majority. Cullen said that the Government was proposing to balance “the rights we want all New Zealanders to enjoy” against the use rights of Māori.\(^{46}\) At the time, however, there was no recognised legal ‘right’ of the

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\(^{39}\) Ibid.


\(^{41}\) See Brash’s claims as to what would happen should Māori rights be granted: Brash, above n 2, at 10-11.

\(^{42}\) Cullen, above n 5.

\(^{43}\) Ibid.

\(^{44}\) Ibid.


\(^{46}\) Cullen, above n 5.
public to access the entire foreshore and seabed. It was only a liberty or privilege. It therefore seems he might be prepared to trade off Māori property rights for a less established interest of the public.

However, he may argue that access to the zone was so important it deserved the added protection of a legal right that was for “all New Zealanders to enjoy”. Under the positivist tradition, the Government can create new legal rights, even ones that qualify established rights, provided they follow the authorised process. Moreover, as will be discussed in Chapter Seven, many of the public perceived the ability to access the zone as a right. It is likely that Cullen, and the Government, were reacting to this overwhelming perception. As the Legislation Advisory Committee has commented:

The balances in society are constantly changing and the legal rules, therefore, are in need of constant review and adjustment. At any time the bulk of the law will remain constant. But the Government of the day must assume responsibility for assessing changes in the political, economic and social environment and for determining whether adjustments to the law are needed in response to those changes.

One way to weigh rights is the utilitarian approach. This approach would seek to maximise the happiness of the majority of New Zealanders, who would retain their existing rights as well as other interests. Thus, any Māori rights might be traded off to appease the majority.

While such an approach is easily justified when Māori rights are viewed as ordinary legal rights, if the rights are viewed as fundamental this process may be inappropriate. Waldron warned that under the utilitarian calculation there is no guarantee that important, fundamental rights will not be traded off for other less important ones in order to maintain majority satisfaction. Dworkin showed a similar concern. For him, to assume that the interests of the majority should prevail over other competing rights in this way is a mistake. He has argued that the claim that government action will

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47 See Chapter Two, Section 13.a.
48 Cullen, above n 5.
50 Waldron, above n 45, at 509.
51 Dworkin, above n 20, at xi, 194 and 199.
improve the common welfare is not a sufficient justification for overriding rights.\textsuperscript{52} To him, if a society takes rights seriously, it would not sacrifice them for the immediate common good.\textsuperscript{53}

In the result, the interests of the majority clearly prevailed in the passage of the Foreshore and Seabed Act (the FSA). By elevating public access to the position of a legal right in s 7 of the legislation, Parliament ensured public access prevailed over Māori rights. Any Māori rights recognised in a customary rights order will be subject to this right of access of all New Zealanders, and the Act therefore places a duty on Māori customary groups to accommodate that new public access right.

Sections 10 and 12 of the FSA removed the jurisdiction of the High Court and the Maori Land Court to determine title in the zone. This effectively removed the title rights themselves.\textsuperscript{54}

While removing ordinary rights may be justified under the exercise of parliamentary sovereignty, when the rights themselves are viewed as fundamental, a higher degree of justification is imposed for the removal of such rights. Fundamental rights benefit from special respect and protection, which should not be subject to majority control, except in rare instances based on compelling justifications.

As considered in Chapter Five, Sections 3.a.iv.1 and 4, the signatories to the Paeroa Declaration were making fundamental claims of right to property. While no such right is recognised in Aotearoa/New Zealand law, it is expressly recognised in arts 25-27 of the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP).\textsuperscript{55}

Article 46(2) then states when and how this right of Indigenous People to property can be limited:

\textsuperscript{52} Ibid, at 191-193 and 204.
\textsuperscript{53} Ibid, at ch 9.
\textsuperscript{54} See Waitangi Tribunal \textit{Report on the Crown’s Foreshore and Seabed Policy} (Legislation Direct, Wellington, 2004) at xiii and [4.4.1].
\textsuperscript{55} See Chapter Five, Section 3.a.iv.1. Aotearoa/New Zealand signed this Declaration on 20 April 2010.
The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

The FSA, however, removes the customary title rights of Māori only. At face value this fails part of the test set out in art 46(2). Questions arise as to whether the removal of such rights are necessary for securing recognition and respect of other New Zealanders’ rights and freedoms, and whether it meets the “just and most compelling requirements” of Aotearoa/New Zealand society.

The Tribunal discussed this in their Report on the Crown’s Foreshore and Seabed Policy. They did so because the fundamental property rights of Māori are also expressly guaranteed in art 2 of the Treaty, and therefore “When the Crown expropriates property rights, especially from its Treaty partner, it must have compelling reasons for doing so”. The standard to be met was described by the Tribunal in its earlier report on the Turangi Township:

… if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Maori in article 2 it should be only in exceptional circumstances and as a last resort in the national interest.

The Tribunal found that there were no compelling reasons for removing Māori title rights: the uncertainty arising from the Court of Appeal case was “not so dire to require immediate legislative intervention”; it was not “necessary to legislate to

56 Existing freehold title remains: FSA, s 5.
57 Cullen, and those who advocate the recognition of a strong right of access, could make that claim here.
58 Waitangi Tribunal, above n 54, at ch 4.
59 Ibid, at [5.1.2].
60 Ibid, at [4.4.2].
secure public access”; and “The small risk Māori might sell their property rights in the foreshore and seabed can easily be managed”. Thus, the Tribunal concluded:… that there is no overriding need for the foreshore and seabed policy in the national interest. The Crown is not driven to act, and so it lacks the necessary moral and legal grounds for overriding the guarantees made to Maori in article 2 of the Treaty.

As noted earlier, the UNDRIP and the Treaty are not binding on the Government unless incorporated into the law. Therefore the fundamental rights guaranteed in each remain subject to the limits imposed by positivist law. However, Aotearoa/New Zealand has incorporated protection for some fundamental rights under the New Zealand Bill of Rights Act 1990 (NZBORA). This, however, is just an ordinary Act. It is not entrenched and does not enjoy the higher constitutional status of some Bills of Rights in other jurisdictions.

Rights to property can be argued to fall under ss 20 and 21. Section 20 codifies art 27 of the International Covenant on Civil and Political Rights (the group right of minorities to their culture), which the Human Rights Committee has linked to Indigenous Peoples’ lands. Section 21 upholds the individual right to be secure from unreasonable seizure of property. The Attorney-General at the time, Margaret Wilson, concluded that the Foreshore and Seabed Bill 2004 (the FS Bill) did not breach these provisions, and therefore no justification was needed.

Sections 10 and 12 of the FSA also removed the right of Māori (and only Māori) to be heard in court. This seemed a breach of s 27(3) of the NZBORA, which codifies the rights to equality before, and access to, the courts. Again, however, the Attorney-General found no breach.

62 Waitangi Tribunal, above n 54, at [4.4.2(a)]-[4.4.2(c)].
63 Ibid, at [5.1.2].
64 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976). For more information see Chapter Five, Section 3.a.iv.1.
65 Margaret Wilson, Attorney-General Report on the Consistency of the Foreshore and Seabed Bill 2004 with the New Zealand Bill of Rights Act 1990 (Ministry of Justice, 2004) at [21]-[22] and [36]. See also discussion in Chapter Two, Section 15.a.
66 These rights have been discussed in Chapter Five, Section 3.a.iv.1 and the relevant provision will not be reproduced in full here.
67 Wilson, above n 65, at [17]. See also discussion in Chapter Two, Section 15.a.
Nonetheless, the Attorney-General did concede that the FS Bill was a prima facie breach of s 19 of the NZBORA. Section 19 holds that: “Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993”. One of the proscribed grounds of discrimination in the Human Rights Act 1993 is race. To remove the right of access to the courts of the members of one race clearly seems to breach this principle.

However, s 5 of the NZBORA also provides that the rights contained within the Act can be subject to any “reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society”. The Attorney-General concluded that this infringement was justified:

The Bill seeks to achieve a balance that recognizes and protects Māori customary interests, recognizes and protects the interests of the general public (including Māori) and resolves the substantial uncertainties resulting from the Court of Appeal’s decision in Ngati Apa. Taken in conjunction with existing mechanisms for the recognition and protection of Māori common law customary interests in the foreshore and seabed (e.g. the fisheries legislation) and in conjunction with the likely future recognition of such interest (e.g. in relation to aquaculture), I consider the Bill meets the section 5 test. Accordingly, it does not involve any breach of the Bill of Rights Act.

This is in stark contrast to the Treaty Tribes Coalition’s position. They did not believe there was any reasonable justification in this case for removing the ability of Māori to access the courts. In fact, their perception of the rule of law was that it guaranteed the separation of powers and the immunity of the courts from undue interference by

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68 Wilson, above n 65, at [38]. See also discussion in Chapter Two, Section 15.a.
69 Human Rights Act 1993, s 21(1)(f).
70 Wilson, above n 65, at [103]. See also discussion in Chapter Two, Section 15.a. The ‘s 5 test’ is set out in Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA) at [18]:

In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective which the Legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. ... The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore the limitation involved must be justifiable in the light of the objective.
Thus, to the Coalition, the Government was not only unjustified but acting unconstitutionally.72

3. The substance (or strength) of the rights claims that should be recognised and the implications for others

3.a. The nature of rights and their implication for others

Where rights conflict this often results in a trade off. When this happens, people often perceive their rights to be violated, causing a sense of injustice. To prevent this, rights are often read down to the status of interests. This removes the conflict and gives a decisive answer: where rights and interests clash, rights prevail. Another way to remove the clash is to deny the existence of one or more of the rights claimed. This, however, impacts negatively on those whose rights are not recognised.

Rights by their nature can be divisive. Strong rights override the public good and utilitarian considerations.73 If the basis upon which a person or group claim their rights is viewed as illegitimate, then even the recognition of such rights can be viewed as injustice. As Alon Harel said, “To say that one has a right is different from saying that it would be good, nice, or noble that one is provided with the good in question or with what one desires to have”.74 Rights can have antagonistic character; strong claims to rights are not merely requests, they are demands.75 During the Debate, different people and groups demanded their rights be recognised. Furthermore, where rights clash, they can create adversaries out of those advocating competing rights claims. This can damage relationships and exacerbate conflict.

A claim to a right is implicitly selfish; it makes it seem that the right claimer views their entitlements as more important than other people’s. It demands that the right holder’s entitlements be afforded special protection over others. Moreover,

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71 Treaty Tribes Coalition, above n 14, at 9.
72 Ibid, at 8.
74 Harel, above n 73, at 191.
75 Ibid.
recognition of a claim of right can confer duties, no-rights, liabilities and disabilities on others.

For example, to claim strong substantive rights to decision making over the foreshore and seabed, or exclusive title in it, may ignore the legitimate entitlements of other New Zealanders which may not have the status of rights or be based on such a strong rights claim. To make a strong rights claim to decision-making, for instance, as both Cullen and the signatories to the Declaration did, not only discounts competing claims to make such decisions, but may also disregard other entitlements, because decision-making powers can be used to change others’ rights, or to disregard them altogether. This was the case when the Government refused to recognise exclusive Māori title. Moreover, in making a strong claim to full and exclusive title, the claims of others to lesser use rights and interests, such as access to the area, may be disregarded. They cannot exist if full and exclusive title is awarded.

Consequently, perhaps such strong claims to substantive rights ought not to be claimed, as a matter of self-restraint. By trying to work out a solution that pays regard to all legitimate interests, relationships may be retained, and conflict may be less likely to occur. This is what the Treaty Tribes Coalition advocated when they called, in effect, for the courts to be permitted to do their job while time was allowed for more reflection.

Nevertheless, strong rights claims were made. Brash advocated Crown ownership of the zone. Cullen called for absolute, unfettered parliamentary sovereignty. The signatories to the Declaration called for absolute Manawhenua authority in the zone, as well as exclusive property. Even the Coalition made such claims when they argued for recognition of the fundamental human right of Māori to be heard and the absolute immunity of the courts from state interference.

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76 Cullen, above n 5.
77 Treaty Tribes Coalition, above n 14, at 12.
78 Brash, above n 2, at 14.
79 Cullen, above n 5.
80 The Paeroa Declaration, above n 5, resolutions 1, 5 and 6.
81 See Treaty Tribes Coalition, above n 14, at 2, 3, 8, 9, 11 and 12.
3.b. With rights come responsibilities

Even so, some of the rights claimed would be matched obligations or restrictions placed on the right holders themselves. This can be described as the notion that with rights come responsibilities.

The Coalition, for instance, in asserting that the courts possessed the right to determine and define rights and interests in zone, implied that the judiciary had a responsibility to follow the rule of law when making their judgments. This required there to be no bias or reliance on irrelevant considerations in their decision-making process.

Brash explicitly stated that Māori had responsibility for what was happening in their own communities. He said this responsibility comes with the duties of citizenship that Māori, as well as other New Zealanders, bear. He grounded this responsibility in art 3 of the Treaty. So, although he refused to regard the Treaty as a source of Māori property, development and decision-making rights, he still considered it a source of Māori responsibilities.

While the signatories to the Paeroa Declaration never explicitly stated that there were responsibilities attached to the rights they advocated, it is understood that with rights sourced in tino rangatiratanga comes the responsibility associated with kaitiakitanga. The question, therefore, is what would kaitiakitanga mean in relation to the foreshore and seabed?

Kaitiakitanga is defined in section 2 of the Resource Management Act 1991 as:

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83 Brash, above n 2, at 14.
84 Ibid. He continued on to state: “Like everybody else, Maori must build their own future with their own hands”: at 15.
86 Sovereignty, ultimate chieftainship, chieftainship, right to exercise authority, chiefly autonomy, self-determination, self-management, indigenous rights, mana Māori (the Māori way of life).
87 The Paeroa Declaration, above n 5, resolutions 1 and 2. Moana Jackson explained that “The obligation upon Iwi and hapu to be kaitiaki is part of the tupuna title but kaitiakitanga itself is only a part of the broader authority of rangatiratanga”: Moana Jackson “Backgrounding The Paeroa Declaration” in Tino Rangatiratanga Te Takutai Moana (2nd ed, prepared as vol 2 of the IRI, Economics, Politics & Colonisation Series 2003) 38 at 38. ‘Kaitiaki’ means guardian, caretaker.
88 ‘Tangata whenua’ literally translates as ‘the people of the land’. It means the Indigenous or local people.
… the exercise of guardianship by the tangata whenua of an area in accordance
with tikanga Maori in relation to natural and physical resources; and includes the
ethic of stewardship:

In this formulation of the law, therefore, kaitiakitanga relates to definite physical
resources.\(^89\) However, kaitiakitanga also has a spiritual dimension. It obliges
Manawhenua to “protect the spiritual wellbeing of the natural resources within their
mana”.\(^90\)

It is from the ethic of kaitiakitanga that the right to establish a rāhui\(^91\) is sourced. A
rāhui is a way to prohibit a specific human activity in a specific area.\(^92\) Thus, if
Manawhenua were recognised as possessing ownership rights in their foreshore and
seabed, they would possess the right to establish a rāhui and restrict others in the
zone. As the Law Commission noted in 2001, rāhui were still practised by many iwi.\(^93\)
They observed that rāhui were imposed when there had been a death in the area, to
protect sacred sites or for conservation.\(^94\) The obligation to impose such rāhui in
proper cases would therefore be imposed on right holders, forming a particular aspect
of the bundle of rights and obligations sourced in tikanga.\(^95\)

\(^89\) This definition was substituted in 1997 by s 2(4) of the Resource Management Amendment Act 1997. Prior to that the definition was unclear on whether it related to physical resources, or spiritual
recourses or both. The historical provision reads:

  Kaitiakitanga means the exercise of guardianship; and, in relation to a resource, includes the ethic
  of stewardship based on the nature of the resource itself.

\(^90\) Law Commission, above n 32, at [163], citing the Waitangi Tribunal The Whanganui River Report
(GP Publications, Wellington, 1999) at 265–283. The Law Commission continued on to note [at
[163]]:

  It is difficult to divorce kaitiakitanga either from mana, which provides the authority for the
  exercise of the stewardship or protection obligation; or tapu, which acknowledges the special or
  sacred character of all things and hence the need to protect the spiritual wellbeing of those resources
  subject to tribal mana; or mauri, which recognises that all thing have a life-force and personality of
  their own.

  ‘Mana’ means power, prestige, ‘tapu’ means under ritual restriction, and ‘mauri’ means life principle.

\(^91\) Embargo, quarantine, ban.

\(^92\) Hirini Moko Mead Tikanga Māori: Living by Māori Values (Huia Publishers, Wellington, 2003) at
193. For further information on rāhui see Mead at 193-207.

\(^93\) Law Commission, above n 32, at [165].

\(^94\) Ibid. ‘Iwi’ are tribes, nations, peoples.

\(^95\) Customs.
3.c. What Māori property rights should be recognised and what would be the implications for others?

With regard to conflicts between rights, perhaps the major question in the Debate concerned the implications for others of recognising exclusive Māori title to the zone.

Any title recognised need not be unqualified, however. There is significant precedent for the conferral of more limited forms of Māori title in our law. In 1992, a deed of settlement was signed between the Crown and Ngāti Tūwharetoa to vest ownership of the bed of Lake Taupō in that iwi’s Trust Board.66 However, the right of the public to access the lake remains, as do public rights to navigation and fishing.67 In 2006, a similar agreement was reached with Te Arawa to vest the ownership of several lakebeds in the Rotorua region in the Te Arawa Lakes Trustees.68 Manawhenua would receive recognition of their authority over the zone, but again many existing rights and interests of others would remain.

If a stronger form of exclusivity was recognised, however, others would have no-right to enter the area without the owner’s permission, and could be sued for trespass if they did. This might not mean the public would be denied access in fact. They might seek and obtain permission to enter from the Māori owners. This is now the practice in many rural areas of the country where members of the public wish to access rivers and lakes across private farm land. They seek and are usually granted access. Exclusive title would give the right holder the power to decide who would use the resource,69 but they may decide to open access to the public provided their authority was followed. If so, recognition of full authority and public access could still co-exist.

Moreover, if the title awarded covered only land in the foreshore and seabed, and not the water above, then the public right of navigation over the water would probably

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67 See the New Zealand Government “New Deed of Settlement for Lake Taupō” (press release, 10 September 2007).
68 Te Arawa Lakes Settlement Act 2006, s 23. This particular settlement Act will be discussed in more detail in Chapter Nine, Section 3.
survive the change in ownership. Moreover, public access to adjoining beaches that lie above the high water mark – and so are neither foreshore nor seabed – would remain. Here too a sharing of interests could be sustained.

The Paeroa Declaration signatories seemed to take the strong position, nevertheless, that Māori rights *should* prevail over other interests in the zone. Even if Moana Jackson argued that the Declaration was not a claim to deny access to the public,\(^\text{100}\) it is clear that the signatories viewed Manawhenua as the proper decision makers, and that they could exercise their rights in a manner that would lead to the interests of others being infringed. This may happen when exercising duties under kaitiakitanga, for instance, or when exercising exclusive powers to develop the area. Then others’ interests clearly could be trumped.

4. Conclusion

What this material shows is that many of the rights claims made across the four documents clearly clash. The different authors articulated different solutions to this clash. For Brash, there was no contest. In his view, since the only legitimate rights that Māori possessed were very limited use rights, and these could continue, no violation occurred. The others contended that some rights trumped others, although they disagreed as to what these rights were and who possessed them. In addition, arguments were made that some rights should be balanced, or that some limits on Māori rights could be justified in a free and democratic society. For the Treaty Tribes Coalition, however, there was no justification for removing the right of Māori to be heard in court. And the signatories to the Declaration continued to assert Manawhenua rights in strong terms.

Strong rights claims seem to pay little regard to the interests of others. So perhaps claims should not be made in those terms. Instead, creative solutions that adjust various rights claims may need to be found. These solutions should recognise Māori interests in strong form, perhaps, but they still need to protect core public access and navigation entitlements. Neither the position of Brash, nor that of the signatories to the Declaration, who take a strong line against and for Māori rights in the zone

\(^{100}\) Jackson, above n 87, at 39.
respectively, seem amenable to such compromise. Perhaps, ultimately, it is the use of
the strong language of absolute rights – of rights as trumps over all other interests –
that is a central impediment to a solution being found. Only through compromise by
reverting to the language of conditional rights, or of interests, perhaps – or by
admitting the legitimacy of justified limitations on rights – will a peaceful resolution
emerge.
Chapter Seven: Positions Taken in the Broader Debate

1. Introduction

This chapter represents a shift in focus from the previous four. Having exposed the equality arguments and claims of right imbedded in the four key documents (the key documents), and assessed their theoretical underpinnings, it examines other empirical data from the Foreshore and Seabed Debate. The data is compiled from a range of sources: newspaper and magazine articles, television documentaries, internet forums, submissions and press releases. These encompass the views of Manawhenua and other Māori, Pākehā, non-governmental groups, and political parties.

There are four aims for this chapter. The primary aim is to substantiate the claim that the key documents studied earlier contain the major equality and rights arguments in the Debate, by canvassing a broad range of further opinion, to see whether additional arguments are raised, or whether they largely overlap with those already discussed. It is therefore a critical step in answering the foundational thesis questions: what equality theories did New Zealanders employ during the Debate; do these theories uphold the notion of separate Māori rights to the foreshore and seabed; and, if so, what are the sources of these rights? The secondary aim is to reveal the range of people who used these arguments, and to show that the Debate did not involve simply an expression of opposing Māori and Pākehā views. Instead, both Māori and Pākehā participants, from many walks of life, employed a wide range of arguments. The third aim is to highlight the interesting interplay between law and politics during the Debate. Finally, this chapter aims to bring to the fore any arguments not represented in the key documents.

Due to the extent of the overlap found between the arguments in the four key documents and those used in the wider Debate, the same structure is used to clarify the arguments as in the previous chapters based on theories of equality and theories of rights. But new variants of these arguments will be indicated as the chapter proceeds.
2. Theories of equality

2.a. Formal equality between individuals

The doctrine of formal equality between individuals that Don Brash expressed touched a raw nerve with many Pākehā New Zealanders, and produced an unprecedented rise for the National Party (National) in the polls.\(^1\) Colin Perris summed up the public perception as follows: “Don Brash has finally caught the attention of the media because he reflects the concerns of the majority of New Zealand-born people of European heritage who feel they are becoming alienated in their own country”.\(^2\)

Within days of the Court of Appeal’s decision, the first articulations of this doctrine appeared in public. On 25 June 2003 Rt Hon Winston Peters, leader of the New Zealand First Party (NZ First), stated that: “We cannot function if there is politically and legally sanctioned racial preferment for one group based on an outdated document that has no legal status whatsoever in the 21st century”.\(^3\) Tom Harrison, the Mayor of the Marlborough District Council, was perhaps the first public figure to openly promote formal equality between individuals in the Debate.\(^4\) Harrison announced there should be one law for all New Zealanders, and that all should have the same rights.\(^5\) Like Brash, Harrison claimed the Government was enshrining privilege for Māori.\(^6\) Later he stated that in law there should be no ethnic privilege because it generates two distinct groups of citizen, and to do so is unjustified as nowhere in the Treaty “does it say anything about giving one or the other side special privilege”.\(^7\)

\(^1\) Donald Brash, Leader of the Opposition National Party “Nationhood” (State of the Nation Speech to the Orewa Rotary Club, Orewa, 27 January 2004). See discussion in Chapter Three, Section 3, and Chapter Four, Section 3. For a full text of Brash’s Speech see Appendix Three.


\(^4\) The Marlborough District Council was one of the respondents in the Court of Appeal proceedings.


\(^6\) See ibid.

\(^7\) Paraphrased and quoted in Monique Devereux “Words that made waves” Weekend Review & World, Weekend Herald (Auckland, 13-14 December 2003) at B7.
Those in public office were not the only ones to espouse the doctrine. Many members of the public articulated it. The Foreshore and Seabed of New Zealand: Report on the Analysis of Submissions (the Report on Submissions)\(^8\) found that many respondents considered protecting Māori customary rights “would confer privilege based on race, which is unfair given that many Maori have little Maori ancestry”.\(^9\) Similarly, Reg Dempster from Albany exclaimed: “Did the Maori really expect to have sole access to the seabeds? We are supposed to be building towards a one nation concept”.\(^10\)

Not only Pākehā held Brash’s view of equality. Peters, quoted above, is Māori. There were also Māori members of the public who took this position. For example, Hine Pritchard stated: “Everyone should be treated the same”. Beverley Wilson Dee, a security guard from Browns Bay concurred: “Special treatment is a liability for Maori”, while an anonymous Rotorua receptionist explained that the special treatment of Māori was unjustified and claimed “we are all New Zealanders”.\(^11\)

Brash utilised the basic ideal of formal equality, that likes should be treated alike. He perceived all New Zealanders to be alike, therefore all should be treated alike and all should have the same rights and duties in relation to the foreshore and seabed.\(^12\) Many other people expressed this sentiment. The New Zealand Herald (the Herald) boldly exclaimed that the call from “middle, European New Zealand” was: “We are all New Zealanders; we should all be treated the same”.\(^13\) An anonymous 18-year-old male from Rotorua, asked: “Isn't it about time that we all just decided that we should be treated the same? We are all New Zealanders”.\(^14\) On 25 June 2003, National (under the leadership of Bill English) launched a “We’re all New Zealanders” advertising campaign.\(^15\) This was run on the slogan: “One Standard of Citizenship For All”.\(^16\)

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\(^8\) Adele Carpinter and Department of the Prime Minister and Cabinet The Foreshore and Seabed of New Zealand: Report on the Analysis of Submissions (Department of the Prime Minister and Cabinet, 2003).

\(^9\) Ibid, at [6].


\(^11\) Quoted in “Ordinary Maori speak out in wake of race speech” Special Feature: Maori After Brash, NZ Herald (Auckland, 28 February 2004) at B3.

\(^12\) See discussion in Chapter Three, 3.b.i and Chapter Four, Section 3.

\(^13\) “What’s eating Pakeha” Weekend Herald (Auckland, 21 February 2004) at Front Page.

\(^14\) Quoted in “Herald readers debate special treatment for Maori”, above n 2.

ACT New Zealand Party (ACT) followed a similar path, stating they were guided by the broad principle of “one law for all” which was a policy of “common rights and responsibilities of all citizens before the law - in other words, one class of citizenship”.\textsuperscript{17}

For Brash, the claimed existence of customary rights did not justify treating Māori differently.\textsuperscript{18} ACT’s Maori Affairs Spokesman, Stephen Franks, stated a similar opinion: that ninety-five per cent of New Zealanders would not stand for what they perceived to be race discrimination “whether through Treaty excuse or any other reason”.\textsuperscript{19}

Like Brash, many people felt Māori were being distinguished purely on race and unfairly privileged in Government policy.\textsuperscript{20} The Report on Submissions noted that many non-Māori submitters felt the document’s principle of protection would confer privileges on Māori based on race.\textsuperscript{21} One family submitted: “The present government will be creating a gross and perpetual injustice if it cedes any preferential rights, be it guardianship, title, ownership or access to any one racial group”.\textsuperscript{22} This belief was reiterated in the media. The Herald reported that some Pākehā believed that under the Government’s policy Māori would get special treatment,\textsuperscript{23} and moreover, the first editorial on the Debate in the \textit{Otago Daily Times} exclaimed it would be wrong if “additional exclusive rights are added just for those New Zealanders who can claim

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\textsuperscript{16} Keenan, above n 5.
\textsuperscript{17} ACT New Zealand “Everyone Must Be Heard on Foreshore” (press release, 9 September 2003); ACT New Zealand “Foreshore And Seabed – The Debate Continues...” (press release, 22 October 2003).
\textsuperscript{18} See discussion in Chapter Three, Section 3.b.i and Chapter Four, Section 3.
\textsuperscript{19} Quoted in ACT New Zealand “Labour Made Its Seabed, now It Must Lie In It” (press release, 17 July 2003).
\textsuperscript{20} For discussion on Brash’s claim that Māori were being unfairly privileged, see Chapter Three, Section 3.a and b, and Chapter Four, Section 3.
\textsuperscript{21} Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [6.6.1].
\textsuperscript{22} Ibid. This was reiterated in submissions to the Select Committee from non-Māori. For example, H Moseley, G Hey, B Halliwell, P Harpham, C Morey, as well as two residents associations: Foreshore and Seabed Group Foreshore and Seabed Bill \textit{Departmental Report} (prepared for the Fisheries and Other Sea-Related Select Committee, Department of the Prime Minister and Cabinet, 2004) intro at 13 and ch 7 at 5 (on file with author).
Maori links, no matter how distant." Political parties repeated this argument. Peters claimed.

The present situation … has been caused by the policy that some citizens have special or antecedent rights and privileges extending over every natural resource in this land and the surrounding sea.

Brash argued that inequalities were an aberration that could be eliminated by extending equal treatment to all in accordance with the same ‘neutral’ standard. The Report on Submissions noted that some submitters took the same view, that having one law for all was essential to the stability of the country. One felt that ensuring the same rights for all New Zealanders would draw Māori and Pākehā closer together.

Another way people expressed Brash’s notion was to say that Māori have no separate rights at all, a position that went further than Brash who acknowledged that Māori may possess some limited traditional use rights. They expressed this in several ways: first, they said Māori had no legitimate property rights as Māori in this zone. Although small, there was a section of society who strongly believed this. For example, it was reported in the Herald that a “sizeable minority” of those Pākehā interviewed in the North Shore suburb of Glenfield and in the Waikato town of Putaruru “felt Māori should not have any special rights to any parts of the foreshore”.

The second variation of the argument was that Māori had never possessed rights to the foreshore and seabed and were just trying to make money. The Report on Submissions noted that a small number of respondents felt Maori did not have genuine customary interests but were “being opportunistic in trying to secure a range of rights to the important resources of the foreshore and seabed”. Franks agreed, arguing “Helen Clark's dithering has fertilised the growth of customary property

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24 Editorial, above n 15.
25 Quoted in New Zealand First Party, above n 3.
26 See discussion in Chapter Four, Section 3.
27 Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [6.6.2].
28 See ibid.
29 For discussion on Brash’s view, see Chapter Three, Sections 3.a and b, and Chapter Five, Section 3.a.i.
31 Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [2.3.2].
claims to beaches - from a fanciful gleam in greedy eyes, to the mythical proportions”. 32

A third variant was that it was unfair to recognise Māori rights. One individual submitted: “There should be no customary rights only for Maori. Customary rights belong to us all”. 33 Jan Teklenburg from Putaruru asked: “What will happen to the average New Zealander who doesn’t have any Maori blood?” 34

It may be that these people were articulating one or both of Brash’s claims against recognising a broad range of Māori customary rights to the foreshore and seabed: that is, that since Pākehā cannot claim customary rights Māori should not be able to; and that there is no justification for recognising separate Māori rights. 35

The fourth variation of the claim was that Māori could not own parts of the foreshore and seabed because the Crown was the rightful owner. This argument was expressed in three ways. The first, articulated by Brash, was that prior to the Court of Appeal’s decision it was settled law that the Crown owned most of the foreshore and seabed. Thus legislation had to be introduced to return to the “previous status quo”. 36 A number of Parliamentarians expressed this view. Franks contended that: “the law was previously clear that the foreshore was Crown-owned, except where others held clear title”. 37

The second expression, which Michael Cullen illustrated, was that the Court of Appeal was wrong to determine that foreshore and seabed were land under Te Ture Whenua Maori Act 1993 and that the Maori Land Court therefore had no jurisdiction to investigate claims to it. 38 The editor of the Herald made this argument: “The Treaty of Waitangi promised iwi continued ownership of their lands, forests and fisheries but

33 Quoted in Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [8.2.2].
34 Quoted in Collins, Rowan and Thomson, above n 30.
35 For discussion on Brash’s claims, see Chapter Three, Section 3.b.i and Chapter Five, Sections 3.a.i and 4.
36 Brash, above n 1, at 14. See discussion in Chapter Five, Section 3.b.i.
38 Michael Cullen “Challenge to find balance on issue of foreshore rights” Opinion, ODT (Dunedin, 18 February 2004) at 19. See discussion in Chapter Three, Section 4.a and Chapter Six, Section 2.c. For a full text of Cullen’s Article see Appendix Four.
the definition of land and fisheries did not, until now, extend to land beneath the sea”. 39 Moreover, Rob Harris from Carterton argued: “the ‘rights’ denied them [Māori] have existed only since the Elias-led Court of Appeal decision a few months ago”. 40

The third expression, stated almost exclusively by non-Māori, based on English common law, held that no individual owned the foreshore and seabed, except where special rights had been conferred. 41 Rather, the Crown owned the foreshore for the benefit of all citizens, and it either owned the seabed or the seabed had no owner at all. 42 Peters expressed this view when vouching for the new legislation: “This new law will simply confirm what everybody already believed, and what was the case, that the Crown owns the foreshore and seabed for all of us in perpetuity”. 43 Although this claim was not expressly stated in any of the key documents, Cullen announced that the Government would legislate to restore Crown ownership. 44 He argued that the Government possessed the power to regulate and control the zone, and the Government’s job was to accommodate all reasonable expectations of New Zealand citizens. 45 Therefore, the Government would administer the area for the benefit of all.

The fifth variant of the argument that Māori have no separate rights was the claim that the foreshore and seabed belonged to all New Zealanders; in other words, everyone owned the resource. One individual said: “All New Zealanders have always believed that the foreshore and seabed belong to us all in equal rights – it is ours – it is part of the New Zealand psyche – we all have mana over it”. 46 Interestingly, the Herald reported that about fifty per cent of Māori supported the notion that the foreshore and

39 Editorial “Stealthy treaty extension had to be blocked” Perspectives, NZ Herald (Auckland, 25 June 2003) at A14. ‘Iwi’ are tribes, people, nations.
41 See Chapter Two, Section 3.
42 See discussion in ibid.
43 Quoted in New Zealand First Party “All Parties Should Support Foreshore And Seabed Legislation” (press release, 16 November 2004). Loren Patolo from Henderson can also be seen to make this argument when she stated that: “No one should own it [the foreshore and seabed] outright. You can’t go around claiming the sea”: Quoted in Collins, Rowan and Thomson, above n 30. As can Stan Lusby from Moeraki, who wrote that no-one could own land under the sea as it was part of the “commons”: A letter to the editor of the ODT: “Letters to the Editor” Editorial, ODT (Dunedin, 7 May 2004) at 14.
44 Cullen, above n 38.
45 See discussion in Chapter Three, Section 4.a and b and Chapter Six, Section 2.c.
46 Quoted in Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [4.3.1]. ‘Mana’ means power, prestige.
seabed should be in the ‘public domain’.\textsuperscript{47} This specific position was not argued in any of the key documents. But this became the Government’s position, in its discussion and policy documents, where it advocated legislating to vest the foreshore and seabed as ‘public domain’.\textsuperscript{48} However, many contended that ‘public domain’ was in fact Crown ownership by another name, where the Crown would maintain its powers to manage and control the area. As the ten mandated iwi representatives who signed the Te Tii Mangonui ki te Tai Tokerau Declaration (Te Tii Mangonui Declaration) asserted, making the foreshore ‘public domain’ was a back-handed way of enabling the Crown to be the unencumbered owner.\textsuperscript{49} Gerald Burns, for the Justice Peace and Development Commission, made a similar claim: “‘Public domain’ effectively suggests state control with Maori in a subordinate role”.\textsuperscript{50} On this view, the claim that the area belonged to everyone can be seen as very similar to the claim that the Crown should own it, which Brash, expressly, and Cullen, implicitly, advocated.\textsuperscript{51}

The sixth variant, articulated by Cullen, was that the doctrine of native title could not recognise Māori ownership in the zone.\textsuperscript{52} This was the view of Paul McHugh upon whose argument the Government, and the Waitangi Tribunal (the Tribunal), based their understanding of the doctrine.\textsuperscript{53}

The seventh variant was unique, and expressed by some Māori; that was, that under tikanga\textsuperscript{54} there is no concept of ownership in an English sense, and consequently

\begin{footnotes}
\item[47] Ruth Berry “Poll finds Maori split on foreshore” \textit{NZ Herald} (Auckland, 25 August 2003) at Front Page.
\item[51] See discussion in Chapter Five, Section 3.b.i.
\item[52] For discussion on Cullen’s claim, see Chapter Three, Section 4.a and b Chapter Five, Section 3.a.ii.2 and Chapter Six, Section 2.c.
\item[53] See discussion in Chapter Five, Section 3.a.ii.2.
\item[54] Custom.
\end{footnotes}
Māori cannot own the foreshore and seabed.\(^{55}\) This was not to say that Māori claiming this believed Māori possessed no rights in the zone. Rather, they argued that Māori possessed the rights and duties associated with kaitiakitanga.\(^{56}\) For example, Houngarea Marae Management Committee submitted that: “Under tikanga I inherited land through whakapapa, not to own, but to be kaitiaki, to protect the land and ensure that future generations can reap the benefits of the land gifted to me”.\(^{57}\) It could be said that those expressing this argument were calling for a type of Kaitiaki title. This would be like ownership in some respects, but the reason for its existence would be the retention and protection of the land. Therefore, while it would encompass many of the rights of ownership needed to carry out kaitiaki duties, such as the claim-right to exclusivity, for example in carrying out rāhui,\(^{58}\) or the power to manage the resource and the liberty to develop it in a way that provides for future generations, it would not entail the liberty to destroy nor the power to alienate it.

Notably, this argument was not made in any of the key documents.\(^{59}\) But only a small number of those in the wider survey argued that tikanga did not recognise ownership, and the arguments of those who claimed that Māori tikanga did provide for ownership rights heavily outweighed them. Leslie Tiki Koroheke explained: “No one ‘owned’ the foreshore or the seabed in terms of what the colonisers’ concept of ownership is. But using their concept of ownership then we do own it! It irrevocably belongs to

\(^{55}\) See discussion in Chapter Two, Section 2.

\(^{56}\) Guardianship, stewardship. Exactly what rights pertained to kaitiakitanga differed depending on those asserting the rights and will be discussed in the next to sections. In law ‘kaitiakitanga’ is defined in s 2 of the Resource Management Act 1991 as:

... the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

‘Tikanga Māori’ is Māori customary law. Section 4 of Te Ture Whenua Maori Act 1993 (TTWMA) defines ‘tikanga Maori’ as: “Maori customary values and practices”.

\(^{57}\) Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [7.3.5]. ‘Marae’ are courtyards, open areas in front of the meeting house in a villages, ‘whakapapa’ means genealogy, and ‘kaitiaki’ means guardian, caretaker. Correspondingly, Anaru Kira (Ngā Puhi) penned that “When you use a word like ownership in relation to Kaitiaki, then of cause [sic] you will discover without much thought, that there is no relationship with these two words”:

Quoted in “Feedback” (2004) Tū Mai <http://www.tumai.co.nz/feedback.htm> (printout on file with author). Likewise, Kororakea Marae Society Incorporated put it this way: “Pakeha interpret property rights as something to be bought and sold. Maori interpret property rights as the right to exercise kaitiakitanga. This is the basic difference in interpretation”: Carpinter and Department of the Prime Minister and Cabinet, above, at [7.3.4]. Similarly, Michelle from Hamilton felt that the Debate was “not an issue of ownership it is about Maori continuing in their role as kaitiaki and continuing to look after our whenua in a sustainable manner”:

Quoted in “Feedback”, above. ‘Whenua’ is land.

\(^{58}\) Embargo, quarantine, ban.

\(^{59}\) This argument, is however, discussed in Chapter Five, Section 3.a.iii.
us". Moreover, Te Kani Williams, a Treaty Claims Lawyer, conceded: “Ownership is a Pākehā system, a European system which has been brought in and it’s the only way in which Māori are able to utilise a … system which recognises their rangatiratanga”.  

2.b. Equal consideration of interests

The equality theory Cullen advocated for the Labour-led Coalition Government promoted equal consideration of interests. This requires that the decision maker, in this case the government, equally consider the like interests of all those potentially affected by a decision. In terms of the democratic process, it requires the interests of every person who is subject to the decision and whose interests will therefore be affected to be accurately interpreted and made known (within limits of feasibility). Essentially, it requires that the government consider, hear, assess, weigh, and pay respect to the interests of those similarly affected by the final outcome. Burdens cannot be imposed and benefits allotted until the decision maker has fairly evaluated all claims.

Māori and Pākehā, from all levels of society, recognised there were legitimate Māori interests in the foreshore and seabed, and that the Government should consider these equally with those of other members of the public. The Waikawa Marae Management Committee claimed the Crown had a duty to consider and protect the rights of Māori guaranteed in art 2 of the Treaty. Ken Mason acknowledged the Crown had to weigh up an essentially non-Māori view that was diametrically opposed to the Māori, and questioned how this would occur. For him, a compromise, although elusive, had to occur otherwise the country would continue to “exist in a state of perpetual

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60 Leslie Tiki Koroheke “Submission on the Foreshore and Seabed Bill” (2 July 2004) (on file with author).
61 Quoted in Showtime “State of the Nation” (TVNZ television broadcast, 10 June 2004) at 66mins 26secs approx (video recording on file with the University of Otago) (emphasis added). ‘Rangatiratanga’ is the shortened form of ‘tino rangatiratanga’, which means: sovereignty, ultimate chieftainship, chieftainship, right to exercise authority, chiefly autonomy, self-determination, self-management, indigenous rights, mana Māori (the Māori way of life).
62 See discussion in Chapter Three, Section 4.b and Chapter Four, Section 5.
63 See discussion in Chapter Four, Section 5.a.
64 Waikawa Marae Management Committee “Submission on the Foreshore and Seabed Bill” (8 July 2004) at 3 (on file with author).
65 Ken Mason “Submission on Crown Proposals” (oral submission presented to a Foreshore and Seabed Consultation Hui, place unspecified, undated) at 9 (on file with author).
antagonism”.66 Gloria Marino (Ngāti Porou) from Taupō expressed a similar sentiment: “The Government needs to sit down and sort it out and make a bit of a compromise”.67

Like Cullen, the Justice Peace and Development Commission recognised that the Government’s role was to achieve the utilitarian goal of the ‘greatest good for the greatest number’.68 Through its chairman, the Commission stated unequivocally that: “One of the central roles of the State is to ensure the common good of all”.69 The Commission, however, disagreed with the Government’s process to achieve this.

Some commentators, Māori in particular, felt that the Government notion of equal consideration of interests as an Utilitarian decision-making procedure was unfair to Māori as a minority.70 Judge Ken Hingston, formally of the Maori Land Court, described the Government’s balancing process as “tyranny of the minority by the majority”.71 Māori members of the public also had concerns. Kathleen Belshaw commented that: “For too long Maori have had to surrender their taonga for the benefit of the public good”.72 Moreover, the Members of Parliament (MPs) for the Labour Party expressed the common dismay of Māori that “their interests are always compromised in the so-called public interest”.73

Others did not believe the Government was adhering to equal consideration of interests. The Iwi of Ngāti Toa Rangatira contended that the Government was not considering Ngāti Toa’s interests adequately because the Crown’s “Protecting Public Access and Customary Rights: Government Proposals for Consultation” (the

66 Ibid.
67 Collins, Rowan and Thomson, above n 30.
68 Cullen can be seen to recognise this utilitarian role when he stated that in balancing rights the Government would find “a middle ground, an equilibrium where the reasonable expectations of all can be accommodated”: Cullen, above n 38. See also Chapter Three, Section 4.a and b. For discussion on equal consideration of interests as a utilitarian decision procedure, see Chapter Four, Section 5.a.iii.
69 Burns, above n 50.
70 Jeremy Waldron warned against using a utilitarian balancing process: Jeremy Waldron “Rights in Conflict” (1989) 99 Ethics 503 at 509. See discussion in Chapter Six, Section 2.e.
71 Quoted in Kui Paki “Fighting Talk On Foreshore” (2004) 50 Tū Mai 28 at 29. The same view was held by Te Rūnanga o Ngāti Awa. See Te Runanga o Ngati Awa “Select Committee Submission” (1 July 2004) at [10] (on file with author).
72 Quoted in “Foreshore and Seabed feedback” (2004) 53 Tū Mai 16 at 18. ‘Tāonga’ are treasures.
73 See NZPA “Labour Maori MPs warn of conflict” General, ODT (Dunedin, 19 August 2003) at 2.
Discussion Document) was “based on appeasing voters, not addressing customary rights nor recognising rangatiratanga as a valid principle for regulating and administering coastal areas of Aotearoa”. For other Māori, the Government failed to adequately weigh their interests. They argued that, as Treaty Partners, their interests should be given more consideration than other interests in the foreshore and seabed. Mason submitted that Māori and the Crown were Treaty Partners, however in “the foreshore and seabed proposals Maori opinion and submissions will be dealt with on the same basis as all others who care to express an opinion. That is demeaning to us and fundamentally wrong”. Similarly, Jane West (Ngāti Whātau) was concerned that if a statistical analysis was employed on the submissions:

… tangata whenua customary rights and all that they entail may well be determined by the weighting given to non-maori and non-New Zealander populations. This would duly limit the substantive integrity to due process between respective Te Tiriti o Waitangi treaty partners thus setting the platform for constitutional change.

Conversely, others believed the Government was giving too much consideration to Māori interests. For example, Hon Peter Dunne, the leader of the United Future New Zealand Party (United Future), claimed: “Labour ministers have abandoned their duty to act in the interests of the whole community and are negotiating in secret over our rights with some sections of the Maori community”. When it is perceived that Māori are being treated differently in the guise of considering all interests, this is often called apartheid. This call was heard. For example, both Dempster and Harrison, who heavily supported the notion of formal equality between individuals, were

75 Te Runanga O Toa Rangatira Inc “Presentation on Crown’s Proposal for Foreshore and Seabed” (oral submission version no 2 presented to the Foreshore and Seabed Consultation Hui, July 2004) at 8 (written copy on file with author).
76 Mason, above n 65, at 10.
79 See discussion in Chapter Four, Section 5.a.
scathing of the Government’s failure to adequately apply equal consideration of interests. Dempster complained: “New Zealand is supposed to be a democracy, not an apartheid state.”

Harrison accused Te Tau Ihu of practising apartheid and later argued that the recognition of indigenous rights bordered on apartheid.

2.c. Equal application of the law

The Treaty Tribes Coalition advocated two related notions of equality. The first, equal application of the law, was echoed in the statements of Manawhenua groups, other Māori factions and individuals, and many non-Māori.

People clearly viewed equal application of the law as a procedural element of formal equality during the Debate. Counsel for several Manawhenua claimants submitted to the Tribunal that the customary property rights of Māori, once determined in a court of law, might amount to full and exclusive title. Therefore these customary property rights may be like freehold titles in the zone issued under the Land Transfer Act 1952. Counsel concluded: “Rights of like kind demand like treatment”. Alison Quentin-Baxter argued this in her submission on the Discussion Document. For her, except where Māori and non-Māori property rights were significantly different, “the

81 The eight iwi (Ngāti Apa, Ngāi Koata, Ngāti Kuia, Ngāi Rārua, Ngāti Tama, Ngāti Toa, Rāngitāne and Te Atiawa) who began the court proceedings in Marlborough Sounds that led to the Court of Appeal decision in Ngāti Apa v Attorney-General [2003] 3 NZLR 643 (CA).
82 See Ruth Berry “Mayor at heart of foreshore row skips hui” Politics, NZ Herald (Auckland, 29 August 2003) at A6.
83 See Keenan, above n 5. Others expressed similar apprehensions. Christine Fitzpatrick of Mission Bay lamented that we “are heading down a path of apartheid if we are not careful”: Quoted in Collins, Rowan and Thomson, above n 30.
84 Treaty Tribes Coalition One Rule of Law for All New Zealanders: A Submission by the Treaty Tribes Coalition on the Foreshore & Seabed Issue (Treaty Tribes Coalition, Christchurch, 2004). See discussion in Chapter Three, Section 5.6.i and Chapter Four, Sections 6 and 7. For a full text of this Submission, see Appendix Five.
85 For discussion on equal application of the law as a form of procedural equality, see Chapter Three, Section 5.6.i and Chapter Four, Section 6.a.i.
86 Submissions of T Castle and others (counsel for Wai 45, 87, 131, 151, 262, 521, 566, 594, 1007), 9 January 2004 at [136], WAI 1071 Doc No A63 (on file with author). Counsel represented Te Rūnanga o Muriwhenua, Ngāti Koata, Ngāti Rangi, Whakatōhea, Ngāti Rarua, Ngāti Apa and the Taranaki Māori Trust Board.
87 Land Transfer Act 1952, s 65.
88 Castle and others, above n 86, at [139].
holders of both must receive equal treatment in the permitted exclusive uses of their property, subject to any applicable regulatory regime.”

The Coalition’s version of ‘one law for all’ required that the courts be allowed to hear cases concerning Māori rights in the foreshore and seabed, and be able to apply the established rules of property law to Māori interests in the zone. Their key argument was that Māori customary rights were genuine property rights, and deserved to be subject to the same legal rules, and enforced through the same judicial processes, as other property rights in this zone. Others, both Māori and non-Māori, held the same view. It was most commonly expressed during the submission process. The Report on Submissions noted that respondents suggested titles to the foreshore and seabed, whether private freehold or customary, should be subject to the same provisions. Similarly, Quentin-Baxter submitted that the full and exclusive title rights of customary right holders in the zone “are entitled to the same degree of protection (though not necessarily through the same mechanism) as the property rights of holders of the existing registered titles extending to the foreshore or the seabed”. Similar submissions were made to the Tribunal and the Fisheries and Other Sea-Related Select Committee (the Select Committee). Claimant counsel argued the Crown’s policy “recognises and protects existing titles that have been issued but will not allow the treaty/customary authority held by the Claimants to be investigated and fully expressed in law”. Kathlene Ryan submitted that: “the Bill targets the rights Maori may have in the foreshore and seabed. It removes the ability for Maori to achieve fee simple title.”

90 See discussion in Chapter Three, Section 5.b.i, and Chapter Four, Section 6.a.
91 Carpenter and Department of the Prime Minister and Cabinet, above n 8, at [7.4.2]. For example, one individual submitted, “Māori customary interests should be protected in the same way that all New Zealanders’ interests are protected”: at [8.3.1].
92 Quentin-Baxter, above n 89, at [31].
93 Opening submissions of K Ertel (counsel for Wai 52, 105, 104, Te Atiawaki Te Tau Ihu and Ngati Te Ata Waiohua), 9 January 2004 at [92], WAI 1071 Doc No A96 (on file with author). In another submission, Counsel argued that should the Maori Land Court find that Māori appellants have customary title, “they should be able to enjoy the same protections all private title holders enjoy whether Māori or non-Māori if the legal nature of that title extends to freehold title”: Castle and others, above n 86, at [136].
Like the Coalition, many individuals and groups felt that the Government’s policy and eventual Foreshore and Seabed Bill 2004 (the FS Bill) failed to apply the law equally to both Māori and non-Māori property rights in the zone. Consequently they argued that the policy discriminated against Māori in not treating their property rights the same as others. Alex Nathan, the claim manager of Te Iwi o Te Roroa, submitted on behalf of Te Iwi o Te Roroa: “The proposal is highly discriminatory as the existing private property rights of non-Maori in the foreshore are protected whilst those of Maori are unilaterally removed”. Brian van Dam contended the proposals were “intrinsically racist and discriminatory”. He felt Maori were being treated differently to other groups of landowners in the zone regarding their ownership and public access because:

… when Maori exert ownership rights to foreshore and seabed, the Crown puts forward proposals to legally extinguish such ownership rights (and even the possibility for Maori to prove such ownership rights in the NZ courts system).

Equal application of the law also requires that there be no irrelevant distinctions in legal rules. Many groups and individuals agreed with the Coalition on this matter and argued that the different foundation of Māori property rights, compared to other property rights in the zone, was not a relevant reason for treating Māori rights differently. For example, the Report on Submissions highlighted that many respondents viewed unrecognised customary title as having the same status as recognised legal title.

Others argued that by distinguishing between Māori customary title and non-Māori freehold title the Government was applying irrelevant distinctions in its decision-
making procedures. Caritas Aotearoa New Zealand objected to the FS Bill “on the grounds of discrimination between different kinds of claims to the foreshore and seabed”.102 Moreover, Te Ope Mana a Tai argued that the Bill was racially discriminatory and detrimentally affected Māori because it discriminated between ownership recognised in a Certificate of Title and customary ownership “by providing that those who currently have private title to areas of the foreshore and seabed will not be affected by the Bill”.103

Equal application of the law is an aspect of the rule of law. This may mean that predetermined rules should be applied universally to all.104 In demanding that the Act not be applied retrospectively, it can be argued that people were calling for enforcement of this aspect of the rule of law. As the Report on Submissions noted, some submitters felt the Government’s decision to retrospectively apply the proposed legislation was “further evidence of a discriminatory attitude toward Māori”.105 This retrospective aspect also brought rebuke from some Manawhenua and other Māori groups for failing to comply with another aspect of equal application of the law: the requirement that decisions on rule application be made consistently.106 In particular, they felt that applying the law retrospectively, so that claims for determination of title in the Maori Land Court that had commenced before the passing of the Act would be blocked, was inconsistent with normal practice and unfair. Ngāti Tama Manawhenua ki Te Tau Ihu Trust asserted: “We do not believe it is normal practice to apply new statutes retrospectively … [or] that current applications should be subject to new procedures”.107

103 Te Ope Mana a Tai “Foreshore and Seabed Bill: Submission from Te Ope Mana a Tai” (July 2004) at 60 (on file with author).
104 See discussion in Chapter Four, Section 6.a.
105 Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [2.4.3].
106 For discussion on the requirement under equal consideration of interests that decisions on rule application are consistent, see Chapter Four, Section 6.a.
107 See Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [2.4.3]. Te Ope Mana a Tai contended the same. They stated that prohibiting the Maori Land Court from investigating current cases before it was retrospective law making, and that it would “have a significant practical effect” in that it would invalidate more than fifty applications then before the Court: Te Ope Mana a Tai, above n 103, at 37-38.
Furthermore, like the Treaty Tribes Coalition, others argued that the Government was acting inconsistently and violating the rule of law by unilaterally overruling the Court of Appeal’s decision.\textsuperscript{108} The Women’s International League for Peace and Freedom applied this argument when they argued:\textsuperscript{109}

By over-riding the Court of Appeal ruling in Ngati Apa et al, and removing the ability of the courts to investigate and confirm Maori property rights in the foreshore and seabed, the Bill is a violation of the rule of law, the protection of which was guaranteed in Article III.

In addition, the Government’s inconsistent rule-making was often described colloquially as ‘moving the goal posts’. One individual claimed: “This is the ultimate irony. When Maori finally achieve something of a victory in the Pakeha court system, the government immediately moves the goal posts”.\textsuperscript{110} Victoria Owen shows how Pākehā used this metaphor:\textsuperscript{111}

When Maori finally achieve something of a victory in the pakeha court system, the Government immediately moves the goalposts, and signals its intention to legislate to prevent the possibility of Maori freehold title becoming a reality.

For her, this was “a blatant denial of the rights of Iwi and Hapu as Treaty partners, and Maori as citizens of this nation in contravention of the Treaty”.\textsuperscript{112}

Finally, many people felt the Government applied inconsistent law as it was prepared to recognise Māori customary title to lakes and rivers but not foreshore and seabed.

\textsuperscript{108} For discussion on the Coalition’s argument, see Chapter Three, Section 5.a, and Chapter Four, Section 6.a.
\textsuperscript{107} Quoted in Carpenter and Department of the Prime Minister and Cabinet, above n 8, at [2.4.3]. A consultation hui participant, speaking for Te Rūnanga o Ngāti Kuia Charitable Trust, put it this way: “Once there is a win, the goal posts keep moving and goals are supposed to be an achievement but they seem to be changing”: at [2.4.3]. Murry Hemi described the Crown’s action in slightly different terms, as changing the rules of draughts after Māori could finally make any move they liked, so they couldn’t jump any of the Crown’s pieces: Murry Hemi “Sea-saw and foresight” (2003) 53 Mana 68 at 68.
\textsuperscript{112} Ibid.
Rev Gary Clover, on behalf of Methodist Social Action in Nelson, contended the FS Bill was:  

… inconsistent with joint-governance arrangements that already are in place with Ngati Tuhoe as regards Lake Waikaremoana, Ngati Tuwharetoa over Lake Taupo, Ngati Whatua over the Okahu Bay public reserve land, and the December 2000 agreement between the Whanganui iwi, Te Haunui-a-Paparangi, the Crown, and the Wanganui District Council, to administer [sic] the Moutoa Gardens.

For Te Rūnanga o Ngāti Whātua, the inconsistency in treatment between land under sea and land under fresh water meant the Government had not considered the Māori worldview. Conversely, Hon Kenneth Shirley, the deputy leader of ACT, used the inconsistency in treatment between lake and river beds and foreshore and seabed to argue that Crown ownership should apply to all these zones to make the law consistent.

2.d. Equal access to the law

The second equality theory the Treaty Tribes Coalition advanced concerned equal access to the law. This theory requires that all people have the same opportunity to bring their cases to court to have a fair determination of their rights. This theory featured heavily throughout the Debate, especially from Māori. In an August 2003 Marae DigiPoll, a majority of one thousand Māori voters surveyed believed Māori should be able to take claims for their customary title in the foreshore and seabed to the Maori Land Court. Moreover, Te Ope Mana a Tai, who had attended all consultation hui, commented that the message from Māori at the consultation hui and in written submissions “was that the loss of the current legal opportunities for investigation and recognition of their customary rights was totally unacceptable”.

Also, claimant counsel before the Tribunal expressly stated this equality claim in their submission: “All New Zealand citizens are entitled to access to due process (Courts)
in order to secure protection of their rights and identification of their liabilities”.  

Many non-Māori saw the denial of access to the courts for Māori as discrimination based on race. Ian Burke, Sharon Wallace Torstonson and John Lawson all drew attention to the discriminatory aspects of the Bill. Burke lamented: “That one section of New Zealand society was denied access to due legal process, based on race is utterly deplorable”.  

Torstonson commented that the introduction of the Bill was “discriminatory in that it denies Māori the right to a due legal process to determine ownership to the foreshore and seabed”.  

Lawson argued that:  

Non-Maori not only have their normal property rights protected where Tangata Whenua do not, but also have access to the new ‘customary rights’. It therefore breaches the Convention on the Elimination of All forms of Racial Discrimination and the Bill of Rights Act by depriving litigants of the fruits of litigation, unreasonable seizure, deprivation of the right to enjoy minority culture and discrimination on the grounds of race.

Equality of access to the law is a procedural aspect of formal equality. The Hon Rodney Hide, the leader of ACT, highlighted this. He claimed:  

If we are to mouth the words that we want to live in a country of one law for all New Zealanders, then that means that each and every New Zealander can have his or her day in court.

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120 Castle and others, above n 86, at [135(b)].  
123 Sharon Wallace Torstonson “Submission on the Foreshore and Seabed Bill” (5 May 2004) at 1 available: <http://www.converge.org.nz/pma/fssubs.htm>. Barbara Menzies and Dorreen Hatch can also be seen be making the same point when they query how the FS Bill purports to uphold one law for all when it removes the ability of Māori to test their ownership through the Maori Land Court: Barbara Menzies and Dorreen Hatch “Foreshore and Seabed Bill 2004” (undated) at 2 available: <http://www.converge.org.nz/pma/fssubs.htm> (accessed 5 May 2010).  
125 See discussion in Chapter Three, Section 5.b and Chapter Four, Section 7.a.i.  
126 ACT New Zealand “Address in Reply Speech” (press release, 16 November 2005).
It can also be inferred that Terna Wara from Ngāruawahia made a similar point. It is imperative that the Government starts treating Maori as equals. … One of the benefits of living in a free and democratic society is that we all have access to justice – the right to a fair trial … we just want a fair trial in order to determine whether we still hold customary title.

Equality of access to the law can also be formulated as a version of equality of opportunity. Derek Fox, a Māori broadcaster, expressed the notion in this way when he said that all New Zealanders should have equal opportunity to access the courts, and that Māori were being denied this opportunity.

The issue is that these people were proceeding under the law, passed by the Pākehā Parliament, and then because somebody panicked and they decided ‘Gee, there’s this potential result that could be ugly, we’ll change the law’. And that could happen to any one of us. And I can’t see why all these fair minded New Zealanders here aren’t jumping up and down on the side of Māori to say “You can’t do that. You cannot take away a people’s opportunity to proceed under the law.

Equality of access to the law is an element of the rule of law. Throughout the Debate, people made claims that equal access to the law should be adhered to in order to uphold the rule of law. For example, Franks stated that although ACT disagreed with the Court of Appeal findings, the party supported the rule of law, and so supported “Māori rights to proceed in court”. Moreover, others expressly commented that denying equal access to the law breached the rule of law. Te Iwi o Te Roroa submitted: “The cynical and unprincipled removal of existing legal remedies and the denial of due process is a serious and unnecessary breach of rule of law values”. Furthermore, Stephen Allen, Chief Executive Officer of the Te Aupōuri

127 Quoted in “Feedback”, above n 57.
128 See discussion in Chapter Four, Section 7.a.ii.
129 Quoted in Showtime, above n 61, at 71mins 18secs approx.
130 See discussion in Chapter Four, Section 7.
131 Quoted in ACT New Zealand “Look Out To Sea While We Steal Your Land” (press release, 16 August 2004).
132 Nathan, above n 97, at [2.6].
Māori Trust Board, asserted the Board perceived the Bill redefined Māori access to the courts and therefore redefined the rule of law.\textsuperscript{133}

2.e. Equality of authority

The concept of equality of authority, that the signatories to the Paeroa Declaration implicitly advanced, was perhaps the theory least expressed during the Debate.\textsuperscript{134} This was conceivably because, unlike the other equality claims expressed, it calls for a normative shift away from a paradigm based on equality between individuals to one based on the equality of peoples.\textsuperscript{135}

Some felt that because Māori and the Crown were equal Treaty partners, Māori should have an equal voice to the Crown in the decision-making process concerning the resource.\textsuperscript{136} Waitaha made this claim: “At the end of the day, we want management of these customary rights in conjunction with the Crown”.\textsuperscript{137} However, equality of authority might require that Māori be equal to the Crown in a different sense: that Manawhenua maintain sole authority over the foreshore and seabed, an authority that is in a sense equal to that exercised by the Crown over other areas of national life.\textsuperscript{138} Under that view of equality of authority, the Crown would have no

\textsuperscript{133} Stephen Allen, CEO of Te Aupouri Maori Trust Board “Te Aupouri Maori Trust Board: Submission on the Foreshore and Seabed Bill” (9 July 2004) at 13 (on file with author).

\textsuperscript{134} The Paeroa Declaration (signed 12 July 2003) reproduced in Tino Rangatiratanga Te Takutai Moana (2nd ed, prepared as vol 2 of the IRI, Economics, Politics & Colonisation Series, 2003) at 11. For the full text of this Declaration see Appendix Two.

\textsuperscript{135} See discussion in Chapter Three, Section 2.b and Chapter Four, Section 8.

\textsuperscript{136} See for example The Foreshore and Seabed of New Zealand: Report on the Analysis of Submissions (the Report on Submissions) noted that some respondents argued for a fifty-fifty sharing of regulatory control, between government and Maori: Carpenter and Department of the Prime Minister and Cabinet, above n 8, at [5.1.4]; Te Hunga Roia o Aotearoa’s submission on the Crown’s proposals stated that Māori and the Crown are equal Treaty partners and therefore Māori are “entitled to participate in decision making on an equal footing”: Te Hunga Roia o Aotearoa – Māori Law Society Incorporated “Submission on Crown Proposals for ‘Protecting Public Access and Customary Rights’ to the Foreshore and Seabed” (undated) at [3] (on file with author); The Justice, Peace and Development Commission of the Catholic Church argued that “there may well be a solution unique to New Zealand … where the Crown and Māori could share administrative rights and management responsibilities on behalf of all New Zealanders”: quoted in Foreshore and Seabed Group, above n 22, intro at 6; Betsan Martin, in a personal submission on the Government’s proposals, stated that he supported “the proposal for the Foreshore and Seabed to become a Commons, to be jointly regulated by the ‘crown’ and Iwi/hapu on a Te Tiriti –based framework”: Betsan Martin “A submission on ‘Government Proposals for Consultation: The Foreshore and Seabed of New Zealand’ from Betsan Martin” (1 October 2003) Converge <http://www.converge.org.nz/pma/inbetsa.html>.

\textsuperscript{137} Quoted in Neil Wallace and NZPA “SI foreshore claims considered” General, ODT (Dunedin, 19 August 2003) at 2.

\textsuperscript{138} See discussion in Chapter Three, Section 2.b and Chapter Four, Section 8.
power to subvert the authority of Manawhenua in the foreshore and seabed, nor would the Crown deny Manawhenua jurisdiction over that region.\textsuperscript{139}

Not surprisingly, those who utilised this concept most were Manawhenua. Article 6 of the Tii Mangonui Declaration declared: “The final decision on the foreshore and seabed rests exclusively with whanau and hapu”.\textsuperscript{140} Ngāti Kahu were one iwi who specifically argued for equality of authority. This can be seen in two statements: that “all decisions relating to the use and management of our foreshore and seabed must now be made by the whanau and hapu with mana whenua/mana moana”,\textsuperscript{141} and that their “exercise of rangatiratanga entails a guarantee of the authority to control a ‘possession’. Ngati Kahu consider that the foreshore and seabed is indeed one of their ‘possessions’”\textsuperscript{142} (a reference to art 2 of the Treaty). Moreover, Margaret Mutu (Ngāti Kahu), head of Māori Studies at the University of Auckland, submitted that the iwi refused:\textsuperscript{143}

\begin{quote}
… to give up our foreshore and seabed and will always actively ensure that we retain complete and absolute authority and control over it, no matter what law the New Zealand government introduces to try and stop that.
\end{quote}

The notion of equality of authority also gives expression to the idea of equality of worldview. The latter demands that Māori worldviews are as valid and legitimate as Pākehā worldviews. It calls for the Aotearoa/New Zealand state to recognise the validity of Māori ideologies and systems of law as being on a par with its own. Equality of worldview would require equality of respect, and would require tikanga be recognised as a valid source of law.\textsuperscript{144} Ngāti Kahu claimed the Treaty’s “guarantee of protection of rangatiratanga and Maori custom, confirms that Maori law or tikanga

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\textsuperscript{139} See discussion in Chapter Three, Sections 2.a and b and Chapter Four, Section 8.a.
\textsuperscript{140} Te Tii Mangonui Declaration, above n 49, art 6, reprinted in Te Runanga o Ngai Takoto and Ngati Kuri and others, above n 49. Note, resolution 8 of the Omaka Hui Resolutions affirms the Te Tii Mangonui Declaration: The Omaka Hui Resolutions (signed 30 August 2003), resolution 8 available: \textless \texttt{http://www.converge.org.nz/pma/in300803.htm} \textgreater .
\textsuperscript{141} Te Runanga-a-Iwi o Ngāti Kahu “Te Runanga-a-Iwi o Ngati Kahu” (powerpoint presented to Hui-a-Iwi on Foreshore and Seabed, Ngā Whare Waatea Marae, Mangere, 26 September 2003) at slide 21 (printout on file with author). ‘Whānau’ means family, extended family, ‘hapū’ are sub-tribes, clans, ‘mana whenua’ means trusteeship of land or the right to hold responsibility for land or resources, and ‘mana moana’ means marine authority or the right to hold responsibility for the sea and its resources.
\textsuperscript{143} Margaret Mutu “Submission on the Foreshore and Seabed Bill” (15 July 2004) at 7 (on file with author).
\textsuperscript{144} See discussion in Chapter Four, Section 8.a.i.
\end{flushright}
Maori … must be employed in determining that which is the subject of the exercise of rangatiratanga or that which is possessed as a matter of fact”.  

Gullian Southey, on behalf of the Christian World Service, wrote that it was for Māori to decide what rights should be recognised and protected in the foreshore and seabed, and what should be implemented to acknowledge their mana and ancestral connections. 

Glenys Daley argued: “The Treaty says very clearly that Maori are guaranteed absolute authority and control over the foreshores and seabeds, which are their ‘taonga’, and therefore “If this government had an understanding of its Article Two responsibilities, it would be making it clear that customary title can only be defined by hapu, according to their own tikanga”. Additionally, the Report on Submissions highlighted: “Maori respondents were unanimous in stating that customary rights can only be defined by Maori in accordance with tikanga, which would change from one situation to another and over time, and were supported in this by many non-Maori”. Furthermore, it noted many submitters felt it was “inappropriate for anyone other than Maori to be defining customary rights, and that the rights pertaining to a specific foreshore and seabed location needed to be defined by hapu and whanau”.

A strong version of equality of authority would support the power of Manawhenua to determine the rights of all people in the realm. West endorsed this when she asserted that “mana ki te whenua” pertains to others living within the Ngāti Whātau tribal area. Dale O’Brien from Hamilton concurred, and wrote that Māori have rangatiratanga that gives:

… an institutional authority to control the exercise of a range of user rights in resources, including conditions of access use and conservation management. Rangatiratanga incorporates the right to make, alter and

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145 Te Runanga-a-Iwi o Ngati Kahu Charitable Trust, above n 142, at [9].
148 Carpenter and Department of the Prime Minister and Cabinet, above n 8, at [6].
149 Ibid, at [6.3.2].
150 See discussion in Chapter Three, Sections 2.a and b, and Chapter Four, Section 8.a.ii.
151 She defined this as: authority, dignity and integrity of mahinga kai (cultivations), the resources of Papatūānuku (Earth Mother) and Tangaroa (atum of the Sea).
152 Jane West “Foreshore and Seabed Bill Submission” (26 July 2004) at iii (on file with author).
153 Quoted in “Feedback”, above n 57.
enforce decisions pertaining to how a resource is to be used and managed, and by whom.

Importantly, the Tii Mangonui Declaration, the Omaka Hui Resolutions and submissions from Te Rūnanga-ā-Iwi o Ngāti Kahu, Te Rūnanga o Toa Rangatira and the Ngatiwai Trust Board expressly affirmed the Paeroa Declaration. While the Manawhenua signatories to these documents may have endorsed the Paeroa Declaration’s notion of equality of authority, they might also have supported a wider claim of Māori sovereignty, which is not expressly renounced in the Declaration, and can therefore be read into its text.

It is unclear as to which meaning the signatories to the Omaka Resolutions attributed to the Paeroa Declaration. It is also unclear as to which meaning the other Manawhenua advocate. Neither the submissions of Te Rūnanga o Toa Rangatira nor the Ngatiwai Trust Board discussed exclusive Manawhenua authority. Te Rūnanga-ā-Iwi o Ngāti Kahu seemed to advocate for equality of authority. They spoke only of authority over their foreshore and seabed, and recognised a place for the courts to give practical recognition of this authority in the legal system.

On the other hand, the “Opening Statement of Te Taitokerau”, in which the Tii Mangonui Declaration was reproduced, pointed to the conclusion that the signatories supported Māori ultimate authority in other zones, although they did recognise a place for the Crown. These other zones were restricted to their lands, both dry and under

154 See Te Tii Mangonui Declaration, above n 49, art 7, reprinted in Te Runanga o Ngai Takoto and Ngati Kuri and others, above n 49, at slide 14; The Omaka Hui Resolutions, above n 140, resolution 7; Te Rūnanga-ā-Iwi o Ngāti Kahu, above n 141, at slide 5; Te Runanga O Toa Rangatira Inc, above n 75, at 1; Laly Haddon, Chairman of the Ngatiwai Trust Board “Ngatiwai Trust Board Statement to the Foreshore and Seabed Hui, Whangārei, 16 September 2003” (oral submission presented to the Foreshore and Seabed Consultation Hui, Whangārei, 16 September 2003) at 1 (written copy on file with author). Furthermore, Te Ope Mana a Tai, a collective of iwi who hold mana whenua, which attended every consultation hui, noted that at these hui there was substantial support shown for the Paeroa Declaration: Te Ope Mana a Tai “Submission on the Crown’s proposals to protect public access and customary rights” (October 2003) at 7 (on file with author); Te Ope Mana a Tai, above n 103, Appendix Two at 27.

155 For discussion on this wider claim to sovereignty, see Chapter Three, Section 2.b and Chapter Four, Section 8.

156 Te Rūnanga-ā-Iwi o Ngāti Kahu, above n 141, at slide 21.

157 Te Runanga o Ngai Takoto and Ngati Kuri and others, above n 49, at slides 3-6. ‘Te Tai Tokerau’ is Northland.
water. The Crown retained a right to govern, but the Manawhenua were adamant that no Government law could change their responsibilities for controlling, using and managing their lands. 

Like the Manawhenua of Te Tai Tokerau, Ngāti Kahungunu argued they held ultimate authority over their lands. However, they went further and refuted Crown authority in their lands, unless Crown decisions and agreements were made with Ngāti Kahungunu. They argued that any other issues, such as aquaculture, oceans policy, and marine reserves, “must also be designed and moved forward in our rohe only in accordance with our Kahungutanga and the authority guaranteed in Te Tiriti”.

A Submission from Te Rūnanga o Te Rarawa advocated limited Crown sovereignty, and by extension extended Māori authority. However, the Rūnanga did not expressly limit this authority to their lands. While acknowledging the Government had the right to govern, by virtue of art 1 of the Treaty, the Rūnanga argued that the authority guaranteed in art 2 of the He Wakaputanga o te Rangatiratanga o Nu Tirene/A Declaration of Independence 1835 remained relevant. Therefore, to the Rūnanga, “no legislative authority or government would be permitted unless it acted consistent with” the “practices, customs, values and beliefs” of Manawhenua.

West asserted that Ngāti Whātua retained sovereignty over their lands. She claimed:

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158 Ibid, at slide 3.
159 Ibid, at slides 3 and 4.
160 Ngāti Kahungunu “Statement by Ngāti Kahungunu on the Government Proposals on the Foreshore and Seabed” (oral submission presented to the Foreshore and Seabed Consultation Hui, Omahu Marae, Hastings, 12 September 2003) at 3 and 6-7 (written copy on file with author).
161 Ibid, at 7.
162 Ibid. ‘Rohe’ means territory, domain. ‘Kahungutanga’ can be described as the Ngāti Kahungunu culture or perspective.
164 Ibid, at [3]-[5]. Article 2 of He Wakaputanga o te Rangatiratanga o Nu Tirene/A Declaration of Independence 1835 stated that the Confederation of United Tribes would not “permit any legislative authority separate from themselves … to exist, nor any function of government to be exercised … unless … acting under the authority of laws regularly enacted by them”. For a copy of the Declaration, see Claudia Orange The Treaty of Waitangi (Allen & Unwin, Wellington, 1987) at 255-256.
165 Herbert, above n 163, at [4].
166 West, above n 152, at iv.
167 Ibid. Her assertion that Ngāti Whātua never relinquished their authority is supported to a degree by Ngāti Whātua elder, Grant Hawke, who stated: “Ngati Whatua never relinquished its rights over the
That of my iwi Ngati Whatua, our mana tupuna has never relinquished kawanatanga within our tribal rohe to a degree that renders us without mana to exercise our kaitiakitanga through our rangatiratanga. Through ahi ka (long standing fires of occupation), raupatu (conquest) and/ or whakapapa (genealogy), Ngati Whatua maintains itself with the authority of mana o te whenua and moana.

The only group in the data sample to proclaim Māori sovereignty over all of Aotearoa/New Zealand were Te Puraranga from Taranaki. At a hui, attended by about 40 people, on 26 June 2003 at Parihaka, the group drafted Te Whakapuakinga: The Taranaki Declaration. This was a direct challenge to Crown sovereignty. The key parts of the English version read:

... Therefore Taranaki!
Stand as firm as the Pou Whenua!
Stand as firm as the Rock in the Sea!
Stand firm as Keeper of Sovereignty
This is Maori Law!
There is no other worthy Law!
and that is to say
Authority of Maori Mana over Land!
Authority of Maori Mana over our seas!
OUR SOVEREIGNTY AND OWNERSHIP!

water” quoted in “Calm before the seabed storm” (2004) 3(137) Te Karere Maori 3. ‘Mana tūpuna’ means ancestral mana, rights and authority passed down from ancestors. ‘Kāwanatanga’ means governorship, government, complete government, although its translation in art 1 of the English version of the Treaty is ‘sovereignty’. The official legal version of the Treaty is laid out in Treaty of Waitangi Act 1975, schedule 1. The full text is reproduced in Appendix One. “Mana o te whenua” translates as ‘prestige or power of the land’. ‘Moana’ means lake, sea.

Parihaka is a small Taranaki coastal settlement, located 55km south west of New Plymouth. From the mid-1860s Parihaka became the centre of a peaceful Māori resistance movement under its leaders, Te Whiti-o-Rongomai and Tohu Kākahi. In November 1881, the government sent a force of over 1,500 troops to Parihaka. Its inhabitants were arrested or driven away, and the village was later demolished. Te Whiti and Tohu were arrested and imprisoned until 1883. For more information see Dick Smith Ask That Mountain: The Story of Parihaka (3rd ed, Raupo, Rosedale (New Zealand), 2008).


Although very rare in the sample, other individuals at times also seemed to make statements challenging Crown sovereignty. For example, Kelly Te Heuheu (Ngāti Tūwharetoa) wrote: “To be honest the pakeha government are here illegally and really should not have rights to rule our country”. Quoted in “Feedback”, above 57.

Te Whakapuakinga, above n 169. ‘Pou whenua’ are land posts.
This material all shows, the equality claims espoused in the key documents were reiterated throughout the wider Debate, although sometimes in different words, from a range of people. All seem to ascribe to the notion of ‘treating likes alike’. However, there is considerable disagreement as to what this means substantively. This chapter therefore turns to discuss the rights arguments made in the wider Debate.

3. Theories of rights

Throughout the data sample claims to rights were made in both the fundamental and ordinary sense. Sometimes this was articulated in a clear manner. For example when Waitangi Fisheries Commissioner, Maui Solomon, stated the Court of Appeal reinforced “our view that the legal rights of iwi to the foreshore and seabed have never been extinguished” he was making claims to Māori property rights in the ordinary sense. On the other hand, Ken Mair, spokesman for the Tino Rangatiratanga Movement, expressed such rights in a fundamental sense when he stated that the Movement “had grave concerns that fundamental rights of Maori were being seriously eroded”.

However, often participants did not distinguish in which sense they were making their claims, regularly making claims in both senses simultaneously. At other times claims of right were made in such a general way that it was impossible to determine in what sense the participants meant. Therefore, when discussing the different claims of right below, I will only mention the sense in which the claim was made where it can clearly be inferred.

3.a. Māori property rights

The vast majority of participants surveyed argued that Māori possessed some form of legitimate property rights in the foreshore and seabed. However, as will be shown, there were major differences of opinion as to the form, extent and foundation of these rights.

173 Quoted in NZPA “Uproar among Maori; suspicion among Pakeha” ODT (Dunedin, 26 June 2003) at Front Page.
A small number in the data surveyed expressly argued Brash’s contention that the only Māori property rights discoverable in the foreshore and seabed were limited traditional use rights. However, many claimed that the actions of the Government would freeze Māori property rights at 1840, which would not allow adaptation of customary practices to meet new technology. This would deny Māori commercial rights and the right to development, discussed below. The New Zealand Human Rights Commission (the Human Rights Commission) were one such group that raised this concern:

It is possible to envisage a number of number of economic activities in the foreshore and seabed area, such as harvesting seaweed, gathering sand, gravel and/or rocks, eco-tourism, horse-trekking, and tramping, which could provide commercial benefit to Māori. However, these ‘freezing’ restrictions [in the FS Bill] may seriously hinder the ability of Māori to carry out those activities.

From the data collected, most people, like Cullen and the signatories to the Paeroa

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174 For example, the Report on Submissions noted that some respondents suggested [Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [8.9.4]:
- rights must not be extended, or confer new uses
- customary rights should not apply to resources not used by Māori prior to 1840, such as oil, gas and minerals
- customary rights should only apply to the purpose and use of the environment in 1840, and must not extend to subsequent developments such as ports and other infrastructure
- customary rights should be limited to customary means – ie traditional methods rather than the use of modern technologies that may be less sustainable
- customary rights should not be allowed to capture emerging technology.

For Brash’s claims, see Brash, above n 1, at 10. For discussion on these claims, see Chapter Three, Sections 3.a and b, and Chapter Five, Section 3.a.i. Of note, the Wai 1066 claimants pointed out the fallacy of Brash’s definition of such rights when they submitted that at 1840 Māori exercised rights that amounted to “Use, control and authority of the seabed and foreshore as part if the greater resource of the sea, managed holistically”: Submissions of M Taylor (counsel for Wai 1066), 10 January 2004 at [19.1], WAI 1071 Doc No A64 (on file with author).

175 For example, many submitters to the Fisheries and Other Sea-Related Select Committee (the Select Committee) raised concerns that cl 42 of the FS Bill froze rights as they were at 1840, and did not allow Māori to adapt their customary practices to new technology available. These submissions came from individuals, Māori groups, community groups and professional organisations, including over 200 submissions based on the primer the Moana Jackson circulated and over 60 submissions from Ngāi Tahu individuals; Foreshore and Seabed Group, above n 22, ch 7 at 12. See also Moana Jackson “Seabed deal plainly not fair to Maori” Perspectives, NZ Herald (Auckland, 19 December 2003) at A21.

176 See the concerns raised to the Select Committee: Foreshore and Seabed Group, above n 22, ch 7 at 12. A barrister, submitting on the Government’s Discussion Document, argued it was inappropriate for the Government to “limit the recognition of all customary rights in the foreshore and seabed to non-commercial rights as it cannot be assumed that these do not exist”: Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [7.1.1].

Declaration,\textsuperscript{178} believed that Māori possessed legitimate modern property rights of a usufructuary nature in the foreshore and seabed. As Ruth Berry reported, all iwi claimed such occupancy and use rights, but what these were and how they should be recognised and protected differed from “from bay to bay, hapu to iwi”.\textsuperscript{179} These rights could be Hohfeldian claim-rights or liberties. Paul Morgan, spokesman for Te Tau Ihu, argued that the Government was trying to restrict Māori “customary rights to discrete activities like gathering pipi”.\textsuperscript{180} To him, “Customary rights are much more than that. They include the right to manage an area, develop an area for cultural and economic benefits and the rights of use and access”.\textsuperscript{181} Those submitting on the Government’s Discussion Document said that, in 2003, these rights extended to t'aiapure, mataitai, waahi tapu, unga waaka reserves, the use of aquatic life for medicinal purposes, the collection of seaweed to eat, access to the mutton bird islands, the observance of spiritual practices at certain rocks and reefs in the seabed, and to the placement of pito in rock crevices.\textsuperscript{182}

The notion of legitimate Māori ownership rights to the foreshore and seabed was not as widely supported as the notion of legitimate Māori use rights. Shane Jones, the Chairman of the Treaty of Waitangi Fisheries Commission, argued that there was a

\textsuperscript{178} See discussion in Chapter Three, Section 2.a and b, 4.a and b, Chapter Five, Section 3.a.ii.2, 3.a.iii, 3.a.iv.1, 3.a.iv.4 and 4.


\textsuperscript{180} Quoted in Ian Llwellyn “Marlborough councillors divided over foreshore” National, NZ Herald (online, 29 August 2003) \textless http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3520743\textgreater ; Te Ope Mana a Tai “Proposal Amounts To An Erosion Of Māori Rights” (press release, 26 August 2003). ‘Pipi’ are small cockles, a type of shellfish.

\textsuperscript{181} Quoted in Llwellyn, above n 180; NZPA “Horomia defends consultation hui” National, NZ Herald (online, 27 August 2003) \textless http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3520228\textgreater ; Te Ope Mana a Tai, above n 180.

\textsuperscript{182} See Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [7.2.1]. ‘Taiāpure’ are local fisheries. Section 174 of the Fisheries Act 1996 sets out that a t'aiapure-local fisheries is a local management tool established in an area that has customarily been of special significance to an iwi or hapū as a source of food or for spiritual or cultural reasons. T'aiapure-local fisheries can be established over any area of estuarine or coastal waters to make better provisions for Manawhenua rangatiratanga and for the rights secured under art 2 of the Treaty. ‘Mataitai’ are prescribed fishing areas. Regulation 2 of the Fisheries (Kaimoana Customary Fishing) Regulations 1998 defines ‘mataitai reserve’ as: “an identified traditional fishing ground established under regulation 23”. Regulation 23 holds that, among other things, a mataitai reserve can only be established where there is a special relationship between tangata whenua and the proposed reserve and that is traditional fishing ground and is of a size appropriate to effective management by tangata whenua. ‘Wāhi tapu’ means sacred place. Section 2 of the Historic Places Act 1993, defines ‘wāhi tapu’ as: “a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense”. ‘Ūnga waka’ are canoe landing places and ‘pito’ are umbilical cords.
level of “acceptance and tolerance among Kiwis in general that Maori may very well have rights in the coastal area but they should not have exclusive private ownership of the coast”. Despite this, various people maintained Māori did possess ownership rights in the foreshore and seabed. The majority of these were Manawhenua. For example, Ngāi Tamanuhiri Whanui Charitable Trust argued, “the foreshore and seabed belong to whanau, hapu and iwi, and until an investigation is carried out that determines otherwise there can be no other interpretation and no other interference”. Tepania Kingi from Whangarei was an individual who supported the notion: “if you ask a Maori who owns Aotearoa, he’ll just as quickly tell you that Maori continues to own all that which has not yet been sold off”. Daley is an example of Pākehā who supported Māori ownership. She insisted: “The foreshores and seabed belong to hapu”. Some political parties also contended this, such as the Green Party, ACT and the New Zealand Alliance Party.

This ownership right was sometimes expressed in a fundamental sense. As Tureitie Hohaia Harrison from Auckland contended: “Ownership: According to International law, indigenous peoples have this traditional right, its just a matter of this Government following through with their obligations by an enactment of law”.

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184 The signatories to the Paeroa Declaration made such a claim: the Paeroa Declaration, above n 134, resolution 1. For discussion on this, see Chapter Three, Sections 2.a and b, Chapter Five, Sections 3.a.iii, 3.a.iv.1, 3.a.iv.4 and 4, and Chapter Six, Section 3.c.

185 Raiania, Chairman of Ngai Tamanuhiri Whanui Trust “Ngai Tamanuhiri Whanui Charitable Trust” (oral submission presented to a Foreshore and Seabed Consultation Hui, place unspecified, undated) at 2 (written copy on file with author). Furthermore, like the signatories to the Paeroa Declaration, many Manawhenua enshrined their ownership rights in Declarations and Hui Resolutions. For examples of such Declarations and Hui Resolutions see: the Paeroa Declaration, above n 134; Resolutions from the 4th National Foreshore and Seabed Hui (signed 13 March 2004), resolution 7 available <http://www.converge.org.nz/pma/fs130304.htm>; Te Tii Mangonui Declaration, above n 49, art 1 reprinted in Te Runanga o Ngai Takoto and Ngati Kuri and others, above n 49, at slide 11; Te Whakapuakinga, above n 169.

186 Quoted in “Feedback”, above n 57.

187 Daley, above n 147.


189 Quoted in “Feedback”, above n 57.
Others, the majority of whom were Manawhenua, argued that Māori held Tūpuna title over the foreshore and seabed. While Tūpuna title was not mentioned in any of the key documents, it can be argued that resolution 2 of the Paeroa Declaration, which affirmed the signatories’ tūpuna rights, alluded to it. Claims to Tūpuna title seemed to be made in the fundamental sense. A hui participant (Ngāti Kahungunu) highlighted the contention that Tūpuna title was an essential part of mana and rangatiratanga, and was similar to but different from ownership, in that it involved “the collective rights and obligations of whakapapa and is never definable by someone else”. Some Pākehā also believed Māori held such title. Anne Wells described Tūpuna title as “absolute title, not ‘ownership’, a European concept”. ‘Absolute title’ encompasses sovereignty and authority rights, which are expressed through the Māori concepts of mana whenua/mana moana and rangatiratanga. Therefore, Tūpuna title can be described as encompassing all the rights associated with ownership, plus more.

Many sourced this title in tikanga. To Ngāti Kahungunu it is “a discrete and unique Maori construct sourced in tikanga that has never been given away, taken, or able to be subsumed within any common law doctrine” and from which “certain tipuna use rights which were prescribed and proscribed in accordance with whakapapa and in our case Kahungunutanga or haputanga”.

Like the Paeroa Declaration signatories, a number of people claimed that Māori were bearers of rights due to their spiritual and ancestral connections implicit through

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190 This title was also expressed as Tīpuna title. ‘Tīpuna’ and ‘tūpuna’ are the eastern and western dialectal words meaning ‘ancestor’.
191 See discussion in Chapter Five, Section 3.a.iii.
192 Quoted in Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [7.4.1]. The Report recognised that this respondent contention was supported in submissions and speeches of many other Māori respondents.
194 The Report on Submissions highlighted this, stating that respondents who believed Māori possessed Tūpuna Title saw it “as providing for expression of tino rangatiratanga and kaitiakitanga, and captures the rights that normally derive from freehold title in English law”: Carpinter and Department of The Prime Minister and Cabinet, above n 8, at [7.4.1]. Moreover, the Report quoted Te Rūmanga o Ngā Apa who argued: “The exercise of rangatiratanga and kaitiakitanga cannot be isolated from tipuna title”: at [7.4.1]. For further support see Te Ope Mana a Tai and others submission to the Waitangi Tribunal (the Tribunal): “rights taken together extend much further than, but include and overlap, European legal concepts of ownership”: Submissions of G Powell and A Ruakere (counsel for Te Ope Mana A Tai and others), undated at [12], WAI 1071 Doc No A46(a) (on file with author).
195 Quoted in Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [7.4.1]. ‘Hapūtanga’ means hapū culture or hapū perspective.
whakapapa.\textsuperscript{196} For example, Te Rūnanga o Ngāti Whātua submitted that: “Ngāti Whātua hold their ancestry connections to the land and waters of their rohe by birthright. Ancestral connection is based on whakapapa, tribal identity and tribal lore”.\textsuperscript{197}

In stating this right was a “birthright” the Rūnanga seemed to advance the right as a fundamental group one. Te Rūnanga o Ngāi Tahu (TRONT) made a similar claim. Through their chairman, Mark Solomon, it claimed that Ngāi Tahu “rights do not derive from the Crown’s recognition of them. They derive from mana atua, mana whenua, mana moana, mana takata”.\textsuperscript{198}

Many people argued that arising out of these ownership rights were powers, in Hohfeldian terms, to manage and control the resource. For example, Te Ope Mana a Tai and Others submitted to the Tribunal that it was entirely reasonable that iwi and hapū, as customary owners “be able to make decisions about the allocation of resources (including coastal space) in a manner that is no different from the way in which decisions are made by other landowners”.\textsuperscript{199}

Some, in particular Manawhenua, also believed these ownership rights entailed the liberty to develop the resource, or the claim-right to exploit the zone for commercial benefit. As the Human Rights Commission argued: “Just as all New Zealanders believe they have the right to develop land and property in which they hold property rights, so obviously Māori believe they enjoy such rights in respect of their property”.\textsuperscript{200} Greg White (Ngāti Tama) submitted on behalf of Te Iwi o Taranaki that their customary interests within the foreshore and seabed “must include the full bundle

\textsuperscript{196} For discussion on the Paeroa Declaration signatories’ claim, see Chapter Five, Section 3.a.iii.
\textsuperscript{197} Te Runanga o Ngāti Whātua, above n 114, at 3.
\textsuperscript{198} Mark Solomon, Chairman Te Runanga o Ngāi Tahu “Ngāi Tahu response to Government Consultation Hui” (oral submission presented at the Foreshore and Seabed Consultation Hui, Rapaki, Christchurch, 18 September 2003) at 1 (written copy on file with author). ‘Mana atua’ means rights and authority passed down from ancestors whose mana is extant. ‘Mana takata’ is the Ngāi Tahu dialectal form of ‘mana tangata’. It means mana of people, power and status accrued through one's leadership talents, human rights.
\textsuperscript{199} Powell and Ruakere, above n 194, at [68].
of rights inherent with ownership, including any commercial right associated with exploitation and development”.

Others held that the liberty to develop and the claim-right to gain commercial benefit existed whether or not Manawhenua held title, as part of their customary rights. Morgan, above, made such a claim. As did Te Ope Mana a Tai, in its definitive *Principles for Engagement with the Crown*, which were expressly endorsed by over half of all iwi, as well as consultation hui participants and submission writers. On the other hand, some Māori sourced the right to development in their right to exercise kaitiakitanga. Te Rūnanga A Iwi O Ngāpuhi chairman, Sonny Tau, explained, from kaitiakitanga “flowed the inalienable right of Ngapuhi to regulate and manage or co-manage the coast, as well as the right to exploit commercial opportunities”.

3.a.i. The foundations of Māori property rights

Many different foundations were asserted for the Māori claims of property right. Most commonly, as the Treaty Tribes Coalition and Paeroa Declaration signatories claimed, tikanga was described as the source of Māori property rights to the foreshore and seabed. Manawhenua reiterated this claim, often arguing tikanga was the foundation for Tūpuna title. Pākehā groups and individuals also made this claim. For example, Tim Howard, for the Northland Urban Rural Mission, claimed that Manawhenua hold

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202 Principle 8 holds: “Iwi/hapu customary rights, both commercial and non-commercial include a developmental component, which must be recognised and given effect to”. These Principles are reproduced in Carpenter and Department of the Prime Minister and Cabinet, above n 8, at Appendix 6. See also Te Ope Mana a Tai “Principles for Engagement” (2003) 46 Tū Mai 24 at 25; Te Ope Mana a Tai “Foreshore and Seabed – Draft Principles” (2003) 3(131) Te Karere Maori 4 at 4. For evidence of endorsement, see Te Ope Mana a Tai, above n 103, Appendix One at 20 and Carpenter and Department of the Prime Minister and Cabinet, above n 8, at [10.3.4]. Endorsement of these Principles was not only from Māori. Kathryn McKenzie is an example of a Pākehā who endorsed them: Kathryn McKenzie “A submission on ‘Government Proposals for Consultation: The Foreshore and Seabed of New Zealand’ from Kathryn McKenzie” (3 October 2003) Converge <http://www.converge.org.nz/pma/inkathry.htm>.

203 See for example Carpenter and Department of the Prime Minister and Cabinet, above n 8, at [7].

204 Quoted in Ruth Berry “Hui as seabed anger mounts” *News, NZ Herald* (Auckland, 21 August 2003) at A5.

205 See discussion in Chapter Five, Section 4.

206 See discussion above in section 3.a.
“rights, based in whakapapa and tikanga, … derived from their own traditions and law”.207

Both Māori and non-Māori argued the Treaty was a source of Māori property rights to the zone, as the Paeroa Declaration signatories maintained.208 Ngāi Kahu made this claim.209 So too did the iwi representatives who signed the Tii Mangonui Declaration when they directed their MPs to oppose any legislation that “proposes to extinguish or redefine Maori customary title or rights under Te Tiriti o Waitangi”.210 Ben Griffiths is just one example of a Pākehā who held that art 2 of the Treaty reaffirmed “to Iwi and Hapu the Tino Rangatiratanga of their lands, all their possessions and everything they hold precious”.211

As the signatories to the Paeroa Declaration may have done, some argued that these Treaty rights to property also included a right to development.212 For example, some submitters to the Select Committee claimed this.213 However, the Treaty was mostly recognised as a document that merely affirmed pre-existing Māori rights. Owen contended: “Iwi and Hapu rights do not derive from the Crown, but existed prior to Pakeha settlement and Pakeha government and continue to exist. Te Tiriti o Waitangi confirmed these existing rights and required the Crown to respect them”.214

Like Cullen, the Treaty Tribes Coalition and the Paeroa Declaration signatories, others sourced Māori property rights in the common law doctrine of native title.215 These rights tended to be viewed in the ordinary sense. The Peace Movement Aotearoa noted that Māori have common law aboriginal rights and title guaranteed in art 2 of the

208 For discussion on the signatories’ claim, see Chapter Five, Sections 3.a.iv.4 and 4.
209 Te Runanga-a-Iwi o Ngati Kahu Charitable Trust, above n 142, at [2].
212 See discussion on the right to development in Chapter Five, Section 3.a.iv.4.
213 See Foreshore and Seabed Group, above n 22, ch 7 at 12-13.
214 Owen, above n 111.
215 For discussion on Cullen, the Coalition and the Paeroa Declaration signatories’ argument that native title is a source of Māori property rights, see Chapter Five, Section 4.
Treaty.\textsuperscript{216} Te Rūnanga o Ngāti Whātua contended: “Ngati Whatua retains its tupuna customary rights in respect to all water bodies within its tribal rohe according to Ngati Whatua tikanga”\textsuperscript{217} and “That a customary right is a common law right naturally afforded to indigenous peoples”.\textsuperscript{218}

Others declared Māori rights were founded in all three sources. Anthony Ward submitted that Māori property rights are recognised in “tikanga, in the Treaty of Waitangi and in common law”.\textsuperscript{219} Similarly, the Campbell Family believed the FS Bill extinguished “Māori rights to the foreshore and seabed that are recognised in Tikanga, in article two of Te Tiriti O Waitangi, and the standard common law rules about property rights”.\textsuperscript{220}

Few alluded to the other foundations for Māori rights that were expressed in the key documents. For example, only Jill Ovens, the President of the Alliance Party, among the political parties, pointed towards indigeneity as a foundation for property rights in the zone.\textsuperscript{221} She stated that: “Customary rights are based on the rights of indigenous people”.\textsuperscript{222} Many people argued that Māori were the Indigenous Peoples of Aotearoa/New Zealand, but few articulated the view that this gave them separate rights.

Several individuals and groups acknowledged Māori possessed property rights before Crown colonisation. For example, Te Rūnanga o Ngāti Tama submitted that Māori property rights were “to be respected and protected not as a privilege for Maori, but because these rights belonged to various communities which formed the people of

\textsuperscript{217} Te Runanga o Ngati Whataua, above n 114, at 2.
\textsuperscript{218} Ibid, at 4.
\textsuperscript{221} For discussion on indigeneity as a source of Māori rights, see Chapter Five, Section 3.a.ii.
\textsuperscript{222} Quoted in New Zealand Alliance Party “Alliance foreshore and seabed position” (press release, 27 May 2004). It can also be argued here that Ovens was alluding to Kingsbury’s fifth structure: claims as Indigenous Peoples, including claims based on treaties or other agreements between Indigenous Peoples and states. For more detail about this structure, see Chapter Five, Section 3.a.iv.4.
Aotearoa before the European came to its shores”.223 Furthermore, Te Ope Mana a Tai and others submitted that: “It is mana whenua, mana moana and/or mana tupuna that is the source of customary ownership”,224 and Ngāti Kahungunu stated that their “tipuna use rights therefore derive not from a Crown or common law base but from the tipuna title inherent in the mana and rangatiratanga of each Iwi and Hapu as reaffirmed in Te Tiriti”.225

Rangatiratanga can also be interpreted as self-determination.226 Thus, when people, like Ngāti Kahungunu, claimed that customary rights and title derived from Māori rangatiratanga, it can be argued that they were, like the Paeroa Declaration signatories, applying Benedict Kingsbury’s third basis of Indigenous rights: that of self-determination.227

A small number founded property rights in Kingsbury’s first structure: that of human rights and non-discrimination claims.228 Those who based property rights in these claims were making fundamental right claims. For example, Joan Macdonald argued that Māori have a right to own property and not to be deprived of it under international human rights conventions, which the FS Bill breached.229 Moreover, she stated that Bill breached “the expectation in international law that the rights of Indigenous Peoples are promoted by their Governments”.230 A few others sourced the right of Māori to development in the Declaration on the Right to Development 1986.231

3.a.ii. The features of Māori property rights

While the Paeroa Declaration signatories never explicitly stated that there were responsibilities attached to the property rights they advocated, it was understood that with rights sourced in tino rangatiratanga came the responsibility associated with

223 Te Runanga o Ngati Tama “Fisheries and Other Sea-Related Legislation Select Committee” (July 2004) at 6. On file with author.
224 Powell and Ruakere, above n 194, at [12].
226 See discussion in Chapter Five, Section 3.a.iv.2.
227 For more detail on this structure, see in ibid.
228 For more detail on this structure, see Chapter Five, Section 3.a.iv.1.
230 Ibid.
231 Aotearoa/New Zealand signed this on 4 December 1986. See Foreshore and Seabed Group, above n 22, ch 7 at 12-13.
kaitiakitanga. This was reiterated time and again throughout the data sample, most noticeably from Manawhenua, but also from others. Ngāti Kahungunu put this very clearly:

Part of the use right was the obligation of kaitiakitanga. It is important to stress too that our understanding of kaitiakitanga is an absolute obligation that is necessarily also prescribed by tikanga and exercised as part of our mana and rangatiratanga. It is a much more substantive and substantial exercise of authority than that attributed to it in the Resource Management Act where it is seen by the Crown as a subordinate idea of ‘guardianship’ or ‘management’.

Cullen conceded that Māori property rights in the foreshore and seabed, like all property rights, should not be taken without just compensation. The Treaty Tribes Coalition made a similar claim. During the Debate, both Māori and Pākehā alike echoed this claim. For example, Federated Farmers submitted “Parliament should not be used to confiscate property rights without the free consent of the property owner and without full compensation”. A right to compensation can be described as a claim-right in Hohfeldian terms, which places a duty on the Government to pay just compensation should property rights be appropriated. For example, submitters to the Select Committee argued that Māori, as rights bearers in the foreshore and seabed, possessed a right to fair compensation, which was being deprived in the Bill, contrary to international human right instruments. Thus, like the Treaty Tribes Coalition, those making these claims were making them in the fundamental sense and may have been basing the right of Māori to compensation on Kingsbury’s first foundation: that of human rights claims and the principle of non-discrimination.

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232 See discussion in Chapter Five, Section 3.a.iii and Chapter Six, Section 3.b.
234 See discussion in Chapter Three, Section 4.a and Chapter Five, Sections 3.a.ii.2 and 3.a.iv.1.
235 See discussion in Chapter Five, Section 3.a.iv.1.
236 Quoted in Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [3.1].
238 For more detail about this structure, see Chapter Five, Section 3.a.iv.1.
Cullen, however, did not believe that Māori ownership rights could be established in the foreshore and seabed. Therefore, he believed there was no need to compensate for their loss. Others, however, argued that legitimate Māori ownership rights did exist, which were being extinguished, and therefore compensation should be paid. Ngāti Kahu argued that the Bill would extinguish their aboriginal title and Treaty rights without consent and did not provide for adequate compensation. Queen’s Counsel, Paul Cavanagh, argued that, although unlikely, if Māori were able to assert ownership so that they were granted Land Transfer Titles “such a right, once conferred, should not be removed without payment of adequate compensation”.

On the contrary, Danny Keenan noted that many Pākehā felt Māori were not entitled to compensation, which they labelled as “special privileges”. One individual argued that Māori deserved no compensation for property loss. To this individual, Māori “shouldn’t own it in the first place. Take it back, and no compensation!”

The Business Round Table offered a unique argument. They argued against over-compensating Māori, submitting that:

If compensation is to be paid, it should be in cash or limited to a fraction of the net proceeds from the sale of rights and not confer on Maori preferential participation in commercial projects or preferential rights to determine the nature of any such projects.

3.a.iii. The importance of upholding Māori property rights

While none of the key documents expressly made this claim, a few participants linked Māori property rights to Māori identity and the continuance of Māori culture. Property here was seen as fundamental to the continuance of Māori as the Indigenous Peoples of Aotearoa/New Zealand, deserving of added protection. Property rights, therefore, were fundamental rights.

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239 See discussion in Chapter Three, Sections 4.a and b, and Chapter Five, Sections 3.a.ii.2.
240 Te Runanga-a-Iwi o Ngati Kahu Charitable Trust, above n 142, at [24].
242 Keenan, above n 5.
243 Quoted in Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [4.5.2].
244 Quoted in ibid, at [7.6].
In his presentation to the United Nations Permanent Forum on Indigenous Culture, TRONT deputy chairman, Edward Ellison, made such a claim. He submitted that the Labour-led Coalition Government was intending to extinguish Māori rights to the foreshore and seabed, “irrevocably severing our customary relationship”. Thus, he claimed: “We are being stripped of our status as indigenous peoples, and are facing an immediate and, to us, unparalleled threat to the retention of our culture and cultural identity.”

Jenny Mauger, on behalf of Ngāti Hauea, Ngāti Hori and Ngāti Hinemoa, can be seen to make a similar claim when she asked: “Without the rangatiratanga to define, maintain, revitalise our tipuna and traditional uses and practises in, on and around our moana, who are we?” Likewise, Wally Harrison, from Waikato and Wellington, a bystander during the Foreshore and Seabed Hīkoi (the Hīkoi), commented: “Maori are the guardians of the foreshore – without it we are lost”.

3.b. Property rights of others

Both Brash and Cullen argued that other individuals and groups possessed legitimate rights, in the ordinary sense, in the zone. Whilst the material surveyed contained many arguments about legitimate Māori rights in the foreshore and seabed, it was relatively quiet on the extent and foundations of the rights of others, except the right of access. However, some Māori acknowledged that there were legitimate rights of others citizens in the zone. John Mitchell, Te Tau Ihu spokesman, expressed this sentiment. He contended these rights were not being challenged by Māori claims to the resource.

Brash argued these rights included recreational and commercial development rights. While commercial developers and recreational users all claimed they had property...
rights to the zone, and that these should remain, none specifically spoke about their rights to development. Only Cavanagh can be seen to take Brash’s view. He argued if the Crown established shared regulation and control of the foreshore and seabed, then that “could produce serious results for landowners who wish to pursue development options where access to the foreshore and sea is required”.

Jock Brookfield, Emeritus Professor of Public Law at the University of Auckland, sourced others’ commercial rights to fish and navigate over the zone in the common law. He argued that: “Public rights to fish and navigate, now much affected by legislation, are common law rights”. The Golden Bay/Motueka Fisherman’s Association sourced fishing rights in statute. They pointed out that under the Fisheries Act 1996 “Property rights have been allocated in various fish stocks, and unrestricted access is necessary to enable commercial fishers to properly utilise their statutory empowered fishing rights”.

Cullen expressly stated that the public had access interests in the foreshore and seabed, and argued that these needed to be protected in legislation through elevating them to the status of a statutory right. Others went further, arguing that public access was not merely an interest, but a right. As Dunne put it, New Zealanders possess a “basic right to access our beaches and seas without hindrance,” and this right should never be impeded. The Report on Submissions highlighted: “Some respondents felt so strongly about their right of access to the foreshore and seabed that they unequivocally endorsed legislating for public access to a coastal strip”. Angela Prendergast concurred, stating: “We have heard a lot of talk about how access to the foreshore and seabed, and that these should remain, none specifically spoke about their rights to development. Only Cavanagh can be seen to take Brash’s view. He argued if the Crown established shared regulation and control of the foreshore and seabed, then that “could produce serious results for landowners who wish to pursue development options where access to the foreshore and sea is required”.

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252 For example, in the Report on Submissions it was noted that “Many commercial operators said that the existing terms of access and use of the foreshore and seabed should not change as a result of recognition of customary rights", and that “As with the rest of the public, recreational users want to maintain current access levels and use rights": Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [7] and [10.2.7].
253 Cavanagh, above n 241.
254 FM (Jock) Brookfield “Treaty does not stop at water’s edge” Perspectives, NZ Herald (Auckland, 1 July 2003) at A15.
255 Quoted in Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [10.2.9].
256 See discussion in Chapter Five, Section 3.b.iii.
257 Quoted in United Future NZ Party “United On New Zealand’s foreshores and seabeds” (press release, 7 August 2003). The Green Party also supported the notion of public rights of access. Metiria Turei, the Green Party’s Māori affairs spokesperson, stated, they “support public rights to access our natural environment in ways that are respectful, non-commercial and sustainable” quoted in Green Party “Greens call for foreshore public access debate”, above n 188.
258 Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [4.5.2].
foreshore is an inalienable right of all New Zealanders. What is amazing is our obvious sloppiness in enshrining that right – until now.”. Consequently, they may have been making claims in the fundamental sense.

Significantly, throughout the data sample, Manawhenua stated time and again that was no risk of Manawhenua denying public access. As Gloria Timoti submitted:

Ngati Whatua as far as can be ascertained have never prevented the public use of its beaches. Young and old, rich and poor alike continue to delight in its goodness and partake of its abundance as always without hindrance from Māori. Manaakitanga is one of the principles which bind Māori with others. Sharing is a matter of pride and the joy of rangatiratanga.

Many claimed that historically Manawhenua had not denied access, except in very small instances, and if their title was recognised they would allow such access to continue. For example, Ngāti Kahungunu stated that:

... even in those areas where freehold title has been vested in Iwi and Hapu there is little evidence that it has been used to deny access in any ongoing way. In those cases where the foreshore and seabed have continued as part of our own tipuna title and rights of use there is no evidence at all except in particular instances of rahui.

Conversely some groups, in particular farmers who drew analogies between access across customary Māori land to the foreshore and seabed, and access across private rural land to riverbeds, felt there was no public right of access and that a statutory one should not be created. For example, Hart Farm Partnership argued: “Public access, except in extreme cases, should not be permitted on private land”.

260 See Foreshore and Seabed Group, above n 22, ch 2 at 3.
261 Quoted in ibid. Ngāti Kahungunu made a similar claim, stating that the claim Māori might deny access fails to take into account “manaakitanga which is fundamental to the exercise of rangatiratanga” and which effectively mitigates “against any blanket denial of access”: Ngāti Kahungunu, above n 160, at 4. ‘Manaakitanga’ means hospitality, kindness.
262 Te Ope Mana a Tai noted that as of October 2003, “no Iwi/hapu have yet said that access to the foreshore and seabed will be restricted, other than on the grounds of tikanga”: Te Ope Mana a Tai, above n 154, at 9.
263 Ngāti Kahungunu, above n 160, at 5.
264 Quoted in Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [3.7.7].
Some non-Māori even argued they possessed customary rights in the foreshore and seabed. 265 Brian Turner wrote that the coastlines “are part of our common heritage. It is time for us to confirm that recreational activities involving access to those parts of the outdoors are the customary right of all”.

Similarly, the West Coast Commercial Gold Miner’s Association argued: 266

… we wish to have our own [non-Maori] interests recognised here. Since the first gold miners (settlers) arrived on the West Coast during the 19th century the mining of gold ... has been carried out continuously on West Coast beaches ... We contend that this activity is a customary right of the West Coaster, valid as any Maori customary right, and the proposed legislation should recognise this.

3.c. Māori procedural rights

The Treaty Tribes Coalition’s core claim was that Māori had a right to be heard, including a right of access to the courts and to equality before the courts. 268 Many individuals and groups made similar claims. Across the data surveyed, where such claims were made they were made in the fundamental sense. Reitu Cassidy, the spokeswoman for a Dunedin group travelling to the Hīkoi, argued that Māori are guaranteed this right. 269 In the data sample, it was variously described as: the “right to have their case heard”; 270 the “right to go to court”; 271 the “right to test claims in

265 This was highlighted in non-Māori submissions made on the Government’s Discussion Document. See Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [6.5.1] and [7]. This was New Zealand First’s stance: New Zealand First Leader Winston Peters, quoted in New Zealand First Party “NZ First Pleased To reach Agreement” (press release, 7 April 2004).

266 Brian Turner “Mine or ours? A response to the recent open letter from Ranginui Walker” (2003) 3316 Listener 34 at 35.

267 Quoted in Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [6.5.1].

268 See discussion in Chapter Three, Section 5.a and b, Chapter Five, Section 3.a.iv.1, and Chapter Six, Section 2.a.

269 Quoted in Staff Reporter “Dunedin group joins the hikoi” General, ODT (Dunedin, 3 May 2004) at 3.

270 See for example Derek Fox, quoted in Showtime, above n 61, at 71mins 16secs approx. Others described this right as: the “right to have their claims heard in Court”: Hone Harawira “We’re Marching” (press release, 15 April 2004); and the “right of a hearing in the courts of justice”: David Gilgen “Olympic Submissions” (2004) 56 Tū Mai 31 at 31.

271 See for example ACT New Zealand “Everyone Must Be Heard on Foreshore”, above n 17; ACT New Zealand “Foreshore And Seabed – The Debate Continues...”, above n 17; Moea Armstrong, Kathryn McKenzie and Network Waitangi Whangarei “Submission on Foreshore and Seabed Bill” (7 July 2004) at 1 available: <http://www.converge.org.nz/pma/fssubs.htm>; Moana Jackson, quoted in AKA Productions “Hikoi: Inside Out” (TVNZ television broadcast, 21 July 2004) at 37secs 58secs approx (video recording on file with the University of Otago); Te Hau Tikanga-The Maori Law Commission “Nga Patai (Reproduction of ‘A Foreshore Primer’ prepared by Te Hau Tikanga-The Maori Law Commission)” in Tino Rangatiratanga Te Takutai Moana (2nd ed, prepared as vol 2 of the IRI, Economics, Politics & Colonisation Series 2003) 6 at 7. Clover on behalf of Methodist Social Action, Nelson, described this right as the right “to have their day in court”: Clover, above n 113, at 3.
court”;

272 the “right to due process”; 273 the “right to use the court process to determine property rights”; 274 the “right to redress in the courts”; 275 the “right of free access to the courts”; 276 and the “right to a fair trial”. 277

Like the Coalition, many people sourced this right to be heard in Kingsbury’s first foundation; that is, human rights and non-discrimination claims. 278 Several submissions to the Select Committee were about how the FS Bill breached the rights of access to and equality before the courts under international human rights law. 279 Others sourced the right of Māori to be heard in the New Zealand Bill of Rights Act 1990 (NZBORA). For instance, a group of Quakers, who met at a Treaty Issues Gathering, stated this explicitly. 280

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272 See for example Ken Shirley, then member of Parliament for the Act New Zealand Party, quoted in “Mayor Racist Cullen Tells Parliament” National, NZ Herald (online, 27 August 2003) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3520198>; Cassidy, quoted in Staff Reporter, above n 269. Others described this right as: the “right to have the matter tested in any court”: Douglas Graham “Crown must lay claim on behalf of all” Perspectives, NZ Herald (Auckland, 27 June 2003) at A13; “right to address their issues in the legal system”: Waikawa Marae Management Committee, above n 64, at 2.

273 See for example Hilary Anne and Maui John Mitchell Foreshore and Seabed Issues: a Te Tau Ihu Perspective on Assertions and Denials of Rangatiratanga (prepared for the Treaty of Waitangi Research Unit at Victoria University of Wellington as no 7 of the Rangatiratanga Series 2006) at 68; Jackson, quoted in AKA Productions, above n 271, at 37mins, 58secs approx.

274 See for example Treaty Issues Gathering, Religious Society of Friends (Quakers) “Submission to the Select Committee considering the Foreshore and Seabed Bill” (undated) at 1 available: <http://www.converge.org.nz/pma/fssubs.htm> (accessed 5 May 2010). Others have described this right as: the “right of Maori to take their claim of ownership of the foreshore and seabed to court for determination”: Peter Kitchenman “To the Foreshore and other Related Sea Matters Special Select Committee on the Foreshore and Seabed” (12 July 2004) at 1 available: <http://www.converge.org.nz/pma/fssubs.htm>; the “right to go to the Maori Land Court to obtain customary property and title to the foreshore and seabed”: John McEnteer, Hauraki Maori Trust Board Claims Manager, quoted in “Hauraki – seasoned campaigners” (September 2003) 46 Tū Mai 22 at 22.


276 See for example Clover, above n 113, at 2.

277 See for example Terna Wara from Ngāruawahia, quoted in “Feedback”, above n 57.

278 For more detail on this structure, see Chapter Five, Section 3.a.i.v.1.

279 For example, the UDHR, art 10 and the ICERD, art 14. See Foreshore and Seabed Group, above n 22, intro at 11. Peter Kitchenman also highlighted that the Bill breached the right to be heard as “laid out” in the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCCPR), and the ICERD: Kitchenman, above n 274, at 2.

As the Coalition may have done, some based the right of Māori to be heard in art 3 of the Treaty. Cassidy said: “The right to be heard in a court of law is a basic right guaranteed in clause three of the Treaty of Waitangi, where we were given the rights and privileges of British subjects”. It was said that these rights and privileges included the right to be heard established in the common law, the Magna Carta and the law of equity. Therefore, some participants may have based the right of Māori to be heard in Kingsbury’s fifth foundation; that is, claims as Indigenous Peoples, including claims based on treaties or other agreements with states. The Treaty was not directly sourced as the basis for the right of Māori to be heard in any of the key documents. However, an argument can be made that when people contended art 3 established procedural rights for Māori, they were implicitly arguing from a non-discrimination basis. Thus, arguments of this kind may fall under Kingsbury’s first foundation, in which the Coalition based their arguments.

3.d Rights of the courts

Both the Paeroa Declaration signatories and the Treaty Tribes Coalition recognised a place for the courts. For the Paeroa Declaration signatories, recognition of the courts upheld the authority of Manawhenua to pursue the identification of their rights in the way they thought best. Article 5 of the Tii Mangonui Declaration reiterated this

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281 See discussion in Chapter Five, Section 3.a.iv.4. Article 3 (Ko te Tuatoru) of the Māori version of the Treaty reads:

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarni nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarni.

Article 3 of the English version reads:

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

282 Quoted in Staff Reporter, above n 269.

283 For arguments that Māori possessed the right to be heard under the common law Magna Carta and the Law of Equity, see “Te Takutai Moana Submission” (9 July 2004) at 2 (on file with author); Clover, above n 113, at 3; Te Hau Tikanga, above n 271, at 7.

284 This claim falls under Kingsbury’s fifth structure for Indigenous rights claims. See discussion in Chapter Five, Section 3.a.iv.4.

285 Following Ngati Apa, above n 81, several iwi lodged claims in the Maori Land Court for recognition of their customary rights to their foreshore and seabed. For example: Ngāti Kahu and Waitaha. Te Rūnanga-ā-Iwi o Ngāti Kahu explained that they had “applied to the Maori Land Court to have our mana whenua /mana moana given practical recognition within the pakeha legal system (not “customary interests”)”: Te Rūnanga-ā-Iwi o Ngāti Kahu, above n 141, at slide 21. Waitaha were reported as wanting the Court to enshrine their “customary rights to the foreshore stretching around the bottom half of the South Island from the mouth of the Waitaki river, on the east coast, to the mouth of the Waitaha River, in Westland”: Wallace and NZPA, above n 137. Others intended to lodge claims. For example Herbert, Chairperson of Te Rūnanga o Te Rarawa, stated that Te Rarawa would “be applying to the Maori Land Court to recognise our ownership, based on customary usage and tikanga of foreshore and...
view, as did resolution 7 of the Resolutions from the 4th National Foreshore and Seabed Hui. Betsan Martin, a Pākehā, also made this argument. He argued that Manawhenua should maintain their customary title to the zone, “without the need to proceed to Maori Land Court to have title affirmed, other than in situations which hapu and iwi consider to be necessary”.

The Coalition argued that the courts were bearers of decision-making rights, that is Hohfeldian powers, over the foreshore and seabed. Shirley agreed, arguing: “The courts are, in principle, the proper place where property right disputes are heard and where rulings should be made”.

Thus those who followed the Coalition’s reasoning and argued that, as the courts were the ultimate decision-makers, held that Māori must accept the final determination, no matter the outcome. John Gwillim, for the Whangarei Anti Racism Coalition wrote that the courts have:

… jurisdiction – under the Crown side of the Treaty – to assess and apply common law jurisprudence. The Court of Appeal, in so doing, found Māori customary rights had not been extinguished and allowed them to take cases to the Māori Land Court to establish whether or not they had ownership over the takutai moana under common law. The Court’s findings should be recognised as part of ‘due process’.

ACT made the claim that while the courts were the proper decision-makers, the power to decide properly resides with the general courts, not the Maori Land Court. Franks explained his party’s reasoning, arguing that specialist courts should not determine seabed resources within our territorial boundaries”: A letter to the editor of the Herald: “Letters to the Editor” Perspectives, New Zealand Herald (Auckland, 24 June 2003) at A14. ‘Tikanga’ are customs. Article 5 reads: “We support whanau and hapu who wish to take their applications to the Court”, reprinted in Te Runanga o Ngai Takoto and Ngati Kuri and others, above n 49, at slide 13. Resolution 7 reads: “Re-affirms themes from previous National Hui … support for iwi, hapu, whanau actions to assert their ownership in courts or otherwise”. Moreover, Te Tii Mangonui Declaration and the Omaka Hui Resolutions expressly affirmed the Paeroa Declaration, and thus recognised the authority of Manawhenua to take their claims to court contained within: See Te Tii Mangonui Declaration, above n 49, art 7 reprinted in Te Runanga o Ngai Takoto and Ngati Kuri others, above n 49, at slide 14; The Omaka Hui Resolutions, above n 140, resolution 7.

286 Martin, above n 136.
287 See discussion in Chapter Three, Sections 2.a and b and 5.b, and Chapter Five, Section 3.b.ii.
288 Quoted in ACT New Zealand “ACT Has The Answer” (press release, 24 March 2004).
interests in the zone as this signifies the application of “different laws for different peoples”. Instead, the resource “should be governed by one law, applied by the same court that has jurisdiction over all of us for everything else, without discrimination on the grounds of race”. Cavanagh supported ACT’s contention, arguing that Māori claims to a customary right to freehold title in the zone: … should be considered by the civil Courts available to all New Zealanders and not dealt with by the Maori Land Court in which non-Maori, who may be significantly affected, have no guaranteed right of audience.

There were also those, like Cullen, who argued the courts did not possess legitimate powers to determine rights in the foreshore and seabed. Those holding this view were mainly Parliamentarians. National Party MP the Hon Nick Smith argued that the Maori Land Court was “never intended as a court to deal with issues of foreshore and seabed”. Also Dunne explained that United Future believed outright that “the Maori Land Court should not be able to determine ownership and customary rights issues”.

The Coalition implied the courts had a duty to apply the rule of law when determining rights. ACT were the only group to mention anything similar. When questioning the close alignment between the Maori Land Court and the Tribunal, Shirley highlighted that: “The integrity of our courts must be upheld at all times, and it is essential that they act impartially and apply proper rules of evidence”.

Many groups and individuals, both Māori and Pākehā, argued that the Government’s decision to change the law was an abuse of Parliamentary power and an unjust
interference with the due process of the courts. Many submitters on the FS Bill felt this way.\textsuperscript{301} Te Ope Mana a Tai was one. They regarded the Government’s interference as “an effective reversal of the Court of Appeal decision (which the Crown lost and has not sought to challenge in the Privy Council) and, as such, amounts to an abuse of Parliamentary power”. \textsuperscript{302}

Many argued along the lines of the Coalition, and stated the courts were immune from government interference under the rule of law and the associated notion of the separation of powers.\textsuperscript{303} Ward perhaps stated the concept best when he acknowledged that:\textsuperscript{304}

In our system of government we have a principle called the separation of powers. Through which the Courts are empowered to interpret and apply laws enacted by Parliament. This separation between the Courts and Parliament is to avoid dangerous concentrations of power in a single institution. …

So when the Court of Appeal ruled on native title in the foreshore and seabed hearing it was entirely appropriate. For the Prime Minister to attempt to pre-empt the judicial process represents a gross violation of that process.

Moreover, Brookfield implied that the courts possessed an immunity from interference under constitutional convention. He believed the successful applicants in \textit{Ngati Apa}\textsuperscript{305} must be free to take their case to the Māori Land Court, as the Court of Appeal determined. To him, if Parliament reversed that decision, that would constitute “a gross breach of established constitutional convention”.\textsuperscript{306}

\textbf{3.e. Government decision-making rights}

Brash, Cullen and the Treaty Tribes Coalition all believed the Government possessed a legitimate right, or Hohfeldian power, to determine the law over the foreshore and

\textsuperscript{301} Foreshore and Seabed Group, above n 22, ch 5 at 9.
\textsuperscript{302} Te Ope Mana a Tai, above n 103, at 12. Mutu was another such submitter. She regarded what was happening as “A flagrant and blatant denial of due process by interfering with a matter before the courts before it has been able to complete the process allowed by the courts”: quoted in Foreshore and Seabed Group, above n 22, ch 3 at 6.
\textsuperscript{303} For discussion on this immunity, see Chapter Three, Section 5.a and Chapter Six, Section 2.c and 3.a.
\textsuperscript{304} Ward, above n 219, at 4.
\textsuperscript{305} \textit{Ngati Apa}, above n 81.
\textsuperscript{306} Brookfield, above n 254.
Many reiterated this belief. However, arguments as to its source, extent, and the associated duties it placed on the Government and others, varied between participants. Some echoed Cullen’s contention that the right was sourced in the doctrine of parliamentary sovereignty. As the Human Rights Commission explained, the Debate drew “forth numerous assertions with regard to parliamentary sovereignty … Parliament is sovereign in New Zealand and has the authority to enact legislation – in some instances removing causes of action – where it chooses”. A few asserted that the Government’s decision-making right afforded it the power to legislate to affect the courts and overrule court decisions. This notion was implicit in the absolute way Cullen described the rights conferred on Government under the doctrine of parliamentary sovereignty. For example, Berry reported that: “It is perfectly valid for Parliament to change the law if a court interprets a law in a way that Parliament had not intended”.

A number of individuals and groups, contended, as the Coalition did, that the Government was acting unconstitutionally, and its interference in the deliberations of the courts was undue political interference. For one individual, the important issue was “that the government is acting in an unethical manner through ignoring the conventions in place to protect the separation of powers and the operation of the legal system”. Similarly, Mitchell, for Ngāti Tama ki Te Tau Ihu Trust, alleged: “The Government’s proposal suggests inappropriate political interference, and there is a worrying implication that there is a measure of distrust by Government of the Maori Land Court itself”.

307 See discussion in Chapter Three, Sections 4.a and b, Chapter Five, Sections 3.b.i and 4, and Chapter Six, Section 2.b.
308 For discussion on Cullen’s contention, see Chapter Three, Section 4, Chapter Five, Sections 3.b.i and 4 and Chapter Six, Sections 2.a and 3.a.
309 Human Rights Commission, above n 200, at 3.
310 See discussion in Chapter Six, Section 2.a and 3.a.
311 Berry, above n 179. Phillip Temple concurred, stating that “It is entirely in order for the Government to propose new legislation if current legislative provisions are inadequate, or if existing law is an ass”: A letter to the editor of the ODT: “Letters to the Editor” Editorial, ODT (Dunedin, 5 August 2003) at 16.
312 For discussion on the Coalition’s contention, see Chapter Three, Section 5.a, Chapter Five, Section 3.b.i, and Chapter Six, Section 2.c and 3.a.
313 Quoted in Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [2.42].
314 Maui John Mitchell, Ngāti Tama Manawhenua ki Te Tau Ihu Trust “Rejoinders to the Crown’s Position” (rejoinder presented to a Foreshore and Seabed Consultation Hui, place unspecified, undated) at 5 (written copy on file with author). Additionally Ngāti Ranginui Iwi Society submitted “It is absolutely contrary to the principles underlying our legal system for the Crown to legislate when there are cases before the Court that are still to be decided. Such behaviour will only lead to increased
Some believed the Government’s decision-making powers entitled them it to
determine the nature and extent of all rights in the realm.\textsuperscript{315} For example, ACT argued
that all users of the resource “need clear and transferable property rights particularly
those associated with activities such as aquaculture, prospecting, mining and marinas.
Parliament, not the Courts, must determine the type and extent of such property
rights”.\textsuperscript{316}

But many Māori, and some Pākehā, felt it was inappropriate for the Government to
determine the nature of Māori rights in the zone. They believed the Government’s
decision-making powers did not extend to determining Māori rights. As Howard, for
the Northland Urban Rural Mission, submitted, Manawhenua rights “are defined by
those hapu and iwi themselves; no other iwi or people have the right to extinguish
them”.\textsuperscript{317} The Women's International League for Peace and Freedom argued:\textsuperscript{318}

\begin{quote}
It is simply not acceptable for one culture to place restrictive definitions upon
another through statute or regulation - and it is contrary to international human
rights jurisprudence relating to the human rights and fundamental freedoms of
indigenous peoples.
\end{quote}

While some acknowledged that the Government possessed the power to overrule the
courts and define the nature of Māori right in the zone, they questioned whether it
should do so in this instance. Ōraka Aparima Rūnaka made this argument:\textsuperscript{319}

\begin{quote}
We acknowledge that in accordance with the doctrine of Parliamentary
Sovereignty the Crown may have the power to legislate to extinguish the rights of
Māori (or any other group for that matter), to prevent them from having
meaningful access to the Courts, and to arbitrarily define the scope of the
remaining ‘rights’. Māori have suffered from a litany of such unjust Acts of
Parliament since 1840. The question for this Select Committee and ultimately for
Parliament is whether the exercise of such draconian powers is warranted.
\end{quote}

\textsuperscript{315} For discussion on this power, see Chapter Three, Section 4.b and Chapter Five, Section 3.b.i.
\textsuperscript{316} ACT New Zealand “Everyone Must Be Heard on Foreshore”, above n 17; ACT New Zealand
“Foreshore And Seabed – The Debate Continues...”, above n 17.
\textsuperscript{317} Howard, above n 207.
\textsuperscript{318} Women’s International League for Peace and Freedom, above n 109, at 1.
Both Māori and Pākehā asserted that the Government’s decision-making powers were fettered. One such fetter was native title. For instance, an individual submitted that the Crown is fiduciary of the sea and that trusteeship is subject to the native title. It is not empowered to make different, restrict or extinguish our ownership or entitlement of our rights, or to redefine whakapapa. Rather, the Crown is charged to protect our rights.

Others argued that the rights guaranteed under the Treaty fettered the Government’s powers. For example, Daley argued:

Parliamentary sovereignty must therefore be qualified by the responsibility to make sure that Maori have absolute authority (tino rangatiratanga) over the things they care about (their taonga). The Principles of the Treaty, as defined by David Lange in 1989, noted that parliamentary sovereignty ‘is qualified by the promise to accord the Maori interests specified in the second Article an appropriate priority’.

Whilst this argument is similar to that asserted in the Paeroa Declaration, it does not go so far. It recognises that Manawhenua possess rangatiratanga over the zone, but this does not remove the power of Government to determine the law over the zone, rather it restrains the exercise of this power.

Some claimed that in exercising its power the Government was under a duty to act in accordance with the principles of good governance. The Human Rights Commission summed this up as Parliament’s responsibility to take into account constitutional conventions, international law, the Treaty and the NZBORA. Moreover, the Commission stated: “It is in the public interest for any exercise of Parliamentary

320 Quoted in Carpinter and Department of the Prime Minister and Cabinet, above n 8, at [8.8.1].
322 In its report, the Tribunal explained such a duty as [Waitangi Tribunal Report on the Crown’s Foreshore and Seabed Policy (Legislation Direct, Wellington, 2004) at xiii]: … that governments in New Zealand want to be good governments, whose actions although carried by power are mitigated by fairness. Fairness is the value that underlies the norms of conduct with which good governments conform – legal norms, international human rights norms, and, in the New Zealand context, Treaty norms. We think that even though governments are driven by the need to make decisions that (ultimately) are popular, New Zealand governments certainly want their decisions to be coloured by fairness.
323 Human Rights Commission, above n 177, at 10.
sovereignty to strive to accord with international and domestic human rights standards”. Others went further and maintained that the Government had duties under international law. Consequently, the Government was under a duty to provide “effective domestic remedies for breaches of the rights articulated in these documents”.

Claimant submissions to the Tribunal held that the Crown was under a duty to act in good faith towards its Treaty Partner. Others contended the Treaty articles imposed duties. Daley articulated this view best:

The Treaty gave the Crown the right to govern (in Article One) and at the same time the Crown accepted the responsibility (in Article Two) to ensure that Maori retained tino rangatiratanga over their taonga (which include the foreshore and seabed) and the Crown accepted the responsibility (in Article Three) to ensure that Maori had equal rights. The government is bound to fulfil these responsibilities, for as long as it retains the right to govern.

Some contended it was the responsibility of the Government to correctly inform the public of the issues in the Debate. Adrienne Ross and Janine Ogg felt the Government had a “responsibility to provide the public, especially the dominant Pakeha majority, with balanced and unbiased information about the history of this land and the possibilities for a Te Tiriti based future”.

3.f. Manawhenua decision-making rights

Like the signatories to the Paeroa Declaration, many Manawhenua asserted that they were bearers of decision-making rights, or powers, over the foreshore and seabed. The iwi signatories to the Tii Mangonui Declaration expressly claimed this in art 6:

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324 Ibid, paraphrasing Philip Joseph Constitutional and Administrative Law in New Zealand (2nd ed, Brookers, Wellington, 2001) at 495-506. See also at 291-292.
325 Te Ope Mana a Tai argued that Māori possessed rights protected in international standards and conventions, such as the UDHR, the ICERD and the International Covenant on Civil and Political Rights (adopted 21 December 1965, entered into force 4 January 1969), which were breached in the Bill: Te Ope Mana a Tai, above n 103, at 63.
326 Ibid.
327 See for example Ertel, above n 93, at [34].
328 Daley, above n 321, at [2].
329 Ross and Ogg, above n 275.
330 For discussion on the Paeroa signatories’ assertion, see Chapter Three, Sections 2.a and b, Chapter Five, Sections 3.a.iii, 3.a.iv.2, 3 and 4 and Chapter Six, Sections 2.a, 2.b and 3.a.
“The final decision on the foreshore and seabed rests exclusively with whanau and hapu”.331 It can therefore be argued that, like the Paeroa Declaration signatories, the iwi representatives here viewed the decision-making right of Manawhenua as absolute and covered the right to make decisions affecting everyone’s rights to the zone.332 Other Māori groups and individuals also asserted this contention. For example, Te Hunga Roia o Aotearoa submitted that at international law, customary rights include “the right of iwi and hapu to regulate and manage their ancestral foreshore and seabed territories”.333 Additionally, some Pākehā groups and individuals supported the claim of Manawhenua. For instance, Owen submitted, “Iwi and Hapu rights included the rights of regulation, although the Crown does not recognise this”.334

Throughout the data sample, different people and groups founded these rights in all the sources to which the signatories alluded: that is, tikanga,335 the Treaty,336 spiritual and ancestral connections;337 and Kingsbury’s categories.338 Thus, like the signatories, others claimed this right as a fundamental one.

332 For discussion on the Paeroa Declaration signatories’ claim, see Chapter Five, Section 4 and Chapter Six, Sections 2.a and 3.a.
333 Te Hunga Roia o Aotearoa, above n 136, at [2.2].
334 Owen, above n 111.
335 For example see Powell and Ruakere, above n 194, at [12]: “Iwi/hapu hold the coastal marine area, including the foreshore and seabed, in terms of tikanga, specifically, and depending upon the tikanga of particular iwi/hapu, through mana whenua, mana moana and mana tupuna”.
336 See for example Daley, above n 147: “The Treaty says very clearly that Maori are guaranteed absolute authority and control over the foreshores and seabeds, which are their ‘taonga’”.
337 Most notably the categories of self-determination claims, including self-determination rights recognised in international law, and the historic sovereign status of Māori. See for example West, above n 77, at 3. ‘Io’ is believed by some to be the supreme being: That customary tūpuna rights were “obtained from IO and our tupuna and practiced by usage of time and presence”; Te Runanga-a-Iwi o Ngati Kahu Charitable Trust, above n 142, at [2]:

To Ngati Kahu, mana whenua and mana moana include the whanau’s or the hapu’s authority over its lands, seas, and all its resources – its possessions. The whenua of Ngati Kahu, which includes the foreshore and seabed, has been passed down to the whanau and hapu of Ngati Kahu as whenua tuku iho according to the tikanga of our ancestors.

‘Whenua tuku iho’ is land handed down from earlier generations.
338 For example, the Foreshore and Seabed Group in their report highlighted that submissions were made about how the Bill breached the Māori right to “self-determination as recognised by article 1 of the ICCPR or otherwise”: Foreshore and Seabed Group, above n 22, intro at 11. While those who expressly affirmed the Paeroa Declaration may also have been calling for their rights as historic sovereign status to be restored, only Te Rūnanga-ā-Iwi o Ngāti Kahu seemed to articulate such a claim: Te Rūnanga-ā-Iwi o Ngāti Kahu, above n 141, at slide 21. After detailing the dismal track record of central and local government in protecting the foreshore and seabed of Ngāti Kahu, [slides 6-20] the Rūnanga-ā-Iwi stated [at slide 21]:

Ngāti Kahu has therefore concluded that all decisions relating to the use and management of our foreshores and seabed must now be made by the whanau and hapu with mana whenua/mana moana.

For discussion on Kingsbury’s structures, see Chapter Five, Sections 3.a.iv.1-4.
The Coalition also recognised the decision-making rights of Manawhenua when they proposed the Crown sit down with individual Manawhenua to work out a solution at the local level, thus acknowledging that Manawhenua had the authority to determine “Māori beliefs and expectations”. Similarly, Dean Stebbing, the chairman of Te Kotahitanga o Te Arawa Fisheries Trust Board, contended that Te Arawa were guaranteed rights under art 2 of the Treaty. Therefore, the Crown was “under a duty to engage and negotiate with Te Arawa in relation to the Crown Proposals”.

Many people, both Māori and Pākehā, contended that Manawhenua had the right to determine their rights in the foreshore and seabed. As the Manaiapoto Māori Trust Board submitted: “We believe that the nature and extent of Iwi and Hapū rights and obligations to the foreshore and sebed are aspects of Tino Rangatiratanga which only Iwi and Hapū have the right to define”.

Many of those who asserted Manawhenua possessed decision-making powers claimed these were burdened by the obligation of kaitiakitanga. This argument was implicit in the Paeroa Declaration. Thus, where Manawhenua possessed decision-making powers, they were under a correlative liability to ensure they exercised this power in relation to their responsibilities under kaitiakitanga. Moreover, Manawhenua were under a duty to maintain the resource for future generations as future generations have the right, or Hohfeldian claim-right, to receive the land in good condition. This obligation of kaitiakitanga continued today. As several Northland Manawhenua explained:

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339 Treaty Tribes Coalition, above n 84, at 14. For further discussion, see Chapter Three, Section 5.a, and Chapter Six, Sections 2.b and 3.c.
340 Dean Stebbing, Chairman of Te Kotahitanga o Te Arawa Fisheries Trust Board and the chairman of Te Arawa Māori Trust Board “Submission by Te Kotahitanga o Te Arawa Fisheries Trust Board and the Te Arawa Māori Trust Board on the Crown Foreshore and Seabed Proposals” (3 October 2003) at [13] (on file with author).
341 Manaiapoto Maori Trust Board “Statement of Objections to the Foreshore Seabed Debate 2003” (undated) at 2 (on file with author).
342 See discussion in Chapter Three, Section 2.a, Chapter Five, Section 3.a.iii and 3.a.iv.4 and Chapter Six, Section 3.b.
343 See discussion in Chapter Six, Section 3.b. Non-Māori also recognised kaitiakitanga and the obligations it placed on Māori. As Ward explained [Ward, above n 219, at 11]: Before the pakeha arrived here, Maori saw themselves as charged with the sacred duty and responsibility for kaitiakitanga – the whānau and hapū are responsible for the control, use, care and management of the environment to ensure that all of its life-sustaining powers are passed onto future generations intact.
344 Te Runanga o Ngai Takoto and Ngati Kuri and others, above n 49, at slide 4. The Manawhenua were: Te Rūnanga o Ngāi Takoto and Ngāti Kuri, Te Rūnanga-ā-Iwi o Ngāti Kahu, Te Rūnanga-a-Iwi
We are responsible for controlling, using and managing our lands in a manner that ensures that they can be passed on to following generations with all their life-sustaining powers in tact (kaitiakitanga).

Many argued these obligations would never cease, although they may be supported or inhibited through the actions of the Crown. To the Haranui Marae o Takanini, the Crown could persist in frustrating their ability to carry out their kaitiaki obligations and responsibilities, or it could assist and enable Manawhenua. Either way, they contended, their obligations and responsibilities would not change, “only the ease with which we are able to exercise them”.

Leana, a Lawyer from Palmerston North, raised another obligation. She said Māori decision makers had obligations under the Treaty. For her if Māori exclude others from the resource for an “abhorrent reason”, then “we’re breaching the Treaty. … So we have obligations under the Treaty to protect the interests and the access of all New Zealanders to the foreshore”.

4. Conclusion

This chapter has found that during the Debate there were some additional arguments made that were not reflected in the key documents studied earlier. For example: that Māori do not have any legitimate claim to separate rights in the foreshore and seabed; that Manawhenua possess Tūpuna title, which encompasses ownership but goes further than ownership entails; that under tikanga there is no concept of ownership in a European sense, only duties of kaitiakitanga; that the retention of property rights are fundamental to Māori identity and culture; that the same rules are not being applied to coastal and interior land under water; and that compensation should not put Māori in a preferential position. These, however, were arguments made by only some participants. And in some instances, such as with regard to the claim that tikanga cannot recognise ownership, they were heavily overshadowed by arguments to the contrary that were represented in the key documents. Therefore, the existence of these

345 Quoted in ibid.
346 Quoted in Showtime, above n 61, at 74mins 35secs approx.
new arguments does not negate the claim that the key documents represent the major equality and rights arguments expressed during the Debate.

Other expressions made in the data sample also seemed at first glance to be new arguments. For example, the claim that to recognise Māori rights resulted in apartheid, and the call that the Government was ‘shifting the goal posts’ and ‘changing the rules of the game’. However, as has been shown, these claims were simply articulations of similar concepts to those deployed in the key documents using new language and metaphors.

Importantly, therefore, this chapter has highlighted that the arguments captured in key documents do represent, to a credible extent, the central positions taken in the Debate. The central positions on equality were: formal individual equality; equality of consideration; equal application of the law; equal access to the law; and what I term equality of authority. These theories overlap and share similar philosophical underpinnings. In particular, all five were used by participants in the Debate in some sense as partaking of the notion of formal equality. Despite their overlap, however, they are able to be distinguished and can be described as sitting along a spectrum.

As the key documents, and the wider empirical data, showed, the central positions on rights tended to overlap more than the equality claims, and therefore the spectrum metaphor was not useful to adequately analyse the rights arguments made throughout the Debate. However, the majority of the rights claims fell into three prominent areas: property rights; procedural rights; and decision-making rights. Claims for property rights ranged from no legitimate Māori rights, to legitimate Māori use rights, to full ownership rights, and included Hohfeldian claim-rights, liberties and powers. Such claims were made in both the fundamental and ordinary sense. There were also arguments for ordinary property rights of others in the zone. The procedural right claims were mainly variations on the right to be heard in the courts. Almost always this claim of right was asserted as fundamental, and it was often expressed as a claim-right, which placed the Government under a duty to ensure it remained unimpeded. Decision-making rights, or Hohfeldian powers, were also widely claimed. Different participants in the Debate argued that these powers rightfully rested with the
Government, the courts and Manawhenua. Such claims were often stated in absolute terms, as fundamental rights.

In the wider Debate, a wide range of different parties, both Māori and Pākehā, took the above positions on equality and rights. Therefore, positions that might be identified with the Māori authors of key documents (such as the signatories to the Paeroa Declaration) cannot be exclusively identified with the members of any ethnic group. This explicitly supports the claim made in the introduction, that the Debate is more than simply one between two opposed parties, Māori and Pākehā. Moreover, the participants in the Debate were engaged in a complex interplay of these arguments, with many utilising several to support their contentions. The chapter has also shown that those participating in the Debate used legal and political arguments interchangeably. The Debate therefore reflects the broader interplay between law and politics.

It has become apparent throughout the chapters of this thesis that those involved in the Debate were using similar terms to express a complex array of equality arguments, claims of right, and arguments about the sources of rights to the foreshore and seabed. This often meant that people used the same terminology but were talking past one another. This in turn fuelled the Debate and created greater misunderstanding.

It is evident that a way forward is needed that gives fair consideration to the different claims of right, and does not leave one group of people feeling subjugated and subject to discrimination. The next chapter considers that way forward.
Chapter Eight: Foundations for Settlement

The current [foreshore and seabed] debate is unfinished business of a hugely symbolic kind. The sea beach, the first meeting place of settlers and Maori, remains one of the final places where the Treaty relationship is being sorted out. In 2004 the country is being sent back to 1840 to reconsider its origins. The solution will say much about the development and maturity of the relationship between settlers and Maori in the intervening 164 years.¹

The Labour-led Coalition Government’s solution in 2004 was to pass the Foreshore and Seabed Act 2004 (the FSA). This solution failed to quieten the Foreshore and Seabed Debate, and, as a result, in 2010, the country is in the process of reconsidering a tenable solution. This chapter examines whether the conceptual positions of the equality and rights theories espoused during the Debate are sufficiently close to allow one to draw the outlines of this potential solution.

1. Introduction

This thesis has demonstrated that the Debate involved a complex interplay of equality and rights arguments. It has exposed the major equality and rights claims made, represented in the four key documents, and revealed their theoretical underpinnings. It has pulled apart the terminology used, such as claims of ‘one law for all’, to bring to light the equality and rights claims beneath, achieving the aim of clarifying the participants’ meaning and intention. In addition, it has examined whether the equality claims made supported the notion of separate Māori rights to the foreshore and seabed, and considered the sources participants relied on to argue for the legitimacy of these rights. It has debunked the perception that the Debate was about opposing Māori and Pākehā views of equality and rights, by showing that both Māori and Pākehā participants used a wide range of equality and rights arguments.

Having exposed these different equality and rights claims, this chapter must now answer the question “where to from here?” As has been shown, the Labour-led Government’s solution to the Debate was to pass the FSA. The empirical data

surveyed in this thesis showed that many were disgruntled with the Government’s solution because it proceeded on the basis of the Government’s preferred equality theory: equal consideration of interests. Some criticised this theory as unfair to Māori as a minority.\textsuperscript{2} Others simply did not believe the Government was equally considering all relevant interests.\textsuperscript{3} In addition, the Act codified the Labour-led Government’s view of Māori rights,\textsuperscript{4} by extinguishing rights based on other sources and placing what some perceived to be fundamental rights\textsuperscript{5} within the ordinary confines of state law, thus making them vulnerable to amendment. As a result, it has been criticised both domestically and internationally for discriminating against Māori,\textsuperscript{6} while at the same time others viewed any codification of Māori rights as affording one ethnic group new and special privileges above other citizens.\textsuperscript{7}

This dissent with the Government’s solution shows the Debate is destined to continue unless a greater range of viewpoints can be accommodated. It is precisely because many participants’ views of equality and rights were not addressed in the FSA that the Debate has persisted and is, in 2010, again at the forefront of public awareness. This is complicated by the fact that people still do not understand each other’s points of view, or do not wish to understand, and therefore they continue to talk past each other using the same terminology to express different concepts.

In order to move forward as a country, greater understanding must be established concerning these equality and rights claims. A compromise must be established that can attract a sufficient political consensus to permit a tolerably stable, suitably supported solution to emerge.

\textsuperscript{2} See Chapter Seven, Section 2.b.
\textsuperscript{3} See ibid.
\textsuperscript{4} See Chapter Two, Sections 13 and 15.
\textsuperscript{5} See Chapter Seven, Section 3.a, c and f.
\textsuperscript{6} For examples of domestic criticism of the discriminatory nature of the Foreshore and Seabed Act 2004 (FSA) see discussion around the Treaty Tribes Coalition’s arguments at the United Nations in Chapter Two, Section 16.a and Chapter Three, Section 5. For examples of international criticism, see discussion around the Reports of the Committee on the Elimination of Racial Discriminations and the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples: Chapter Two, Section 16, Chapter Five, Section 3.a.iv.1.
\textsuperscript{7} See Donald Brash, Leader of the Opposition National Party “Nationhood” (State of the Nation Speech to the Orewa Rotary Club, Orewa, 27 January 2004) at 13. For discussion on Don Brash’s “Nationhood” Speech, see Chapter Three, Section 3. For discussion of those in the empirical data survey who felt Māori were being distinguished purely on race and unfairly privileged in Government policy in Chapter Seven, Section 2.a. The full text of Brash’s Speech is reproduced in Appendix Three.
This chapter, therefore, will identify a zone for potential compromise, which could act as the foundation for a political solution that may quieten the Debate for a reasonable period of time. In other words, I will suggest a possible creative synthesis of the different equality and rights positions. The synthesis will, however, be selective in the elements retained for a final solution. The aim is not necessarily to find a permanent solution, as that may be unattainable. Ideas of equality and rights are not static; they are apt to change, as are those who argue for them. Consequently, in the future, another solution may emerge. Moreover, as there is no real finality or certainty in political life, few political solutions are permanent. It is therefore realistic to seek a solution that most Debate participants can live with at the present time, but one that does not preclude change in the future.

In order to identify such a zone, substantive concession is required between the different conceptual notions of equality and rights, to reach a position where the notions are sufficiently close to enable the outlines of a potential solution to be deduced. While any solution may require the holders of such notions to trade off the less essential aspects of their claims, in order to remain viable it would have to retain what is most essential to them.

In identifying this zone for potential compromise, this chapter will also identify equality and rights positions outside this zone. For example, it is unlikely that full equality of authority, which the signatories to the Paeroa Declaration advocated, will receive consensus and be reflected in the solution. However, as this chapter will show, since complete consensus is not likely, or necessary, in political life, not all equality and rights claims need to be reflected in the solution. But this would not preclude further movement in the direction of Manawhenua authority, and even sovereignty; it may even make those movements more likely. But, as this chapter will show, those elements may not be vital to a current settlement, and might even preclude it, as they will not attract sufficient consensus.

Noticeably, since the new Government took office in 2008, the Debate has continued, but in a very different form. The third and fourth sections of this chapter therefore will examine the continuance of the Debate in late 2009 and 2010, and will scrutinise the National-led Coalition Government’s Marine and Coastal Area (Takutai Moana) Bill.
These sections will analyse the process and structure of the new legislation in light of the zone of potential compromise that I describe, upon which a foreshore and seabed settlement could be reached, and upon which other like settlements could occur. The foreshore and seabed is not the only resource in relation to which New Zealanders are debating the legitimacy of Māori rights. Similar debates are occurring regarding rights to fresh water and national parks. The equality and rights claims revealed in this thesis are being repeated. The aim is not to prevent such debates, which can lead to change and greater recognition of rights, but to promote more informed and less divisive debate. Robust debate over Māori rights to the nation’s resources is bound to occur, and should occur, but it could be better informed and less divisive.

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8 Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1) (MCA Bill). [An addendum: Between the time of submission in December 2010, and the publication of this thesis in September 2011, the MCA Bill was in fact passed into law. On 22 March 2011, the Bill passed its third reading, it gained royal assent on 31 March, and as of 1 April now stands as the law on the foreshore and seabed: Marine and Coastal Area (Takutai Moana) Act 2011 (MCA Act), s 2. The legislation was enacted in an almost identical form to the Bill. Therefore, for ease of reference to the applicable law, this chapter has been amended and differs slightly from its original form. When clauses of the Bill are cited, the relevant sections of the Act have been inserted in brackets. Where variation does occur, this is also noted].

9 The following are just a few examples, and are not meant as an exhaustive list. In the debate surrounding rights to freshwater, Manawhenua have claimed that they have property and decision-making rights over fresh water, and for some these property rights equated to ownership: Jon Stokes “Tribes demand control of water” Weekend Herald (Auckland, 21 October 2006) at A5. For others it did not: Sacha McMeeking “Background Paper 6: freshwater management” (2010) Iwi Chairs Forum 33 at 39 <http://www.iwichairs.maori.nz/Kaupapa/Water/>. Again these rights were sourced in either tikanga, art 2 of the Treaty, or the common law doctrine of native title: Dean Stebbing “Water: A Maori Perspective” (powerpoint presented to the MATA – An Eye to the Future: Water Symposium, Wellington, 6 March 2010) at slide 8. The Government has agreed that Māori do have some rights in the governance of freshwater, but it has stopped short of recognising legitimate ownership rights: Jacinta Ruru “Indigenous Peoples’ and freshwater: rights to govern?” (2009) Resource Management Journal 10; Juliet Rowan “Key offers Maori a say on water” ODT (Dunedin, 15 December 2008) at Front Page. The right of Māori to be heard has also been expressed: McMeeking at 36. Moreover, it can be inferred that Mark Solomon, Chairman of Te Rūnanga o Ngāi Tahu, called for equal application of the law, when he claimed that Māori property rights, sourced in the Treaty, should be treated the same as any other water property right to be recognised: “No matter what the Government are saying, they are moving towards water becoming tradeable, [sic] which creates a property right. If that is the case iwi have a right under the Treaty as tangata whenua”: Quoted in Stokes at A5. In the debate surrounding Māori rights to national parks, to use the debate over Te Urewera as an example, there was agreement amongst several groups that Tūhoe held ownership rights. These groups included Park user groups, Territorial Local Authorities and governmental departments engaged in the negotiations. However, Tūhoe argued that the Government backed out due to political pressure from other New Zealanders: Tamati Kruger “Ngai Tuhoe Disappointed at Loss of Nerve” (public statement, 11 May 2010). It can therefore be argued that the Government was applying equal consideration in an utilitarian manner, which weighed against Tuhoe as a minority.
2. The foundations for greater compromise

This section seeks to determine if there is sufficient proximity between matters of equality and rights among participants in the Debate to provide the foundation for a legislative solution. As this thesis has demonstrated, the equality and rights arguments participants employed during the Debate were not wholly incompatible. While some theories sit absolutely opposed to one another, even they may share similarities with other theories. For example, the claim that Māori may possess use rights shares similarities with the claim that Manawhenua possess the full range of property rights in the zone as both recognise Māori have significant rights. Moreover, with the equality and rights claims that sit nearer the centre, much overlap occurs. For example, the theories of equal consideration of interests, equal application of the law, and equal access to the law, are all procedural equality claims that share many similar attributes.\(^\text{10}\)

It is in the centre, therefore, that we find a basis for some compromise between the different positions, and there a way forward can be found.

2.a. The zone for potential compromise on matters of equality

First and foremost, those expressing equality claims during the Debate all accepted that likes should be treated alike.\(^\text{11}\) This is important, because although the five major forms of equality argument discussed in this thesis differ substantively as to who or what is alike, and what equal treatment entails, there is consensus on this formal point. Seen in this light, even those arguing for equality of authority are not arguing for unequal treatment between Māori and Pākehā individuals. Instead they are arguing for the proposition that Manawhenua and the Crown are alike as collectives, and so should be treated as equals.\(^\text{12}\)

Unlike the others though, those who advocated equality of authority did not argue that there should be equal treatment of like entities in the foreshore and seabed or to

\(^{10}\) See Chapter Four, Section 4.
\(^{11}\) For discussion on the notion of formal equality, see Chapter Four, Section 2.
\(^{12}\) For discussion on equality of authority, see Chapter Four, Section 8.
decisions made over it. They asserted Manawhenua were the ultimate authority in the zone. Moreover, those expressing the other equality theories all recognised Crown sovereignty over the resource, albeit to differing degrees. The underlying conceptions of these theories are therefore close enough to determine that any stable solution needs to accommodate Crown sovereignty. Thus, for those who advocated equality of authority to have any Manawhenua authority recognised in the zone, they may have to concede Crown sovereignty, and instead insist upon co-management between Crown institutions and Manawhenua. This would bring them in line with the other positions as they would hold equal treatment of like entities, that is the Crown, local government, and local Manawhenua, while still providing for a Manawhenua decision-making role. It is unlikely, however, that such a solution would suit those who favoured equality of authority in the strong sense, such as those who advocated absolute Manawhenua sovereignty over the foreshore and seabed, and it would most definitely not appease those who challenged Crown sovereignty by making claims to Māori sovereignty beyond that sphere.

There are also sufficiently close conceptual notions among three of the equality theories to see that equal treatment should take place on a procedural level. Participants who expressed the equality claims that sit near the middle of the ‘Equality Spectrum’, equal consideration of interests, equal application of the law and equal access to the law, all called for equality of process: that is, for an equal chance for all those whose interests and rights in the foreshore and seabed are affected to participate in a fair procedure to determine the outcome. In this sense also, they subscribed to the rule of law principle that likes should be treated alike.

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13 Those who argued for formal equality between individuals argued Māori and Pākehā were like entities who warranted equal rights to the foreshore and seabed. Those who argued for equal application of, and equal access to, the law also argued Māori and Pākehā were like entities who should have equal rights to adjudication of their property rights in the zone. And those who argued for equal consideration of interests argued that the interests of those similarly situated were like entities that deserved equal weight in the process of governmental decisions over the resource. See Chapter Three, Sections 3.a and b, 4.b, and 5.a and b, Chapter Four, Sections 3, 5, 6 and 7, and Chapter Seven, Sections 2.a, b, c, and d.

14 See Chapter Three, Sections 2.a and b, Chapter Four, Section 8 and Chapter Seven, Section 2.e.

15 See Chapter Three, Sections 3.a, 4 and 5.c, Chapter Five, Section 3.b.i, and Chapter Seven, Section 3.e.

16 For discussion on the possible Māori sovereignty claims made during the Debate, see Chapter Three, Section 2.a and b, Chapter Four, Section 8 and Chapter Seven, Section 2.e.

17 See Chapter Four, Section 4.a, and Chapter Seven, Sections 2.b, c and d.

18 For discussion on the notion of procedural equality as a feature of the rule of law, see Chapter Four, Section 4.a.iii.
Procedural equality would therefore have sufficient support to be part of a stable solution to the Debate. This is so, not only because those who expressed three out of five equality theories called for it, but because it was supported by both Māori and non-Māori, and it fits within Aotearoa/New Zealand’s current constitutional arrangements, promoting features of the rule of law and upholding the sovereignty of Parliament.

A solution that incorporates procedural equality as an equal treatment ideal cannot, however, accommodate the equality theories that sit at the far ends of the ‘Equality Spectrum’. This is because procedural equality calls for a fair, open forum in which to conduct a full inquiry into historical practices and past exercise of rights in the foreshore and seabed. It might not therefore accommodate those who express a version of equality of authority that calls for Manawhenua to be the sole decision-makers in the zone. Their decision-making processes might not be considered open, on an equal basis, to all those who assert rights and interests in the zone. Moreover, since procedural equality does not require equality of outcome, fair process alone is not sufficient for those who argue for a strong version of formal equality between individuals, which requires that all individuals have exactly the same substantive rights, because it cannot be guaranteed that will be the outcome of the process. Nevertheless, there was considerable consensus among participants in the Debate that the courts, as a forum, should be open to Māori, on fair terms, to permit them to make claims of customary right.

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19 It was the overarching equality claim of the Labour Party and the Treaty Tribes Coalition, see Chapter Four, Sections 4, 5, 6, and 7. Many in the empirical data sample also expressed it, see Chapter Seven, Sections 2.b, c, and d.
20 Such as the aspects of the rule of law that require likes to be treated alike before the law and that there be no illegitimate or arbitrary distinctions embedded in legal rules. See Chapter Four, Section 4.a.iii.
21 Michael Cullen and the Treaty Tribes Coalition, who were all proponents of procedural equality, all upheld the notion of parliamentary sovereignty: Cullen, Michael “Challenge to find balance on issue of foreshore rights” Opinion, ODT (Dunedin, 18 February 2004) at 19; Treaty Tribes Coalition One Rule of Law for All New Zealanders: A Submission by the Treaty Tribes Coalition on the Foreshore & Seabed Issue (Treaty Tribes Coalition, Christchurch, 2004). See Chapter Three, Sections 4 and 5. For a full text of Cullen’s Article and the Coalition’s Submission see Appendices Four and Five.
22 See Chapter Four, Section 4.a.
23 See Chapter Four, Section 8.
24 See Chapter Four, Section 4.a.
25 See Chapter Four, Section 3.
Moreover, even though formal equality requires likes to be treated alike, there was widespread recognition that different treatment of Māori could be justified, in some respects, in this case. Many were prepared to distinguish the position of Māori, as both collectives and individuals, from the rest of the population: based on the indigeneity of Māori; Māori spiritual and ancestral connections to the zone; the right against discrimination (Benedict Kingsbury’s first structure); Māori self-determination rights (Kingsbury’s third structure); the status of Māori as historic sovereigns (Kingsbury’s fourth structure); and the status of Māori as indigenous peoples (Kingsbury’s fifth structure). On one or more of these foundations, many distinguished Māori as legitimate property holders, with rights, sourced in the Treaty, the common law doctrine of native title, or tikanga, that entitled them to different treatment.

In addition, it is clear there was agreement among many participants that the basis for Māori rights claims was not ethnicity per se but prior connection and use. These were inherited property rights. For many, the recognition of rights based on such foundations was not an illegitimate form of discrimination, or contrary to formal notions of equality. Don Brash’s notion of formal equality, however, was of a different kind. He dismissed the indigenous status of Māori as a relevant justification for treating Māori differently. Those who subscribed strongly to formal equality between individuals of this kind denied the legitimacy of rights sourced in the Treaty, the common law, and tikanga. For them, any separate recognition of Māori rights was discrimination based on race and unfairly privileged Māori over other citizens. Those who believed this could not therefore be fully accommodated in a solution that recognised Māori possessed inherited rights deserving of inclusion in the law. While

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26 For discussion on the notion of indigeneity as a foundation for claims of rights, see Chapter Five, Section 3.a.ii. For discussion of the notion of indigeneity as a foundation for claims of rights in the foreshore and seabed, see Chapter Five, Section 3.a.ii.2 and Chapter Seven, Section 3.a.i.
27 See Chapter Five, Section 3.a.iii and Chapter Seven, Section 3.a.
28 See Chapter Five, Section 3.a.iv.1 and Chapter Seven, Sections 3.a.i, 3.a.ii and 3.c.
29 See Chapter Five, Section 3.a.iv.2 and Chapter Seven, Sections 3.a.i and 3.f.
30 See Chapter Five, Section 3.a.iv.3 and Chapter Seven, Sections 3.f.
31 See Chapter Five, Section 3.a.iv.4 and Chapter Seven, Section 3.a.i and 3.c.
32 See Chapter Five, Section 4 and Chapter Seven, Section 3.a.i. ‘Tikanga’ are customs.
33 See Chapter Three, Section 3.b.i.
34 See Chapter Three, Section 3.a and b, Chapter Four, Section 3 and Chapter Seven, Section 2.a.
35 See Chapter Four, Section 3, Chapter Five, Section 3.a.i and Chapter Seven, Section 2.a.
there is a core of consensus evident in the range of arguments, therefore, some positions remain outside this core.

2.b. The content of Māori rights that might be recognised

Within the potential zone of compromise there was some consensus as to the form of property rights capable of recognition in the foreshore and seabed. Michael Cullen and the signatories to the Paeroa Declaration, as well as a range of participants surveyed in the empirical data, agreed that both individual and collective property use rights could be recognised.\(^{36}\) Examples of individual rights could be the right of all individuals to walk on the foreshore and the individual rights of specific Māori to collect seaweed. With regard to collective use rights, these pertained to specific Manawhenua groups. Arguments for these rights seem sufficiently close to accept that such rights could include the management of canoe landing areas or the right to be fully consulted by local government on future development in the zone. A solution that recognised these kinds of individual and communal rights to the foreshore and seabed might therefore have enough support to be viable. Nevertheless, this would not accommodate those who subscribe to the notion of formal equality between individuals as the paramount concern, and who do not recognise the legitimacy of collective rights.\(^{37}\)

Among those who did support greater recognition of Māori customary use rights in the zone, there was some consensus that those rights could take a range of forms. They could amount to claim-rights or liberties, which could potentially place others under duties or restrictions, and they could extend to limited powers to manage and control the resource, which would place others under liabilities to obey.\(^{38}\) For instance, the idea that Manawhenua should have a power to veto development might attract significant consensus, especially as it would not affect (and might even promote) access for all residents to the foreshore. There was considerable acceptance that it would be legitimate for others to be affected by the recognition of Māori

\(^{36}\) See Chapter Three, Sections 2.a and b, and 4.a and b, Chapter Five and Chapter Seven, Sections 3.a and 3.b.

\(^{37}\) Formal equality between individuals holds that equality is determined between individuals. See Chapter Three, Section 3.b.i and Chapter Four, Section 3.

\(^{38}\) See Chapter Five and Chapter Seven, Section 3.a. For more discussion on Wesley Newcomb Hohfeld’s categories, see Chapter Five, Section 2.
usufructuary or limited management rights. Consequently, a solution that accommodated Māori use rights, and would permit Māori to exercise limited powers affecting others, could find significant support, although the extent and breadth of the use and management rights would still be an issue.

2.c. The need for public access rights to be recognised

One element where very little compromise would need to occur was that the ability of the public to access the foreshore and seabed should remain.\textsuperscript{39} There was disagreement, however, as to the precise character of this interest. Some argued it was a claim-right, of all New Zealanders, which would place a duty on others to ensure access was available or not to interfere.\textsuperscript{40} Others claimed it was only a liberty, which could be overridden by others’ proprietary rights.\textsuperscript{41} For some, however, this interest was so fundamental that it deserved full protection, meaning the public should also possess an immunity from having their access altered.\textsuperscript{42}

Therefore, arguments for an unqualified form of property right, or exclusive title, for Māori, sit outside the zone of potential compromise because this type of right might deny public access. So, while there was some support, from both Māori and Pākehā, for Māori ownership over the resource, particularly from those advocating for the equality theories of equal protection of the law and equality of authority,\textsuperscript{43} for any solution to be accepted by the general public such title would have to be qualified by the right of public access.

Moreover, generous access would have to be guaranteed. In a legislative solution this would involve codifying public access, as was done in s 7 of the FSA. This would require compromise from those who argued Māori possessed ownership rights.\textsuperscript{44} In order to retain the other claim-rights, liberties, powers and immunities associated with ownership, they would have to consent to the duty not to exercise these in a way that would restrict or impede public access. This, however, does not seem to be a major

\textsuperscript{39} See Chapter Five, Section 3.b.iii and Chapter Seven Section 3.b.
\textsuperscript{40} See Chapter Seven, Section 3.b.
\textsuperscript{41} See Chapter Five, Section 3.b.iii and Chapter Seven, Section 3.a.
\textsuperscript{42} See Chapter Seven, Section 3.b.
\textsuperscript{43} See Chapter Five and Chapter Seven, Section 3.a.
\textsuperscript{44} For examples of these arguments, see Chapter Seven, Section 3.a.
compromise, as throughout the Debate, Māori, and Manawhenua in particular, argued that Manawhenua had always enabled access to the area, barring a few exceptions such as rāhui, and they would continue to allow it. Nevertheless, such a solution would not satisfy those who argued that Māori ownership should be unqualified in this sense.

It is unlikely that a legislative right to access would be unqualified, however. As with any ordinary property right, access could be prohibited by limitations authorised under other enactments, for example, under the Resource Management Act 1991 (RMA). Moreover, amongst those who advocated for Māori rights there was widespread consensus that some Māori rights may justifiably affect others’ interests in the zone. Thus, a compromise might be drawn where the recognition of certain Māori rights may also place some limitations on public access. An example could be prohibited access over the foreshore where a rāhui is declared. This would require an acceptance by the general public that Māori spiritual reasons were a justifiable limit on the right of public access. Consequently this would not find favour with those who viewed such reasons as illegitimate.

2.d. The distribution of authority that would be required

It is likely that any solution reached would require power-sharing arrangements between Parliament, central government, local councils and Manawhenua. As we have seen, different participants in the Debate argued that Parliament, the courts and Manawhenua respectively should hold decision-making rights, or powers, over the foreshore and seabed. A solution that would attract a sufficient consensus may therefore require that all three possess discrete zones of power.

45 Embargo, quarantine, ban.
46 See arguments made in Chapter Seven, Section 3.b.
47 See arguments made in Chapter Seven, Sections 3.a and f.
48 Scared places. ‘Wāhi tapu’ is defined by s 2 of the Historic Places Act 1993 as: “a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense”.
49 For arguments that Parliament hold this right, see Chapter Three, Section 4.b, Chapter Five, Section 3.b.i and Chapter Seven, Sections 2.b and 3.c. For arguments that the courts hold this right, see Chapter Three, Sections 5.a and b, and Chapter Seven, Sections 2.d and 3.d. For arguments that Manawhenua hold this right see Chapter Three, Section 2.a and b, Chapter Five, Sections 3.a.iii, 3.a.iv.2, 3 and 4, Chapter Six, Sections 2.a, 2.b, 3.a and 3.c. and Chapter Seven, Sections 2.e and 3.f.
What could such an arrangement look like? Perhaps the Treaty could be used as a guide. The principle of partnership imbedded in it\textsuperscript{50} could help establish power sharing between the Crown, through its political and judicial institutions, and Manawhenua. This could be achieved by incorporating the principles of the Treaty into the legislation. For example, a section that requires those exercising power over the zone to take into account the principles of the Treaty could be enacted.\textsuperscript{51} Thus, Crown institutions making decisions over the zone would have to take into account the principle of partnership, which would require them to act reasonably and in good faith towards Manawhenua of the area.\textsuperscript{52}

Second, local councils could be required by statute to share some power with Manawhenua. This arrangement could be modelled on the requirements for decision-making already placed on local councils, under the Local Government Act 2002 (LGA), to involve Māori in decision-making (s 81) and to consult with Manawhenua over decisions affecting them (s 82(1)). Manawhenua could even have a veto power over decisions made by local councils or regional government concerning developments in the zone.

Those who advocate full equality of authority for Manawhenua may not support this approach, and those claiming unfettered Māori sovereignty over Aotearoa/New Zealand definitely would not. However, recognising absolute Manawhenua decision-making powers would not find support amongst the majority, as this would be a direct challenge to the authority of local and regional government and to the sovereignty of Parliament. But legislating powers that are less than absolute, yet stronger than mere

\textsuperscript{50} The Court of Appeal in New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 (CA) at 664 per Cooke P [the Lands Case] set out that the Treaty signifies a partnership. The Court concluded this principle of partnership required the Crown and Māori partners to act towards each other reasonably and with the utmost good faith: at 664 per Cooke P and 682 per Richardson J. The Waitangi Tribunal (the Tribunal) stated the basis for this principle in its Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (The Waitangi Tribunal, Wellington, 1988) at 192:

\begin{quote}
It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Māori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Māori eyes, for a continuing relationship between the Crown and Māori people, based upon their pledges to one another. It is this that lays the foundation for the concept of partnership.
\end{quote}

\textsuperscript{51} Such sections are already in existence. For example, s 8 Resource Management Act 1991 (RMA):

\begin{quote}
In achieving the purposes of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
\end{quote}

\textsuperscript{52} The Lands Case, above n 50, at 664 per Cooke P.
participation and consultation, such as a power to place requirements or qualifications on resource consents and district plans, or to veto certain developments altogether, may be an acceptable compromise. This is because parliamentary sovereignty would be maintained, if such arrangements were embodied in the legislation, quelling the fears of some that drastic constitutional re-arrangement is needed to accommodate the authority of Manawhenua within the state legal system. Those advocating full equality of authority, however, would have to compromise and accept a lesser form of Manawhenua authority if their perspectives were to be accommodated in a solution.

Such a compromise would be unacceptable to those who argued that there were no legitimate separate Māori rights to the zone, or who argued that the only legitimate rights were those limited to traditional use rights. It is also likely that those who perceive Māori rights to the zone as modern use rights would also sit outside such a solution, unless they were willing to accept that modern use rights encompassed decision-making powers.

2.e The sources of rights that may be recognised

As this thesis has revealed, during the Debate many identified the sources of Māori rights in the foreshore and seabed in the Treaty and tikanga Māori, with these being viewed as legitimate sources of rights. Therefore, in coming to a solution, the place of the Treaty and tikanga in the state legal framework may need to be re-assessed and evaluated. To meet the aims of those who advocate a strong version of equality of authority, the Treaty and tikanga would have to be recognised as direct sources of law. This may achieve equality of worldview, elevating tikanga Māori to the same status as statute law. However, this would involve a significant change in the country’s constitutional framework, especially if tikanga could not be trumped by statute. There is no consensus on that, and to insist on it might preclude a sufficiently stable solution to the Debate.

53 For examples of such claims, see Chapter Seven, Sections 2.a and 3.a.
54 See Chapter Five, Section 4 and Chapter Seven, Section 3.a.i. ‘Tikanga Māori’ is Māori customary law. Section 4 of Te Ture Whenua Māori Act 1993 defines ‘tikanga Māori’ as: “Māori customary values and practices”.
55 For more discussion on equality of worldviews see Chapter Four, Section 8.a.i.
An acceptable compromise may be that perhaps only the specific content of tikanga concerning the foreshore and seabed requires incorporation into the law: for example, via statute, as a recognised form or source of law that poses no threat to parliamentary sovereignty. Rights sourced in tikanga, as well as in the Treaty and the common law, could be given statutory status, elevating them to the highest form of law in Aotearoa/New Zealand, giving previously vulnerable rights protection. As this would be done through Parliament, it would affirm rather than subvert Parliament’s sovereignty. This approach is well established. It was used to quieten the fisheries debate of the 1990s and is adopted in many Treaty Settlement statutes.

Incorporating Māori decision-making authority into statute in such a fashion would not prevent later movement in the direction of greater Māori powers over the resource, or greater recognition of tikanga as a direct source of law. Greater recognition of Māori authority over the zone could be viewed as small-scale constitutional change, but it would only involve a subtle alteration of the sources of Aotearoa/New Zealand’s law, and incremental changes of this sort may even make larger constitutional changes possible. If the public can see that giving Manawhenua the power to make decisions based on their own tikanga over specific areas of foreshore and seabed has no dire consequences, and it does not overly impede the public’s enjoyment of the zone, then a political climate may gradually be created that would produce even greater recognition of tikanga as a valid source of law.

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56 See Maori Fisheries Act 1989. This Act was repealed by s 213 of the Maori Fisheries Act 2004 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
59 Ibid.
2.f. The possible solution

The possible outlines of a solution are therefore evident. First, a solution must be widely viewed as meeting the requirement that likes be treated alike, and that those who are differently situated may be treated differently. Second, it would reinstate due process for Māori to permit the courts to determine the scope of their property rights. Third, it would involve only limited changes to Aotearoa/New Zealand’s recognised sources of law, as the foundations for rights, and it would operate beneath, rather than in conflict with, the sovereignty of Parliament. It would involve only minor constitutional change and would support the rule of law. For those very reasons, however, it might attract significant agreement from those committed to a range of premises, and from both Māori and Pākehā.

There was consensus amongst many that Māori claims of right were based on inheritance and past connection not ethnicity per se. There was also some consensus that both individual and collective Māori use rights to the zone are legitimate and that these could impose duties and restrictions on others. Some agree that Māori rights could extend to limited powers to manage and control the resource. Thus a solution that recognises Māori use rights in the foreshore and seabed, and limited management powers, even if they impede others to some degree, will probably find support.

For a lasting settlement, some degree of power sharing between Parliament, local councils and Manawhenua will probably be required. For the majority of New Zealanders to support this solution, however, any powers afforded Manawhenua would have to be less than absolute, in order to support the authority of local and regional government, and to maintain parliamentary sovereignty, while accommodating the authority of Manawhenua within the state legal system. Moreover, while the place of tikanga Māori and the Treaty as sources of law are being revisited, it is probable that obtaining a solution right now only requires the incorporation of specific aspects of tikanga into statute law. This poses no threat to parliamentary sovereignty or the established hierarchy of laws.

Perhaps the clearest point, however, is that for any solution to be accepted by the general public, rights of access of all New Zealanders must be guaranteed. This means
that any Manawhenua title over specific areas of foreshore and seabed must be qualified by this guarantee.

3. The latest political developments

As discussed earlier, the Debate did not finish with the passing of the FSA in 2004. It continued, simmering below the surface until 2009 when it again appeared on the political agenda, and culminated in the MCA Bill that proposes to repeal and replace the FSA. This section reviews the political developments in the Debate of late 2009 and 2010, by way of introduction to the MCA Bill, before the next section critically reviews the Bill.

3.a. An overview of the process that lead to the Marine and Coastal Area (Takutai Moana) Bill 2010

In order to understand the Government’s proposals of 2010, it is important to briefly outline the political climate at the time of writing this thesis. A change of government occurred following the General Election of 8 November 2008. The complexion of the new National-led Coalition Government is much more conducive to favourable recognition of Māori interests in the foreshore and seabed than its Labour-led Coalition predecessor. This is because the Māori Party, by virtue of their

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‘Relationship and Confidence and Supply Agreement’ with the National Party, is part of the present Government.

The political climate following the outbreak of the Debate, the Foreshore and Seabed Hīkoi and the subsequent establishment of the Māori Party brought Māori agendas to the centre of political discourse. Since the election in 2008, the National Party has often required the votes of the Māori Party (which holds five out of the seven Māori seats) to ensure its legislation and budget would be passed. The relationship formed between the National and Māori Parties is remarkable. The National Party has managed to form a political relationship with Māori despite the fact that the Māori vote had previously been delivered overwhelmingly to the Labour Party for almost 70 years. Although the National Party had not been previously noted for policies friendly to Māori, as the policies of the National Opposition Party under the prior leadership of Brash illustrated, the National Party-Māori Party alliance is not without precedents. It was a National Party Government that first legislated historic settlements for past Treaty breaches in the 1990s.

The “Relationship and Confidence and Supply Agreement between the National Party and the Māori Party” expressly provided for a review of the FSA. The relevant clause reads.

**Foreshore and Seabed**

The National Party recognises the concerns of the Māori Party relating to the current Foreshore and Seabed legislation.

The Māori Party recognises the public interest and concern of all New Zealanders to ensure that their usage of the foreshore and seabed are protected.

**The National Party and the Māori Party** will, in this term of Parliament, initiate as a priority a review of the application of the Foreshore and Seabed Act 2004 to ascertain whether it adequately maintains and enhances mana whenua.

Ministers representing the two parties will work together to prepare agreed terms.

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63 ‘Hīkoi’ means march.

64 For example the Waikato Raupatu Claims Settlement Act 1995 and the Ngai Tahu Claims Settlement Act 1988 were passed under the fourth National Party Government.

of reference for the review by 28 February. The review will be completed by 31 December 2009.

In the event that repeal of the legislation is necessary, the National-led Government will ensure that there is appropriate protection in place to ensure that all New Zealanders enjoy access to the foreshore and seabed, through existing and potentially new legislation.

In early 2009, a Ministerial Review Panel (the Panel) was appointed to review the FSA. The Panel’s membership comprised former Justice Sir Eddie Durie as Chair, with Richard Boast, and Hana O’Regan as members. Under the “Terms of Reference” the Panel was asked to provide independent advice on: the nature and extent of interests in the zone prior to Ngati Apa; the options that were available to the Government to respond to Ngati Apa; and whether the FSA effectively provided for customary or native title, and public interests in the area, and supported mana whenua. If the Panel had reservations about the FSA they were to outline options for recognising customary and public interests in the foreshore and seabed, and how those processes could be streamlined. In doing so the Panel was required to: consider approaches taken in other Commonwealth jurisdictions; consider the submissions made to the Fisheries and Other Sea-Related Legislation Select Committee, and the Waitangi Tribunal (the Tribunal) Report; undertake consultation through public meetings and hui; and report to the Attorney-General, the Hon Christopher Finlayson, by 30 June 2009.

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66 Durie is a Former Chief Judge of the Maori Land Court and the Former Chairman of the Tribunal. Boast is an Associate Professor at Victoria University of Wellington. O’Regan is Dean of Te Puna Wānaka, the Faculty of Māori, at Christchurch Polytechnic Institute of Technology. For detailed biographies on the Ministerial Review Board Members, see “Panel Profiles” Ministry of Justice. Te Tāhu o te Ture <http://www2.justice.govt.nz/ministerial-review/panel-profiles.html> (accessed 22 July 2010).
69 Ibid.
71 Gatherings, meetings.
72 Finlayson, above n 68.

The Ministerial Review Report recommended that the FSA should be repealed and replaced. It did so on several grounds: that the Act failed to successfully recognise and provide for Māori customary and native title; that it removed the legal rights of Māori to have their interests determined in court; that it failed to properly balance customary and public interests; and that it did not effectively enhance the status of Manawhenua. The Ministerial Review Report recommended that any new Act should be based in a Treaty framework and on a set of core principles: recognition of customary rights; attachment of customary rights to hapū and iwi; reasonable public access; equal treatment; due process; good faith; restricting alienation; ensuring compensation; and the right to development.

The Panel proposed that the Government pass an interim Act that would repeal the FSA while a permanent solution was determined. The Panel set out two models that could be used for any new legislation: the ‘National Policy Proposal’, which focused on establishing a formal, national regime; and the ‘Regional Iwi Proposal’, which concentrated on more informal, regional negotiations. The Panel thought the issues

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73 For information on who were consulted and where, see Ministerial Review Panel, above n 68, vol 3 at 2-5.
74 Ibid, at 5.
75 The Report contains three volumes. The first contains the report itself, the second contains the appendices, and the third contains a summary of submissions: Ministerial Review Panel, above n 68, vol 1-3.
76 Ministerial Review Panel, above n 68, vol 1 at [7.5.2] and [7.6.2].
77 Ibid, at [7.4].
78 Ibid.
79 Ibid.
80 Ibid.
81 Ibid, at [7.6.3].
82 Sub-tribes, clans.
83 Tribes, nations, peoples.
84 Ministerial Review Panel, above n 68, vol 1 at [7.6.4].
85 Ibid, at [7.6.5].
86 Ibid, at [7.6.6].
87 Ibid, at [7.6.7].
of customary usage, authority and ownership would need to be settled under each proposal.88

For the remainder of 2009, and through early 2010, the Government considered the Ministerial Review Report, and engaged with iwi representatives and other interested parties to formulate options for finding a lasting solution.89 On 31 March 2010, the Attorney-General released the Government’s “Reviewing the Foreshore and Seabed Act 2004: Consultation Document” (the Consultation Document).90 This set out four options for replacing the FSA91 and outlined the Government’s preferred option: option four.92

Option four: A new approach – ‘public domain/takiwā iwi whānui’

No one would own (ie, by freehold title) the foreshore and seabed (except existing land held in private title). Instead of identifying an owner of the public foreshore and seabed, legislation would specify roles and responsibilities within it. The Crown and local government would continue to have regulatory responsibility. The area would be named ‘public domain/takiwā iwi whānui’.

The Government’s preference was therefore to repeal the FSA and remove Crown ownership of the public foreshore and seabed, while providing for public access and existing private property rights, as well as recognising customary title.93 It would therefore restore the right of Māori to be heard in the courts as to ownership. Public submissions on the Consultation Document were received between 31 March and 20 April 2010, and the Government undertook twenty hui and public meetings between 9 and 24 April 2010.94

88 Ibid.
89 See the New Zealand Government “Reviewing the Foreshore and Seabed Act 2004: Consultation Document” (31 March 2010) at 1.
90 Ibid.
91 Ibid, at [3.1], [3.2], and [3.3].
92 Ibid, at [3.1].
93 Ibid, at [3.2].
On 14 July 2010, the National Party met with the Māori Party and iwi leaders to discuss replacement legislation for the FSA, and an agreement was struck. The agreement followed the Government’s preferred option. Under it the FSA would be repealed and replaced, vesting the foreshore and seabed in public domain. Māori could access the High Court or negotiate with the Crown for recognition of their customary rights and title. Customary title would allow Manawhenua to develop areas and potentially source revenue from minerals. However this title would not equate to full and exclusive title, as customary title would be inalienable and subject to public access and other existing property rights. This agreement culminated in the MCA Bill, which was introduced on 6 September 2010 and first read in Parliament on 15 September 2010. At the time of writing, the Bill is currently before the Māori Affairs Select Committee. Submissions to that Select Committee closed on 19 November 2010 and the report is due on 25 February 2011.

3.b. The equality conceptions in the review process

During the review process the foundation for greater compromise has emerged, as discussed above. A new Debate has taken place, under a new Government, which has produced further consultation and new legislative proposals. The Māori Party is a driving force behind this legislative process. It can be argued that this process shows a certain kind of equality of authority in action between the Māori Party and the National Party, albeit one that operates under the umbrella of parliamentary sovereignty, or acts within that structure, not inconsistently with it. Moreover, it can be argued there has been greater deference to Māori authority in the preparatory steps of the legislative process, which has been central to reaching an agreement on the MCA Bill. In particular, iwi leaders were directly involved in negotiating the contents of the MCA Bill. This can be contrasted with the idea of local Manawhenua making all the rules that the Paeroa Declaration signatories argued for. That strong form of equality of authority remains inconsistent with parliamentary sovereignty, and would require a major change in constitutional arrangements, which is not likely to attract

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97 The MCA Bill will be discussed in greater detail under Section 4.
consensus at present. However, the weaker form of equality of authority in play here, which exists without challenging parliamentary sovereignty, has worked to produce an apparent solution.

In addition, the argument can be made that procedural equality was adhered to, in the form of equal consideration of interests in the democratic process. This can be seen in the process of considering submissions through the Ministerial Review and in the Consultation Document, and in the consideration given to iwi leaders’ points of view in the discussions on the MCA Bill. The make up of the Panel also lends weight to the argument that equal consideration of interests took place. Two of the Panel members, Durie and O’Regan, are Māori, and the other, Boast, is a leading academic writer on Māori legal issues who has appeared before the Tribunal as both counsel and expert witness. All three worked within the institutions of the state: Durie is a retired Justice of the High Court, and O’Regan and Boast work within the tertiary education sector. Thus, the Panel had a good understanding of both te ao Māori and te ao Pākehā. An argument can therefore be made that they were able to understand the sources of Māori concern and give them an equal weighting with other interests and consider them accordingly.

On the other hand, it can be argued that equal consideration of interests did not occur as the consultation and submission period on the Consultation Document was extremely short, meaning that those with relevant interests did not have the time to properly formulate their submissions, and therefore their interests could not be properly considered. Moreover, Prime Minister Rt Hon John Key’s unwillingness to consider any other option than the Government’s preferred option in the Consultation Document indicated that there could be no real equal consideration of interests as

98 The Māori world.
99 The Pākehā world.
100 John Key quoted in Radio NZ “PM increases pressure on Maori Party over foreshore and seabed” Checkpoint (Brent Edwards, 8 June 2010) at 24-32secs approx, available: <http://static.radionz.net.nz/assets/audio_item/0010/2316853/ckpt-20100608-1715-PM_increases_pressure_on_Maori_Party_over_foreshore_and_seabed-m048.asx>; Radio NZ “PM says take it or leave it over foreshore and seabed” Morning Report (Jane Patterson, 9 June 2010) at 32-38secs approx available: <http://static.radionz.net.nz/assets/audio_item/0006/2317263/mnr-20100609-0639-PM_says_take_it_or_leave_it_over_foreshore_and_seabed-m048.asx>. See also for example NZPA “Years of grievance if foreshore law not repealed – PM” The New Zealand Business Review (online, 1 April 2010) <http://www.nbr.co.nz/article/years-grievance-if-foreshore-law-not-repealed>
the outcome of the consultation was predetermined. In addition, Key’s insistence that
the Māori Party follow this option, if there was to be repeal of the FSA, further
highlights that while there seemed to be equality of process, questions could be raised
as to whether the whole process was fair and open.

4. The Marine and Coastal Area (Takutai Moana) Bill 2010: A
tenable solution to the Foreshore and Seabed Debate?

The Attorney-General has hailed the MCA Bill as an “enduring solution” to the
Debate. This section critically discusses that claim in light of the equality and rights
concerns. Does the Bill adequately incorporate the outlines of a compromised solution
necessary to quieten the Debate?

4.a An overview of the Marine and Coastal Area (Takutai Moana)
Bill 2010

4.a.i. Creation of a new “marine and coastal area”

Once enacted, the MCA Bill will repeal the FSA. It will rename the foreshore and
seabed zone the “marine and coastal area”. The Bill creates a common space in this

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103 MCA Bill, cl 14. [MCA Act, s 5].

104 Ibid, cl 7. [MCA Act, s 9]. This interpretation clause defines the marine and coastal area as:

(a) means the area that is bounded,—
(i) on the landward side, by the line of mean high-water springs; and
(ii) on the seaward side, by the outer limits of the territorial sea; and

(b) includes the beds of rivers that are part of the coastal marine area (within the meaning of
the Resource Management Act 1991); and

(c) includes the airspace above, and the water space (but not the water) above, the areas
described in paragraphs (a) and (b); and

(d) includes the subsoil, bedrock, and other matter below the areas described in paragraphs
(a) and (b)
area, called the “common marine and coastal area”. This common space will codify the Government’s policy, which was to put the zone in ‘public domain’. This common space is granted a special status, as it cannot be owned in freehold title. The special status afforded this common space, however, does not affect the recognition of any future customary interests that may be found to exist in accordance with the new Act. Moreover, current general statutes, bylaws, regional and district plans that regulate activities in the zone and grant existing use rights remain, and continue unaffected. Importantly, once enacted, the legislation will repeal the FSA and remove Crown ownership over the zone.

4.a.ii A new rights regime

The new law will uphold the FSA’s guarantee of free public access to the zone, as well as public rights of navigation and fishing. It will also guarantee that existing private titles in the marine and coastal area remain unaffected.

The MCA Bill also aims to restore at least some of the customary property interests of Māori that were arguably extinguished by the FSA. It sets out to do this by

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105 Ibid, defines this area as:

... means the marine and coastal area other than:
(a) specified freehold land located in that area; and
(b) any area that, immediately before the commencement of Part 2, is both owned by the Crown and also has a status of any of the following kinds:
(i) a conservation area within the meaning of section 2(1) of the Conservation Act 1987;
(ii) a national park within the meaning of section 2 of the National Parks Act 1980;
(iii) a reserve within the meaning of section 2(1) of the Reserves Act 1977;
(iv) a wildlife management reserve, wildlife refuge, or wildlife sanctuary within the meaning of section 2(1) of the Wildlife Act 1953; and
(c) the bed of Te Whaanga Lagoon in the Chatham Islands.

[The MCA Act, s 9 enacted a slightly different definition to the Bill, which does not include a wildlife management reserve, refuge or sanctuary. The law now defines the area as:

... means the marine and coastal area other than:
(a) specified freehold land located in that area; and
(b) any area that is owned by the Crown and has the status of any of the following kinds:
(i) a conservation area within the meaning of section 2(1) of the Conservation Act 1987;
(ii) a national park within the meaning of section 2 of the National Parks Act 1980;
(iii) a reserve within the meaning of section 2(1) of the Reserves Act 1977; and
(c) the bed of Te Whaanga Lagoon in the Chatham Islands].

106 Ibid, cl 11(2). [MCA Act, s 11(2)].
107 Ibid, cl 11(5)(a). [MCA Act, s 11(5)(a)].
108 Ibid, cl 11(5)(b)-(e). [MCA Act, ss 5(b)-(f)].
109 Ibid, cl 14. [MCA Act, s 5].
110 Ibid, cl 27. [MCA Act, s 26].
111 Ibid, cls 28 and 29. [MCA Act, ss 27 and 29].
112 These titles are not included in the definition of ‘common marine and coastal area’, and as such are outside the scope of this bill: ibid, cl 7. [MCA Act, s 9].
providing for specified Māori customary interests and rights in the common marine and coastal area to be recognised. These specified interests and rights are to be clustered under three main concepts or labels: that of “customary marine title”, “protected customary rights”, and “mana tuku iho”.

The first two of these require formal recognition through a court order or agreement with the Crown, while the third does not. This section will now consider each of these in turn.

Customary marine title is a new type of title: customary not freehold. It is unlike most private titles in that it will be subject to a right of public access and will be inalienable. However, under the new legislation, such title would afford the group that has obtained customary marine title several significant rights. The first is a power to permit or decline future activities requiring resource consent in the group’s customary marine title area, referred to as a RMA permission right. The second is a power to determine whether the Minister of Conservation or Director-General of Conservation can consider applications concerning marine reserves and conservation protected areas in a group’s customary title area, or to grant a conservation concession in that area, referred to as a conservation permission right. The third is the power to declare wāhi tapu areas within the customary marine title area, and to place prohibitions or restrictions on access to protect these wāhi tapu, referred to as a wāhi tapu protection right. In order for such a right to be recognised, the group must show that they have a connection to the wāhi tapu area in accordance with tikanga, and that the prohibitions and restrictions they seek are needed to protect the wāhi tapu area. The fourth is the right to own any new tāonga tūturu found in the future in

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113 Ibid, (explanatory note) at 3. [MCA Act, s 6].
114 Ibid, cl 7 defines ‘mana tuku iho’ as: “inherited right or authority derived in accordance with tikanga”. [MCA Act, s 9].
115 Ibid, cls 27, 63. [MCA Act, ss 26 and 60(1)(a)].
116 Ibid. According to cl 7, [MCA Act, s 9], ‘customary marine title group’:
(a) means an applicant group to which a customary marine title order applies or with which an agreement is made; and
(b) includes a delegate or transferee of the group if the delegation or transfer is made in accordance with tikanga.
117 Ibid, cl 65. [MCA Act, s 66].
118 Ibid, cl 70. [MCA Act, s 71].
119 MCA Bill, cl 77. [MCA Act, s 78].
120 Ibid, cl 77(2). [MCA Act, s 78(2)].
the group’s customary marine title area.\textsuperscript{122} This right comes into existence if after six months no competing claims are lodged for the tāonga tūturu, or where such claims have been lodged, the Secretary for Justice determines that the customary marine title group is the owner.\textsuperscript{123} The fifth is the right to own all minerals found in the group’s customary marine title area, except Crown minerals (petroleum, gold, silver and uranium) and pounamu.\textsuperscript{124} Finally, customary marine title gives the titleholders the right to create a planning document setting out objectives and policies for the area, which would have some influence on other statutory decisions.\textsuperscript{125}

The second type of rights that may be recognised, protected customary rights, are use rights in a specific area of the common marine coastal area, that amount to less than title.\textsuperscript{126} Such rights must pertain to “a physical activity or use related to a natural or physical resource”.\textsuperscript{127} A protected customary right group\textsuperscript{128} would be afforded the ability to exercise such rights without resource consent and without liability for coastal occupation charges.\textsuperscript{129} Moreover, the group could delegate, transfer, limit and suspend its rights, derive commercial benefit from exercising them and determine who may perform particular aspects of the rights.\textsuperscript{130}

\begin{footnotesize}
\textsuperscript{121} Real or authentic treasures. “Taonga tūturu” is defined by s 2(1) of the Protected Objects Act 1975 as:

… an object that—

(a) relates to Māori culture, history, or society; and

(b) was, or appears to have been,—

(i) manufactured or modified in New Zealand by Māori; or

(ii) brought into New Zealand by Māori; or

(iii) used by Māori; and

(c) is more than 50 years old.

\textsuperscript{122} MCA Bill, cl 81. [MCA Act, s 82].

\textsuperscript{123} Ibid, cl 81(7). [MCA Act, s 82(6). One noticeable change here is that the Act outlines that the chief executive of Land Information New Zealand determines the owner of the tāonga tūturu, rather than the Secretary for Justice as originally provided for in the Bill].

\textsuperscript{124} Ibid, cl 82. [MCA Act, s 83]. ‘Pounamu’ is greenstone, a type of jade, found only in the South Island. It is defined by the Ngai Tahu (Pounamu Vesting) Act 1997, s2 as:

(a) Browenite:

(b) Nephrite, including semi-nephrite:

(c) Serpentine occurring in its natural condition in the land described in the Schedule:

All pounamu is vested in Ngāi Tahu through this Act, s 3.

\textsuperscript{125} MCA Bill, cls 84-91. [MCA Act, ss 85-93].

\textsuperscript{126} Ibid, cls 53 and 54. [MCA Act, ss 51 and 52].

\textsuperscript{127} Ibid, cl 53(2)(d). [MCA Act, s 51(2)(e)].

\textsuperscript{128} Ibid. According to cl 7, [MCA Act, s 9], ‘protected customary rights group’:

(a) means an applicant group to which a protected customary rights order applies or with which an agreement is made; and

(b) includes a delegate or transferee of the group if the delegation or transfer is made in accordance with tikanga

\textsuperscript{129} Ibid, cl 54(1) and (2). [MCA Act, s 52(1) and 2].

\textsuperscript{130} Ibid, cl 54(4). [MCA Act, s 52(4)].
\end{footnotesize}
Overall, the cluster of customary rights that may be recognised under both these two schemes of rights, acting in concert, is a major distinguishing feature of the new regime.

As to process, the MCA Bill provides two ways in which an applicant group\(^\text{131}\) may gain customary marine title or protected customary rights. The first is for the group to apply to the High Court for a coastal marine title order, or a protected customary rights order, over a specific area of the customary marine area.\(^\text{132}\) To be granted customary marine title, the group must meet a strict three-part test: that the group “holds the specified area in accordance with tikanga”\(^\text{133}\), that the group “has exclusively used and occupied the specified area from 1840 to the present day without substantial interruption”\(^\text{134}\), and that the title is not “extinguished as a matter of law”\(^\text{135}\).

Applicants must meet a similar three-part test in respect of a protected customary rights order. However, they are not required to prove exclusivity and the use right can still be recognised if it has evolved and changed over time. The test is: that the right “has been exercised since 1840”;\(^\text{136}\) that it “continues to be exercised … in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time”;\(^\text{137}\) and that it “is not extinguished as a matter of law”\(^\text{138}\).

\(^{131}\) Ibid. According to cl 7, [MCA Act, s 9], ‘applicant group’:
- (a) means 1 or more iwi, hapū, and whānau groups that seeks recognition under Part 4 of their protected customary rights or customary marine title by—
  - (i) a recognition order; or
  - (ii) an agreement; and
- (b) includes a legal entity (whether corporate or unincorporate) or natural person appointed by 1 or more iwi, hapū, and whānau groups to be the representative of that applicant group and to apply for, and hold, an order or enter into an agreement on behalf of the applicant group

\(^{132}\) Ibid, cl 96. [MCA Act, s 98]. Clause 7 [s 9] defines customary marine title order as: “an order of the Court granted in recognition of a customary marine title of a customary marine title group in respect of a customary marine title area”; and a protected customary rights order as: “an order of the Court granted in recognition of the protected customary rights of a protected customary rights group in respect of a protected customary rights area”.

\(^{133}\) Ibid, cl 60(1)(a). [MCA Act, s 58(1)(a)].
\(^{134}\) Ibid, cl 60(1)(b). [MCA Act, s 58(1)(b)].
\(^{135}\) Ibid, cl 60(3). [MCA Act, s 58(4)].
\(^{136}\) Ibid, cl 53(1)(a). [MCA Act, s 51(1)(a)].
\(^{137}\) Ibid, cl 53(1)(b). [MCA Act, s 51(1)(b)].
\(^{138}\) Ibid, cl 53(1)(c). [MCA Act, s 51(1)(c)].
If an application for either order raises a question of tikanga, the High Court has the discretion to refer the question to the Maori Appellate Court for a binding opinion or seek the non-binding advice of a court expert who has knowledge and experience of the tikanga in question.\(^{139}\)

Of particular note, however, is the silence of the MCA Bill over the role of the Crown in such proceedings. Questions, therefore, must be raised as to whether the Crown would be required to be a party.

Alternatively, an applicant group may seek to bypass the court process, and negotiate directly with the Crown for recognition of their customary marine title or protected customary rights.\(^{140}\) Before a group can enter into an agreement with the Crown, it must also meet the relevant three-part test, described above.\(^{141}\) However, the Bill explicitly states that the Crown is under no obligation to enter into negotiations or an agreement with an applicant group.\(^{142}\)

Notably, the MCA Bill also specifies that all applications for recognition of customary marine title and protected customary rights, whether made to the High Court or via direct negotiations with the Crown, must be made within 6 years of the new legislation coming into force.\(^{143}\) There was no similar cut-off date in the FSA.\(^{144}\)

The third regime of customary rights supported by the MCA Bill aims to recognise “the mana tuku iho of iwi and hapū, as tangata whenua, over the foreshore and seabed of New Zealand” and contribute “to the continuing exercise of that mana by giving legal recognition, protection, and expression to the customary interests of Māori in the area”.\(^{145}\) The Bill purports to do this through rights to participate in conservation processes described in the applicable orders. Moreover, it endeavours to recognise this mana as a separate matter from customary marine title or protected customary

\(^{139}\) Ibid, cl 97. [MCA Act, s 99].
\(^{140}\) Ibid, cl 93. [MCA Act, s 95].
\(^{141}\) Ibid, cl 93(4)(a) and (b). [MCA Act, s 95(4)(a) and (b)].
\(^{142}\) Ibid, cl 93(3). [MCA Act, s 95(3)].
\(^{143}\) Ibid, cls 93(2) and 98(2). [MCA Act, s 95(2) and 100(2)]
\(^{144}\) FSA, s 48(2) states that all applications for customary rights orders must be made by 31 December 2015. There is no cut-off date provided in the Act for direct negotiations with the Crown.
\(^{145}\) MCA Bill, (explanatory note) at 1. ‘Tangata Whenua’ literally translates as ‘the people of the land’. It means the Indigenous or local people.
rights. The Attorney-General declared that mana tuku iho “is a formal recognition of
the longstanding association between a group and the common marine and coastal
area in their rohe”.\textsuperscript{146} He stated further that mana tuku iho will give Manawhenua
“rights to participate in conservation processes along their coastline in the common
marine and coastal area”.\textsuperscript{147} Their rights in this respect will not require specific
recognition through a court order or agreement with the Crown. They will exist
simply because the relevant group already exercises customary authority in a specific
part of the foreshore and seabed.

These “rights to participate in conservation processes” are guaranteed in cls 49 to 51
of the Bill.\textsuperscript{148} The range of iwi recognised to possess these participation rights are
those already listed in Schedule Four of the Maori Fisheries Act 2004 and the range of
hapū are those listed in iwi constitutional documents, or stated by iwi to the Director-
General of Conservation.\textsuperscript{149} Interestingly, however, mana tuku iho, as a term, is not
mentioned in any of these clauses.

These provisions would mean that when the Director-General is considering
applications to declare or extend marine reserves, marine mammal sanctuaries,
conservation areas, or to authorise marine mammal watching permits, or to grant
conservation concessions, then the Director-General will have to use his or her best
endeavour to notify the relevant Manawhenua in the area.\textsuperscript{150} The notification must be
in writing.\textsuperscript{151} The relevant Manawhenua then have forty working days to provide their
views,\textsuperscript{152} and if provided within this timeframe, the Director-General must take these

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\textsuperscript{146} Christopher Finlayson “Marine and Coastal Area Bill introduced - guarantees public access” (press
release, 6 September 2010). ‘Rohe’ means territory, domain.
\textsuperscript{147} Ibid.
\textsuperscript{148} The MCA Act guarantees these “rights to participate in conservation processes” in ss 47-50.
\textsuperscript{149} MCA Bill, cl 49(2). Schedule 4 of the Maori Fisheries Act 2004 specifies fifty-four iwi. [Here the
MCA Act is significantly different. It holds that the range of iwi, hapū and whānau recognised to
possess these participation rights are those who exercise kaitiakitanga in the area: s 47(1)].
‘Kaitiakitanga’ means guardianship, stewardship. In resource management law it has the meaning
provided in s 2 of the RMA:

\begin{quote}
Kaitiakitanga means the exercise of guardianship by the tangata whenua of an area in accordance
with tikanga Maori in relation to natural and physical resources; and includes the ethic of
stewardship.
\end{quote}

\textsuperscript{150} MCA Bill, cl 50(1)(a). [MCA Act, s 48(1)(a)].
\textsuperscript{151} Ibid, cl 50(3)(a). [This specific requirement is not reproduced in the Act, and is therefore not a legal
duty of the Director-General].
\textsuperscript{152} Ibid, cl 50(3)(c). [Instead of giving a timeframe of forty days, the Act specifies that the Director-
General has the authority to determine the timeframe that the affected Manawhenua have to provide
views into consideration when determining the outcome of the application.\textsuperscript{153} Furthermore, the relevant Manawhenua also possess the right to participate in the management of stranded marine mammals.\textsuperscript{154} This means that in deciding how to deal with a stranded marine mammal, a marine mammals officer must have particular regard to the expressed views of relevant Manawhenua.\textsuperscript{155}

In summary, the MCA Bill will remove Crown ownership of the foreshore and seabed and create a special “common marine and coastal area” which belongs to no-one, but in which the Crown retains its managerial role. The Bill upholds public access to the zone, as well as public rights of navigation and fishing. It guarantees the future existence of all private titles in the area, as well as the continuance of existing use rights granted under statute, by-law or regional and district plans. In this sense, there will be very little change. However, the Bill will also provide for the recognition of mana tuku iho, and establish a new statutory regime for the recognition of Māori customary rights. Importantly, it will provide for the recognition of an inalienable customary marine title, which is burdened by the right of public access. While this title is something less than full and exclusive freehold title, its inclusion represents a significant change from the law under the FSA. The Bill also goes some way to restoring due process for Māori. They are able to petition the High Court for a customary marine title order. However, the test to prove such title is very high and requires that the group prove exclusivity, in accordance with tikanga, since 1840.

4.b. The outlines for solution visible in the Marine and Coastal Area (Takutai Moana) Bill 2010

So, to what extent do the principles of the MCA Bill reflect the outlines of possible solution that can be discerned between many participants in the Debate, as discussed earlier in this chapter?

\textsuperscript{153} Ibid, cl 51(1). [MCA Act, s 49].
\textsuperscript{154} Ibid, cl 52. [MCA Act, s 50].
\textsuperscript{155} Ibid, cl 52(2)(b). [MCA Act, s 50(3)(b)].
4.b.i. The underlying equality ideals

At first glance, because the MCA Bill aims to uphold the mana tuku iho and customary rights of Manawhenua, it seems to treat Māori differently to others in the zone. The Bill therefore does not adhere to the formal notion of treating all individuals exactly alike that some called for in the Debate. This is an important concession. It shows the Crown has accepted Māori are differently situated in this area, due to their Indigenous status, so treating them differently is justified. Indigenous status, in this instance, is viewed as a relevant difference. This, however, fulfils the requirement for legitimate departure from formal equality principles: that if people are to be treated differently, there must be a relevant justification for doing so.156

However, in a procedural sense, it could be said that the Bill returns to a position of greater equality between individuals, grounding the solution in the shared ideal of equal treatment when it provides greater opportunities for Māori to access the High Court to seek recognition of their customary property rights. On the one hand, therefore, the Bill recognises that Māori are different, so it is justifiable to treat them differently in the range of rights potentially available to them, while, on the other, it recognises that Māori are the same as other New Zealanders, and should be able to petition the courts on an equal basis for recognition of their title rights, especially their rights to customary title, when the right of other private title holders can be recognised in the zone.

The MCA Bill therefore supports the shared ideal of procedural equality by restoring the right of Māori to be heard. Particularly, it seems to enable Māori to access the High Court to have their rights determined in the same manner that other New Zealanders can assert their property rights. It also provides the possibility for Māori to directly negotiate with the Crown for recognition of the full extent of their rights to the zone, without going through the courts, though in this case the same legal tests must be met.

156 See Chapter Four, Section 2.a.
A fundamental concern, however, is that the MCA Bill fails to adequately restore due process to Māori – a value that is related to the claim of equal access to the law.\textsuperscript{157}

The Bill goes some way to reinstating due process: by reinstating the jurisdiction of the High Court to determine ownership claims. However, it removes all jurisdiction of the Maori Land Court to hear claims in relation to the resource.\textsuperscript{158} Under the current FSA, Māori can petition the Māori Land Court for a customary rights order.\textsuperscript{159} Under the MCA Bill, if Māori wish to take a claim to court, they have only one option: the High Court. This technically treats them the same as other New Zealanders, who cannot access the Māori Land Court. However, in other respects, it treats Māori differently. Usually, when Māori seek adjudication of their customary interests in land, they have the option of proceeding in the Māori Land Court. The judges of this Court are predominantly Māori, and fluent in te reo Māori,\textsuperscript{160} and well versed in tikanga Māori, especially in relation to land. The procedures in this Court are less formal and less expensive. But in relation to their interests in the foreshore and seabed, the Bill denies Māori this option. Instead, they will have to initiate the more formal and expensive processes of the High Court, whose judges are mainly non-Māori, and not well-versed in te reo Māori or tikanga. The MCA Bill, as a solution, allows judges of the High Court to refer questions of tikanga to the Māori Appellate Court or seek an expert opinion, but that is at the Judge’s discretion. Moreover, expert opinion is not binding. There is therefore the potential for tikanga to be misapplied.

Despite this, the incorporation of tikanga into the test to be applied the High Court to determine whether Māori rights to the zone remain is a significant improvement on the FSA. This elevates tikanga into the highest form of law. It falls short of recognising tikanga as a source of law in its own right, a position that might prejudice any settlement. But it still ensures tikanga plays a crucial role in the rights allocation.

However, granting only the High Court jurisdiction to hear such claims maintains inequality of access. This is so because of the added cost and formality of application

\textsuperscript{157} See Chapter 4, Section 7.a.i.
\textsuperscript{158} MCA Bill, cl 96(2). [MCA Act, s 98(3)].
\textsuperscript{159} See Chapter Two, Sections 15.b and 15.b.ii.
\textsuperscript{160} The Māori language.
to the High Court in comparison with the Maori Land Court.\(^{161}\) It also raises the question whether applicants would be eligible for legal aid.\(^{162}\) As a result, it is likely that only Manawhenua who have the necessary financial resources will be able to petition the Court.

If Manawhenua instead preferred to negotiate directly with the Crown, there is no guarantee that the Crown will hear them. This is because the decision to negotiate is at the Crown’s discretion. This may create inequalities between some Manawhenua groups as the Crown may choose to negotiate with some and not others. Moreover, there is no guarantee that the Crown will re-open negotiations with those Manawhenua who already have negotiated full and final Treaty settlements. There is no guarantee, therefore, of equal treatment in this process.

It of course is a question of whether there can ever be a guarantee of equal treatment in the process in the same way that there is in adjudication. Negotiations are necessarily party-specific. Some negotiations may take place. But, even so, they will be much less transparent than High Court proceedings. They will be considered a political process and for this reason they may not be easily challenged in a court.\(^{163}\)

This opens such negotiations up to challenges of legitimacy from those who can’t participate in the process, challenges that sit outside strict equality claims. The Attorney-General was eager to point out that any negotiated settlements ‘would be done in a transparent manner and applicants must meet the same threshold tests in the

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\(^{161}\) For example, currently it costs $61 to file proceedings in the Maori Land Court: Maori Land Court Fees Regulations 1993, Schedule 3. While the MCA Bill [and the MCA Act] is silent as to the cost of filing proceedings, should it continue the practice established under the FSA for territorial rights orders applications to the High Court, the cost for filing would be $400: FSA, s 99 and the High Court Fees Regulations, schedule 1.

\(^{162}\) Section 9 of the Legal Services Act 2000 describes when a natural person or trustee corporation is eligible for legal aid in civil matters. The income thresholds are set under reg 5 of the Legal Services Regulations 2006. A new Legal Services Bill 2010 (189-1), which will replace the 2000 Act, is currently before Parliament. [That Bill has now been passed and the Legal Services Act 2011 enacted. Section 10 of the 2011 Act now describes when a natural person or trustee corporation is eligible for legal aid in civil matters. The income thresholds are still set under reg 5 of the Regulations].

legislation”. Here he was trying to alleviate fears that the standard of evaluation before the courts and in negotiations would be different, or that there would be a different range of solutions possible in each process, which might lead to claims by some that Māori were getting more than what they would in the court, or less, depending on who was making the claim. Despite this, because negotiations are ultimately Crown controlled, there is a possibility that such disparity could occur.

Nevertheless, negotiations of this kind have been the Crown’s chosen method to settle Māori claims within the Treaty settlement process. It does not threaten the sovereignty of Parliament, as, ultimately, statutes enacted by Parliament are required to implement any agreement reached. Such negotiations seem one of the preferred methods for rights recognition on the part of Manawhenua also. So far, of the five Manawhenua who have entered direct negotiations with the Crown to gain recognition of their rights, only Ngāti Pahauwera began by initiating court proceedings under s 48 of the FSA.

Another barrier to true procedural equality is the six-year timeframe placed on all applications for customary marine title. Moana Jackson argues:

This is a particularly odious provision as it introduces something new into the whole discourse of civil and human rights, namely that a right or interest can only exist if people can establish it within a certain time limit.

It is rather like saying for example that the basic right to freedom of speech can only exist if you can prove you have it in six years. Rights are meant to be universal and their universality depends upon them being free of time constraints. It simply introduces another discriminatory process applicable only to Maori.

164 Finlayson, above n 146.
165 See Chapter Two, Section 15.b.iii.
Limitation periods, that block the initiation of proceedings after specified periods of time, do exist, of course, in other areas of property law. But Jackson’s point is that these are not ordinary property rights: Indigenous Peoples’ rights to land are more in the nature of fundamental human rights, whose assertion should not be blocked by the passage of time.\textsuperscript{168}

Moreover, imposing this limitation period could create inequality between Manawhenua groups, as those with limited money and resources may struggle to compile the necessary evidence in time. This may be especially true for those Manawhenua whose Treaty claims have not been heard. They may not have the same financial assets as Manawhenua who have settled their claims, and the money they have may be directed primarily towards the settlement of their historical grievances.

The Crown may include rights to foreshore and seabed in negotiations towards a global settlement, but there is no guarantee that this will occur. Moreover, if claims to foreshore and seabed are included in such negotiations, this may delay settlement and increase costs, as further time and money may be required to compile the extra evidence.

Elsewhere in the Bill, in the provisions directed to conservation processes, procedural equality may be achieved, to an extent, through the requirement that decision-makers must seek and take particular regard of Manawhenua views in regard to applications or proposals made concerning conservation proposals or stranded marine animals.\textsuperscript{169} This guarantees Manawhenua a voice in the consultation process. But it does not guarantee Manawhenua views are followed, nor prevent other members of the public and interested groups having a say. It would not therefore satisfy those who call for full equality of authority, as Manawhenua are not given the final say, but nor would it satisfy those who call for complete formal equality between individuals, as the

\textsuperscript{168} Some participants asserted Māori rights in a fundamental sense during the Debate. See discussion in Chapter Seven, Section 3.a, c and f. Moreover, the signatories to the Paeroa Declaration may have made their claim to property in this fundamental sense. See discussion in Chapter Five, Sections 3.a.ii.1 and 3.a.ii.4. Of note, there is growing international recognition of the importance of retention of Indigenous lands to the maintenance of Indigenous cultures. See discussion in Chapter Five, Section 3.a.ii.1. Some, during the Debate, recognised this importance. See discussion in Chapter Seven, Section 3.a.iii.

\textsuperscript{169} MCA Bill, cls 49-52. [MCA Act, ss 47-50].
decision-maker is required to seek the views of Manawhenua as the members of a special group. However, incorporating these views at the far ends of the ‘Equality Spectrum’ sit outside the outlines for the potential solution discussed above.

The Attorney-General has said that the MCA Bill’s requirement concerning consultation with Māori in conservation processes is a formalisation of what is already considered “best practice” under existing statutory conservation procedures. The process established under cl 52 of the Bill, which pertains to stranded marine mammals, seems similar to the procedure employed under s 6(e) of the RMA. For instance, under cl 52, a marine mammals officer dealing with stranded mammals must have particular regard to the views of Manawhenua, while under the RMA the appropriate decision-maker must recognise and provide for Māori and their cultural relationship to a resource. The processes are alike in that they provide for a Māori voice in the decision-making process but do not dictate the final decision.

However, the participation in conservation processes afforded Manawhenua under cl 49 to 51 seems a stronger entitlement. The MCA Bill specifically states that Manawhenua have “the right to participate in conservation processes in the common marine and coastal area”. This claim-right places the Director-General of Conservation under specific duties that go beyond merely giving an opportunity to be heard. The Director-General must use his or her best endeavours to notify affected Manawhenua and actively seek their views. Moreover, the notification must give sufficient information as to the conservation application or proposal. This seems

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170 Finlayson, above n 146.
171 That section holds:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

…

c) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

[The equivalent section to cl 52 in the MCA Act is s 50].

172 These participation entitlements are legislated for in ss 47-49 of the MCA Act.
173 MCA Bill, cl 49(3). [MCA Act, s 47(2)].
174 Ibid, cl 50(1). [MCA Act, s 48].
175 Ibid, cl 50(3)(d). [MCA Act, s 48(3)(c)].
more like s 81 of the LGA, which places significant duties on local authorities to involve Māori in decision-making.\textsuperscript{176}

This part of the solution therefore applies processes already familiar to statutory decision-makers, and enables Manawhenua to have their views carefully considered, without challenging the sovereignty of Parliament. Here the MCA Bill reflects the previous Labour-led Government’s preferred equality standpoint: equal consideration of interests. It extends this position beyond the general field of local government, to specific foreshore and seabed issues, but not in a manner that ousts the authority of statutory decision-makers or affords Māori full authority over the zone. It involves only a relative movement on a spectrum of interests that might still be acceptable to many participants in the Debate.

4.b.ii. The underlying notion of inherited rights

The solution proposed in the MCA Bill is grounded in the common consensus that Māori rights are inherited rights. It recognises that these rights must be “held in accordance with tikanga”. Moreover, in removing also the jurisdiction of any court to “hear and determine an aboriginal rights claim relating to the common marine and coastal area”,\textsuperscript{177} the Bill may also be implicitly acknowledging that the customary rights acquired under the Bill are in substitution for prior inherited rights under the doctrine of native title, the law of equity, the Treaty, as well as under specific trusts and obligations.\textsuperscript{178}

\textsuperscript{176} That section holds:

(1) A local authority must—

(a) establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority; and

(b) consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority; and

(c) provide relevant information to Māori for the purposes of paragraphs (a) and (b).

(2) A local authority, in exercising its responsibility to make judgments about the manner in which subsection (1) is to be complied with, must have regard to—

(a) the role of the local authority, as set out in section 11; and

(b) such other matters as the local authority considers on reasonable grounds to be relevant to those judgments.

\textsuperscript{177} MCA Bill, cl 96(3). [MCA Act, s 98(4)].

\textsuperscript{178} Ibid, cl 96(4) defines an “aboriginal rights claim” as:

any claim in respect of the common marine and coastal area that is based on, or relies on, customary rights, customary title, aboriginal rights, aboriginal title, the fiduciary duty of the Crown, or any rights, titles, or duties of a similar nature, whether arising before, on, or after the commencement of this section and whether or not the claim is based on, or relies on, any 1 or more of the following:

(a) a rule, principle, or practice of the common law or equity:

(b) the Treaty of Waitangi:
Thus, while the solution proposed recognises that Māori have inherited rights, these rights are codified and defined in the MCA Bill, and all other rights of a similar kind are extinguished. This approach therefore continues the practice of past governments, which was applied in the FSA, of seeking to transform Māori customary rights, through codification, into restricted, ordinary rights based in statute.

4.b.iii. The recognition of individual access rights

The MCA Bill recognises both individual and collective property rights. Importantly it recognises and upholds the individual right of all New Zealanders to access the common marine and coastal area, including any part that is under customary marine title. This may create some inequality of treatment between foreshore and seabed under private title and that under customary marine title, as not all private titles are subject to the same qualification. However, as discussed, public access is fundamental to any lasting solution. This inequality is likely to remain, therefore, in any solution acceptable to the general public.

In most instances, the effect of the Bill is to impose a general duty to respect this public access right. However, the Bill recognises that such access can be limited in certain instances. In particular, it may be prohibited or restricted in an area declared to be wāhi tapu under a customary marine title order. In that case, the right of the public to access the zone would only be a liberty. This is important, because on this one occasion the Bill acknowledges that the right, or power, of customary marine titleholders to determine the rules pertaining to wāhi tapu can place the public under a liability, in that their usual absolute entitlement to access can be changed. In this small area, this is a relative, and perhaps acceptable, movement in the direction of equality of authority.

(c) the existence of a trust:
(d) an obligation of any kind.

[The MCA Act, s 98(5) reproduces this definition, with one slight change; it substitutes the word “Act” for “section” in the line above paragraph (a)].

179 Such as by another enactment, bylaw, regional plan and district plan, or conditions of wāhi tapu (sacred places) under a customary marine title order: ibid, cl 27(2). [MCA Act, s 26(2)].

180 Ibid, cl 78(1)(b). [MCA Act, s 79(1)(b)].
4.b.iv. The recognition of Māori use rights

Customary rights may be protected that amount to an activity, use or practice that is less than full ownership, except in minor ways, and this recognition cannot affect the access rights of other individuals to the protected area. These rights to carry out an activity, use or practice are therefore Hohfeldian liberties. Examples given by the Attorney-General are collecting hāngi stones and launching waka. But other rights may also be recognised which could amount to limited powers to manage and control the resource, a point on which there seems some consensus, even if it would place others under liabilities to obey. For instance, the Bill allows for commercial benefits to be determined from the exercise of a protected customary right, as does the current FSA. In determining the scale and timing of such commercial activities, the group would be engaged in limited forms of management and control of the resource, which others would be obliged to respect. Such limited forms of management by Manawhenua may not, however, go beyond the terms of the core consensus as to the range of acceptable customary use rights in the zone.

Furthermore, the MCA Bill may also be acceptable to the majority when it permits a customary rights group to: delegate the rights described in a protected customary rights order or agreement; transmit its protected customary rights order or agreement; determine who may carry out the specific use rights described in its protected customary rights order or agreement; and limit or suspend the exercise of its protected customary rights.

In addition, a protected customary right can be exercised without resource consent. Thus a protected customary rights group is not liable to any prohibitions, restrictions

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181 Ibid, cls 7 and 53. [MCA Act, ss 9 and 51].
182 Earth oven.
183 Canoes. See Finlayson, above n 146.
184 MCA Bill, cl 54(4)(c). [MCA Act, s 52(4)(b)].
185 FSA, s 76(2).
186 MCA Bill, cl 54(4)(a). [MCA Act, s 52(4)(a)].
187 Ibid, cl 54(4)(b). [This power was removed from the MCA Bill during its second reading, and therefore is not a legal entitlement: Marine and Coastal Area (Takutai Moana) Bill 2010 (201-2)].
188 Ibid, cl 54(4)(d). [MCA Act, s 52(4)(c)]. The subsection now places two exceptions on this entitlement. First, that a protected customary rights group may not derive a commercial benefit from a non-commercial aquaculture exercise; and second that the group may not derive a commercial benefit from a non-commercial fishery activity that is not a right or interest subject to the declarations in s 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
189 Ibid, cl 54(4)(c). [MCA Act, s 52(4)(d)].
or impositions applied under ss 9 to 17 of the RMA. Moreover, the group would not be liable for payment of coastal occupation charges imposed under s 64A of that Act. They thus possess a Hohfeldian immunity to certain liabilities under the RMA. This may seem to promote unequal treatment between Māori and others who must apply for resource consents in the zone. But, if protected customary rights orders are viewed as equivalent to resource consents, on the other hand, then this approach would be akin to equal treatment in the zone.

A consent authority is also under a duty not to grant a resource consent for an activity to be carried out in the rights holder’s protected customary rights area if the activity is likely to have adverse effects on the exercise of their right. There are some exceptions, however. A resource consent may still be granted for mining

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190 Ibid, cl 54(1). [MCA Act, s 52(1)].
191 Ibid, cl 54(2). [MCA Act, s 52(2)(a)].
192 A “consent authority” is a regional council, a territorial authority, or a local authority that is both a regional council and a territorial authority, whose permission is required to carry out an activity for which a resource consent is required under the RMA.
193 MCA Bill, cl 57(2). [MCA Act, s 55(2)].
194 See ibid, cl 57(3), which states:

The existence of a protected customary right does not limit or otherwise affect the grant of—

(a) a coastal permit under the Resource Management Act 1991 that is necessary to enable aquaculture activities to continue in that area, provided there is no change to the area of the coastal space occupied by the aquaculture activity for which the coastal permit was granted; or

(b) a resource consent under section 330A of the Resource Management Act 1991 for an emergency activity (within the meaning of section 8(2)) undertaken in accordance with section 330 of that Act, as if the emergency activity were an emergency work to which section 330 applies.

(c) a resource consent for—

(i) an existing nationally or regionally significant infrastructure and its associated operations (within the meaning of section 8(2)):

(ii) a deemed accommodated activity within the meaning of section 9(1)(b).

[The MCA Act, legislates a slightly more detailed exception section: s 55(3). It reads:

The existence of a protected customary right does not limit or otherwise affect the grant of—

(a) a coastal permit under the Resource Management Act 1991 to permit existing aquaculture activities to continue to be carried out in a specified part of the common marine and coastal area—

(i) regardless of when the application is lodged or whether there is any change in the species farmed or in the method of farming; and

(ii) provided that there is no increase in the area, or change in the location, of the coastal space occupied by the aquaculture activity for which the existing coastal permit was granted; or

(b) a resource consent under section 330A of the Resource Management Act 1991 for an emergency activity (within the meaning of section 63) undertaken in accordance with section 330 of that Act, as if the emergency activity were an emergency work to which section 330 applies.

(c) a resource consent for an existing accommodated infrastructure (within the meaning of section 63) if any adverse effects of the proposed activity on the exercise of a protected customary right will be or are likely to be—

(i) the same or similar in character, intensity, and scale as those that existed before the application for the resource consent was lodged; or

(ii) if more than minor or temporary in nature; or
petroleum, for instance, even if the consent authority, when considering such an application, must have particular regard to the effect on the protected customary right. In these situations, the interests of the protected customary right group are liable to be affected by the decisions of the consent authority.

Protected customary rights are also limited by any controls imposed by the Minister of Conservation where the Minister determines that the exercise of the protected customary right is likely to have a significant adverse effect on the environment. Here again, the rights of the customary group are liable to be altered.

Overall, these provisions establish a very subtle interplay between the rights of protected customary rights groups, and the position of consent authorities in local or regional government, central government as represented by Ministers, and other potential users of the foreshore and seabed. But this outcome may still reflect a sufficient consensus concerning equality and rights of Māori and non-Māori in the zone.

4.b.v. The recognition of Māori ownership rights

The provision for customary marine title is a significant improvement on the FSA, which removed the jurisdiction of the courts to determine Māori customary ownership over the foreshore and seabed. Under the FSA, if Manawhenua could prove that but for the Act they would have had exclusive title, they could petition the High Court for a territorial customary rights order. Such an order would simply state that fact. The group could then negotiate with the Crown for redress, but no such redress was available directly from the Court.

Under the MCA Bill, successful applicants will be awarded a form of customary title. This title is qualified in that it is inalienable and subject to the right of public

(d) a resource consent for a deemed accommodated activity (within the meaning of section 65(1)(b)(i))

195 Ibid, cl 57(5). [MCA Act, s 55(4)].
196 Ibid, cls 56(2)(b) and 58. [MCA Act, ss 54(2)(b) and 56].
197 See Chapter Two, Section 15.b.
198 FSA, ss 37 and 38.
199 MCA Bill, cl 63(1). [MCA Act, s 60(1)].
In this respect, the Bill may recognise Māori rights to a greater extent than the FSA, but it may not extend the full range of rights that might have been recognised had the Ngati Apa decision been allowed to stand as law. Granting this form of customary title will not satisfy those who believe there are no legitimate Māori ownership rights in the zone, but nor will it satisfy those who advocate full Māori ownership. For there to be sufficient public acceptance, however, perhaps any title recognised in a settlement must be qualified in this way.

Customary marine title does not afford the titleholders the claim-right to exclusive possession of the area. In fact, recognition of public access as a counter-claim-right imposes a duty on customary marine title groups not to impede this access. Nor do they possess the power to alienate their area to which they have been granted title. To this extent they are under a disability.

Like protected customary rights groups, they have the power, however, to delegate rights conferred by a customary title order or agreement, and to transfer the order or agreement. Moreover, titleholders also have: the liberty to use the area; the benefit of exercising specific rights conferred; and the liberty to develop the area in specified ways.

Specific consultation rights are also conferred. First is the right of customary marine title groups to be consulted on decisions regarding marine mammal watching permits. The Director-General of Conservation, in considering such permits, must give the group written notice, and recognise and provide for their views if they are provided within forty working days.

Second, the group must be consulted when the Minister of Conservation is considering changes to coastal policy statement under s 57 of the RMA. The Minister

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200 Ibid, cl 27. [MCA Act, s 26].
201 Ibid, cl 63(2)(a). [MCA Act, s 60(3)(a)].
202 Ibid, cl 63(2)(b). [MCA Act, s 60(3)(b)].
203 Ibid, cl 63(2)(c). [MCA Act, s 60(2)(a)].
204 Ibid, cl 75(1). [MCA Act, s 76(1)].
must seek the customary marine title groups’ views, and consider their views in his or her decision.\textsuperscript{205}

In addition, the group has a right to own any tāonga tūtūrū found in their customary marine title area.\textsuperscript{206} Other individuals are under a duty to notify such findings,\textsuperscript{207} and this right is protected through s 11(9) of the Protected Objects Act 1975, which creates an offence not to notify the finding. Others may still make legitimate claims on the tāonga tūtūrū.\textsuperscript{208} If so, the Secretary for Justice determines ownership.\textsuperscript{209}

The title-holding group is also granted the right to own minerals (other than the Crown owned minerals) within their customary marine title area.\textsuperscript{210} However, the MCA Bill specifies that existing privileges, rights, obligations, functions and powers in relation to non-Crown minerals, that have already been granted, continue to the end of their current term.\textsuperscript{211} Where these privileges apply, the customary marine group is still entitled to receive the royalties that are due to the Crown.\textsuperscript{212}

\begin{footnotesize}
\begin{enumerate}
\item[Ibid, cl 76. ]\textsuperscript{[MCA Act, s 77].}
\item[Ibid, cl 81(1). ]\textsuperscript{[MCA Act, s 82].}
\item[Ibid, cl 81(3). ]\textsuperscript{[MCA Act, s 82(3)].}
\item[Ibid, cl 81(4) and (7). ]\textsuperscript{[MCA Act, s 82(4) and (7)].}
\item[Ibid, cl 81(7). ]\textsuperscript{[Under the MCA Act, the law now holds that the chief executive of the Ministry of Arts, Culture and Heritage, or the Maori Land Court, has the power to determine the ownership of such tāonga tūtūrū: s 82(7)].}
\item[Ibid, cl 82. ]\textsuperscript{[MCA Act, s 83].}
\item[Ibid, cl 83(1). ]\textsuperscript{These are:}
\begin{enumerate}
\item[\textsuperscript{(a)}] privileges in existence immediately before the effective date; and
\item[\textsuperscript{(b)}] rights that can be exercised under the Crown Minerals Act 1991 by the holders of those privileges; and
\item[\textsuperscript{(c)}] subsequent rights and privileges granted to those holders following the exercise of the rights referred to in paragraph (b); and
\item[\textsuperscript{(d)}] the obligations on those holders imposed by or under the Crown Minerals Act 1991; and
\item[\textsuperscript{(e)}] the exercise by the Crown of its functions and powers under the Crown Minerals Act 1991 in relation to any of the matters referred to in paragraphs (a) to (d).
\end{enumerate}
\item[\textsuperscript{The MCA Act now specifies that those existing privileges, rights, obligations, functions and powers continue as if the Act had not been enacted: s 84(1). These are now defined as:}]
\begin{enumerate}
\item[\textsuperscript{(a)}] privileges in existence immediately before the effective date; and
\item[\textsuperscript{(b)}] rights that can be exercised under the Crown Minerals Act 1991 by the holders of those privileges or any other person; and
\item[\textsuperscript{(c)}] subsequent rights and privileges granted to those holders or any other person following the exercise of the rights referred to in paragraph (b) (including those provided for by section 32 of the Crown Minerals Act 1991); and
\item[\textsuperscript{(d)}] the obligations on those holders or any other person imposed by or under the Crown Minerals Act 1991; and
\item[\textsuperscript{(e)}] the exercise by the Crown of its functions and powers under the Crown Minerals Act 1991 in relation to any of the matters referred to in paragraphs (a) to (d)]
\end{enumerate}
\item[Ibid, cl 83(2). ]\textsuperscript{[MCA Act, s 84(2)(a)].}
\end{enumerate}
\end{footnotesize}
Customary marine titleholders have a right to have a planning document that sets out the objectives and policies of the group, including the sustainable management of the area and protection of their cultural identity and historic heritage.\(^\text{213}\) This is a liberty, in a Hohfeldian sense. However, once lodged, this document generates claim-rights in that the agencies with which it is lodged must take it into account when making specific decisions.\(^\text{214}\)

Finally, customary marine title also confers on titleholders powers in the form of RMA permission rights, conservation permission rights, and powers to designate and protect wāhi tapu area. These could be described as Hohfeldian powers. For instance, customary marine titleholders may be able to veto some future development. But that would not affect access for all individuals to the zone, nor will it affect fishing and development rights already established in law.\(^\text{215}\) For clarity of structure, these rights will be examined in the next section.

4.b.vi. The provision for power-sharing arrangements

There remains the question of equality of authority. It was earlier suggested that any stable solution would require power-sharing arrangements between Parliament, central government, local councils, and Manawhenua, with each having discrete zones of power. So what is the effect of the MCA Bill here? Would it grant Manawhenua some authority in the zone, that might be sufficient to satisfy their immediate aims, but would not be so extensive as to attract strong opposition from other groups?

The mana tuku iho regime grants Manawhenua some heightened consultation rights in conservation processes, but still leaves the ultimate decisions (about marine mammal watching permits, for instance) in others’ hands. In some other areas, however, it may be said that limited forms of decision-making authority are conferred, in relation to: consents under the RMA;\(^\text{216}\) new consultation measures;\(^\text{217}\) and protection of wāhi

\(^\text{213}\) Ibid, cl 84(1) and (2). [MCA Act, s 85(1) and (2)].
\(^\text{214}\) Ibid, cls 86-90. [MCA Act, ss 88-91].
\(^\text{215}\) Ibid, cl 21 declares: “Nothing in this Act limits or affects any resource consent granted before the commencement of this Part”; and cl 22(2) proclaims: “A proprietary interest that, immediately before the commencement of this Part, was in effect continues, so far as it is lawful, to have effect according to its tenor”. [Sections 20 and 22(2) reproduce these declarations in law, with one slight change; the word “Act” substitutes the word “Part”].
\(^\text{216}\) See ibid, cls 65-69. [MCA Act, ss 66-70].
tapu.\textsuperscript{218} The precise powers conferred on Manawhenua in each of these areas, therefore, need careful scrutiny.

4.b.vi.1. \textit{A Resource Management Act 1991 permission right}

First, customary marine titleholders would hold the right, or Hohfeldian power, to give or decline permission for some future activities that require resource consent under the RMA.\textsuperscript{219} This permission from the customary group would be required in addition to, and not in substitution for, the necessary resource consent granted by a local or regional government or another designated authority. This permission of the customary title holders may be granted or declined for any reason, but once given it cannot be revoked.\textsuperscript{220} This places the applicants for, or the holders of, a resource consent under a liability, in that they cannot commence with the activity unless the relevant customary marine title group has given permission.\textsuperscript{221} This power seems to be absolute, as the decision of the customary marine title group is not subject to a right of appeal or a right of objection under ss 357 and 357A of the RMA.\textsuperscript{222} The courts, however, may consider the groups to be exercising statutory powers of decision and thus their decisions could be judicially reviewed

Once the MCA Bill is enacted, the law will protect this permission right because it will be an offence to commence the activity unless the customary group has given permission, and imprisonment or a fine may be imposed.\textsuperscript{223} Consequently, this right seems equivalent to a veto power, although that language is not used, perhaps because the Crown believes using such terminology would jeopardise the settlement.

This power is limited in that it does not apply to “accommodated activities”, which includes activities undertaken to prevent danger to humans or the environment, or scientific or monitoring research.\textsuperscript{224} It is also subject to procedural limits in that once the customary group has received notice that an applicant is seeking permission to

\textsuperscript{217} See ibid, cls 70-72. [MCA Act, ss 71-73].
\textsuperscript{218} See ibid, cls 77-80. [MCA Act, ss 78-81].
\textsuperscript{219} Ibid, cl 65(2). [MCA Act, s 66(2)].
\textsuperscript{220} Ibid, cl 65(2) and (5). [MCA Act, s 66(2) and (3)].
\textsuperscript{221} Ibid, cl 67(1). [MCA Act, s 68(1)].
\textsuperscript{222} Ibid, cl 67(2). [MCA Act, s 68(2)].
\textsuperscript{223} Ibid, cl 68. [The law now protects this permission right: MCA Act, s 69].
\textsuperscript{224} Ibid, cl 65(6). [MCA Act, s 66(4)]. For definitions of “accommodated activities” see cls 8 and 9 [s 64].
carry out a RMA related activity, the group has forty working days in which to notify the applicant and the consent authority of its decision.\textsuperscript{225} If the group fails to meet this deadline, they are treated as having given their permission.\textsuperscript{226}

The MCA Bill, therefore, sets up the process of gaining such permission as separate from the resource consent process under the RMA. Exactly what this permission right entails, and what it imposes on others, requires further unpacking. It applies only to applications for resource consents lodged after customary marine title is granted.\textsuperscript{227} Thus, activities in the group’s customary marine title area for which resource consent has already been obtained prior to the group being awarded title remain unimpeded.\textsuperscript{228} Moreover, even if it is only an application for a resource consent that has been made prior to a group being awarded title, then the customary marine title group has no permission right concerning such applications, even, it seems, if the application is actually resolved after the award of customary title has been made.\textsuperscript{229}

Sections 12, 12A, 14, 15, 15A and 15B of the RMA set out activities that may require resource consents in the common coastal marine area, and would therefore require permission, under the new legislation, from customary marine title groups in their area.\textsuperscript{230} Examples of such activities include: building or altering a structure; introducing plants or removing vegetation; reclaiming or dredging the foreshore or seabed; taking gravel, sand or shell; discharging water or contaminants; depositing material on the foreshore or seabed; aquaculture activities; special events; laying a mooring outside of a mooring management area; erecting a sign; and taking and using coastal water.

\textsuperscript{225} Ibid, cl 66(3). [Now, in law, the customary group must notify the applicant and the Ministers of Conservation and for the Environment of its decision: MCA, s 67(3)].
\textsuperscript{226} Ibid, cl 66(4). [MCA Act, s 67(4)].
\textsuperscript{227} Ibid, cl 65(4). [This requirement was removed from the final version of the MCA Act at the Bills second reading].
\textsuperscript{228} Ibid, cl 64(4(a)). [This has not eventuated in law, as this paragraph was removed from the final enacted Bill at its second reading].
\textsuperscript{229} Ibid, cl 64(4(b)). [Again, this has not eventuated as this paragraph was removed from the final enacted Bill at its second reading].
\textsuperscript{230} The Act calls this type of resource consent a ‘coastal permit’: RMA, s 87(c). Coastal permits may not be required for such activities if the activities are expressly allowed under some of the following: a national environmental standard; regulations made under the Act; a rule in a regional coastal plan; a rule in a proposed regional coastal plan; a rule in a regional plan; or a rule in a proposed regional plan.
Take consents to engage in aquaculture as an example. No person may apply for resource consent for aquaculture activities unless the area to which the consent applies is an aquaculture management area as specified under a regional coastal plan. If this area happens to fall within a group’s customary marine title area, then the group could veto applications for marine farms and other aquaculture activities made after they were awarded title. This would prevent the applicants obtaining their resource consent, and it would place them under a further disability in that they would not be able to challenge the customary group’s decision.

The likelihood of a group exercising such a veto right may still be slim. First, they would have to be awarded customary title. Second, there would have to be an aquaculture management area established in their title area. Third, the customary group would have to decline permission to the application within forty working days, a very short and onerous period as the decision-making process of the group may require wide ranging consultation among many people. Finally, even if permission were given, resource consent would still be required from the designated public authority.

The customary group could not, however, simply give themselves permission to set up a marine farm in their title area without also acquiring resource consent. Even if they could give themselves permission, the consent authority at the relevant level of government must still approve the application.

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231 Ibid, s 2 defines aquaculture activities as:
(a) means the breeding, hatching, cultivating, rearing, or ongrowing of fish, aquatic life, or seaweed for harvest if the breeding, hatching, cultivating, rearing, or ongrowing involves the occupation of a coastal marine area; and
(b) includes the taking of harvestable spat if the taking involves the occupation of a coastal marine area; but
(c) does not include an activity specified in paragraph (a) if the fish, aquatic life, or seaweed—
   (i) are not in the exclusive and continuous possession or control of the person undertaking the activity; or
   (ii) cannot be distinguished or kept separate from naturally occurring fish, aquatic life, or seaweed.

232 RMA, s 12A(1A). The Act defines “aquaculture management area” in section 2 as:
(a) means an area established as an aquaculture management area in accordance with section 165AB; and
(b) includes part of an aquaculture management area.

233 MCA Bill, cl 65(7). [MCA Act, s 66(5)].
4.b.vi.2. A conservation permission right

Second, a customary marine title group can give or decline permission, on any grounds, for the Minister of Conservation or Director-General of Conservation to consider an application, made after they have been awarded title, to declare or extend a marine reserve, to declare or extend a conservation protected area, or to grant a concession over their title area.\(^{234}\) Under this permission right, customary marine titleholders are not obliged to comply with obligations arising under enactments to which such applications pertain.\(^{235}\) For example, they do not have to follow the procedure for objecting to an establishment of a marine reserve as set out under s 5 of the Marine Reserves Act 1971, as the process set out in the new legislation supersedes this. Their permission right is limited in that it does not apply to applications for “accommodated activities”,\(^{236}\) and it is limited by the power of the Minister or Director-General to proceed with a proposal to declare or extend a marine reserve or conservation protected area without permission if the proposal is essential for protection purposes.\(^{237}\)

Consequently, the Minister of Conservation or Director-General of Conservation are placed under a duty to refer an application for a conservation activity to the relevant customary marine title group.\(^{238}\) The group’s decision to give or refuse permission must then be followed and there is no right of appeal.\(^{239}\) However, once permission is given it cannot be revoked.\(^{240}\) This power, however, is less than absolute. Then the permission right must be exercised within forty working days of the group receiving the application, and if it fails to do so, it is treated as having given permission.\(^{241}\)

\(^{234}\) Ibid, cl 70(1), (2) and (3). [MCA Act, s 71(1), (2) and (3)].
\(^{235}\) Ibid, cl 72(3)(a). [MCA Act, s 73(3)(a)].
\(^{236}\) Ibid, cl 70(6). [MCA Act, s 71(6)].
\(^{237}\) Ibid, cl 73. [The MCA Act holds that the “protection purposes” for which the Minister or Director-General can proceed with a conservation proposal without permission of the customary marine title group must be “of national importance”: s 74(2)].
\(^{238}\) Ibid, cl 71. [MCA Act, s 72].
\(^{239}\) Ibid, cl 72(3)(b). [MCA Act, s 73(3)(b)].
\(^{240}\) Ibid, cl 70(4). [MCA Act, s 71(4)].
\(^{241}\) Ibid, cl 72(1) and (2). [MCA Act, s 73(1) and (2)].
4.b.vi.3. A wāhi tapu protection right

Third, the customary marine titleholders have the power to prohibit or restrict activities in wāhi tapu areas specified in their customary marine title area.\(^\text{242}\) This includes the power to appoint wardens to promote compliance with such prohibitions or restrictions.\(^\text{243}\) In order for such areas to be specified, the Manawhenua group applying or negotiating their customary marine title area must state they seek to include wāhi tapu in their title.\(^\text{244}\) If the group can prove they are connected to the area in accordance with tikanga, and that prohibitions or restrictions on access are required to protect the area, then such areas will be specified in their title.\(^\text{245}\) This protection right will therefore only be exercised in very limited areas, and only where a customary group can met the test to establish a wāhi tapu.

Where that occurs, this protection right therefore places a liability on all other individuals to comply, unless they are carrying out an emergency activity,\(^\text{246}\) or have an exemption notified under cl 77(4).\(^\text{247}\) It will be an offence intentionally not to comply, which could result in a summary conviction or a fine not exceeding $5000.\(^\text{248}\)

There is still one important limit on this power to prohibit or restrict activities,

\(^{242}\) Ibid, cl 78(1). [MCA Act, s 79(1)(b)].
\(^{243}\) Ibid, cl 79. [MCA Act, s 80].
\(^{244}\) Ibid, cl 77(1). [MCA Act, s 78(1)].
\(^{245}\) Ibid, cl 77(2). [MCA Act, s 78(2)].
\(^{246}\) Ibid. According to cl 8(2), “emergency activity”:

\begin{itemize}
  \item[(a)] means an activity undertaken in a customary marine title area to prevent, remove, or reduce—
  \begin{itemize}
    \item[(i)] an actual or imminent danger to human health or safety; or
    \item[(ii)] a danger to the environment or property so significant that immediate action is required; and
  \end{itemize}
  \item[(b)] includes all necessary coastal protection work undertaken in a customary marine title area by a local authority; and
  \item[(c)] includes any activity authorised by legislation for the purpose of preventing any of the matters referred to in paragraph (a), including an activity in relation to—
  \begin{itemize}
    \item[(i)] a state of emergency declared under the Civil Defence Emergency Management Act 2002; or
    \item[(ii)] a biosecurity emergency declared under section 144 of the Biosecurity Act 1993; or
    \item[(iii)] an emergency or special emergency declared under section 49B or 136 of the Hazardous Substances and New Organisms Act 1996; or
    \item[(iv)] a marine oil spill response under the Maritime Transport Act 1994; or
    \item[(v)] an emergency within the meaning of section 2(1) of the Fire Service Act 1975; or
    \item[(vi)] emergency works described in section 330 of the Resource Management Act 1991
  \end{itemize}
\end{itemize}

[This definition clause is reproduced in law through s 63 of the MCA Act, with one minor change; the phrase “or Crown agency” is inserted at the end of paragraph (b)].
\(^{247}\) [Now s 79(1)(c) of the MCA Act]. Ibid, cl 80(4). [MCA Act, s 81(4)(b)].
\(^{248}\) Ibid, cl 80(2). [MCA Act, s 81(2)].
however. It cannot substantially reduce the entitlements of fishers under the Fisheries Acts.\textsuperscript{249}

To conclude, these regimes seem to grant customary marine titleholders significant powers to control and regulate resource consented, conservation and access activities in their customary title area. In particular, a RMA permission right seems a strong veto right and a wāhi tapu protection right seems a significant burden on public access. However, such powers are limited. The RMA and conservation permission rights must be exercised within a strict timeframe of forty working days, they do not apply to “accommodated activities”, and the relevant consent authorities or Ministers still exercise concurrent authority. In the case of a wāhi tapu protection right, it is limited by its non-application to activities protected under the Fisheries Acts.

These regimes therefore move the solution proposed in the MCA Bill some degree towards equality of authority, as they would establish greater power sharing between Manawhenua and local or regional government. This power sharing, however, occurs only in specific instances, and only when Manawhenua comply with strict conditions. Therefore, RMA and conservation permission rights seem to only supplement other forms of public authority. However, the exercise of a wāhi tapu protection right will be able to limit the right of public access the zone. These regimes will not satisfy those who call for Māori to be the sole authority in the zone. It seems, however, that these power-sharing arrangements could be acceptable to many participants in the Debate, especially as they are not described as veto rights and all existing activities continue unimpeded.

4.c. The central differences between the Marine and Coastal Area (Takutai Moana) Bill 2010 and the current Foreshore and Seabed Act 2004

This section examines the key differences that the new legislation would make to the law in the foreshore and seabed. It seems that the rights recognisable under protected customary rights orders will be very similar to those recognisable under the FSA regime. Significantly, no customary rights orders have been issued under the FSA, nor

\textsuperscript{249} Ib id, cl 78(2). [MCA Act, s 79(2) and (4)].
have many been sought.\textsuperscript{250} Perhaps more will be sought under the new law. The test for protected customary rights will be slightly less onerous than the test for customary rights under the FSA.\textsuperscript{251} This is because the test does not require that the right be “integral to tikanga”, and the exercise of the right is allowed to have changed over time. However, the requirements that the protected customary right has been exercised since 1840 and that the law has not extinguished it, make the test a very high threshold to meet. Manawhenua may find it hard to prove a continuous relationship with their foreshore and seabed, due in large part to the actions of the Crown since 1840.

In enabling the High Court to grant customary marine title orders, the MCA Bill is significantly different to the FSA. Such orders will recognise a greater range of property rights in the zone, including qualified ownership, and will also convey limited decision-making powers. Successful applicants can also receive such title directly from the court, rather than simply obtaining a further right to negotiate with the Crown for redress as is currently available under a territorial rights order.\textsuperscript{252} But, like the test for those orders, the threshold for a successful customary marine title application is extremely high. Applicants must prove the area is held “in accordance with tikanga” and, as under the FSA, they must prove that the group “has exclusively used and occupied the specified area from 1840 to the present day without substantial interruption”, and that the law has not extinguished their interests. The applicants would no longer have to prove ownership of contiguous land since 1840, but such ownership would still be a factor to be taken into account, along with the exercise of non-commercial fishing rights in the zone.\textsuperscript{253}

A question raised here is whether the High Court will accept proof of exclusive title in instances where Manawhenua claim exclusivity but have allowed others to use the area in accordance with tikanga. If the Court did, would it require that such allowance be express, such as in the case of other groups seeking and being granted permission, or implied by the inaction of Manawhenua to stop others using the area?

\textsuperscript{250} The reasons for this may not just be an issue of proof: it may be an issue of value. For example, are these customary rights orders worthwhile seeking?
\textsuperscript{251} See Chapter Two, Section 15.b.ii.
\textsuperscript{252} See Chapter Two, Section 15.b.i.
\textsuperscript{253} MCA Bill, cl 61(1)(a). [MCA Act, s 59(1)].
Despite this, applicants may find it extremely difficult to prove exclusive ownership since 1840 “without substantial interruption”. The Prime Minister himself has stated that this threshold is so high that most Māori will be unable to meet it.\footnote{John Key, paraphrased in Audrey Young “Foreshore plan opens door to iwi claims” \textit{NZ Herald} (Auckland, 15 June 2010) at Front Page; Audrey Young “Beach pledge unhelpful, Act told” \textit{Politics, NZ Herald} (Auckland, 17 June 2010) at A4.} As Jackson contends:\footnote{Jackson, above n 167, at 4-5.}

> Because the ability of most of our people to use the foreshore since 1840 has been taken away or limited by actions of the Crown it is going to be almost impossible for most Iwi and Hapu to meet the test.

Indeed research conducted into the previous regime suggested that at least 98% of Iwi and Hapu have been denied undisturbed possession since 1840.

The acceptance by the Prime Minister that the threshold was so high most wouldn’t meet it is both an accurate assessment of the test and a perhaps unwitting acknowledgement of its basic discriminatory nature.

It is a case therefore of applicants having to prove exclusive title to receive a title that is less than exclusive. On the face of it, this seems to be unequal application of the law. Perhaps, however, since other ordinary property rights generally within the Aotearoa/New Zealand legal system can be affected and restrained, the concern here is more that the nature of the rights recognised are, substantively, inappropriate. Despite this, as discussed in Section 2, underlying any viable solution must be guaranteed public access to the zone. Thus any legislation that incorporates Māori title must provide for this. The majority of New Zealanders are most unlikely to accept full and exclusive Māori title, and requiring that would endanger any attempts at solution.

This does not mean, however, that tests for qualified Māori title should require proof of exclusivity. The Attorney-General has commented that the test for customary marine title reflects Aotearoa/New Zealand’s unique bicultural national experience by incorporating tikanga into the law.\footnote{Finlayson, above n 146.} Yet it fails to incorporate one vital aspect of tikanga: that of ahi kā. Ahi kā literally means ‘burning fires of occupation’. It denotes
that title to land may be conferred through occupation by a customary group. While this occupation is generally over a long period of time, it is usually believed that such fires can be revived up to three generations after people occupied the land. The requirement of continuous occupation may not reflect this practice, and so may itself be contrary to tikanga.

Moreover, were the test to reflect the country’s experience, as the Attorney-General claims, should it not take into account the experience of colonisation? This could mean that applicants would not have to prove exclusive use where this had been interrupted due to a Treaty breach. Perhaps they could prove that but for the breach they would have exercised such exclusivity. There is no precedent for this, however, in our law, except perhaps the Treaty settlement process, which is a political rather than a legal one. More importantly, this is unlikely to gain acceptance as a solution, where other New Zealanders have rights to use the area that may be affected were Māori to be awarded title.

4.d. Concluding remarks as to whether the Marine and Coastal Area (Takutai Moana) Bill 2010 will be an “enduring solution”

At an abstract level, the MCA Bill falls within the outlines of the possible compromise solution that I propose. If enacted, it will likely quieten the Debate for a while. This is not to say that it will silence the Debate. Not only might some participants be outside the compromise, but even those who assent to the compromise might see it as a second-best solution, and retain their preference for another option. However, once claims begin to be lodged through the courts it seems likely that the Debate will again grow louder. This is because, while the MCA Bill may aim to promote the shared ideal of procedural equality, placing a time limit of six years on commencing claims, denies full equality of that kind. Moreover, while the MCA Bill recognises a greater range of Māori property rights than the FSA, the high threshold test for such rights will likely prove difficult for many Manawhenua to meet. Due process may be restored, to some degree, but it may be empty in outcome.

Furthermore, while the MCA Bill sets out to recognise the mana tuku iho of Manawhenua to their foreshore and seabed, this recognition only accords consultation and procedural rights, and fails to fully incorporate the greater power sharing arrangements needed for any lasting solution. For the most part, the Bill seems only to reassert rights to consultation that Manawhenua already possess under the RMA and the LGA.

The MCA Bill does recognise a number of decision-making powers that would be attached to customary marine title, but these powers will accrue very rarely, they are limited and apply only to future developments.

The Bill therefore misses the opportunity to establish a true Treaty partnership between Manawhenua and the Crown. It purports to take into account the Treaty in cl 5\textsuperscript{258} by recognising and promoting “the exercise of, customary interests of Māori in the common marine and coastal area”. However, as with the FSA, the “customary interests of Māori” are defined and codified narrowly in the Bill. Therefore, while the Bill recognises that Māori rights to the zone are inherited, which is one point of consensus between many participants, the provisions of the Bill will in future become the only source of Māori rights to the zone, and any customary rights that are not recognised in the MCA Bill are extinguished.

At this stage, it seems, while the MCA Bill, once enacted, will likely quieten the Debate for a while, regrettably I must conclude that it will not be an “enduring solution”.

\[\textsuperscript{258} \text{MCA Act, s 7}].
Chapter Nine: Discussion and Conclusion

1. Introduction

In this thesis I have examined the major equality and rights claims made during the Foreshore and Seabed Debate of 2003 to 2006. I have considered the theories of equality expressed, the notion of separate Māori rights, and the potential sources and scope of such rights. From this examination I have identified a zone of conceptual compromise, within which a tolerably stable, suitably supported solution could be found. The lines of this of potential compromise then formed the yardstick against which to measure the National-led Coalition Government’s proposed solution to the Debate, the Marine and Coastal Area (Takutai Moana) Bill 2010 (the MCA Bill).\(^1\) As I write this conclusion, the outstanding political question is: *will this Bill be enacted, in something like its current form, and, if so, will its passage quieten the Debate?*

2. Summary of the solution proposed

The measure adopted in this thesis for determining the validity of a solution to the Debate is not a normative one: it does not endorse any single equality theory as the right one, or any single theory as to the proper sources of Māori rights. Nor does the solution proposed recognise Māori rights in the foreshore and seabed to the extent that I, and others advocating greater Manawhenua control of the resource, would promote. Instead, the solution proposed is a practical one, based on a qualitative assessment of the range of opinion expressed on the issues and the point at which these different opinions are sufficiently close to allow a potential solution to emerge.

Chapter Eight showed any tenable settlement to the Debate would have to be a legislative one. The legislation would have to incorporate the requirement that likes be treated alike, and that those who are differently situated may be treated differently. In particular, likes would have to be treated alike on a procedural level. It would need

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\(^1\) Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1) (MCA Bill). [An addendum: Between the time of submission in December 2010, and the publication of this thesis in September 2011, the MCA Bill was in fact passed into law: Marine and Coastal Area (Takutai Moana) Act 2011 (MCA Act). The legislation was enacted in an almost identical form to the Bill. Therefore, for ease of reference to the applicable law, this chapter has been amended and differs slightly from its original form. When clauses of the Bill are cited, the relevant sections of the Act have been inserted in brackets].
to reinstate due process for Māori to permit the courts, as a fair and open forum, to determine the scope of Māori property rights. For any solution to be acceptable to coastal Manawhenua, such a judicial determination must be available for ownership rights, although for the solution to be acceptable to other New Zealanders, such ownership would have to be qualified by specific public rights, discussed below.

The solution would also have to recognise that Māori are differently situated to others because their property rights are founded in different sources of rights. These sources include tikanga Māori, the Treaty and the doctrine of native title. A settlement may require rights with such sources to be incorporated into legislation. This would elevate them to the status of our highest source of law, and it would give the rights endorsed full legal recognition and protection.

Any legislative solution must recognise in this fashion a significant range of Māori use rights in the foreshore and seabed, and grant Manawhenua limited management powers, even if these impede others’ freedoms to some degree. For a lasting settlement, some degree of power sharing between Parliament, local councils and Manawhenua will probably be required. Such an arrangement could be based on the Treaty Partnership, or modelled on the statutory requirements for decision-making already placed on local councils. In saying this, any powers afforded Manawhenua would have to be less than absolute. These powers would have to fit the current management scheme of the coast without causing too much alteration to current practices or creating excessive uncertainty for others exercising rights in the resource.

In addition, to be widely endorsed, any legislative solution would need to maintain and protect existing commercial and recreational rights and interests. There was very little discussion of existing commercial rights during the Debate, and only a few participants alluded to the need to protect such rights, perhaps because few felt that the continuation of these rights was threatened. In addition, for acceptance from

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2 Māori customary law.
3 See Chapter Seven, Section 3.b.
recreational users, the statutorily protected rights of navigation and fishing would have to remain unimpeded.\textsuperscript{4}

Another element likely required for acceptance, but not one featuring strongly in the Debate, is that any Māori title awarded would have to be inalienable. This would continue the practice established in Te Ture Whenua Maori Act 1993, which makes Māori customary dry land inalienable, except in very limited circumstances.\textsuperscript{5}

Above all, for any solution to attract a consensus, the statutory right of all New Zealanders to obtain access to the beaches must be guaranteed.\textsuperscript{6} This would mean that that any title granted to Manawhenua in the legislation would have to be limited by the public’s right of access.

### 3. Examples of similar solutions in analogous areas

Other debates over Māori rights to the nation’s resources have occurred in the past, and continue to occur in 2010, over rights to fresh water, national parks, forests and Crown land, for instance. Some of these debates have been settled in a similar legislative manner to the solution I propose. This section will briefly examine two such solutions in order to illustrate that their success is based on compromise between notions of equality and rights that fall within a similar conceptual zone. The two solutions pertain to the regional debates over Māori rights to several North Island lakebeds, and to a major inland river, and are contained within the Te Arawa Lakes Settlement Act 2006 (the Te Arawa Lakes Act) and the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (the Waikato River Act).\textsuperscript{7} Although the

\textsuperscript{4} These rights are guaranteed in the Foreshore and Seabed Act 2004 (FSA), ss 8 and 9, and are upheld in the MCA Bill, cls 28 and 29. [MCA Act, ss 27 and 28].

\textsuperscript{5} Te Ture Whenua Maori Act 1993, s 145. However, the Maori Land Court can change the status of Māori customary land to freehold: s 132. This Māori freehold land can then be alienated in accordance with the Act: ss 147 and 147A.

\textsuperscript{6} This right is guaranteed in the FSA, s 7, and in the MCA Bill, cl 27. [MCA Act, s 26].

\textsuperscript{7} The Te Arawa Lakes are Rotoehu, Rotomā, Rotoriti (or Te Roto-Whati-i-kite i-a-Ihenga-i-Ariki-ai-a Kahumatamomoe), Rotorua (or Rotorua-nui-a Kahumatamomoe), Ōkataina (or Te Moana i kataina a Te Rangitākaroro), Ōkareka, Rerehakaantu, Tarawera, Rotomahana, Tikitapu, Ngahawa, Tutaeianga, Ngāpouri (or Opouri) and Ōkaro (or Ngakaro). The Waikato River is Aotearoa/New Zealand’s longest river. It runs from Mount Ruapehu, flowing north to the Tasman Sea, south of Auckland at Port Waikato. Of note, the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (Waikato River Act) sits alongside the Ngāti Tūwharetoa, Raukawa and Te Arawa River Iwi Waikato River Act 2010, which is the legislative solution to the debate surrounding the recognition of the customary rights of Ngāti Tūwharetoa, Raukawa and Te Arawa River Iwi to the river. In a like manner to the Waikato
debates over these resources occurred within the context of settling historical claims, and did not have the national prominence of the foreshore Debate, their legislative solutions illustrate many features required for a lasting settlement.

Both Acts recognise and protect a wide range of interests, both Māori and non-Māori. The Te Arawa Lakes Act recognises the ownership rights of Te Arawa and vests title to 13 lakebeds in the Trustees of the Te Arawa Lakes Trust, as the representative body of Te Arawa. Such a vesting though is purely in the lakebeds. It does not include the Crown stratum below the lakebed, nor the water above. It also does not include ownership over aquatic life, except plants attached to the lakebeds. As owners, the Trustees may grant leasehold in the lakebeds for not more than 35 years, and licences, easements, or profit à prendre over all or part of a lakebed for any term.

However, as I propose with the foreshore and seabed, this ownership of the lakebeds is deemed to be inalienable, and is limited by continuing rights of public navigation and recreation. Such recreation rights include swimming, boating, water-skiing and fishing. Although not explicitly stated in this legislation, such rights include public access to the lakes for recreational purposes, although not over private land. Encumbrances on certain lakebeds continue, such as specific wildlife refuges and the right of the Rotorua District Council to remove sediment from

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River Act, as will be described below, the purpose of this Act is to recognise the significance of the Waikato River to these Manawhenua, recognise the vision and strategy for river, establish and grant functions and powers to the Waikato River Authority, and established the Waikato River Clean-up Trust as well as acknowledge and provide a process that may recognise certain customary activities of the Ngāti Tūwharetoa, Raukawa and Te Arawa River Iwi and provide co-management arrangements with these Manawhenua for the Waikato River: see s 4.

8 Te Arawa Lakes Settlement Act 2006 (Te Arawa Lakes Act), s 23. Te Arawa are a confederation of iwi (tribes, nations, peoples) and hapū (sub-tribes, clans) based in the Rotorua and Bay of Plenty areas in the North Island of Aotearoa/New Zealand. The Te Arawa Lakes Trust is the governance entity to receive and manage the benefits of the Te Arawa settlement. It was established under the Te Arawa Lakes Trust dated 22 August 2005: Te Arawa Lakes Act, s 11. The Trust was formerly the Te Arawa Maori Trust Board which was established under s 27 of the Native Land Amendment and Native Land Claims Adjustment Act 1922, and now operates under the Maori Trust Boards Act 1955. The bed of Lake Ōkaro remains vested in the Rotorua District Council. For more information see the Te Arawa Lakes Trust website: “Welcome to Te Arawa Lakes Trust” (2008) Te Arawa Lakes Trust <http://www.tearawa.iwi.nz/>.

9 Te Arawa Lakes Act, ss 23(2) and 25(a).
10 Ibid, s 25(b).
11 Ibid, s 24(3).
12 Ibid, s 24(1).
13 Ibid, s 31.
14 Ibid, s 32.
15 Ibid, s 32(1)(a).
specific bays and to dam specific waterways.\textsuperscript{16} The Te Arawa Lakes Act also ensures the continuance of commercial activities in or on the lakebeds that existed prior to settlement with Te Arawa.\textsuperscript{17}

In contrast, the Waikato River Act does not vest the bed of the Waikato River in Waikato-Tainui,\textsuperscript{18} so it does not need to protect existing public and commercial rights, as these continue unaffected. For example, the nine hydroelectric power stations on the River continue to operate as before. The Act does, however, provide for recognition of specific customary activities of Waikato-Tainui.\textsuperscript{19} These include: the launching of waka\textsuperscript{20} and the erection of associated temporary structures; the collection of stones, shingle and sand for building altars, to carve and for hāngi;\textsuperscript{21} and the use of the river for physical, spiritual and cultural health and wellbeing.\textsuperscript{22} This recognition is grounded in the core conceptual consensus. It recognises and upholds the customary use rights of Waikato-Tainui as inherited property rights. The protection of spiritual use rights also highlights that the solution recognises rights that are grounded in tikanga.\textsuperscript{23}

Both Acts recognise and provide for limited Manawhenua management powers as I contend will be required for a settlement to the Foreshore and Seabed Debate to be acceptable to Manawhenua. The Te Arawa Lakes Act provides that any new commercial activities or the establishment of new structures in the lakebeds, unless permitted under another Act, requires the written consent of the Trustees.\textsuperscript{24} This is similar to a veto right. The Trustees also have the power to amend or cancel protocols that pertain to the Department of Conservation, fisheries, protected objects, and the environment.\textsuperscript{25} The Crown must comply with such amended protocols while they are

\begin{itemize}
  \item \textsuperscript{16} Ibid, s 23(3)(a) and schedule 1.
  \item \textsuperscript{17} Ibid, s 36.
  \item \textsuperscript{18} Waikato are a central North Island Iwi. Tainui are a confederation of four North Island Iwi, including Waikato. For more information see the Waikato-Tainui website: “Welcome to the official website of Waikato Tainui” (2010) Waikato Tainui <http://www.tainui.co.nz/main.html>.
  \item \textsuperscript{19} Waikato River Act, ss 56-63.
  \item \textsuperscript{20} Canoes.
  \item \textsuperscript{21} Earth ovens.
  \item \textsuperscript{22} These “authorised customary activities” are set out in the Waikato River Act, schedule 3.
  \item \textsuperscript{23} Customs.
  \item \textsuperscript{24} Te Arawa Lakes Act, s 41.
  \item \textsuperscript{25} Ibid, s 52(2)(a). See ss 55-58 for protocols.
\end{itemize}
in force, and should it fail to meet its obligations, the Trustees may enforce the protocol in court. However, the Act holds that these protocols, and thus the management powers of the Trustees, do not limit the sovereignty of Parliament.

The Waikato River Act also gives Waikato-Tainui a right to be consulted over the preparation of environmental plans relating to the River. These plans must then be recognised: by local authorities, in the same in the same manner as would be required under the Resource Management Act 1991 (RMA) for any planning document recognised by an iwi authority when reviewing a RMA planning document; by RMA consent authorities, when considering resource consents under s 104 of the RMA; by persons exercising powers under ss 12 to 14 of the Fisheries Act 1996; and by those exercising powers under conservation legislation.

Both Acts therefore provide for power sharing between Manawhenua, the Crown and local councils, which I argue is probably required for lasting settlement of the foreshore Debate. The Te Arawa Lakes Act achieves this power sharing by requiring the Rotorua District Council and the Bay of Plenty Regional Council to establish a joint committee, the Rotorua Lakes Strategy Group, which consists of two representatives from each. The Group’s purpose is to promote the sustainable management of the lakes while “recognising and providing for the traditional relationship of Te Arawa with their ancestral lakes”.

The Waikato River Act also establishes a statutory body, the Waikato River Authority, to restore and protect the heath and wellbeing of the Waikato River, as well as promote implementation of a vision for the river, and its strategy and management. This Authority is comprised of 10 members, one from the Waikato Raupatu River Trust, five from the Crown as well as four others from the other

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26 Ibid, s 54(1).
27 Ibid, s 54(2).
28 Ibid, s 53(b)-(d).
29 Waikato River Act, s 39(2)(a).
30 Ibid, s 40.
32 Te Arawa Lakes Act, s 49.
33 Waikato River Act, s 22.
Manawhenua representative groups in the area.\textsuperscript{34} The Authority’s general functions include: providing advice to local authorities on amending RMA planning documents in line with the Waikato River vision and strategy,\textsuperscript{35} providing advice to the range of agencies with responsibilities relating to the Waikato River, to achieve a co-ordinated approach to the implementation of the vision and strategy and the management of the Waikato River;\textsuperscript{36} and acting as a trustee to the Waikato River Clean-up Trust and administering the contestable clean-up fund for the Waikato River.\textsuperscript{37} In addition, the authority must report to Waikato-Tainui every five years as to its effectiveness.\textsuperscript{38}

Moreover, the Waikato River Act provides for power sharing between government departments, local authorities and agencies, and the Waikato Raupatu River Trust, as representatives of Waikato-Tainui.\textsuperscript{39} This is achieved by giving Waikato-Tainui a say in the integrated river management plan that provides for the management of aquatic life, habitats and natural resources within the Waikato River, via provisions for joint management agreements.\textsuperscript{40} Such agreements enable the Trust and local authorities to work together in exercising functions under the RMA in relation to monitoring and enforcement, planning documents, and resource consent applications regarding the river.\textsuperscript{41}

These settlements are specific regional solutions to regional debates, which did not have the same national impact as the Foreshore and Seabed Debate. Despite this, they provide further recent illustrations of the point that suitably endorsed solutions can be found to integrate the recognition of distinct Manawhenua rights with general public management systems of large resources, like lake and river networks.

\begin{footnotes}
\item[34] Ibid, schedule 6(2)(1).
\item[35] Ibid, s 23(a).
\item[36] Ibid, s 23(b).
\item[37] Ibid, s 23(d).
\item[38] Ibid, s 23(f).
\item[39] The Waikato Raupatu River Trust was set up to undertake initiatives to restore and protect the relationship of Waikato-Tainui with the Waikato River and its flora and fauna. It was established under cl 12.4 of the deed of settlement between the Crown and Waikato-Tainui dated 22 August 2008: ibid, s 6(2) and (3).
\item[40] Ibid, ss 35 and 41-55.
\item[41] Ibid, ss 43, and 45-47.
\end{footnotes}
4. Summary of the Government’s proposed solution: The Marine and Coastal Area (Takutai Moana) Bill 2010

The MCA Bill repeals the FSA and renames the foreshore and seabed the marine and coastal area. It creates a common space in this area, the common marine and coastal area, which applies to all foreshore and seabed not in private title. It is from this area that any possible Māori customary rights will be drawn.

As a national settlement, the MCA Bill takes a similar approach to the regional settlements discussed above. It also upholds interests already legally recognised in the common marine and coastal area. It guarantees public access, fishing and navigation, and the continuance of use rights granted under statute, by-laws or regional and district plans.\(^\text{42}\) This includes the continuation of commercial rights.\(^\text{43}\)

It does not, however, give the same protection to Māori rights. In order to have their rights afforded legal protection, applicants must first prove their existence in the High Court, or in direct negotiations with the Crown.\(^\text{44}\) All rights must be exercised since 1840, in accordance with tikanga, and not be extinguished by law.\(^\text{45}\) In the case of claims to ownership, applicants must have held the specified area since 1840 without “substantial interruption.”\(^\text{46}\)

The inclusion of tikanga here as part of the test for Māori rights does recognise that Māori rights are inherited rights, sourced in tikanga, and that this justifies the differential treatment of Māori in the zone. Such an inclusion will not destabilise the solution, because tikanga are incorporated into the statute, not recognised as a source of law in their own right, and cannot override legislation, nor act as a fetter on the sovereignty of Parliament.\(^\text{47}\)

The MCA Bill places a number of restrictions on Māori access to the courts. In particular, access is only granted to the High Court, and proceedings must be

\(^{42}\) See Chapter Eight, Sections 4.a.ii and 4.b.iii.
\(^{43}\) See ibid.
\(^{44}\) See Chapter Eight, Section 4.a.ii.
\(^{45}\) See ibid.
\(^{46}\) See ibid.
\(^{47}\) See Chapter Eight, Section 4.b.i.
commenced within six years of passing the new legislation. If Manawhenua choose to bypass this and negotiate directly with the Crown, they are not guaranteed a right to be heard. These restrictions, coupled with the high threshold of the tests for customary rights, mean that the Bill fails to fully restore due process to Māori and uphold equal treatment.

However, where Manawhenua prove such customary rights exist, these rights will gain legal recognition as “protected customary rights” or “customary marine title”. Holders of protected customary rights orders will then be able to exercise such rights without resource consent or liability for coastal occupation charges. Moreover, the group would possess limited management powers over its customary rights.

Holders of marine customary title orders would be granted title over specific foreshore and seabed. This title is unlike private title, as it is inalienable and subject to the rights of public access, navigation and fishing as well as commercial users’ rights, somewhat like the title Te Arawa hold over their lakebeds. Attached to this title are several significant rights, including the right to own any new tāonga tūturu; the right to own certain minerals; and the right to create a planning document, which would have some influence on other statutory decisions. None of these rights are absolute, however; all have limitations on them.

The MCA Bill also seeks to create greater power sharing between Manawhenua and local or regional councils, something that is a key aspect to the Waikato River settlement, discussed above. It aims to do this through recognition of “mana tuku

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48 See Chapter Eight, Sections 4.b.i.
49 See ibid.
50 See Chapter Eight, Sections 4.b.ii and 4.b.iv.
51 See ibid.
52 See Chapter Eight, Section 4.a.ii.
53 See Chapter Eight, Sections 4.a.ii and 4.b.v. ‘Tāonga tūturu’ are real or authentic treasures. “Taonga tūturu” is defined by s 2(1) of the Protected Objects Act 1975 as:

... an object that—
(a) relates to Māori culture, history, or society; and
(b) was, or appears to have been,—
(i) manufactured or modified in New Zealand by Māori; or
(ii) brought into New Zealand by Māori; or
(iii) used by Māori; and
(c) is more than 50 years old.
54 See ibid.
55 See ibid.
56 See Chapter Eight, Section 4.b.v.
ihō”, a regime modelled on existing practices, which aims to build on the relationship already in existence between coastal Manawhenua and local councils. Manawhenua are granted some heightened consultation rights in conservation processes, but the ultimate decisions are left in the hands of the statutory decision-makers. This seems to grant little more than the consultation and participation rights Manawhenua already possess under other statutes.

However, the Bill does seem to grant customary marine titleholders some decision-making powers over their customary marine title areas. Such rights are the power: to permit or decline future activities requiring resource consent; to determine whether the Minister or Director-General of Conservation can consider applications concerning marine reserves and conservation protected areas, or grant a conservation concession in that area; and to declare wāhi tapu areas, and place prohibitions or restrictions on access to them. These rights go further than any Manawhenua management rights recognised in the Waikato River Act. But these rights would not displace the role of Parliament as the final decision-maker. These management rights are limited, and it is likely they will be exercised very rarely. However, where exercised, they may well establish greater power sharing between Manawhenua and local or regional government.

5. Outstanding political questions

Significant parts of the compromise solution I described are therefore reflected in the MCA Bill. But this does not guarantee that the immediate political imperatives will lead to its actual passage into law, with Māori support, in something like its current form, or that strenuous opposition to the Bill’s legal structure will not continue in some quarters or will not surface again. This section therefore discusses the political character of the current legislative process in more detail. In particular, it addresses

57 MCA Bill, cl 7 [MCA Act, s 9] defines “mana tuku iho” as “inherited right or authority derived in accordance with tikanga”.
58 See Chapter Eight, Sections 4.a.ii and 4.b.i.
59 See Chapter Eight, Sections 4.b.ii and 4.b.vi.
60 See Chapter Eight, Sections 4.a.ii and 4.b.vi.1.
61 See Chapter Eight, Sections 4.a.ii and 4.b.vi.2.
62 Scared places. ‘Wāhi tapu’ is defined by s 2 of the Historic Places Act 1993 as “a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense”.
63 See Chapter Eight, Sections 4.a.ii and 4.b.vi.3.
64 See discussion in Chapter Eight, Sections 4.b.vi.1, 2, and 3.
two outstanding political questions: whether the MCA Bill will get passed, especially with Māori Party support; and, whether it will quieten the Debate if passed.

While there may be sufficient agreement between those endorsing equality and rights claims to enable a possible compromise solution to occur, those advocating views at the far ends of the ‘Equality Spectrum’ are still vocal and threaten to derail settlement. There remains strong opposition to the Bill from those advocating formal equality between individuals. One such group are the Coastal Coalition. This group recently placed advertisements in several national newspapers, and produced a briefing paper outlining its opposition to the Bill. They argued that the MCA Bill would surrender the ownership that all New Zealanders currently possess over the beaches and seas, under Crown ownership, and will make it easier for iwi to claim title. This would establish “Maori-only” ownership. For them equality is something to be measured between individuals. Like Don Brash contended, they argue that Māori should be viewed as individuals with needs. In this vein, they say Māori already get a share of the foreshore and seabed:

… as equal New Zealand citizens. Proceeds from our ‘Crown jewels’ should be used to buy medicines and education for all Kiwis, not just make the part-Maori tribal aristocracy richer.

Essentially, the Coastal Coalition is arguing that the Bill would promote discrimination, because Māori and Pākehā, as individuals, would be treated differently. They therefore implicitly take the view that indigenous status is not a relevant reason for treating Māori differently.

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65 The Coastal Coalition is an umbrella group who represents 7000 New Zealanders “who feel strongly that the foreshore & seabed is the birthright and common heritage of all New Zealanders and should remain in Crown ownership”: Muriel Newman “Coastal Coalition” New Zealand Centre for Political Research <http://www.nzcpr.com/CoastalCoalition.htm> (accessed 19 November 2010). See also Coastal Coalition “He’s about to trade 2000km of your coastline for a resource he values more: Maori Party votes.” ODT (Dunedin, 27 October 2010) at 14 (advertisement).

66 See for example Coastal Coalition, above n 65.


68 Coastal Coalition, above n 65.


70 Donald Brash, Leader of the Opposition National Party “Nationhood” (State of the Nation Speech to the Orewa Rotary Club, Orewa, 27 January 2004) at 14. See discussion in Chapter Three, Section 3.b.i. For the full text of this Speech see Appendix Three.

71 Coastal Coalition, above n 65. ‘Kiwi’ are flightless birds, native to Aotearoa/New Zealand. They are the nation’s national bird, and the term is used to describe New Zealanders.
Moreover, the Coastal Coalition argued that the Bill would substantially expand Māori rights over the whole of the country’s coastline, and give Māori substantial governance powers.\(^{72}\) In particular, they asserted that recognition of mana tuku iho would give iwi the “right to priority treatment by the Department of Conservation in such matters as marine reserves, whale-watching and ferry concessions”\(^{73}\), while customary marine title would afford iwi:\(^{74}\)

The right to by-pass the Resource Management Act and veto and extract payment for everything that happens on their stretch of coast. The right to develop the area and mine its mineral wealth. The right to all new aquaculture developments. The right to impose iwi resource plans on central and local government.

Interestingly, they also claim the Bill removes the need for Māori to “have their day in court” by allowing Māori the option of direct negotiation with the Crown.\(^ {75}\) They claim non-iwi New Zealanders “will be shut out of this secret negotiation”.\(^ {76}\) This too can be viewed as a discrimination claim, as Māori are seen to be treated differently from other New Zealanders who cannot access this process. They view this as “allowing the public’s foreshore and seabed to be given away to corporate iwi through secret deals negotiated with friendly Ministers and rubber stamped through an Order in Council”.\(^ {77}\)

The Coastal Coalition view the right of public access as so fundamental that they express alarm that the Bill does not expressly guarantee free access.\(^ {78}\) The ACT New Zealand Party (ACT), which is also in coalition with the National Party, have also objected to Bill on this ground. During the Bill’s first reading, ACT’s David Garrett, stated that the Bill “is deliberately poorly drafted, and loopholes failing to guarantee free access to beaches will be exploited, unless closed”.\(^ {79}\)

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\(^{72}\) Newman, above n 67, at 3.
\(^{73}\) Coastal Coalition, above n 65.
\(^{74}\) Ibid.
\(^{75}\) Newman, above n 67, at 3. See also ibid.
\(^{76}\) Coastal Coalition, above n 65.
\(^{77}\) Newman, above n 67 at 2.
\(^{78}\) Ibid, at 6; Coastal Coalition, above n 65.
\(^{79}\) David Garrett, quoted in (15 September 2010) 666 NZPD 13977.
This seems a considerable change to the stance ACT took in 2004 when they publically supported the conclusions of the Treaty Tribes Coalition.\(^{80}\) However, ACT still support the Coalition’s conclusions. Garrett explained that ACT opposed the Foreshore and Seabed Bill 2004 because it treated “Māori as second-class citizens by denying them the chance to have their property rights tested in court”.\(^{81}\) For them, the solution is “deceptively simple, and it is to restore the situation that existed before the 2004 Act was passed”.\(^{82}\) They therefore agree with the clauses in the Bill that enable Manawhenua to go to the High Court to have their customary title determined.\(^{83}\)

It seems that ACT sit further towards the centre of the ‘Equality Spectrum’ than the Coastal Coalition. However, they agree with the Coastal Coalition that, “The biggest problem with the bill is letting iwi negotiate with the Government directly, which will result in purely political outcomes and create new injustices”.\(^{84}\) Here ACT, like the Coastal Coalition, are making a claim to democracy, rather than equality. For ACT, the negotiation process is undemocratic, because it denies wider public participation.\(^{85}\)

ACT raised a further objection to the Bill: that it does not clearly define tikanga. Garrett argued that the phrase “Māori customary values and practices” is an extremely vague term, and that a clear definition should be sought.\(^{86}\)

Opposition to the Bill has also been expressed from those who advocate for greater equality of authority. Hone Harawira, the Māori Party Member of Parliament (MP) for Te Tai Tokerau,\(^{87}\) has refused to endorse the Bill. He has stated that he supports

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\(^{80}\) See discussion in Chapter Three, Section 5.

\(^{81}\) Garrett, quoted in NZPD, above n 79.

\(^{82}\) David Garrett, quoted in ibid.

\(^{83}\) David Garrett, quoted in ibid.

\(^{84}\) David Garrett, quoted in ibid.

\(^{85}\) See David Garrett, quoted in ibid.

\(^{86}\) David Garrett, quoted in ibid.

full vesting of the foreshore and seabed in Māori title. This would grant Māori all the rights associated with ownership, including management rights and the right to exclusively control the zone.

Rawiri Taonui, the former Head of Māori and Indigenous Studies at the University of Canterbury, makes a slightly different claim. He has argued that while the MCA Bill replaces Crown ownership with common space, this is much less than the joint title under the Treaty that Māori would prefer. This position is different from Harawira’s, in that it calls for shared authority between the Crown and Māori as joint owners, rather than full Māori authority.

To Taonui, the customary title that Māori will be able to apply for is “a downgraded version of the fuller pre-1840 collective ownership right”. He acknowledges that if Māori could prove title they would gain a number of extra rights, including the ability to veto development, which he champions, given the record Māori have for environmental advocacy over the Waitara reefs, the Waikato River and the Rotorua lakes. Despite this, in stark contrast to the claims of the Coastal Coalition, Taonui claims the MCA Bill discriminates against Māori, because customary marine title “is a discriminatory title”. He claims it is discriminatory because the notion of common space that sits alongside this title only applies to foreshore claimed by Māori, not to areas in recognised private title. Furthermore, Taonui argues customary marine title is discriminatory because it is inalienable, when private title can be sold, and because the public will have a right of access over customary marine title areas, but not privately owned zones.

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90 Ibid.
91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid.
Like Taonui, the Te Upoko o te Ika branch of the Māori Party also argue the MCA Bill is discriminatory because the common space applies only to foreshore claimed by Māori. To them, the Bill “discriminates against Maori, and privileges the many foreign owners who maintain their rights to exclude public access to beach and foreshore”. They argue the Bill discriminates between those possessing recognised legal title, and those possessing Indigenous title rights founded in sources outside the current law, such as tikanga, the Treaty and the doctrine of native title. This ultimately results in unequal application of the law, and denies procedural equality.

Taonui also argued that the test for customary marine title is unjust “because Crown actions via confiscation, forced sales and public works, forcibly separated Maori and moana”. That is, the Bill is discriminatory because it will not fully take into account the impact of colonisation on the exclusivity of Māori occupation of the zone. Another way to put this is to say that it fails to restore full due process to Māori. The branch of the Māori Party referred to above makes the same claim. They argue that due process is illusionary because many Manawhenua will be unable to meet the test for customary marine title “due to previous injustices of the Crown against them and their tolerance of public use” and that this is compounded by the six-year time limit on claims.

Thus, while opposition to the Bill is sourced in positions that sit outside the zone of potential compromise, there is also opposition based on elements, such as procedural equality, that lie within the zone. This lends weight to my contention that, should the Bill be passed, it will not settle the Debate.

For any viable settlement to occur, the Māori Party must be included. Otherwise, Māori opposition is unlikely to be quietened at all. A solution that does not include the Māori Party will lack credibility in Māori eyes, and may be unstable if it continues

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96 Ibid.
97 Ibid.
98 Taonui, above n 89. ‘Moana’ means sea, lake.
99 Tauroa, above n 95.
to be opposed by the most visible representatives of Māori interests in Parliament. The National Party’s endorsement of the MCA Bill shows it has moved significantly away from the position exemplified by Brash. But has there been sufficient movement to attract the support of the Māori Party?

Four of the five Māori Party MPs voted for the Bill at its first reading. Yet even prior to this, some Māori Party MPs conceded that the Bill would not quell the Debate. Māori Party co-leader, the Hon Tariana Turia, conceded that the legislation cannot be said to be the end of the matter. She acknowledged that “any legislation can be changed at any point in time”, and that there are bound to be Māori in the future who will challenge this new law as unfair or say it is up to those in the future to decide. Moreover, Te Ururoa Flavell, as acting Party Leader, admitted that: “The new marine and coastal legislation may not be a final solution to the divisive foreshore and seabed issue and could be relitigated in the future”. He noted that not everyone is happy “but we also accept at this point in time iwi leadership is comfortable, we’re comfortable… we’re happy to move forward”. Flavell also hinted that the Māori Party might seek to review the new legislation after the next election. Recently, however, Turia has said the Māori Party would pull its support for the Bill if there was strong Māori opposition to it in submissions to the Māori Affairs Select Committee. This raises serious doubt as to whether the Bill will in fact be passed at all.

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100 As Parliament is currently constituted, only 5 of the 20 Māori members of Parliament are members of the Māori Party.
101 NZPD, above n 79. Harawira voted against it. The Bill passed its first reading by 106 votes to 15.
102 Tariana Turia, quoted in Audrey Young “Foreshore law may be challenged again” Politics, New Zealand Herald (Auckland, 15 September 2010) at A4.
103 Turia, quoted in ibid.
104 Member of Parliament for Waiariki, the electorate centred in the Bay of Plenty region in the North Island, and runs down into the central North Island. For more information, see “Home” (2009) The Waiariki Electorate Website <http://www.waiariki.maori.nz/>.
105 Te Ururoa Flavell, paraphrased in NZPA “Foreshore legislation may not be final: MP” General, ODT (Dunedin, 8 September 2010) at 3.
106 Flavell, quoted in ibid.
107 NZPA “Foreshore legislation may not be final: MP” General, ODT (Dunedin, 8 September 2010) at 3; Claire Trevett “Māori Party may have another go at seabed bill” (8 September 2010) Stuff <http://www.stuff.co.nz/national/politics/4105582/Maori-Party-may-have-another-go-at-seabed-bill/>, Tariana Turia, quoted in Claire Trevett “Māori Party wavers in support for foreshore bill” National, NZ Herald (online, 20 October 2010) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10681761>. 386
6. The future

So, in some areas, the conceptual positions of the different participants are sufficiently close to enable an acceptable level of compromise to occur to produce a political solution. Such a level of compromise has lead to similar regional settlements and could form the floor for other settlements regarding other natural resources. But the politics of enacting the current MCA Bill remain unresolved at the present time. The Bill must ultimately be enacted through a political process, via a representative legislature, in which Māori constitute a small minority of MPs. Politics is said to be the art of compromise. But in an Mixed Member Proportional parliamentary environment, where parties advocating distinct minority positions can still capture significant numbers of seats, the required compromise may not attract sufficient support across the necessary range of political parties. Consequently, the Bill may come under threat if certain political positions, such as opposition from ACT and others, are strongly advocated and start gaining traction.

Despite this, the present positions of the Aotearoa/New Zealand political parties seem to indicate that an Act like this Bill will be passed. However, this may change if there is strong Māori opposition to the Bill during the select committee process and the Māori Party pulls its support.

Nevertheless, I have shown that there is potential for political solutions to be found on this and other similar issues, even in a context of disagreement between strongly-held opposing positions and robust political debate – where there is the will to compromise and to reach a settlement that the majority can endorse.

Such settlements may not be either full or final, but they can keep the peace, even amidst strenuous disagreements on matters of equality and right. With great intensity, in late 2010, the nation continues to watch this space.

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109 At the time of writing, it has the backing of the National Party, the United Future Party and four of the five Māori Party MPs: Martin Kay “Labour to turn its back on foreshore bill” (9 December 2010) Stuff.co.nz <http://www.stuff.co.nz/national/politics/4439379/Labour-to-turn-its-back-on-foreshore-bill>.

110 The Bill is currently before the Māori Affairs Select Committee. Submissions closed on 19 November 2010 and the report is due on 25 February 2011.
7. Conclusion
The Foreshore and Seabed Debate erupted in 2003. Calls for one law for all resonated across the country and people passionately claimed their rights to the zone. The Labour-led Coalition Government’s solution was to enact the Foreshore and Seabed Act 2004, which vested the foreshore and seabed in the Crown, and guaranteed public rights of access, navigation and fishing, as well as existing commercial rights and private title. At the same time, it codified a regime for recognising Māori customary use rights and removed the jurisdiction of the courts to award customary title. This solution failed to quieten the Debate, and as a result it remained simmering until 2009 when it again reached political prominence, culminating in the MCA Bill.

This thesis has proved that at its heart the Debate is a conceptual one. It has demonstrated that peoples’ arguments were based on deeper equality and rights notions that are not easily identified in their public statements but reflect the foundations of their positions. It was the complex interplay of these notions that characterised the Debate, and made it so difficult to understand.

This thesis has revealed that the major equality theories used during the Debate can be articulated as separate and distinct concepts, but they can also all be portrayed in some sense as partaking of the notion of formal equality: that is, they all require that likes be treated alike. This thesis has also disentangled the different claims of right these theories support. Moreover, it has revealed and considered the distinct sources participants relied on to argue for the legitimacy of their rights claims. This in turn has involved some reassessment of the country’s sources of law. Finally, by showing that both Māori and Pākehā used a wide range of equality and rights arguments, it has debunked the perception that the Debate was simply about opposing Māori and Pākehā views. The matter is much more complex.

So, this thesis does more than simply highlight conflicting views. It provides a positive contribution to the Debate by identifying a framework for a solution. It has shown that while the various equality and rights theories that lie behind competing arguments possess different dynamics, they also enjoy shared correlates and foundations, on which a suitable compromise solution might be based.
This chapter has proved the usefulness of this framework. It has shown that two successful legislative solutions to regional debates over Māori rights fit the framework identified for solution to the Foreshore and Seabed Debate. Unfortunately, examination of the National-led Coalition Government’s MCA Bill against this framework has shown that while it is likely to be passed in something like its current form, it is unlikely to settle the Debate, and any legislation enacted may be revisited in the future. However, the framework can still be used as a political yardstick against which to measure the likely success of such future attempts to settle the Debate, as well as other similar debates over this nation’s natural resources.

Ahakoa e haere kē ana te tautohetohe, ka mutu i kōnei tāku mahi mō tēnei wā.
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Submissions to International Bodies

Appendix One:

Te Tiriti o Waitangi/The Treaty of Waitangi 1840


The Treaty of Waitangi (The Text in English)

Preamble

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article The First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.
Article The Second
Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and 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; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article The Third
In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W. HOBSON Lieutenant Governor.
Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified. Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.
[Here follow signatures, dates, etc]

(The Text in Maori)

Preamble
Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata
maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei. Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana. Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te Tuatahi
Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.

Ko te Tuarua
Ko te Kuini o Ingarani ka wakarite ka wakaai ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te Tuatoru
Hei wakaritenga mai hoki tenei mo te wakaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) WILLIAM HOBSON,
Consul and Lieutenant-Governor.
Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangoa ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.
Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tautou Ariki.
Ko nga Rangatira o te wakaminenga.
Appendix Two: The Paeroa Declaration


The Paeroa Declaration

**Resolution One:**
The foreshore and seabed belong to the Hapu and Iwi under our tino rangatiratanga.

**Resolution Two:**
We reaffirm our tupuna rights to the foreshore and seabed as whenua rangatira.

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

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

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

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

**Resolution Seven:**
We accept the invitation of Te Tau Ihu to host the next hui.
Appendix Three: Don Brash’s “Nationhood” Speech

Donald Brash, Leader of the Opposition National Party “Nationhood” (State of the Nation Speech to the Orewa Rotary Club, Orewa, 27 January 2004).
NATIONHOOD

An address by Don Brash
Leader of the National Party
to the Orewa Rotary Club
on 27 January 2004
Ladies and gentlemen,

This is the second occasion on which I have addressed your Club on the last Tuesday of January, and I very much appreciate your invitation.

Soon after becoming leader of the National Party, I outlined my five main priorities.

First, we must as a country take vigorous steps to counter the long-standing relative decline in New Zealand incomes, which sees our per capita incomes now around $180 lower per week – or about $9,000 per year – than those enjoyed by Australians. The Labour Government is doing nothing to bridge this gap, but is instead erecting barriers to faster growth at almost every turn.

Second, we must deal with the fact that too many of our children leave school massively handicapped by illiteracy and innumeracy. Today’s education system is failing many of our children, particularly the least privileged. If education is the passport to a better future, too many of our children currently have no chance of getting there. The Labour Government is failing to deal with this issue, and has made things worse by removing the elements of parental choice which the National Governments of the nineties introduced.

Third, we have to face the reality that traditional kiwi values are being destroyed by a government-funded culture of welfare dependency. National will stop communities wasting away on welfare. Sitting at home on welfare should never be an option, as the Labour Government seems to believe.

Fourth, we must deal with the issues of security, and especially the current half-hearted attitude towards enforcing the law in New Zealand. Under a National Government, when people step over the line which marks the boundary between honest and criminal activity, between civilised behaviour and that which preys on the community, they will be punished. Labour, by contrast, appears to be much more concerned with the rights of the criminal than with those of the victim.

And fifth, the topic I will focus on today, is the dangerous drift towards racial separatism in New Zealand, and the development of the now entrenched Treaty grievance industry. We are one country with many peoples, not simply a society of Pakeha and Maori where the minority has
a birthright to the upper hand, as the Labour Government seems to believe.

Over the next few months, I plan to give a major speech on each of my five main priorities, but today I want to speak about the threat which “the Treaty process” poses to the future of our country. I am focussing on this topic because, just before Christmas, after Parliament had risen for the year, the Government announced its foreshore and seabed policy, a policy with potentially huge significance for the future of our country.

So let me begin by asking, what sort of nation do we want to build?

Is it to be a modern democratic society, embodying the essential notion of one rule for all in a single nation state?

Or is it the racially divided nation, with two sets of laws, and two standards of citizenship, that the present Labour Government is moving us steadily towards?

But the spirit of the Treaty of Waitangi was expressed simply by then Lt-Gov Hobson in February 1840. In his halting Maori, he said to each chief as he signed: *He iwi tahi tatou*. We are one people.

A number of issues flow from this. They are complex, highly sensitive, even emotionally charged.

But I believe in plain speaking. So let me be blunt.

Over the last 20 years, the Treaty has been wrenched out of its 1840s context and become the plaything of those who would divide New Zealanders from one another, not unite us.

In parallel with the Treaty process and the associated grievance industry, there has been a divisive trend to embody racial distinctions into large parts of our legislation, extending recently to local body politics. In both education and healthcare, government funding is now influenced not just by need – as it should be – but also by the ethnicity of the recipient.

The Nelson-Tasman Primary Health Organisation is a good example: PHOs are explicitly established on a racial basis, and the Nelson-Tasman PHO is required to have half of the community representatives on its board representing local iwi, even though the number of people actually
belonging to those local iwi is a tiny fraction of the population covered by that PHO.

Much of the non-Maori tolerance for the Treaty settlement process – where people who weren’t around in the 19th century pay compensation to the part-descendants of those who were – is based on a perception of relative Maori poverty. But in fact Maori income distribution is not very different from Pakeha income distribution, as sociologist Simon Chapple pointed out a couple of years ago in a much publicised piece of research.¹

Maori-ness explains very little about how well one does in life. Ethnicity does not determine one’s destiny.

It is the bottom 25% of Maori, most of them on welfare, who are conspicuously poor. They are no different to Pacific Islanders or other non-Maori on welfare; it’s just that there is a higher percentage of them in that category.

**The myths of our past**

Let me now counter some of the myths of our past. Too many of us look back through utopian glasses, imagining the Polynesian past as a genteel world of “wise ecologists, mystical sages, gifted artists, heroic navigators and pacifists who wouldn’t hurt a fly”.²

It was nothing like that. Life was hard, brutal and short.

James Belich shows us that, once guns fell into Maori hands in the early years of the 19th century, ancient tribal rivalries saw Maori kill more of their own than the number of all New Zealanders lost in World War I. Probably 20,000 Maori were killed by Maori in the 1820s and 1830s.³

Equally, however, the initial Maori contact with Europeans was hardly a contact with the cream of European civilisation. The first Europeans that Maori encountered were explorers, whalers, escaped convicts from Australia, and then settlers hungry for land to build a new life. Many were none-too concerned about the niceties of the Treaty. And none possessed any appreciation of the interpretations of its meaning that some are trying to breathe into the document today.

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² Roger Sandill, The Culture Cult, p 114.
Any dispassionate look at our history shows that self-interest and greed featured large on both sides. Pakeha tried hard to separate Maori from their lands, and usually succeeded, although at various points the Crown endeavoured to ensure that proper procedures, consistent with the Article 2 guarantee to Maori that they were able to sell freely and fairly, were upheld.

Yet in spite of these problems, and in spite of all the turmoil, the shocks from the collision of two cultures and the chaos of unprecedented social change, the documentary evidence clearly shows that Maori society was immensely adaptable, and very open to new ways. That adaptability and resourcefulness, that openness to opportunity, that entrepreneurial spirit, is something that survived the trauma of colonisation, and is today reflected in a Maori renaissance across a wide range of business, cultural and sporting activity.

We should celebrate the fact that, despite a war between the races in the 1860s and the speed with which Maori were separated from much of their land – partly through settler greed, partly through a couple of generations of deficient leadership by some Maori – our Treaty is probably the only example in the world of any such treaty surviving rifle shots. Those who said a hundred years later that New Zealand possessed good race relations by world standards weren't wrong. While we try to fix the wrongs of the past, we should celebrate the good things and shared experiences that underpin our nationhood.

All Maori got the right to vote, and had it long before 1900. By the 1930s, they possessed equal rights of access to state assistance, be it pensions or subsidised housing loans or access to education. One standard of citizenship was gradually working, and the gaps that existed in every other colonial country were closing here as Maori took advantage of full employment.

Although he listed a number of land grievances in his centennial speech at Waitangi on 6 February 1940, Sir Apirana Ngata told those present that in the whole world it was unlikely that any “native” race had been as well treated by settlers as Maori.

Let me be quite clear. Many things happened to the Maori people that should not have happened. There were injustices, and the Treaty process is an attempt to acknowledge that, and to make a gesture at recompense. But it is only that. It can be no more than that.
None of us was around at the time of the New Zealand wars. None of us had anything to do with the confiscations. There is a limit to how much any generation can apologise for the sins of its great grandparents.

There are a few radicals who claim that sovereignty never properly passed from Maori into the hands of the Crown, and thus ultimately into the hands of all New Zealanders, Maori and non-Maori. They are living in a fantasy world. These claims come from the more radical Maori end of the spectrum. They can be seen for what they really are: a negotiating position.

What worries me about the current Treaty debate is that we find ourselves now, at the beginning of the 21st century, still locked into 19th century arguments.

Too many Maori leaders are looking backwards rather than towards the future. Too many have been encouraged by successive governments to adopt grievance mode.

**The Treaty process**

I want, now, to briefly review the more recent history of the Treaty process.

We have moved from a badly drafted and ambiguous Treaty document of 1840⁴, through a long period of colonisation to an attempt to live by the simple principles that seem to underlie that document.

In 1975, the Waitangi Tribunal was established to hear Maori grievances about contemporary problems. The powers of the Tribunal were greatly extended in 1985. In a fateful decision, it was given authority to cover claims going back as far as the 1840 Treaty itself – this despite the fact that "full and final" settlements had been made with Tainui, Ngai Tahu and others, decades before.

A poorly drafted Act in 1985, coupled with inadequate attention to its implementation, allowed a major grievance industry to blossom.

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Only a year later, in the State-Owned Enterprises Act 1986, the Government, not foreseeing the consequences of its decisions, made a last minute amendment to the Act. It read into the bill under urgency, without any reference back to a Select Committee, a revised section 9, which stated that “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”.

Whether intended or not, Parliament had created a new concept – the “principles of the Treaty”. But these principles were never defined – nobody had a clue what they might be. In the end, it was left to unelected Court of Appeal judges to determine an interpretation of the Treaty’s meaning that the politicians most certainly never intended.

Thus an accident of litigation, which related to a specific provision in a piece of economic legislation, and the Court’s attempt to make that legislation work without adequate guidance from Parliament, ended up by providing a basis for building an entire constitutional relationship between Crown and Maori.

Since 1987, and especially since 1999 when the current Labour Government took office, governments have included references to the “principles of the Treaty” in legislation, still without defining them. Even the Cabinet Manual now states that Ministers must specify whether proposed bills comply with “the principles of the Treaty”. It doesn’t define those principles either.

In 1988, there was another development of great significance. The Government's decision to sell off some of the state forests resulted in a judicial ruling that the Crown could not do so until ownership of the land beneath the trees had been determined by the Waitangi Tribunal process. To speed up what was becoming a much more drawn out process than had been envisaged in 1985, ministers came up with the idea of a Crown Forest Rental Trust that would receive the cutting fees as the forests were managed, and use the money to speed the hearing process about the land under the trees.

Far from speeding the process, it quickly slowed down. As one commentator has observed: “A growing number of bees – some busy, others drones – swarmed around this new, lucrative [Crown Forest Rental Trust] honey pot.”5 The troubles surrounding this particular honey pot continue to this day, and only very belatedly, and after a lot of very

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adverse publicity, is the current Government moving to clean up the Crown Forest Rental Trust process.

The biggest problem we face with the Treaty process is a lack of leadership. For 20 years now, mischievous minds have been interpreting the document in ways that they envisage will suit their financial purposes. We need proper leadership on the issue, and the next National Government will provide it. One principle above all others guides my thinking:

The Treaty of Waitangi should not be used as the basis for giving greater civil, political or democratic rights to any particular ethnic group.

The direction in which the current Government is heading is fundamentally different and it is wrong. For the sake of our future, it must be changed.

**Treaty references in legislation**


The only conclusion we can reach is that successive governments have believed that this 19th century treaty has something to say about today’s SOEs and national parks, today’s schools and universities, how we go about approving or declining building permits, what science we should study, what art we should look at, and even how we should regard the new frontier of genetic science!

Well, it doesn’t.

Local government now also has statutory obligations with respect to the undefined principles of the Treaty. The anachronism of the Parliamentary Maori seats (created as a temporary device in 1867 when tribally-organised, rurally-based Maori still formed the bulk of the Maori population) is now being extended by Labour to include local government. Some local authorities are introducing Maori wards without
regard to whether the guiding democratic principle of "one person, one vote, one value" is violated.

The Local Government Act also requires local authorities to set up special consultation with Maori, over and above the extensive consultation already required with local communities, as if somehow Maori are not part of local communities. As a result, iwi are developing a central role with respect to local government. They possess the power to veto many development projects, projects which could provide us all with jobs.

Where does this all stop? And what group is driving this process?

As one commentator observed recently, a number of non-Maori radicals, having climbed high into our social hierarchy, wield considerable political, economic and judicial influence, and now “constitute a powerful fifth column in the Maori cause.”

It is bizarre that, in a society where the Prime Minister refuses to allow grace to be said at a state banquet, because, she says, we are an increasingly secular society, we fly Maori elders around the world to lift tapu and expel evil spirits from New Zealand embassies; we allow courts to become entangled in hearings about the risks to taniwha of a new road or building; we refuse to undertake potentially life-saving earthworks on Mount Ruapehu lest we interfere with the spirit of the mountain; and we allow our environment law to be turned into an opportunistic farce by allowing metaphysical and spiritual considerations to be taken into account in the decision process. It is a farce that could all too quickly turn to tragedy.

Spiritual beliefs are important in any society. They should be respected. They should never be mocked. But personal spiritual beliefs should not be allowed to drive our development as a modern society.

I am sure most Maori are as embarrassed by the present situation as most non-Maori are astounded. We are becoming a society that allows people to invent or rediscover beliefs for pecuniary gain. This process is becoming deeply corrupt, with some requirements for consultation resulting in substantial payments in a system that looks like nothing other than stand-over tactics.

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These are crucial issues for the future of our nation. Unless they are dealt with properly, they will ultimately undermine the very essence of what it means to be a New Zealander.

Chris Trotter – who writes in the Dominion-Post in Wellington, and The Independent nationally – is not known for his sympathy for the National Party. He writes unashamedly from the political left, but what he writes is intellectually honest and always arresting. He recently asked:

"Shall New Zealand go forward into a new century as a modern, democratic and prosperous nation; or shall it become a culturally divided, economically stagnant and aristocratically misgoverned Pacific backwater, like the Kingdom of Tonga or the Republic of Fiji?"

He asked that question presumably because he thinks, as I do, that under the present Government, the answer is the latter. We’re going downhill.

The foreshore proposals

Now to a current problem that gets to the heart of today’s mismanagement of Treaty relations. Just after the closing of Parliament last year, when MPs couldn’t debate the issue, the Government released its proposals for dealing with the foreshore and seabed following a legal decision that overturned 125 years of settled law. The simple option was to legislate to establish the Crown ownership that almost everyone believed already existed.

Instead, the Government has come up with a convoluted notion called "public domain". On the face of it, it sounds good. But it leaves room for much more than just limited recognition of "customary rights", and in fact embodies vast powers, including the right to a Maori veto.

First, Government documents make it clear that the proposed “customary title” will allow the development of commercial activity arising from customary use. This “development right” will mean an expansion of traditional customary rights.

Secondly, along with commercial development, customary title also gives Maori a veto power over anyone else’s development, whether commercial or recreational. As I read the papers released by the Government, anyone

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7 Chris Trotter, *op. cit.*
wanting to build a small jetty on a coastal property where customary title has been established will need iwi consent. And what we know from experience is that this is likely to require a substantial payment to smooth the path for consent.

Thirdly, Maori also gain a new role in the management of the entire coastline. Customary title will give commercial development rights, which over time will inevitably erode public access. In addition, 16 newly-created bureaucracies will give Maori a more dominant role than other New Zealanders in the use and development of the coastline, not only where customary title is granted, but elsewhere as well. All these committees will be taxpayer-funded. Maori will gain access to even more taxpayers’ funds for consultants, lawyers and hui to “build capacity” to take part in this process.

It is not hard to envisage what is going to happen.

The additional costs in any development process will make a small number of people much better off, but will make all other New Zealanders, including most Maori, worse off, by slowing, and in many cases blocking entirely, the potential for development of our resources, especially aquaculture.

There are massive conflicts of interest in all of this, and they will inevitably invite corruption. Under the proposals, Maori can now be owners, managers and regulators, all at the same time, thereby ensuring their own developments can succeed. They can block others if they can show to sympathetic authorities that their customary right is adversely affected. It is astonishing that the Government could establish such a conflict-ridden model. It is an absolute recipe for disaster.

A multi-cultural melting pot

Let me turn briefly to what we mean by “Maori”.

The short cut of referring to Maori as one group and Pakeha as another is enormously misleading. There is no homogenous, distinct Maori population – we have been a melting pot since the 19th century – although there is, of course, a highly distinctive Maori culture, which many people see as central to their identity.

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This section relies heavily on material from Simon Chapple, op. cit.
Our definition of ethnicity is now a matter of subjective self-definition: if you are part Maori and want to identify as Maori you can do so.

The Maori ethnic group is a very loose one. There has always been considerable intermarriage between Maori and Pakeha. Anthropologists tell us that by 1900 there were no full-blooded Maori left in the South Island. By 2000, the same was true of the North Island. Today, nearly 70% of 24 to 34 year old New Zealanders who identify as Maori are married to someone who does not.

And most of the rest are themselves of multi-ethnic identity, itself a consequence of two centuries of intermarriage. As a consequence, a majority of Maori children grow up today with a non-Maori parent.

Many people feel it is somehow impolite to mention these facts. But by ignoring them we create an oppositional picture of race relations in this country, and we overlook the many powerful forces that can promote social cohesion.

What we are seeing is the emergence of a population in New Zealand of multi-ethnic heritage – a distinct South Seas race of New Zealanders – where more and more of us will have a diverse ancestry. Hopefully, we will get joy and pride from all the different elements that go to make us who we are.

My own family is racially mixed. My 10 year old gains both from his New Zealand-European and from his Singaporean-Chinese heritage.

There is plenty of evidence that most New Zealanders are happy to see New Zealand develop in this way. In spite of the heightened rhetoric from the publicists of ethnic difference, most people treat their ethnic allegiances fluidly. For many people, aspects other than their ethnicity matter much more to them – their religion, their profession, their sports club, their gender, and their political allegiance.

What do I conclude from all this?

First, we need to look at our past honestly, not through a lens which projects current values onto 19th century New Zealand, and not by stripping away the context of the past.
The Treaty contains just three short clauses, and deals with the
government of New Zealand, property rights, and citizenship. Those
principles must be upheld. Where there has been a clear breach of the
Treaty – where land has been stolen, for example – then it is right that
attempts to make amends should be made.

But the Treaty is not some magical, mystical, document. Lurking behind
its words is not a blueprint for building a modern, prosperous, New
Zealand. The Treaty did not create a partnership; fundamentally, it was
the launching pad for the creation of one sovereign nation.

We should not use the Treaty as a basis for creating greater civil, political
or democratic rights for Maori than for any other New Zealander. In the
21st century, it is unconscionable for us to be taking that separatist path,
and this Labour Government deserves to be defeated on that basis alone.

The National Party has an honourable record of resolving historical
Treaty grievances. Virtually all of the major financial settlements
achieved to date occurred under National in the 1990s. They included
settlements for the Fisheries ($150 million), Tainui ($170 million) and
Ngai Tahu ($170 million). The leadership shown by Prime Minister Jim
Bolger and Treaty Negotiations Minister Sir Douglas Graham was crucial
in establishing a national consensus on the need to resolve historical
grievances as part of the process of reconciliation.

The settlement process has slowed considerably since Labour took office,
with claims resolution bogged down due to lack of leadership and
commitment.

Let me make it quite clear. National is absolutely committed to
completing the settlement of historical grievances. We will ensure that
the process is accelerated and brought to a conclusion. It must then be
wound up. It is essential to put this behind us if all of us – and Maori in
particular – are to stop looking backward and start moving forward into
this new century as a modern, democratic and prosperous nation.

We intend to remove divisive race-based features from legislation. The
“principles of the Treaty” – never clearly defined yet ever expanding –
are the thin end of a wedge leading to a racially divided state and we want
no part of that. There can be no basis for special privileges for any race,
no basis for government funding based on race, no basis for introducing
Maori wards in local authority elections, and no obligation for local
governments to consult Maori in preference to other New Zealanders.
We will remove the anachronism of the Maori seats in Parliament.

We will deal with the foreshore issue by legislating to return to the previous status quo – the settled legal situation before the Court of Appeal decision. That is a position where for the most part the Crown owned the foreshore. In so far as there was uncertainty about the situation before, we will clarify the position. Public ownership leaves room for recognising limited customary rights, but we will not allow customary title. If this Government issues such title, we will revoke it.

Having done all that, we really will be one people – as Hobson declared us to be in 1840.

I acknowledge that there are problems of Maori socio-economic disparity in some places, mostly rural. We will focus our welfare reform efforts on those areas. We will not have entire townships, and some suburbs, on the dole.

Welfare recipients will be offered retraining, and offered some activity by which they can earn, and be seen to earn, their welfare cheque. Their children will see their parents constructively engaged in the community each day, not marginalised by it. That, more than anything, will restore their dignity.

But these are not Treaty issues: they are social welfare issues, and Maori New Zealanders who are in need are as entitled to assistance as any other New Zealanders who are in need.

Similarly, a National Government will continue to fund Te Kohanga Reo, Kaupapa Maori, Wananga and Maori primary health providers – not because we have been conned into believing that that is somehow a special right enjoyed by Maori under the Treaty, but rather because National believes that all New Zealanders have a right to choice in education and health.

Finally, we ask Maori to take some responsibility themselves for what is happening in their own communities. Citizenship brings obligations as well as rights. The Maori translation of Article 3 was very clear about that. We all have an obligation to make the effort to build a culture of aspiration – as the great Maori leaders of the past, and indeed some of the Maori leaders of the present, have advocated – not a culture of grievance.
Like everybody else, Maori must build their own future with their own hands.

Most are doing that already, and it is crucially important that government policy encourages this, not discourages it.

The spirit evident in the Maori response to the new opportunities that emerged in the mid-19th century is alive and well today. It is displayed in the outstanding performance of Maori in fishing and other primary sectors, and in a range of entrepreneurial business, sporting and cultural activities.

Their efforts, their aspirations, and their focus are light-years away from the handout mentality being fostered by this Government.

A culture of dependence and grievance can only be hugely destructive of the Maori people and, if left unchecked, destructive of our ability to build a prosperous nation of one people, living under one set of laws.

Let me make one final concluding comment.

In many ways, I am deeply saddened to have to make a speech about issues of race. In this country, it should not matter what colour you are, or what your ethnic origin might be. It should not matter whether you have migrated to this country and only recently become a citizen, or whether your ancestors arrived two, five, 10 or 20 generations ago.

The indigenous culture of New Zealand will always have a special place in our emerging culture, and will be cherished for that reason.

But we must build a modern, prosperous, democratic nation based on one rule for all. We cannot allow the loose threads of 19th century law and custom to unravel our attempts at nation-building in the 21st century.
Michael Cullen “Challenge to find balance on issue of foreshore rights” Opinion, ODT (Dunedin, 18 February 2004) at 19.

LIKE foreshore and seabed, Customary rights are closely one of the most challenging items on the Government’s agenda for the year ahead. It is a challenge for the country too, to ensure that the decisions made are made to serve the people, rather than those making the decisions, and to be regarded as stronger a nation and not hijacked by those taking extreme positions on the far right (through excitable, irrational fears) and on the far left (through promoting unrealistic expectations)

It is important to remember the limits of the Court of Appeal decision which sparked this issue. The court did not say Māori now own the foreshore and seabed. That was not even the question before it. The question before it was whether the jurisdiction of the Māori Land Court extended to the foreshore and seabed or whether, in effect, all Māori indigenous rights had been extinguished.

The court found that the Māori Land Court did have the jurisdiction to hear claims, but was bound to consider that the issues were separate and to refer them to the Court of Appeal. The court was not saying that Māori now owned the foreshore and seabed.

What is the significance of the legal advice supplied in Professor Paul McHugh’s submission to the Waitangi Tribunal? He stated that the New Zealand laws would most likely be swept away by comparable overseas cases and that the common law cannot recognize exclusive ownership of the foreshore and seabed.

But while Professor McHugh, who is well known and respected, said there would be no exclusive ownership, he also stated that he believed there may be substantial Māori rights over the foreshore and seabed.

Like any other property rights, customary rights, where they are established, should not be taken without just compensation, writes the Deputy Prime Minister, MICHAEL CULLEN.

The Government’s policy envisages a vigorous process for recognising and protecting customary rights while also protecting public access by placing the foreshore and seabed, as far as possible, in the public domain.

The legislation framework for the 21st century which balances the rights we want all New Zealanders to enjoy and finds a secure peace for the long standing customary practices of Māori with respect to the foreshore and seabed. We are confident that there is a middle ground, an equilibrium where the reasonable expectations of all can be accommodated.
Appendix Five: The Treaty Tribe Coalition’s Submission

A Submission by the
Treaty Tribes Coalition
on the
Foreshore & Seabed Issue

prepared for

Rt Hon. Helen Clark
Prime Minister
Leader of the New Zealand Labour Party

Dr Don Brash
Leader of the Opposition
Leader of the New Zealand National Party

Rt Hon. Winston Peters
Leader of the New Zealand First Party

Mr Rod Donald & Ms Jeanette Fitzsimons
Co-Leaders of the Green Party of Aotearoa New Zealand

Hon. Peter Dunne
Leader of the United Future New Zealand Party

Hon. Richard Prebble
Leader of the ACT New Zealand Party

Hon. Jim Anderton
Leader of the New Zealand Progressive Party

February 2004
I. Introduction

This submission on the foreshore and seabed issue has been prepared by the Treaty Tribes Coalition for the Prime Minister, the Leader of the Opposition and the Leaders of all Parliamentary Political Parties.

The submission is based on the principles that there should be one law for all New Zealanders, and that all New Zealanders – Māori and Pakeha, and the New Zealand Parliament – must respect the rule of law and the proper roles of the different branches of Government.

The proposal does not reach any conclusions about the current ownership of the foreshore and seabed, which are matters for the courts. However, it submits that it would be entirely improper for Parliament to, in effect, unilaterally over-rule the judgment in Ngāti Ape\(^1\) to prevent the successful appellants in that case from having their arguments heard by and ruled upon by the Māori Land Court and, if sought by any party, subsequent appellate courts. Such a move would be unconstitutional and could not be respected by any New Zealander of goodwill.

If the case were to proceed through its natural course, and should the Māori Land Court or any subsequent appeal court ultimately rule that the successful appellants do not have rights and interests in the foreshore and seabed, that would have to be accepted by Māori. It would bring the matter to a conclusion that may be welcomed by many New Zealanders, but one which would not leave a bitter taste in the mouths of

\(^1\) Attorney General v Ngāti Ape (2003) 5 NZLR 845 (CA).
Māori. It would be a fair and final legal determination reached according to the rule of law.

Should the Māori Land Court or any subsequent appeal court ultimately rule that the successful appellants do have property rights in the foreshore and seabed under dispute, that could lead to negotiations between the Crown and the litigants, based on a determination of the nature and extent of any Māori rights. These negotiations could lead to an outcome that meets the legitimate expectations of Māori and the needs of contemporary New Zealand society. The Crown’s opening position could, if it deemed appropriate, be the Government’s current proposal.

Either outcome would be far better for New Zealand than the current process which risks Māori, alone among New Zealanders, having their right to their day in court usurped by Parliament. This is creating bitter division between the races in New Zealand, as seen most recently at Waitangi.

Both Māori and Pakeha must work together to build our country’s economic and social future. That requires the application of the principles of one law for all New Zealanders, and that all New Zealanders – Māori and Pakeha, and the New Zealand Parliament – must respect the rule of law and the proper roles of the different branches of Government. Current proposals do not promote these principles of respect for the rule of law. The Treaty Tribes Coalition does seek to promote these principles, and urges all political parties to join us in doing so by supporting the recommendations outlined in this submission.
2. The Treaty Tribes Coalition

The Treaty Tribes Coalition represents Ngāi Tahu, Ngāti Kahungunu, Ngāi Tamanuhiri and Hauraki Iwi. In addition, it has been supported by the majority of iwi on the issue of allocation of resources currently held in trust by the Treaty of Waitangi Fisheries Commission (TOKM). On the issue of whether Parliament should interfere with the rights of the successful appellants in Ngāi Apa to have their case heard by the courts, the Treaty Tribes Coalition is confident its views are supported, perhaps unanimously by iwi, but, at least, by the overwhelming majority of iwi, and all New Zealanders who respect the rule of law.

The guiding principle of the Treaty Tribes Coalition is mana whenua, mana moana. We are a Māori organisation. But we have always sought to be sympathetic to the views and aspirations of all New Zealanders, and sought their support. In one sense, New Zealand consists of many peoples but, in another sense, we are also one people. On the issue of allocation of resources held in trust by TOKM, we sought and received widespread support from local government, the seafood and wider business community, the media and the public. On the foreshore and seabed issue, we shall do so again. What will guide us, as New Zealanders, are the principles of one law for all New Zealanders, and that all New Zealanders – Māori and Pakeha, and the New Zealand Parliament – must respect the rule of law and the proper roles of the different branches of Government.
3. *Ngāti Apa*

On 19 June 2003, the New Zealand Court of Appeal issued a unanimous decision in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) (*Ngāti Apa*). The case followed an application by Ngāti Apa, Ngāti Koata, Ngāti Kuia, Ngāti Rarua, Ngāti Tama, Ngāti Toa, Rangitane and Te Atiawa for the Māori Land Court to declare that certain land below the mean high water mark in the Marlborough Sounds is Māori customary land.  

This application has never been heard and no court has ruled on whether the claimants have rights in the foreshore and seabed under dispute. Instead, the Attorney-General and other interested parties properly exercised their rights to argue that the application by the Māori litigants could not succeed as a matter of law, and so the Māori Land Court could not hear the case. This point was argued in the courts, and eventually reached the Court of Appeal.

After fully considering precedent, and long-standing legal principles relating to the doctrine of aboriginal title and the sanctity of property rights, the Court of Appeal found that the law protects Māori property rights which have not been sold, extinguished by law or otherwise lost. The courts said the litigants at least had a case which should be heard, although they questioned how strong the case might be.

However, it made no ruling on whether the foreshore and seabed under dispute was in fact owned by the appellants. It ruled on a very narrow point that “[t]he Māori Land Court has jurisdiction to determine the status of foreshore and

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*None of these litigants is a member of the Treaty Tribes Coalition and the Treaty Tribes Coalition has no direct commercial interest in the outcome of their case.*
In Ngāti Apa no ruling was made that the appellants had an ownership interest in the foreshore and seabed. The Court of Appeal ruled only that, after eight years and substantial legal fees, the appellants could have their day in court.

In summary, no ruling was made that the appellants had an ownership interest in the foreshore and seabed, let alone that they could exclude access. The Court of Appeal ruled only that, after eight years and substantial legal fees, the appellants could have their day in court.

4. Response to Ngāti Apa

The Ngāti Apa decision led to an inflammatory response by opinion-leaders. No less than the Attorney-General, a party to the case, immediately said that the Crown would not accept the outcome but would instead legislate to put the foreshore and seabed in Crown ownership. This showed very little respect for the Court to which she had recently presented arguments, especially as she had a right to appeal. Moreover, if it had always been her intention not to accept a judgement unfavourable to the Crown, it begs the question why she did not say so earlier and act sooner, to avoid the litigants and the taxpayer being put to such significant legal expense.

Even worse, the response mistakenly led many to believe that the Court had granted exclusive ownership of the foreshore and seabed to Māori, wrongly fuelling some Māori expectations and outraging many other New Zealanders who mistakenly believed their access to the beach could be in jeopardy.

3 Elias CJ in Ngāti Apa, par 91.
4 Gault P in Ngāti Apa, par 128.
In what appears to have been a poll-driven response to concerns about beach access, the two main political parties took positions to unilaterally put the foreshore and seabed into some form of public ownership, despite the Court having left open the possibility that any interest claimed by the litigants may already have been extinguished or otherwise lost. Meetings occurred involving the Deputy Prime Minister and some Māori groups, leading to the Government’s proposal to put the foreshore and seabed in “public domain” while also seeking to give Māori some acknowledgement of ancestral and customary interests such as the right to continue customary practices. In effect, the Office of the Deputy Prime Minister took over the role of the courts.

5. The Government’s Proposal

It is not difficult to see why the Government’s proposal appears to have satisfied no one. It needs to be retained as a possible path forward, but one that no New Zealander could take in good faith at this time.

By those who believe the foreshore and seabed is already owned by the Crown, the proposal has been criticised as special treatment for Māori. If it is believed that the foreshore and seabed under dispute is in fact owned by the Crown, then the proposal means the new form of ownership—“public domain”—is being proposed for solely political reasons. Moreover, if the foreshore and seabed under dispute is already owned by the Crown, then it is also difficult to see why the Crown should have made any “concessions” to
Māori. If Māori do not have rights in the foreshore and seabed, which the Government will not allow to be tested by the courts, then Māori had nothing to trade with the Deputy Prime Minister. The aspects of the proposal that many Pakeha may see as “concessions” must have been made by him, and people unsympathetic to the successful appellants are right to question his judgement.

But to those who believe Māori may have customary ownership of some or all of the foreshore and seabed, the proposal was equally outrageous. Through these eyes, the Government’s proposal is nothing less than the greatest property confiscation in New Zealand’s history, and one without compensation. As even the Deputy Prime Minister has said, confiscating property without compensation is theft. Consequently, the Government’s proposal can never be supported, and many Māori see an obligation to fight it through any means possible should Parliament take the Government’s recommended step.

No people can be expected to accept the legitimacy of a Parliament or a law that would confiscate their property without compensation, and this threatens to undermine the principle of respect for the rule of law. To people who believe that Māori have property rights in the foreshore and seabed, the proposed “concessions” are simply inadequate to compensate for the proposed confiscation, and have in any case not been freely made.

Moreover, the very idea of Parliament acting to usurp the proper role of the courts is outrageous. The rule of law “is the sentinel of constitutional government.” 5 This means that

5 Philip Joseph Constitutional and Administrative Law in New Zealand (2nd Ed) (2001).
Parliament must not interfere with the due process and decisions of the judiciary. To do so is to breach fundamental constitutional principles of the separation of powers, and that all branches of government are bound by the law. Parliament should not manipulate, to its own advantage, the outcome of a case before the courts.

A well known example of when it did so was the passage of the Inland Revenue Department Amendment Act (No 2) 1988. In response to this, senior members of the New Zealand Law Society expressed concern that “[i]f a government can change the law ... part way through a case when it sees a chance of that case being lost, then the rule of law, the role of the courts, the right of citizens to be tried in accordance with the law, seem to take on a somewhat hollow or shadowy existence.”6

The Treaty Tribes Coalition submits that this comment in fact vastly understates the outrageous nature of what the Government is proposing, especially considering recent assertions by the Attorney-General and the Leader of the Opposition supporting one law for all New Zealanders.7 It would be a dangerous example that the Government and Parliament may take from the courts their proper judicial function and install this power in the Office of the Deputy Prime Minister and Parliament.

We do not believe today’s Government and Parliament would treat non-Māori this way and we do not believe they should treat any New Zealander this way. We believe that the

4 Nigel Hampton QC (New Zealand Law Society South Island Vice-President), LawTalk vol 205, 1988, 1.
5 For the Leader of the Opposition’s statement to this effect, see his National speech to the Orewa Rotary Club on 27 January 2004. The Attorney-General was reported in The New Zealand Herald on 12 February (“Govt sidesteps veto pressure”, p A3) that there should be “one law for everyone.”
Government and Parliament must respect the rule of law, and the due process of the judiciary.

We have considered the hypothetical case of a young family which inherits a valuable parcel of undeveloped land in Auckland, left by will when a grandmother passes away. The family seeks to have a portion of land converted into a park in remembrance of the grandmother. However, when it does so, it finds that the certificate of title was never properly registered. The family has evidence of the land being in the family for generations, and takes a case to court, to prove ownership and have the land properly registered. The Attorney-General contests the family's right to have the case heard, arguing that if the land was never registered, it is Crown land and the courts have no jurisdiction to inquire any further into the matter. After many years, and significant legal expense by the family and the taxpayer, the Court of Appeal rules that there is a case to hear and that the family has a right to have it heard.

The Court of Appeal does warn that it may be difficult for the family to prove the claim. Nevertheless, immediately following the judgment, the Attorney-General announces that legislation will be introduced, vesting the land in "public domain", without compensation. In her opinion, the family has no legal rights that warrant recompense. As a conciliatory gesture, the Government does "concede" that it will acknowledge the family's long-standing relationship with the land, by mounting a plaque. The family is outraged that despite the Court saying it has only a small chance of a finding
in its favour, Parliament plans to prevent the family from having its day in court at all.

It would be understandable if the family could neither accept nor respect that law or the Parliament that made it. While the family may well have accepted and respected a final judgement against it by the Supreme Court, it could hardly accept and respect such outrageous conduct by the Attorney-General and Parliament. Worse, the respect for the law held by all property owners would be substantially reduced.

By analogy, this case is exactly what the Government’s proposal would do to Ngāti Apa, Ngāti Koata, Ngāti Kuia, Ngāti Rarua, Ngāti Tama, Ngāti Toa, Rangitane and Te Atiawa. It is impossible to see how they could be expected to accept and respect any legislation passed by Parliament based on the Government’s proposal. It is impossible to see how any New Zealander who cares about the rule of law and our unwritten constitution, could continue to have the same respect for the law or for our Parliament. Especially given that the appellants are Māori, it is difficult to see how the Government’s proposal reflects the principles of one rule of law for all New Zealanders and respect for the rule of law. It is a race-based response.

These are worrying developments that should concern all New Zealanders.

The mistaken but genuine concerns held by many New Zealanders, following the exaggerated interpretation of the Ngāti Apar decision, are understood and accepted by the Treaty Tribes Coalition. Time is needed for the decision to be properly understood and placed in its proper context in the public mind. We repeat: it was a decision that simply allowed certain iwi to have their day in court, after eight years of legal argument at substantial cost to them, and to the taxpayer.

Nevertheless, we also accept that the current political environment makes it difficult for the Labour and National parties to change their positions towards the foreshore and seabed issue at the present time. We also note with some irony that groups as diverse as the Green Party, the ACT Party, the Business Roundtable and some in the Labour Party’s Māori Caucus have positions on the matter which are roughly similar in outcome and more sympathetic to the successful appellants, being based on a better understanding of the Treaty of Waitangi, the doctrine of aboriginal title and the sanctity of property rights. They will also want to hold to their positions.

Our recommendations do not rely on any political party, organisation or person having to change their current position. They rely only on the principle that the courts must be allowed to do their job while time is allowed for more sober reflection.
7. Recommendations

Taking into account the above, and upholding the principles of one law for all New Zealanders, and respect for the rule of law and the proper role of the courts, the Treaty Tribes Coalition recommends:

a) That, given the Crown appears to disagree with the Court of Appeal’s answer to the question in Ngāti Aro, the Attorney-General appeal the decision. This would allow New Zealand’s highest appellate court to consider whether the Māori Land Court has jurisdiction to determine the status of foreshore and seabed. Should the Court ultimately rule that the Māori Land Court has no jurisdiction, that would settle the matter in a way that upheld the principles of one law for all New Zealanders, and respect for the rule of law and the proper role of the courts.

b) That, should the Māori Land Court be found on appeal to have jurisdiction to determine the status of foreshore and seabed, the Government and Parliament should await a final decision on Ngāti Aro before taking any further action. This process would allow the Māori Land Court and subsequent appellate courts to apply the doctrine of aboriginal title and make a determination on Māori customary rights in the foreshore and seabed. This, at the least, would allow more informed public debate on the matter. Should the courts ultimately rule that the Māori litigants do not have an interest in the foreshore and seabed,
that would settle the matter in a way that upheld the principles of one law for all New Zealanders, and respect for the rule of law and the proper role of the courts.

c) That, should the courts ultimately find that the successful appellants in Ngāti Apa have an ownership or other interest in the foreshore and seabed under dispute, the Government and those successful appellants could enter into negotiations informed by a final determination of existing law and rights. Such negotiations would be based on a legal determination of Māori rights, and would therefore be more constructive than recent discussions where there is no common understanding of Māori property rights.

Māori have shown in previous negotiations with governments over property rights to be prepared to seek win-win solutions that meet the needs of contemporary New Zealand society while reflecting Māori beliefs and expectations. There is no reason to believe negotiations as recommended would not be equally constructive and practical.

d) That the Government's current proposals not be abandoned but retained as a possible opening position for the Crown in any negotiations commenced as envisaged in recommendation (c) above. Considerable work has gone into these proposals and that should not be lost. It is possible the Government could consider them an opening position should the courts
rule that the Māori litigants have a substantial ownership interest in the foreshore and seabed under dispute. Alternatively, they could be seen as the basis for improving systems designed to recognise and protect customary rights and practices across a wide range of legislation concerning the marine environment. It is also possible that the Government may later consider the proposals too generous to Māori should the courts ultimately rule that the successful appellants have only limited interests in the foreshore and seabed under dispute, and may therefore start any negotiations with a more restricted opening position.

8. Conclusion

Wherever the Treaty Tribes Coalition looks in New Zealand today, we see increasing division and reduced respect for the rule of law as a result of the foreshore and seabed issue and how it is being handled. A solution based on due process and a commitment to good faith negotiations, if appropriate in the future, is one which we believe offers New Zealand the best path forward and hope for unity. We urge all political parties to continue expressing their views on the issue and to endorse these recommendations that we put forward for the benefit of all New Zealanders.