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February 2005
Ngati Apa: Legally Sound but Bravely Apolitical

Jane Dunlop

October 2005

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours), University of Otago, Dunedin
Rub away the earthen clump to leave but one lone grain of dirt; whilst it is but one, yet it is inextricably joined to the land, from the land to the sky, the sky to the land, to the mountain, to the sea, to the people; tis I who is that one lone grain.

Acknowledgements

To the people who are inextricably linked to this paper...

Jacinta Ruru ~ you have inspired me this year. Thank you for helping me find in law school what I always hoped I would.

Luke ~ my balance! It would never be the same without you.

Mum and Dad ~ for never pushing, put always guiding and understanding.
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Introduction

For many years the Indigenous peoples of Australia, Canada and New Zealand were precluded from seeking redress from the courts for the loss of their lands. In Canada and New Zealand a principle of non-justiciability arose from the courts’ differential attitude towards Crown sovereignty and a failure to accept that the laws and customs of Indigenous peoples could be recognised by common law courts. In Australia the terra nullius fiction generated a similar result.

Recently, this has changed. The highest appellate courts in Australia, Canada and New Zealand have now recognised Indigenous land rights pursuant to the common law doctrine of native title: Mabo v Queensland (No 2) in the High Court of Australia, Delgamuukw v British Columbia in the Supreme Court of Canada, and Attorney-General v Ngati Apa in the New Zealand Court of Appeal. These decisions were highly celebrated and heralded as ‘landmark’ cases within their respective jurisdictions.

However, despite the aura of celebration that surrounds these cases, a stark truth has surfaced in all three countries – that Indigenous land rights remain inherently vulnerable to the political majority. Criticisms have been targeted at the Australian and Canadian
courts for flouting their constitutional roles and deciding the *Mabo* and *Delgamuukw* cases, not in line with legal principle and precedent, but according to political and economic considerations. The vulnerability of Indigenous land rights was also confirmed in New Zealand in recent years where the controversial issue has been whether Māori, the Indigenous peoples of New Zealand, should be allowed the opportunity to prove customary ownership of the foreshore and seabed. While the Court of Appeal in *Ngati Apa* affirmed they should, the New Zealand Government replied by enacting legislation, the *Foreshore and Seabed Act 2004*, which effectively annulled that decision. The foreshore and seabed debate has illustrated that although the New Zealand Court of Appeal could not be subject to the same criticisms as Canadian and Australian courts, the end-point is much the same because New Zealand’s constitutional framework does little to protect Māori land rights.

From within this background, and focussing on the role of the common law courts, the themes that permeate this paper are:

- Indigenous land rights and the legitimacy of society;
- The vulnerability of Indigenous land rights to the political majority; and
- The significance of constitutional choices to the protection of Indigenous land rights.

Chapter one places Indigenous land rights within a contemporary theoretical discourse which challenges nations to confront Indigenous legal issues within their territories. The chapter then examines the Australian and Canadian landmark cases of *Mabo* and *Delgamuukw*, followed by a précis of the recent academic attack of these cases.

Chapter two introduces *Ngati Apa*, New Zealand’s landmark case on the common law doctrine of native title. In order to elucidate the significance of *Ngati Apa* chapter two delineates the background to the common law doctrine of native title within New Zealand’s unique legal system and demonstrates how that doctrine came to be perceived as obsolete. A descriptive account of *Ngati Apa* is then advanced within the context of a recent judicial revival of native rights.
Chapter three analyses the separate judgments in *Ngati Apa* with an emphasis on comments pertaining to extinguishment of native title. This exposes *Ngati Apa* as a politically brave decision, unlike the landmark cases of *Mabo* and *Delgamuukw*.

Chapter four considers the implications of a brave judicial decision within New Zealand’s constitutional framework. Government’s response to *Ngati Apa* is examined from the orthodox context of Parliamentary sovereignty. Chapter four then contests this orthodox position from a variety of perspectives unique to New Zealand. Whilst concluding that these circumstances call for a different notion of legitimacy and an improved constitutional structure, the chapter concedes that New Zealand’s current political climate means that constitutional changes are unlikely to be on Parliament’s agenda. This has implications for the continued vulnerability of Indigenous land rights.

The final chapter concludes this paper reflects on the combined lessons of Indigenous land rights in Australia, Canada and New Zealand to suggest possible ways forward.
Chapter One

Challenges, responses and failures

The aim of this chapter is threefold. First, it places Indigenous land rights within a contemporary theoretical discourse which challenges nations to confront Indigenous legal issues within their territories. It then examines two ‘landmark’ cases on the common law doctrine of native title which emerged from Australia and Canada in the 1990s in response to this challenge. Finally this chapter presents a recent academic attack of these landmark cases; an attack which has exposed the vulnerability of Indigenous land rights to political and economic power structures.

1.1 THE CHALLENGE

Academic literature has queried the relationship between Indigenous peoples and settler societies from various jurisprudential perspectives. The literature addressed in this paper calls into question how various manifestations of the law have treated and continue to treat Indigenous peoples and it poses a challenge for contemporary society to deal with current inequities.

From a global perspective Paul Keal has exposed Indigenous land rights as an important but neglected aspect of the expansion of international society. As well as being a society of states, Keal presents international society as a “moral community with shifting boundaries”. Employing case studies of several colonised nations, including Australia, Canada and New Zealand, Keal illustrates that from the inception of international society

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9 Keal above n8. Paul Keal is a Senior Fellow in the Department of International Relations, Australian National University. Keal’s work has been chosen for the current paper as it provides the most recent, comprehensive work on these issues.
10 Keal above n8.
these boundaries were drawn up in ways that involved the simultaneous inclusion and exclusion of certain categories of non-Europeans. Keal draws an analogy between a state with unresolved Indigenous claims and one that abuses human rights. His thesis is that because modern states have been founded on the dispossession of Indigenous peoples, they are morally flawed. This, in turn, calls into question the moral foundations of the international society that is constituted by them.\footnote{Keal above n8, 3.}

Rather than accepting the expansion of international society resulting in ‘the state’ as a universal form of political organisation as a success story, Keal urges his readers to open their eyes to the dispossession and destruction of Indigenous peoples which is part of “the dark side of the story of expansion which needs correction”.\footnote{Keal above n8, 2 \[emphasis added\].} According to Keal, all nations have two vital responsibilities in order for them to advance as “morally legitimate”\footnote{Keal above n8, 2.} states and hence validate the legitimacy of international society: they must correct existing boundaries to be inclusive of Indigenous peoples and they must resolve (historical) Indigenous claims.

A leading political theorist, James Tully, has advanced a localised point of view by employing Canada as a lens through which to illustrate that Indigenous peoples are not free peoples within contemporary society.\footnote{James Tully “The Struggles of Indigenous Peoples for and of Freedom” in D Ivison, P Paton and W Sanders (eds.) \textit{Political Theory and the Rights of Indigenous Peoples} (Cambridge University Press, Cambridge, 2000) 36-59 plus notes 260-264. James Tully is the Distinguished Professor of Science, Law, Indigenous Governance and Philosophy at the University of Victoria. His work has been chosen for this paper because James Tully is a leading theorist in the field of contemporary political and legal philosophy.} Whilst Tully’s focus is on Canada, his contention is that a “Goliath-versus-David”\footnote{Tully above n14, 41.} relationship provides the foundation for the constitutional democracies of Australia, Canada and New Zealand. In order to support his contention Tully reminds us that the cumulative processes of ‘internal colonisation’ have resulted in the appropriation of the land, resources and jurisdiction of the Indigenous peoples within these countries. By ‘internal colonisation’ Tully is referring to both the historical processes by which structures of domination have been set in place and to the

\[11\] Keal above n8, 3.
\[12\] Keal above n8, 2 [emphasis added].
\[13\] Keal above n8, 2.
\[14\] James Tully “The Struggles of Indigenous Peoples for and of Freedom” in D Ivison, P Paton and W Sanders (eds.) \textit{Political Theory and the Rights of Indigenous Peoples} (Cambridge University Press, Cambridge, 2000) 36-59 plus notes 260-264. James Tully is the Distinguished Professor of Science, Law, Indigenous Governance and Philosophy at the University of Victoria. His work has been chosen for this paper because James Tully is a leading theorist in the field of contemporary political and legal philosophy.
\[15\] Tully above n14, 41.
techniques of government by which Indigenous peoples and their territories are governed. According to Tully this form of colonisation is termed ‘internal’ as opposed to ‘external’ as the colonising society is built on the territories of the formerly free and now colonised peoples. With external colonisation, by contrast, the colony and the imperial society coexist on different territories. The colonies can free themselves and form independent societies with exclusive jurisdiction over their respective territories, as Australia, Canada and New Zealand have done in relation to the former British Empire. With internal colonisation this is not possible as the dominant colonial society occupies the same geographical space as the Indigenous peoples.16

On Tully’s account, given the overwhelming power of the dominant societies within the same territory of the Indigenous peoples of Australia, Canada and New Zealand, the Indigenous peoples of these countries cannot overthrow the colonial system in a direct revolution.17 Instead they are forced to employ alternative arts of resistance - “confrontation by the pen rather than the sword”8 - in an attempt to modify the existing system imposed by internal colonisation.19 This elevates the significance of ‘the law’ in the struggle of Indigenous peoples for freedom and inclusion.

According to Keal and Tully, the Indigenous peoples of Australia, Canada and New Zealand remain the unrecognised, unattended aspect of these countries’ past and present. As such, contemporary society has been presented with the challenge of confronting Indigenous legal issues in order to become “morally legitimate”20 states. Whilst Tully concedes that the overwhelming power of dominant society makes this challenge very difficult, both Keal and Tully’s work emphasise that the rights and quality of life of Indigenous peoples has implications for the legitimacy of society as a whole. The theme of legitimacy runs through this paper and will be discussed in detail in chapter four with reference to the contested theories of legitimacy in New Zealand.

16 Tully above n8, 37-42.
17 Tully above n8, 50.
18 Tully above n8, 51.
19 Tully above n8, 58-59.
20 Keal above n8, 2.
1.2 THE RESPONSE – LANDMARK CASES

In the 1990s, courts in Australia and Canada were expressly presented with the “dark side of the story of expansion”\(^\text{21}\) and thus began to address the colonial reality of Indigenous peoples within their territories. Judicial pronouncements from the highest courts in both jurisdictions now contain unprecedented victories for Indigenous land rights.

1.2.1 *Mabo v Queensland (No 2)\(^\text{22}\)*

Until 1992 the assumption in Australia was that when the British Crown assumed sovereignty over the continent it became the universal and absolute beneficial owner of all the land therein.\(^\text{23}\) This assumption was the product of a historical perception that saw the Indigenous inhabitants as barbarous or unsettled and without settled law.\(^\text{24}\) The perception, which became embedded in precedent, enabled Australia to be regarded as *terra nullius*: “an uninhabited country ... discovered and planted by English subjects”.\(^\text{25}\) According to the weight of authority the interests of Indigenous inhabitants in colonial land were extinguished as soon as British subjects settled in the colony, though the Indigenous inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest. The clearest statement of this proposition is found in an 1847 Supreme Court of New South Wales decision, *Attorney-General v Brown*,\(^\text{26}\) which

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\(^{21}\) Keal above n8, 2.


\(^{23}\) *Mabo* above n4, 28-29. This was the mistake of conflating *imperium* with *dominum*, see above n1.

\(^{24}\) *Mabo* above n4, 37-38.

\(^{25}\) *Cooper v Stuart* (1889) 14 App Cas 291 Lord Wilberforce. *Terra nullius* literally means “no mans land”.

rejected an Aboriginal group’s challenge to the Crown’s title and possession of the land in the Colony. In that case Stephen CJ stated the law to be:

[T]hat the waste lands of this Colony are, and ever have been, from the time of its first settlement in 1788, in the Crown; that they are, and ever have been, from that date (in point of legal intendment), without office found, in the Sovereign’s possession; and that, as his or her property, they have been and may now be effectually granted to subjects of the Crown.\(^{27}\)

In \textit{Mabo}, decided in 1992 (in a judgment that ran over 200 pages), the High Court of Australia overturned this authority, rejecting the “enlarged doctrine”\(^{28}\) of \textit{terra nullius} which had previously provided legitimacy for the take over of Australia.\(^{29}\) Brennan J described the application of \textit{terra nullius} in the Australian context as both “false in fact”\(^{30}\) and “unjust and discriminatory”\(^{31}\) to the Indigenous peoples and said that it is inconsistent with contemporary values of justice and human rights.\(^{32}\)

\textit{Mabo} replaced the theory of \textit{terra nullius} with the doctrine of native title, defined as a right that exists when an Indigenous community can show they have a “connexion with the land”\(^{33}\) according to their “traditional laws and customs”.\(^{34}\) In this process the High Court clarified that the effect of colonisation was to give the British Crown sovereignty and radical title to the land, but that it did not affect the rights of possession and use of

\(^{27}\) \textit{A-G v Brown,} above n\textsuperscript{3}, 316 Stephen J.

\(^{28}\) \textit{Mabo} above n\textsuperscript{4}, 58 Brennan J. His Honour’s use of the term “enlarged notion” was referring to the application of the doctrine to a territory occupied by Indigenous people, as in the case of Australia. He was not questioning the application of the doctrine in a territory which was truly vacant and unoccupied at the time of British colonisation.

\(^{29}\) Brennan J (Mason CJ and McHugh J concurring), Deane and Gaudron JJ, and Toohey J wrote separate judgments, all arriving at this conclusion. Dawson J dissented.

\(^{30}\) \textit{Mabo} above n\textsuperscript{4}, 22 42 Brennan J.

\(^{31}\) \textit{Mabo} above n\textsuperscript{4}, 42 Brennan J.

\(^{32}\) \textit{Mabo} above n\textsuperscript{4}, 42 Brennan J.

\(^{33}\) \textit{Mabo} above n\textsuperscript{4}, 70 Brennan J. Loss off connection (or “connexion” as Brennan J called it) with the land is dealt with at 59-61, 70 Brennan J; 110 Deane and Gaudron JJ.

that land by the Indigenous peoples under their own laws.\textsuperscript{35} The Indigenous peoples became British subjects, and their land rights continue and are enforceable today as common law legal entitlements.\textsuperscript{36} This common law entitlement persists until there is a loss of connection with the land by the Indigenous titleholders\textsuperscript{37} or until it is extinguished by a valid exercise of sovereign power inconsistent with a continued right to enjoy native title.\textsuperscript{38}

According to the High Court native title can be extinguished by acts of sovereign power which can be either legislative or executive in nature.\textsuperscript{39} In the context of legislative extinguishment the High Court held that provided the legislature has constitutional authority it can extinguish native title, as it can other property rights, if it evidences an intention that is “clear and plain”.\textsuperscript{40} In terms of executive infringement, it was held that

\textsuperscript{35} \textit{Mabo} above n4, 56-57 Brennan J; 95-99 Deane and Gaudron JJ; 184 Toohey J.

\textsuperscript{36} \textit{Mabo} above n4, 38 Brennan J; 182 Toohey J.

\textsuperscript{37} Above n4. Recently the High Court has also held that Native Title can be lost through failure to preserve the requisite connection with the land through maintenance of the traditional laws and customs on which that title is based. See \textit{Yorta Yorta Aboriginal Community v Victoria} (2002) 194 ALR 538. As this means of losing native title is distinct from extinguishment by legislative or executive act (the focus of this paper) it will is not be discussed.

\textsuperscript{38} \textit{Mabo} above n4, 69 Brennan J.

\textsuperscript{39} As Brennan J’s decision expressed the majority position on extinguishment, it will be the focus of the present discussion. For a thorough analysis of Deane and Gaudron JJ’s and Toohey J’s positions on extinguishment see Kent McNeil “Racial Discrimination and Unilateral Extinguishment of Native Title” (1996) 1 ALR 181, reprinted in \textit{Emerging Justice? Essays on Indigenous Rights in Canada and Australia}, above n34, 357-408 [“Racial Discrimination and Unilateral Extinguishment of Native Title”].

\textsuperscript{40} This is due to the general rule of English constitutional law based on parliamentary sovereignty that legislature acting within its constitutional jurisdiction can infringe or extinguish private rights, including property rights, as long as the intention to do so is unequivocal. See \textit{Central Control Board (Liquor Traffic) v Cannon Brewery Company, Limited} [1919] AC 744 at 752, Lord Atkinson. Brennan and Toohey JJ both followed Canadian and American authority applying the same test, see \textit{Mabo}, above n4, 64 Brennan J, 195-96 Toohey J Deane, Gaudron and Toohey JJ related this “clear and plain” test directly to the presumption against legislative taking of property rights without compensation: \textit{Mabo}, above n4, 111 Deane and Gaudron JJ; 195 Toohey J. However, Brennan J said that the requirement of clear and plain intent “flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in the land”. Nonetheless, regardless of its source, Brennan J had no doubt about the correctness of the requirement, stating that “[i]t is patently the right rule” (p196).
prior to the introduction of the *Racial Discrimination Act 1975* (Cth),\(^41\) native title was extinguished to the extent that it was “inconsistent”\(^42\) with either a real property interest granted by the Crown or appropriation and use of the land by the Crown.\(^43\) Justice Brennan provided a very broad justification for this rule:

> Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign’s territory. It follows that, on a change of Sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by the exercise of the new sovereign power.\(^44\)

Justice Brennan found no clear and plain intention in the statutory law of Queensland relating to land.\(^45\) He did, however, conclude that such intent could be found in Crown grants of interests that were “inconsistent”\(^46\) with native title.

Because the recognition of native title rights and interests in this instance did not “fracture the skeletal principle ... of [Australian] law”,\(^47\) the Indigenous Meriam people of the Torres Straight Islands were held to be entitled to the “possession, occupation and

\(^{41}\) The *Racial Discrimination Act 1975* (Cth) is an attempt to give effect to Australia’s obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*. The Act makes racial discrimination unlawful in Australia and aims to ensure that human rights and freedoms are enjoyed in full equality. The *Racial Discrimination Act* applies to all Australians including businesses, schools, local governments, States and Territory government and agencies and departments and Commonwealth government agencies and departments. The Act overrides racially discriminating State or Territory legislation; however, significantly, commonwealth legislation which is racially discriminating is not overridden. This explains why the *Native Title Act 1993* (Cth) and subsequent amendments in 1998 enacted without judicial intervention.

\(^{42}\) *Mabo* above n4, 68, 69 Brennan J.

\(^{43}\) *Mabo* above n4, 63-70 Brennan J. However, in the absence of clear statutory authority to the contrary, Deane, Gaudron and Toohey JJ, dissenting on this issue, were of the view that the Crown grant or appropriation would be wrongful, and therefore would result in a claim for compensation. See “Racial Discrimination and Unilateral Extinguishment of Native Title”, above n39, 274.

\(^{44}\) *Mabo* above n4, 63 Brennan J [footnote omitted]. Brennan J relied solely on American authority for this. For criticism see “Racial Discrimination and Unilateral Extinguishment of Native Title” above n39 “Racial Discrimination and Unilateral Extinguishment of Native Title”, 274 where McNeil shows that this is remarkable as American law does not in fact support his position.

\(^{45}\) *Mabo* above n4, 64-68 Brennan J.

\(^{46}\) *Mabo* above n4, 68 Brennan J.

\(^{47}\) *Mabo* above n4, 29 Brennan J.
enjoyment”48 of the lands of the Murray Islands, with the possible exception of certain leased or appropriated lands.49

1.2.2 Delgamuukw v British Columbia50

The history of Indigenous land rights in Canada is very different from the pre-Mabo history of denial in Australia.51 In Canada, Aboriginal title52 has been acknowledged by the Crown through such instruments as the Royal Proclamation of 176353 and the Indian Treaties.54 Historically, however, this acknowledgement took place mainly outside of British Columbia.55 In British Columbia, for the most part, the provincial denial of Aboriginal title parallels the denial that prevailed for so long in Australia.56 As such, many of the leading cases that have lead to a judicial recognition of Aboriginal rights in Canada derive from British Columbia.57 The Supreme Court of Canada’s decision in

48 Mabo above n4, 216 Toohey J.
49 Mabo above n4, 217 Toohey J.
50 Delgamuukw, above n5. The Mabo case has also been the subject of extensive publication. See for example John Borrows “Sovereignty’s Alchemy: An Analysis of Delgamuukw v. British Columbia” (1999) OHLJ 537; Frank Cassidy (ed) Aboriginal Title in British Columbia: Delgamuukw v. The Queen (Oolichan Books and The Institute for Research on Public Policy, Victoria, 1992); Gordon Christie “Delgamuukw and the Protection of Aboriginal Land Interests” (2000-2001) 32 Ottawa LR 85; Delgam Uukw and Stan Persky Delgamuukw: the Supreme Court of Canada decision on aboriginal title (University of Washington Press, Seattle, 2000); Rachel Yurkowski “We are all here to stay”; Addressing Aboriginal Title Claims After Delgamuukw v British Columbia” (2000) 31 VUWL 85.
51 Note that the existence of these rights under the French regime is still a matter of debate but will not be discussed in this paper. See R v Côté [1996] 3 SCR 139, 164-73.
52 Indigenous title to land is generally referred to as Aboriginal title in Canada.
Delgamuukw is undoubtedly the most significant of these cases. Whereas previous Aboriginal rights were limited to usufructuary rights, Delgamuukw recognised a right to the land itself.

In Delgamuukw the Supreme Court defined Aboriginal title as a *sui generis* form of property. According to the Court, Aboriginal title includes a right of exclusive use and occupation for a variety of purposes that are not limited to the uses that the Aboriginal titleholders made of their lands in the past, but subject to a limitation that the lands cannot be used in a way that is inconsistent with its use and enjoyment by future generations. Aboriginal title can be established by proving exclusive occupation of lands at the time the Crown acquired sovereignty, by evidence of physical presence and use, and by Aboriginal practices, customs and traditions that reveal the lands were exclusively occupied.

Significantly, because this Aboriginal title falls within the rubric of aboriginal rights it is constitutionally protected pursuant to section 35(1) of the *Constitution Act 1982*. This section provides:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

This means that, unlike native title in Australia and New Zealand, Aboriginal title in Canada is constitutionally protected against both legislative *and* executive action,

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58 See for example *St Catharines Milling and Lumber Company v The Queen* (1888) 14 App Cas 46; *Calder v Attorney-General of British Columbia* above n57; *Guerin v The Queen* above n57; *R v Sparrow* [1990] 1 SCR 1075 [Sparrow]; and *R v Van der Peet* SCC [1996] 2 SCR 507.

59 Delgamuukw above n5, paras 112-115 Lamer CJ where Aboriginal title is described as a *sui generis* form of property in order to distinguish it from other proprietary interests such as fee simple title. It is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. These characteristics are its inalienability, source (prior occupation) and the fact that it is held communally.

60 Delgamuukw above n5, 1083 Lamer CJ (Cory and Major JJ concurring). La Forest J delivered a separate judgment for himself and L'Heureux-Dubé J in which they arrived at the same result as the majority but differed on the definition of Aboriginal title. McLauclin J concurred with Lamer CJC and substantially agreed with La Forest J.

61 Delgamuukw above n5, 1097-1106 Lamer CJ.

whether federal or provincial. However, whilst constitutional entrenchment has provided Aboriginal rights with this protection against extinguishment, Canadian courts have established that Aboriginal rights can still be ‘infringed’ by or pursuant to federal legislation, as long as that infringement can be ‘justified’ under the test laid out in a line of cases originating from *R v Sparrow*. These cases were applied by the Supreme Court in *Delgamuukw*.

According to the *Sparrow* decision, once Aboriginal people prove a *prima facie* infringement of an Aboriginal right (in that case it was the right to fish for food for ceremonial purposes) the onus is on the Crown to justify that infringement. The Crown first has to prove that the infringement is pursuant to a valid legislative objective. In *Sparrow* the Supreme Court found conservation of fish stocks to be a valid objective because it is “aimed at preserving s.35 (1) rights by conserving and maintaining a natural resource”. The Court rejected the argument that the “public interest” would be a sufficient objective as it is “so vague as to provide no meaningful guidance and so broad as to be unworkable for the justification of a limitation on constitutional rights”.

In a later case of *R v Gladstone* the Supreme Court back-pedalled from its position in *Sparrow* and said that in allocating aboriginal fishing rights the federal government is entitled to take into account “economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups”. Chief Justice Lamer (as he then was) regarded concern of these third party interests as

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63 The use of the term ‘infringement’ is supposed to refer to the prioritisation of other interests over the Aboriginal rather than extinguishment in the strict sense (i.e., the construction or management of a regulatory regime in which other interests are given priority) see “Submission by Dr PG McHugh to the Select Committee Hearing of the Foreshore and Seabed Bill” above n1, 84, fn 124. It will emerge that this might not be the reality.

64 *Sparrow* above n58.

65 See *Delgamuukw* above n5, 1111-1115 Lamer CJ for an articulation of the full test. It is in fact a two step process: first, the Crown has to prove that the infringement is pursuant to a valid legislative objective; and second, the Crown has to show that it has respected its fiduciary obligations to the Aboriginal people in question. Only the first part of the test is dealt with in this paper.

66 *Sparrow* above n58, 1113 Dickson CJ and La Forest J.

67 *Sparrow* above n58, 1113 Dickson CJ and La Forest J.

68 *Sparrow* above n58, 1113 Dickson CJ and La Forest J.

69 *R v Gladstone* [1996] 2 SCR 723 [Gladstone].

70 *Gladstone* above n69, 755 Lamer CJ. See also *R v Marshall [No. 1]* [1999] 3 SCR 456 where the Supreme Court took the same approach to a treaty right to fish for a moderate livelihood.
falling within the *Sparrow* justification test because “[i]n the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment”.71

In *Delgamuukw*, Chief Justice Lamer reviewed the articulation of the justification test for infringement of Aboriginal rights laid out in *Sparrow* and *Gladstone* and then explained how the test would apply in the context of infringement of Aboriginal title. His Honour said that in most cases a valid objective will be one that “can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty”.72 The Chief Justice elaborated as follows:

> In my opinion, the development of agriculture, forestry, mining and hydro-electric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.73

### 1.3 FAILURES – VULNERABILITY

Despite these celebrated landmark cases the Canadian academic Professor Kent McNeil, arguably the world’s leading authority on the common law doctrine of native title,74 has recently criticised the way that Australian and Canadian case law has dealt with extinguishment of native title.75 The following discussion provides a synopsis of McNeil’s criticisms.

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71 *Gladstone* above n69, 775 Lamer CJ [emphasis in original].
72 *Delgamuukw* above n5, 1111 Lamer CJ [emphasis in original].
73 *Delgamuukw* above n5, 1111 Lamer CJ.
74 Kent McNeil is a Professor at Osgoode University. His comprehensive book Kent McNeil *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989) influenced both the High Court of Australia in *Mabo* above n4, fn 37 Brennan J and the Supreme Court of Canada in *Delgamuukw* above n5, 1082 Lamer CJ.
1.3.1 Criticisms of Mabo

McNeil agrees with the “well-supported”\textsuperscript{76} majority position in \textit{Mabo} that after the acquisition of British sovereignty the Indigenous peoples continued to have native title to any lands they had a connection with under their traditional laws and customs. However, he reveals a “vital aspect”\textsuperscript{77} of that decision which cannot be readily justified on the basis of legal principle and precedent, namely the judges’ views that native title can be extinguished if it is inconsistent with either a real property interest granted by the Crown or appropriation and use of the land by the Crown.

According to McNeil the problem is that in English constitutional law the Crown in its executive capacity cannot infringe or take away vested rights of British subjects, especially in relation to land, without unequivocal statutory power.\textsuperscript{78} He highlights that it is a fundamental aspect of the rule of law that the Crown, and hence the Executive through which it acts, cannot interfere with the rights of its subjects without lawful authority.\textsuperscript{79} Moreover, in the absence of clear and plain legislative intent to the contrary, statutory authority to grant lands would not allow the Crown to infringe or extinguish existing land rights. This is because a well-established principle of statutory interpretation requires legislation to be construed, if at all possible, in favour of vested rights and against authorising executive interference with them as it presumed that legislatures do not intend to interfere with vested rights.\textsuperscript{80}

McNeil points out that Justice Brennan recognised this: “under the constitutional law of [Australia], the legality (and hence the validity) of an exercise of sovereign power

\begin{footnotes}
\item[76] “The Vulnerability of Indigenous Land Rights in Australia and Canada” above n75, 273. McNeil means “well supported” in the legal sense.
\item[77] “The Vulnerability of Indigenous Land Rights in Australia and Canada” above n75, 274.
\item[79] Since at least the 17\textsuperscript{th} Century, a basic constitutional principle has prevented the Crown from making or changing law or custom without the authority of Parliament. See \textit{Proclamations Case} (1610) 12 Co R 74 (KB); AV Dicey \textit{Introduction to the Study of the Law of the Constitution} (9\textsuperscript{th} ed, MacMillan and Co, London, 1939) 50-54. This is the principle of parliamentary sovereignty, discussed below at 4.1.1, which underpins the rule of law by protecting individuals from arbitrary acts by officers of the Crown, see \textit{Entick v Carrington} (1765) 19 St Tr 1029.
\item[80] “The Vulnerability of Indigenous Land Rights in Australia and Canada” above n75, 275.
\end{footnotes}
depends on the authority vested in the organ of government purporting to exercise it”.

However, his Honour tried to avoid its implications by stating that the presumption only applies to prevent “impairment of an interest in land granted by the Crown or dependent on a Crown grant”. Accordingly, Brennan J concluded that, “as native title is not granted by the Crown, there is no comparable presumption affected the conferring of any executive power on the Crown the exercise of which is apt to extinguish native title”.

McNeil emphasises that the missing piece from Justice Brennan’s judgment is an identification of the statutory provisions that clearly and plainly empowered the Crown to infringe or extinguish native title by grant. McNeil argues that there is no justification in legal principle or precedent to deny native title protection from executive action simply because that title is not derived from a Crown grant. On the contrary, McNeil asserts that the principle that statutes should be interpreted, if possible, so as not to authorise executive interference is of general principle – it is not limited to protecting property rights that originate from the Crown.

This extinguish-by-grant aspect of the Mabo decision has been followed in subsequent cases which, McNeil observes, have proceeded “with the same lack of attention to and respect for fundamental legal principles and precedents”, failing to identify the clear and plain legislative source of the Crown’s authority to infringe or extinguish native title.

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81 *Mabo* above n4, 63 Brennan J.
82 *Mabo* above n4, 64 Brennan J.
83 *Mabo* above n4, 64 Brennan J.
84 “The Vulnerability of Indigenous Land Rights in Australia and Canada” above n75, 276.
85 “The Vulnerability of Indigenous Land Rights in Australia and Canada” above n75, 277.
1.3.2 Criticisms of Delgamuukw

McNeil has expressed similar disapproval of the explanations given by Lamer CJ in Delgamuukw for the expansion of the justification test concerning infringement of Aboriginal title. That explanation was that certain objectives are in the "interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society". McNeil comments that that this "sounds suspiciously like the public interest rationale that was explicitly rejected in Sparrow".

McNeil notes that Justice McLaughlin provided a vigorous dissent on the issue of justification in an earlier case of R v Van der Peet, saying that it "runs counter to the authorities" and "is indeterminate and ultimately more political than legal". In her Honour's view, the legislative objectives that the court in Sparrow regarded as sufficiently compelling and substantial to justify infringement of Aboriginal rights were objectives relating to the "responsible exercise of the rights", such as conservation and safety, not factors like economic and regional fairness and the interests of third parties. Justice McLachlin drew a distinction between the justifiable limitations on the exercise of an Aboriginal right and diminution of the right itself. In property law terms McNeil identifies this as equivalent to the distinction between regulation and expropriation.

According to McNeil, the objectives that Lamer CJ had in mind in Delgamuukw do not appear to be limited to the taking of Aboriginal lands for public purposes, such as the construction of highways or state-owned hydroelectric projects. Instead, he seems to have envisaged that Parliament could temporarily take Aboriginal lands and make them available to private individuals and corporations (his "foreign populations") who would

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87 See above, n71 and accompanying text [emphasis in original].
88 "The Vulnerability of Indigenous Land Rights in Australia and Canada" above n75, 291.
89 Significantly, Mc Laughlin is now the Chief Justice of the Supreme Court of Canada.
90 R v Van der Peet (1996) 2 SCR 507, 659 McLaughlin J [Van der Peet].
91 Van der Peet above n90, 659 McLaughlin J.
92 Van der Peet above n90, 659 McLaughlin J.
93 Van der Peet above n90, 660 McLaughlin J.
94 Van der Peet above n90, 661 McLaughlin J.
95 "The Vulnerability of Indigenous Land Rights in Australia and Canada" above n75, 292-294.
96 Delgamuukw above n5, 1111 Lamer CJ. See above n73 and accompanying text.
then engage, for example, in farming, forestry and mining. This is a long way from the *Sparrow* "conserving and maintaining a natural resource"\(^{97}\) justification. Elsewhere, McNeil has commented that this sounds very much like a modern-day equivalent of a familiar justification for dispossessing Aboriginal peoples in the heyday of European colonisation – that agriculturalists are superior to hunters and gatherers, and can also take their lands.\(^{98}\)

McNeil divided the possible objectives for justification of infringement of Aboriginal title into three categories:

1. objectives that involve *regulation* of Aboriginal title for the good of Aboriginal people themselves and Canadian society generally ("protection of the environment and endangered species");
2. objectives that involve *expropriation* of Aboriginal title, in whole or in part, for *public* purposes ("the building of infrastructure", and possibly "the development of ... hydroelectric power");
3. objectives that seem to involve the *transfer* from the Aboriginal titleholders to *private* individuals or corporations ("the development of agriculture, forestry, mining ... the general economic development of the interior of British Columbia ... and the settlement of foreign [non-Aboriginal?] populations to support those aims").\(^{99}\)

According to McNeil the first of these categories encompasses the kind of compelling and substantial objectives that the Court had in mind in *Sparrow*. The objectives in the second category resemble the kind of objectives that allow the Crown to expropriate private property for public works. However, the third category goes beyond regulation and even public purposes to the creation of third party interests. Chief Justice Lamer apparently thought it was possible to accord Aboriginal titleholders exclusive rights to their land, but at the same time allow infringements that would eliminate that exclusivity.

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\(^{97}\) *Sparrow* above n58, 1113, Dickson CJ and La Forest J. See above n66 and accompanying text.


\(^{99}\) "The Vulnerability of Indigenous Land Rights in Australia and Canada" above n75, 293 [emphasis in original].
by allowing the Crown to allocate some of their lands or the resources thereon to third parties. In McNeil’s words:

> from a property perspective this aspect of Chief Justice Lamer's judgment borders on the bizarre, particularly if you remember that Aboriginal title is not only a property right that includes exclusive use and occupation – it is also a constitutionally protected property right.100

While McNeil agrees that regulation of Aboriginal title for such purposes as protection of the environment or endangered species is no doubt within the compelling and substantial purposes contemplated by the Court in Sparrow, expropriation of Aboriginal title land for public purposes is a completely separate matter. As Justice McLachlin pointed out in Gladstone, there is a qualitative difference between infringements ensuring the responsible exercise of a right, and infringements that reduce or take away the substance of the right. McNeil concludes by highlighting that expropriation amounting to permanent, even partial extinguishment of Aboriginal title, would appear to be inconsistent with Chief Justice Lamer's statement in Van der Peet that “[s]ubsequent to s. 35(1) aboriginal rights cannot be extinguished”.101

1.4 COMMENT

McNeil’s article suggests a real concern for the way in which Australian and Canadian judges are interpreting and applying the doctrine of native title in what are regarded as ‘landmark’ cases. These concerns, according to McNeil, are indicative of other explanations which are “[l]urking behind the decisions”.102 Explanations that, he says, “relate more to political stability than to legal principle and precedent”103 and perpetuate the vulnerability of Indigenous land rights. McNeil concludes that “[r]egardless of the strengths of legal arguments in favour of Indigenous peoples, there are limits to how far

100 “The Vulnerability of Indigenous Land Rights in Australia and Canada” above n75, 294.
101 Van der Peet above n90, 538 Lamer CJ.
the courts in Australia and Canada are willing to go to correct the injustices caused by colonisation and dispossession”104 and that:

... at the end of the day what really seems to determine the outcome in these kinds of cases is the extent to which Indigenous rights can be reconciled with the history of British settlement without disturbing the current political and economic power structure.105

As such, Keal and Tully’s concerns about the “moral legitimacy of states”106 and the overwhelming power of dominant societies remain highly relevant in Australia and Canada. New Zealand has more recently had a landmark case on the doctrine of native title - Ngati Apa.107 Could the same criticisms be made of this case, or has New Zealand chosen a more “morally legitimate” path? This is an inquiry which takes place in the following two chapters.

104 “The Vulnerability of Indigenous Land Rights in Australia and Canada” above n75, 300.
105 “The Vulnerability of Indigenous Land Rights in Australia and Canada” above n75, 300-301 [emphasis added].
106 Keal above n20 and accompanying text.
107 Ngati Apa above n6.
Chapter Two
The Aotearoa/New Zealand Context

The aim of this chapter is to introduce Ngati Apa,108 New Zealand's landmark case on the common law doctrine of native title. In order to elucidate the significance of Ngati Apa this chapter begins by providing a background to the common law doctrine of native title within New Zealand's unique legal system and how that doctrine came to be perceived as obsolete. A descriptive account of Ngati Apa is then advanced within the context of a recent judicial revival of the doctrine of native title by the New Zealand judiciary.

2.1 BACKGROUND

Māori rights to land were upheld in the New Zealand Courts pursuant to the doctrine of native title in the earliest years of colonial settlement. In R v Symonds,109 decided in 1847, Justice Chapman stated:

... it cannot be too solemnly asserted that [native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows ... that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi ... does not assert either in doctrine or in precedent anything new and unsettled.110

108 Ngati Apa, above n6.
109 R v Symonds (1847) NZPCC 387.
110 R v Symonds above n109, 390 Chapman J.
The second article of the Treaty of Waitangi (the document generally accepted as ceding sovereignty over New Zealand to England) guarantees to Māori “their lands, villages and all their treasures”, or, as the English version reads: “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession”. According to Justice Chapman this article endorses the common law doctrine of native title. A change in sovereignty does not extinguish the Indigenous people’s property rights.

Despite early recognition, extensive extinguishment of that title shortly followed. The following discussion will demonstrate how consensual and legislative extinguishment, a change in judicial attitude, and common suppositions regarding Crown ownership led to a perception that the doctrine of native title had been rendered obsolete to the vast majority of New Zealand land. It was this perceived status quo that was shattered by the Court of Appeal’s decision in Ngati Apa.


112 This is Professor Sir Kawharu’s English translation of the Māori version of the second article: I Kawharu Waitangi. Māori and Pakeha Perspectives of the Treaty of Waitangi (Oxford University Press, Auckland, 1989) 319-320.

113 Kawaharu above n112, 320. The Treaty of Waitangi was singled in New Zealand in 1840 by representatives of the British Crown and Māori. For information on the Treaty see for example FM Brookfield Waitangi & Indigenous Rights: Revolution, Law & Legitimation (Publishing Press Ltd, Auckland, 1999); and Paul McHugh The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi (Oxford University Press, Auckland, 1991). To view a copy of the Treaty see First Schedule of the Treaty of Waitangi Act 1975 or the Government’s official Treaty of Waitangi Website, online:<www.treatyofwaitangi.govt.nz> [last accessed 29 September 2005]. Following the decision of the Privy Council in Hoani Te Heu Heu Tukino v Aotea District Maori Land Board [1941] AC 308 the orthodoxy is that the Treaty of Waitangi is not part of the domestic law of New Zealand except in so far as it has been incorporated into legislation. Throughout history there have been statutory references to the Treaty. Article 2 was recited in part in the Long Title to the Native Land Act 1862. Its influence on other legislation has not been as consistent although since the 1980s references to the Treaty have been quite common in legislation, particularly those dealing with the management of natural resources. See for example the Resource Management Act 1991, s8.
2.1.1 Consensual Extinguishment

It has long been established that customary rights can be lawfully extinguished by their cession. In the words of Chapman J in R v Symonds that is "by the free consent of the Native occupiers", namely sale. According to Stuart Banner, New Zealand is the colony in which the greatest proportion of Indigenous land has been lost through sale.

From 1840 all sales of land in New Zealand were ruled by the doctrine of pre-emption by which the Crown preserved for itself the exclusive monopoly right to extinguish Māori customary title to land through purchase. Māori were initially very willing to sell and by as early as 1862 two-thirds of the country had been converted from Māori customary land to land held by Crown grant through this Crown pre-emption. For various reasons, however, Māori soon became reluctant to sell their lands. While

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117 The issue of when Māori came to understand the British concept of sale and therefore whether consent was in fact free, which is a significant debate in itself, will not be addressed in this paper. For examples of this debate see Angela Ballara "The pursuit of Mana? A re-evaluation of the process of land alienation by Maoris" (1982) 91 JPS 519, 521-522; Ann R Parsonson “The expansion of a competitive society: A study in 19th century Maori social history” (1980) 14 NZJH 45, 56. The loss of land through cross-cultural misunderstanding and competing paradigms of land tenure has also been the subject of in-depth academic discussion. See for example Stuart Banner "Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand" (1999) 24 L & Soc Inquiry 807; Williams above n116, 108-116; E T Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 Otago Law Rev 449.


Maori resistance grew, strong public pressure was placed on government officials in order to ensure such land was made available to an increasing number of settlers.120

In the early 1860s the Government actively sought to ensure the availability of land for the new settlers. The *Native Land Act 1862* formally abolished the Crown's exclusive right of pre-emption in the acquisition of Maori lands and insisted that settlement of the colony depended upon assimilating Maori ownership of land to British law.121 As part of this policy New Zealand developed a unique approach for translating Maori customary title into a title cognisable by the common law. The *Native Land Act 1865* permanently established a Native Land Court.122 While the 1865 Act recognised Maori proprietary customs and ownership of land, the purpose of this recognition was to ascertain who owned the land in order for it to be converted into the Land Transfer System.123 The Act's express purpose was to encourage the "extinction" of Maori proprietary customs.124 A process was created whereby Maori were to apply to the Court for the issuance of a fee simple title which would, in effect, change the status of Maori customary land to Maori freehold land.125 Once a freehold title was issued, Maori were encouraged to alienate (sell, gift, lease, mortgage and so on) their lands to new settlers.126 This process, which has no counterpart in any other jurisdiction, proved extremely successful at breaking down Maori resistance to land sales.127

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121 See Long Title. See also "Maori and the law 1840-2000" above n118, 151-154.
123 See Long Title.
124 See Long Title.
126 "A Politically Fuelled Tsunami: The Foreshore/Seabed Controversy in Aotearoa Me Te Wai Pounamu/New Zealand" above n125, 60.
Effectively, the establishment of the Native Land Court meant that Māori rights to land became entwined within a statutory scheme. Whilst this scheme did not expressly exclude the jurisdiction of the common law courts pursuant to the doctrine of Native title, the Native Land Court became the dominant mechanism by which Māori customary title was recognised. Today the Native Land Court, now the Māori Land Court, continues to have jurisdiction to issue orders declaring the status of land. This jurisdiction is now constituted under *Te Ture Whenua Maori Act / The Māori Land Act 1993* which has entrenched a fundamentally different philosophy based on the retention of Māori land.\(^\text{128}\)

### 2.1.2 Legislative Extinguishment

The other aspect of “the Queen’s exclusive right to extinguish”\(^\text{129}\) native title is by legislation which evinces a clear and plain intention to do so.\(^\text{130}\) This legislative power of extinguishment is derived from British constitutional law which in theory contains no protection against interference with rights by the British Parliament.\(^\text{131}\)

Legislative extinguishment of Māori customary land was fostered through the taking of land for public works, such as roading. Confiscation for such purposes was generally without payment of compensation and without consultation.\(^\text{132}\) Compensation under the *Public Works Acts 1873* for example would only be payable if the land taken included any “pahs, [sic] Native villages or cultivations ... buildings gardens orchards plantations burial or ornamental grounds”.\(^\text{133}\) In other words, any land not obviously ‘occupied’ in some way was free for the Crown to take as it pleased.

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\(^\text{128}\)*Te Ture Whenua Māori Act 1993* explicitly reaffirms that the Treaty of Waitangi guaranteed to Māori protection of rangatiratanga and recognises that “land is a taonga tuku iho of special significance to Māori people”. The Act is premised on promoting the retention of “that land in the hands of its owners, their whanau, and their hapu” as expressed in the preamble, see ss 2 and 17.

\(^\text{129}\) See *R v Symonds*, above n109 and accompanying text.

\(^\text{130}\) Whilst *R v Symonds* confirmed that native title may be extinguished by legislation, this “clear and plain” terminology is American in origin, see *Lipan Apache Tribe v United States* (1967) 180 Ct Cl 487, 492. See also “Submission by Br PG McHugh to the Select Committee Hearing of the Foreshore and Seabed Bill” above n1, 82. This “clear and plain” test is discussed at length in chapter 3.

\(^\text{131}\) “The Vulnerability of Indigenous Land Rights” above n75, 288, fn75.

\(^\text{132}\) Williams above n116, 196.

\(^\text{133}\) Section 106.
After the mid-century wars over three million acres of land in New Zealand was confiscated by the colonial government through Crown legislation. Proclamations of confiscated land districts relied on the *New Zealand Settlements Act 1863* which allowed land to be confiscated from Māori who were labelled as “rebels”.

### 2.1.3 Judicial Extinguishment

Ten years after the establishment of the Māori Land Court the 1877 case of *Wi Parata v Bishop of Wellington* marked the emergence of a different precedent to *R v Symonds*. Chief Justice Prendergast, in *Wi Parata*, stated:

> On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered, to such extent as may be necessary, by the Courts of the new sovereign... But in the case of primitive barbarians, the supreme executive Government must acquit itself ... of its obligation to respect native proprietary rights.

In effect, *Wi Parata* rendered the doctrine of native title irrelevant in New Zealand for, according to Prendergast J, Māori were “primitive barbarians” who had no laws or rights in property before 1840. This bought New Zealand in line with Australia - the doctrine of *terra nullius* had come into play.

At the turn of the century the Privy Council, hearing an appeal from New Zealand in *Nireaha Tamaki v Baker*, retaliated and said the reasoning in *Wi Parata* “goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand

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134 The Sim Commission total for the lands confiscated under sections 2-4 of the *New Zealands Settlements Act 1863* was 3,215,172 acres (AJHR, 1928, G-7, pp 6-22), cited in Williams above n116, 53.
135 Williams above n116, 3. See preamble.
136 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 [*Wi Parata*].
137 *Wi Parata* above n136, 78 Prendergast CJ.
138 *Nireaha Tamaki v Baker* PC 1900 [1901] AC 561.
Despite this, *Wi Parata* reasoning proved difficult to escape. The Crown continued to argue in litigation that, through the acquisition of sovereignty, it became the owner of all land in New Zealand. This presumption was argued by the Solicitor-General in 1963 in *In Re Ninety Mile Beach*. In this case the New Zealand Court of Appeal adhered to *Wi Parata* reasoning and re-worked the concept of legislative extinguishment, holding that all foreshore in New Zealand which lies between the high and low water marks, and in respect of which contiguous landward title has been investigated by the Māori Land Court, was land in which Māori customary property was extinguished. According to the *Ninety-Mile Beach* case only foreshore land contiguous to Māori customary land on the shore was capable of being Māori customary land. But as the amount of Māori customary land on dry soil is so little it has not been quantified, the case essentially established that all native title in the foreshore had been extinguished by the granting of title contiguous to the foreshore.

### 2.1.4 A doctrine redundant?

By the end of the 20th century the common law native title jurisdiction had long been perceived as redundant to the vast majority of New Zealand land. The foregoing discussion has revealed that a large amount of Māori customary land had been extinguished through Crown pre-emption in the earliest years of settlement. This, combined with the success of Māori land legislation which converted customary interests to fee simple-ownership, meant that customary title was all but extinguished on dry land.

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139 *Nireaha Tamaki v Baker*, above n 138, 577 Lord Davey.

140 Again, this is the mistake of conflating *imperium* with *dominium*, see above n1.

141 *In Re Ninety Mile Beach* [1963] NZLR 461, 467, North J [the *Ninety Mile Beach* case]. Significantly, this was also the argument of the Attorney-General in *Ngati Apa*, see *Ngati Apa* above n6, para 86 Elias CJ. For detailed discussion of the *Ninety-Mile Beach* case, which also questions the basis of its authority, see Richard Boast "In Re Ninety Mile Beach Revisited: The Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 VUWLR 145 ["In Re Ninety Mile Beach Revisited: The Native Land Court and the Foreshore in New Zealand Legal History"].

142 *In Re Ninety Mile Beach* above n141, 473-474 North J.

143 *In Re Ninety Mile Beach* above n141, 473-474, North J.

144 "A Politically Fuelled Tsunami: The Foreshore/Seabed Controversy in Aotearoa Me Te Wai Pounamu / New Zealand" above n125, 60. See Maori Land Court website: <www.courts.govt.nz/maorilandcourt/> [last accessed 3 October 2005]; and *Ngati Apa* above n6, para 46 Elias CJ.

145 "Report on the Crown's Foreshore and Seabed Policy" above n114, 44.
Today, the percentage of Māori customary land on dry soil is so small that it cannot be quantified.\textsuperscript{146} It is more common for land to bear the title of Māori freehold land, General land owned by Māori, General land, Crown land, or Crown land reserved for Māori.\textsuperscript{147} As for the area below high-water mark, there was a 'general supposition' based on the Ninety-Mile Beach case that any customary rights in that zone had been extinguished when the customary rights to the contiguous dry land were extinguished. That supposition became part of the political wisdom, bolstered by a belief that the Crown owned the foreshore and seabed anyway as part of its prerogative right and that New Zealand legislation, such as the \textit{Harbours Act 1978}, confirmed that.\textsuperscript{148}

2.2 JUDICIAL REVIVAL

The doctrine of native title was reintroduced into New Zealand's judicial consciousness by Williamson J in \textit{Te Weehi},\textsuperscript{149} a High Court case decided in 1986. \textit{Te Weehi} held that a Māori person has a right to take undersized shellfish (paua) in contravention of the law, on the basis that he was exercising a customary right which the law had not extinguished. Williamson J found in favour of \textit{Te Weehi}, recognising that the establishment of British sovereignty had not set aside the local laws and property rights of Māori. With reference to \textit{R v Symonds} and Canadian case-law, his Honour concluded that because the fishing right had not been "clearly and plainly\textsuperscript{150} extinguished by legislation, the right continues to exist: "[i]t is a right limited to the Ngai Tahu tribe and its authorised relatives for personal food supply.\textsuperscript{151}

Williamson J distinguished \textit{Wi Parata} because the right to take paua was a "non-territorial" claim that was "not based upon ownership of land or upon an exclusive right
to a foreshore or bank of a river." The case of Te Weehi was therefore restricted to a
discussion of native rights as opposed to title. It was necessary for Williamson J to
emphasise this distinction, otherwise he would have been bound by Court of Appeal’s
Ninety Mile Beach precedent.

The 1990s witnessed three major cases on the common law doctrine of native title
although they focussed on rights as opposed to title. In Te Runanga o Muriwhenua v
Attorney-General, decided in 1990, Cooke P recognised that “[t]he New Zealand
people and the New Zealand Courts are certainly not alone in having to confront these
issues in the current era,” and that Canadian Aboriginal title jurisprudence is likely to
provide “major guidance” for New Zealand. Cooke P drew analogies between New
Zealand’s Treaty of Waitangi and Canada’s partnership and fiduciary duties, seeing no
reason to distinguish the Canadian jurisprudence based on constitutional differences, but
rather: “it must be right for the New Zealand Courts to lean against any inference that in
this democracy the rights of the Māori people are less respected than the rights of
aboriginal people are in North America”. With this in mind, his Honour concluded
that “[i]n principle the extinction of customary title to land does not automatically mean
the extinction of fishing rights.”

In Te Runangnamui o Te Ika Whenua Society v Attorney-General, decided in 1994, the
Court of Appeal agreed that the Treaty guaranteed to Māori, subject to British
kawanatanga or government, their tino rangatiratanga and their taonga and that “[i]n
doing so the Treaty must have intended to preserve for them effectively the Māori
customary title”. Although concluding that neither under the Treaty of Waitangi nor
under the common law doctrine of native title do Māori have a right to generate

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152 Te Weehi above n149, 692 Williamson J.
153 What Williamson J referred to as a “non-territorial” claim.
154 See above n142 and accompanying text.
155 Te Runanga o Muriwhenua v Attorney-General [1990] 2 NZLR 641 [Muriwhenua].
156 Muriwhenua above n155, 645 Cooke P.
157 Muriwhenua above n155, 645 Cooke P.
158 Muriwhenua above n155, 655 Cooke P.
159 Muriwhenua above n155, 655 Cooke P.
160 Te Runangnamui o Te Ika Whenua Society v Attorney-General [1994] 2 NZLR 20 [Te Ika Whenua].
161 Te Ika Whenua above n160, 24 Cooke P.
electricity by the use of water power, the court proceeded with an elaboration of the nature of the common law doctrine of native title.

With express reference to *R v Symonds* and *Nireiah Tamaki v Baker* Cooke P stated that native title rights “cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only in strict compliance with the relevant statutes”.162 Cooke P commented that it is likely to be a breach of fiduciary duty widely and increasingly recognised as falling on the colonial power if an extinguishment occurs by less than fair conduct or on less than fair terms.163 Cooke P then explained the scope of any native title as falling along a continuum, adopting the rights versus title distinction espoused in *Te Weehi*.164 In *McRitchie v Taranaki Fish and Game Council*,165 decided in 1999, Richardson P discussed the doctrine citing the then leading Supreme Court of Canada and High Court of Australia cases166 which emphasised that native rights “are highly fact specific”.167 In relation to the test he explained:

The existence of a right is determined by considering whether the particular tradition or custom claimed to be an aboriginal right was rooted in the aboriginal culture of the particular people in question and the nature and incidents of the right must be ascertained as a matter of fact.168

The issue in *McRitchie* was whether Māori have a right to fish for introduced fish, namely trout. The majority of the Court answered in the negative: there is no common law right to fish for trout as they have always been under a separate regime exclusively

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162 *Te Ika Whenua* above n160, 24 Cooke P.
163 *Te Ika Whenua* above n160, 24 Cooke P. Cooke P made these comments with reference to *R v Symonds* and the practice of extinguishing native title by fair purchase which was noted in that case see: *R v Symonds* above n109, 390, Chapman J. He also cited more recent New Zealand and Canadian authority: *Muriwhenua*, above n 155, 655; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 306; *Eastmain Band v James Bay and Northern Quebec Agreement (Administrator)* (1992) 99 DLR (4th) 16; and *Apsassin v Canada (Department of Indian Affairs and Northern Development)* (1993) 100 DLR (4th) 504.
164 *Te Ika Whenua*, above n160, 24 Cooke P.
165 *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 *[McRitchie]*.
166 *R v Sparrow* above n58 and *Mabo* above n4.
167 *McRitchie* above n165, 147 Richardson P.
168 *McRitchie* above n165, 147 Richardson P.
controlled by legislation. Justice Thomas provided a strong dissent to the majority’s finding. His Honour emphasised that the proper starting point was not with the right to fish for a particular species, but the right to fish *per se* along a particular stretch of the river.

2.2.1 *Comment*

At the end of the 20th century the doctrine of native title was making a revival. However, because the amount of Māori customary land on dry soil is so small, and because of the *Ninety-Mile Beach* case which established that any customary rights in the foreshore and seabed had been extinguished when the customary rights to the contiguous dry land were extinguished, all discussion in relation to the doctrine was restricted to one end of the spectrum of native title – the rights end. It was not until *Ngati Apa* that the fallacies of the *Ninety-Mile Beach* case were finally dispelled and the significance of the doctrine resurfaced in relation to title.

2.3 **ATTORNEY-GENERAL V NGATI APA**

2.3.1 *The Litigation*

Litigation was commenced in 1997 by eight Marlborough Sounds hapū. They applied to the Māori Land Court under *Te Ture Whenua Māori Act 1993* for orders declaring the land below mean high-water mark in the Marlborough Sounds out to the limits of the territorial sea (the foreshore and seabed), to be Māori customary land171 - land held in accordance with *tikanga Māori*.172 In December 1997 Judge Hingston of the Māori Land Court issued an interim decision that Māori customary rights to the foreshore and seabed

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169 *Me Ritchie*, above n165, 154 Richardson P.
170 *Me Ritchie*, above n165, 156 Thomas J.
had not been extinguished. He also held that the Māori Land Court had jurisdiction to investigate such claims and determine whether customary rights had been extinguished or not. The Attorney-General appealed. In October 1998 the Māori Appellate Court stated a case to the High Court on eight questions of law. In the High Court Ellis J found against the Māori Land Court decision on all eight questions. Relying on the Ninety-Mile Beach case, Ellis J held that:

- the Māori Land Court has jurisdiction to determine Māori customary land claims to the low-water mark;
- any claim to ownership of the foreshore must be part of a claim to contiguous dry land; and
- once title to dry land is determined, and does not include foreshore, then no further claim to the foreshore is possible.

The hapū appealed this decision to the Court of Appeal.

2.3.2 The Court of Appeal's Decision

The Court of Appeal confined its inquiry to one of the eight questions posed: whether the Māori Land Court has jurisdiction under Te Ture Whenua Māori Act to determine the status of the foreshore and seabed as Māori customary land. On 19 June 2003 the Court of Appeal reversed the High Court’s decision and unanimously ruled that the Māori Land Court has the jurisdiction to determine, if the evidence warrants, that foreshore and seabed is Māori customary land. The Court of Appeal’s main findings were:

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173 In Re Marlborough Sounds Foreshore and Seabed, 22A Nelson MB 1, 22 December 1997, Hingston J, cited in "Report on the Crown's Foreshore and Seabed Policy" above n114, 42. The writer was unable to locate a copy of both the Māori Land Court and Māori Appellate Court judgments on the Māori Land Court website on-line at <www.courts.govt.nz> [last accessed 12/10/05]. This has been recognised as an ongoing problem which the Māori Land Court is attempting to rectify.
174 1998/2-9 Te Waipounamu ACMB, Durie CJ, Smith, Carter, Isaac JJ.
175 Attorney-General v Ngati Apa [2002] 2 NZLR 661, 683-685 Ellis J.
176 Attorney-General v Ngati Apa [2002] 2 NZLR 661, 685 Ellis J.
177 See also “Report on the Crown’s Foreshore and Seabed Policy” above n114, 42.
• The transfer of sovereignty under the Treaty of Waitangi did not effect customary property which encumbered the Crown’s radical title and which was preserved by common law (as modified by New Zealand conditions) until extinguished by clear and plain legislation;\textsuperscript{178}

• The Court of Appeal’s previous decisions in \textit{Wi Parata} and the \textit{Ninety-Mile Beach} case are wrong in law and should not be followed;\textsuperscript{179}

• “Land” under \textit{Te Ture Whenua Maori Act} extends to foreshore and seabed;\textsuperscript{180} and

• None of the numerous Acts relied on by the respondents evidenced a clear enough intention to extinguish customary property in the foreshore or seabed for the appellants to be precluded from seeking an order from the Māori Land Court.\textsuperscript{181}

\textit{Ngati Apa} reflects the unique characteristics of New Zealand’s legal system. The hapū had a choice of two paths - the Māori Land Court or the High Court - to pursue their claim of ownership of the foreshore and seabed. In the Māori Land Court the argument would have been that the foreshore and seabed is Māori customary land. In the High Court the argument would have been the foreshore and seabed is land held by them under the common law doctrine of native title. While the hapū took the first option, the court did not address the issue of the Māori Land Court’s jurisdiction in a vacuum devoid of the doctrine of native title jurisprudence.\textsuperscript{182}

\textsuperscript{178} Paras 14-15, 77-89 Elias CJ, 102 Gault P, 139-142 Keith and Anderson JJ; and 183-186 Tipping J.

\textsuperscript{179} Paras 23-28 Elias CJ; 118-122 Gault P; 153-158 Keith and Anderson JJ; and 204-215 Tipping J.

\textsuperscript{180} Paras 55-57 Elias CJ; 97-111 Gault P; 171-180 Keith and Anderson JJ; and 187-188 Tipping J.


In regard to native title, Elias CJ acknowledged that common law recognition of property interests in land under native custom is little developed in New Zealand. The Chief Justice attributed this lack of development to the success of the Māori Land Court in converting occupation interests into estates in fee simple, and to legislation which in the past had prevented customary title to land being enforceable in “any court” against the Crown.  

Despite the doctrine being little developed in New Zealand the Chief Justice discussed it as a “vital rule” of the common law that holds that any property interest of the Crown in land over which it acquired sovereignty depends on any pre-existing customary interest and its nature. The content of such customary interest is a question of fact discoverable, if necessary, by evidence. With express reference to *R v Symonds*, Elias CJ stated that any extinguishment of that title could only be achieved through sale to the Crown, investigation of title through the Māori Land Court, or by legislation or other lawful authority. Elias CJ endorsed the spectrum of rights when she explained: “[a]s a matter of custom, the burden of the Crown’s radical title might be limited to use or occupation rights held as a matter of custom”, or, quoting from the Privy Council decision *Amodu Tijani v Secretary, Southern Nigeria*, they might “be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference”.

This reasoning was extended to apply to land under water; native title can exist in regard to land under water and it can exist to the extent of exclusive ownership – akin to a fee simple title. The other four justices concurred with this conclusion, discussing the

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183 Para 46. Elias CJ cited the specific legislation which prevented customary title to land being available or enforceable “in any Court” against the crown as *Native Land Act 1909*, s84; *Native Land Act 1931*, s122; *Maori Affairs Act 1953*, s155.

184 Para 28 Elias CJ.

185 Para 31 Elias CJ.

186 Para 31 Elias CJ with reference to *Nireaha Tamaki v Baker*, above n138.

187 Para 16 Elias CJ.

188 Para 31 Elias CJ.

189 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399.

189 Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399.

189 Para 31 Elias CJ, referring to Canadian jurisprudence.

The Court of Appeal’s decision in Ngati Apa was a landmark one. It overturned a precedent of forty years, shattering a perceived status quo which regarded the doctrine of native title redundant to the vast majority of New Zealand land. Chapter three examines Ngati Apa in more detail and investigates whether the decision could be subject to the same criticisms as Mabo and Delgammukw. In particular, was the Court of Appeal swayed by current political and economic power structures?

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192 Paras 102-103 Gault P; 143-148 Keith and Anderson JJ; 183-185 Tipping J.
Chapter Three

Ngati Apa: politically brave?

McNeil’s article suggests a real concern for the way in which Australian and Canadian courts are interpreting and applying the common law doctrine of native title. Essentially, McNeil’s criticism is that both Mabo and Delgamuukw suffer from serious weaknesses in respect to the court’s articulations on extinguishment of native title. This, according to McNeil, is symptomatic of Indigenous rights’ vulnerability to “current political and economic power structures”.

This chapter investigates whether such criticisms could be made of Ngati Apa, New Zealand’s landmark case on the doctrine of native title. The four judgments in Ngati Apa will be analysed. The finding in this chapter is that Ngati Apa set forward a precedent that, arguably, goes much further than Mabo and Delgamuukw as the Court of Appeal’s discussion indicates that Ngati Apa was perhaps willing to disturb the current political and economic power structure in a way that the courts in Australia and Canada were not.

3.1 POST-NGATI-APA AND EXTINGUISHMENT

Whilst the justices in Ngati Apa did not elaborate the probative requirements for native title nor venture into a sustained exploration of the elements of such title, they did emphasise the strictness of the test of extinguishment, thereby consolidating and clarifying the native rights jurisprudence that had been revived in New Zealand in the late 1980s and early 1990s. Extinguishment attracted their attention because their reasoning was that whatever common law native title rights there might be, they had not been statutorily extinguished. The outcome of Ngati Apa was to reverse the role of statutes

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193 See above n105 and accompanying text.
194 This issue of why these rights may not have been extinguished raises an interesting point. At English common law, unlike all other lands in the realm, the foreshore and the beds of tidal rivers and coastal
in relation to native property rights: statutes are now scoured for a clear and plain extinguishment of common law rights rather than viewed as their exclusive source or means of legal status.

3.1.1 Elias CJ

The Chief Justice began her discussion of extinguishment by circling-back to R v Symonds, paraphrasing Chapman J’s declaration that “it cannot be too solemnly asserted that native property over land is entitled to be respected and cannot be extinguished (“at least in times of peace”) otherwise than by the consent of the owners”.195 Her Honour emphasised that in New Zealand land was not available for disposition by Crown grant until Māori property was extinguished.196 She stated:

New Zealand legislation has assumed the continued existence at common law of customary property until it is extinguished. It can be extinguished by sale to the Crown, through investigation of title through the Land Court and subsequent deemed Crown grant, or by legislation or other lawful authority.197

When investigating ownership of the foreshore and seabed at common law according to Elias CJ “[t]he first question is whether Parliament has extinguished any property rights which Maori may be shown to have had”.198 The Chief Justice emphasised that whether any such interests have been extinguished is a matter of law: “[e]xtinguishment depends on the effect of the legislation and actions relied upon as having that effect.”199

waters were presumed to be owned by the Crown (and in their possession all along) by prerogative right, held for the benefit of the subject see: Kent McNeil Common Law Aboriginal Title (Clarendon Press, 1989) 103-105. It has therefore never been necessary (so it was assumed) for the Crown to extinguish native title to the foreshore and seabed – it was theirs all along. As this position is challenged a gap thus opens for Indigenous ownership to fill, particularly now that the courts insist on strict “clear and plain” tests for legislative extinguishment. This point is noted but will not be further pursued in this paper.

195 Para 16 Elias CJ.
196 Para 19 Elias CJ.
197 Para 47 Elias CJ.
198 Para 57 Elias CJ.
199 Para 49 Elias CJ.
Accordingly, her Honour proceeded to discuss whether legislation presented to the Court was sufficient to extinguish any pre-existing Māori customary property rights.

The questions posed by the Māori Appellate Court asked whether nine area-specific Acts which were said to vest parts of the Marlborough Sounds in harbour boards, local authorities and other persons, extinguish Māori customary title to the foreshore and seabed in that area. The Chief Justice felt that if such area-specific legislation confers freehold interests there would be “no argument”[200] that it would extinguish any pre-existing Māori property rights inconsistent with such interests. While indicating that any customary property in the areas vested seems unlikely to survive, her Honour opted to avoid answering the question on the basis that it was artificial to consider the issue in the absence of identification of any customary property.[201]

General legislation presented to the court was then dismissed by Chief Justice Elias as sufficiently clear and plain enough in their intention to extinguish Māori customary property. The Crown relied on the Harbours Act 1978 which, according to the Court of Appeal in the Ninety-Mile Beach case, deprived the Māori Land Court jurisdiction to investigate land below the high water mark. The provision as originally introduced in 1878 was replaced with an equivalent restriction on disposal by Crown grant by s150 of the Harbours Act 1955. It provided:

No part of the shore of the sea or of any creek, bay, arm of the sea, or navigable river communicating therewith, wherein so far up as the tide flows and re-flows, nor any land under the sea or under any navigable river, except as may already have been authorised by or under any Act or Ordinance, shall be leased, conveyed, granted or disposed of to any Harbour Board, or any other body (whether incorporated or not), or to any person or persons without the special sanction of an Act of the General-Assembly.

[200] Para 49 Elias CJ.
[201] Para 58 Elias CJ.
The Chief Justice agreed with the conclusion of Keith and Anderson JJ that the Harbours Act 1955 could not properly be construed as having a confiscatory effect. The terms of the legislation applied to future grants, it did not disturb any existing grants.\(^{202}\)

No expropriatory purpose was found in either the Territorial Sea and Fishing Zone Act 1965 or the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 which deem the seabed and its subsoil from the low water mark to the limits of the territorial sea (3 miles and 12 miles respectively in the two Acts) to “be and always have been vested in the Crown”.\(^{203}\) Those provisions, according to the Chief Justice, are principally concerned with matters of sovereignty, not property. The language of deeming, the preservation of existing property interests, the compatibility of radical title in the Crown and Māori customary property, and the absence of any direct indication of intention to expropriate made it is impossible to construe the legislation as extinguishing such property.\(^{204}\)

The Crown argued that s9A Foreshore and Seabed Endowment Revesting Act 1991 vests of all foreshore and seabed land in the Crown.\(^{205}\) It reads:

9A. Foreshore and seabed to be land of the Crown

(1) All land that –

... 

(b) Is for the time being vested in the crown, but for the time being is not set aside for any public purpose or held by any person in fee simple, -

shall be land of the Crown to which this section applies and shall be administered by the Minister; but the provisions of the Land Act 1948 shall not apply to such land.

The Chief Justice emphasised that the sense of s9A is to set up a different regime in relation to foreshore or seabed lands, not to vest all land in the Crown and thereby

\(^{202}\) Para 60 Elias CJ.

\(^{203}\) Para 62 Elias CJ.

\(^{204}\) Para 63 Elias CJ.

\(^{205}\) Para 68 Elias CJ.
extinguishing any Māori customary interest. Elias CJ observed that the identification of land in s9A(1)(b) as being land which is “for the time being vested in the Crown, but for the time being is not set aside for any public purpose or held by any person in fee simple” echoes the definition of “Crown land” in the Land Act 1948 because Māori customary land is specifically excluded from that Land Act definition. Read in context, Chief Justice Elias felt that it clearly applies only to lands which are property of the Crown. The argument for the Crown would entail reading s9A to effect an appropriation to the Crown of Māori customary land in respect of the foreshore and seabed where that cannot be done under the Land Act 1948. In conformity with the Land Act 1948 and the common law notion of radical title, her Honour concluded that Māori customary land is necessarily excluded.206

It was argued on behalf of the New Zealand Marine Farming Association that claims to ownership of property in the foreshore and seabed are inconsistent with the controls of the coastal marine area under the Resource Management Act 1991 (RMA). Whilst the Chief Justice admitted that the management of the coastal marine area under the RMA may substantially restrict the activities able to be undertaken by those with an interest in Māori customary property, that is the case for all owners of land above high water mark. The statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom. The legislation does not effect any extinguishment of such property.207

Finally, Elias CJ considered the Ninety-Mile Beach precedent which held that native title to the foreshore and seabed could be extinguished by the investigation of title to land bounded by the sea. The Chief Justice found that the judgment is not supported by authority; rather, the applicable common law principle in the circumstances of New Zealand is that rights of property are respected on assumption of sovereignty and that “[t]hey can be extinguished only by consent or in accordance with statutory authority”.208

206 Para 73 Elias CJ.
207 Paras 75-76 Elias CJ.
208 Para 85 Elias CJ [emphasis added].
3.1.2 Keith and Anderson JJ

In line with the Chief Justice, Justices Keith and Anderson circled-back to *R v Symonds*, quoting a lengthy passage from that judgment.\(^{209}\) Keith and Anderson JJ stressed that the test for legislative extinguishment is one that is protective of the native title, with doubtful expressions to be resolved in favour of survival.\(^{210}\) According to Keith and Anderson JJ the well-established need for "clear and plain"\(^ {211}\) extinguishment had not been met by the various Acts presented to the Court vesting the foreshore, inland and territorial seabed in the Crown. It had not been met in respect of the *Harbours Acts 1878* and *Harbours Act 1950*. Keith and Anderson JJ attributed the misreading of the 1950 Act in the *Ninety-Mile Beach* case to a lack of recognition by the court of this clear and plain principle of interpretation.\(^ {212}\)

In respect of s7 *Territorial Sea Contiguous Zone and Exclusive Economic Zone Act 1977*, and its predecessor s7 *Territorial Sea and Fishing Zone Act 1965*, Keith and Anderson JJ asked: "do the provisions deny the existence of Māori customary land in the territorial sea or extinguish that land if it did exist?"\(^ {213}\) Their Honours answered no for three reasons. First, the fact that the seabed is "vested" in the Crown was found not to be inconsistent with the continuing existence of Māori customary property - the principal focus of the 1965 Act was on establishing a 12 mile fishing zone: "that is with a matter of the exercise of sovereignty, not beneficial ownership".\(^ {214}\) Second, the words of deeming recognise the coexistence of the radical title of the Crown and other (beneficial) property.\(^ {215}\) The final and most decisive reason was that: "legislative measures claimed to extinguish indigenous property and rights must be clear and plain".\(^ {216}\) In the opinion of Keith and Anderson JJ that clarity of purpose does not appear in the legislation, which was

\(^{209}\) Paras 142, 147 Keith and Anderson JJ.
\(^{210}\) Para 148 Keith and Anderson JJ.
\(^{211}\) Para 154 Keith and Anderson JJ.
\(^{212}\) Para 154 Keith and Anderson JJ.
\(^{213}\) Para 160 Keith and Anderson JJ.
\(^{214}\) Para 161 Keith and Anderson JJ.
\(^{215}\) Para 161 Keith and Anderson JJ.
\(^{216}\) Para 162 Keith and Anderson JJ.
primarily directed to extending New Zealand fishing waters and establish an exclusive economic zone.\textsuperscript{217}

Finally, Justices Keith and Anderson concluded that s9A \textit{Foreshore and Seabed Endowment Revesting Act 1991} also failed to extinguish Māori customary property as “there is nothing in it which has the clear and plain character required to extinguish existing Maori customary property”.\textsuperscript{218} Like the Chief Justice, the impact of the area-specific legislation was left to be determined when the facts are established.\textsuperscript{219}

3.1.3 \textit{Tipping J}

Tipping J held Parliament to a very strict test. His Honour began his discussion with the issue of extinguishment: “[w]hen the common law of England came to New Zealand its arrival did not extinguish Maori customary title”.\textsuperscript{220} Tipping J stated that there were two mechanisms available for such extinguishment - “an Act of Parliament or a decision of a competent court amending the common law”\textsuperscript{221} - however he added that “in view of the nature of Maori customary title, underpinned by the Treaty of Waitangi and now by the \textit{Te Ture Whenua Māori Act}, no court having jurisdiction in New Zealand can properly extinguish Maori customary title”.\textsuperscript{222} Thus, Parliament is the only body capable of extinguishing native title in New Zealand. However, in Tipping J’s words, although “Parliament is capable of effecting such extinguishment … again in view of the importance of the subject matter, Parliament would need to make its intention \textit{crystal clear}.\textsuperscript{223} His Honour then proceeded to discuss whether specific legislation presented to the Court fulfilled that test \textit{crystal clear} test.

\textsuperscript{217} Para 162 Keith and Anderson J.
\textsuperscript{218} Para 170 Keith and Anderson JJ.
\textsuperscript{219} Para 181 Keith and Anderson JJ.
\textsuperscript{220} Para 183 Tipping J.
\textsuperscript{221} Para 185 Tipping J.
\textsuperscript{222} Para 185 Tipping J.
\textsuperscript{223} Para 185 Tipping J [emphasis added].
Tipping J held that the importance of public access under the RMA was not necessarily inimical to the existence of Maori customary title so as to entitle the court to draw an inference of intended extinguishment.224 While the restrictions in the RMA represent a formidable barrier they do not inevitably lead to the view that the potential for an underlying status of Maori customary land has thereby been extinguished.225

Equivalent comments were expressed by Tipping J in relation to Maori customary land and the Land Transfer Act 1952. His Honour indicated that he was initially troubled by the apparent incongruity of having a provisional land transfer title in respect of parts of the foreshore and territorial seabed as that consequence seemed to suggest that Parliament cannot have intended foreshore and seabed land to be capable of having the status of Maori customary land.226 However, Tipping J adhered to the strict test of extinguishment laid down at the commencement of his judgment and held that it was not possible to see this potential incongruity as amounting to an extinguishment of Maori customary land.227

Tipping J disagreed with the interpretation of the Harbours Acts 1878 and 1950 in the Ninety-Mile Beach case. In line with Elias CJ and Keith and Anderson JJ, Tipping J stated that the Crown acquired sovereignty over New Zealand land subject to Maori customary title and therefore the proper inquiry concerns extinguishment rather than grant.228 According to Tipping J the Harbours Acts had not met the crystal clear test required to extinguish Maori customary title as it had not been directed at such a purpose. In Tipping J's words:

[T]he statutory embargo on the Crown disposing of the foreshore and seabed other than as sanctioned by an Act of Parliament does not meet the point that unless and until lawfully extinguished Maori customary title and the status of the land to which it pertained continues to exist as part of the common law of New Zealand.229

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224 Para 190 Tipping J.
225 Para 192 Tipping J.
226 Para 195 Tipping J.
227 Para 195 Tipping J.
228 Para 197 Tipping J.
229 Para 197 Tipping J.
The Foreshore and Seabed Endowment Revesting Act 1991 and the Territorial Sea legislation were quickly dismissed by Tipping J as not being designed to extinguish the status of Māori customary land in accordance with the clear and plain intention or crystal clear test.  

Finally, Tipping J dealt with the Ninety-Mile Beach case. Despite employing a cautious approach based on the fact that the Ninety Mile Beach case had stood for forty years, his Honour was “driven” to the conclusion that it was wrongly decided. Essentially, Tipping J identified that the error of the Court in the Ninety-Mile Beach case was the imposition of an incorrect starting point which conflated sovereignty with absolute ownership. Against a contemporary background that understands that when sovereignty was proclaimed Māori rights to land continued until lawfully abrogated, it was difficult for Tipping J to see how a change in status of land above the high water mark from Māori customary land to Māori freehold land should necessary lead to adjacent land loosing its status as such. Māori customary title was not a matter of grace and favour but of common law. Having become part of the common law of New Zealand it could not be ignored by the Crown unless and until Parliament had clearly extinguished it and only then subject to whatever legislation might have been put in its place.

### 3.1.4 Gault P

President Gault’s judgment is arguably the most conservative of the bench. Whilst Gault P expressed the need for clear and plain legislative extinguishment, his Honour felt that investigation of title through the Māori Land Court to land bordering the sea would almost certainly extinguish contiguous title to the foreshore and seabed.

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230 Para 204 Tipping J.
231 Para 204 Tipping J.
232 Para 204 Tipping J, see above n1.
233 Para 205 Tipping J.
234 Para 208 Tipping J.
235 Para 208 Tipping J.
Gault P cites _R v Symonds_ and _Tamihana Korokai v Solicitor-General_ 236 for the proposition that “Maori customary land is extinguished in respect of land that has been alienated by the Crown as by Crown grant or upon Crown purchase”, 237 adding that “it is common ground also that they cannot survive the enactment of legislative provisions that are clearly inconsistent with their continued existence”. 238 However, President Gault was not persuaded that either s7 _Territorial Sea Contiguous Zone and Exclusive Economic Zone Act 1977_ and its predecessor s7 _Territorial Sea and Fishing Zone Act 1965_ were consistent with the non-recognition of Māori customary land as part of the seabed or, alternatively, extinguished that status. Gault P stated that to accept an argument that the operation of s7 was to vest title in the Crown in fee simple would be to recognise extinguishment of customary rights by a “most indirect route when express legislative enactment would have been expected”; 239 land held by the Crown but subject to a grant is not inconsistent with radical title. 240 Gault P also held that the RMA provisions are not wholly inconsistent with some private ownership. 241

Nonetheless, Gault P departed from the balance of the Court in relation to the _Ninety Mile Beach_ case. Whilst Gault P felt that “some of the reasoning in the judgments in that case [was] open to criticism”, 242 he considered that those conclusions were consistent with the intended application of the provisions of the successive _Native Land Acts_. 243 According to Gault P, after interests in native lands bordering the sea had been investigated in the Native Land Court it would not seem open to find that there could have been strips of land between the claimed land bordering the sea and the sea that were not investigated and in which interests were not identified and extinguished once Crown grants were made. 244 If there should be any residue (as by the _Crown Grants Act 1908_ or its predecessor), according to Gault P, it must be regarded as having been reserved out of the

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236 _Tamihana Korokai v Solicitor-General_ (1912) 32 NZLR 321.
237 Para 99 Gault P.
238 Para 99 Gault P.
239 Para 113 Gault P.
240 Para 99 Gault P.
241 Para 123 Gault P.
242 Para 121 Gault P.
243 Para 121 Gault P.
244 Para 121 Gault P.
grant, in which case the radical title would remain and the land would no longer be subject to any Mãori customary claims. In Gault P's judgment the only possibility for Mãori customary property to remain in the foreshore and seabed was if it is shown that the land investigated was not claimed as bordering the sea.245

3.2 COMMENT

Extinguishment is one area of the common law doctrine of native title which the New Zealand courts have signalled in detail their likely position. That position is a very protective one which accepts the extinguishment of native title only in cases where Parliament has expressed a very clear intention to do so.246 Although statements in Ngati Apa could be dismissed as obiter dicta (the actual decision related to the Mãori Land Court's jurisdiction, not the common law) the Court of Appeal's comments were well considered and stand out clearly against the Australian and Canadian decisions of Mabo and Delgamuukw. There was not a hint in Ngati Apa of possible qualifications to the Court of Appeal's strict extinguishment test by way of any skeletal principle, inconsistency or justified infringement exceptions. Instead, the New Zealand Court of Appeal adopted a strict approach which it justified as appropriate to the circumstances of New Zealand.

In this light, Ngati Apa can been seen as a politically 'brave' decision; the Court of Appeal was willing to disturb what McNeil has termed the "current political and economic power structures" in a way that the courts in Australia and Canada were not. In the context of academic literature which challenges contemporary society to deal with the "dark side of the story of expansion",247 this is a positive step towards increasing the freedom of Indigenous peoples within New Zealand society.248 However, the foreshore and seabed story does not end there. While the Court of Appeal adhered to its

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245 Para 121 Gault P.
246 Para 121 Gault P. The only exception to this was Gault P's comments in relation to foreshore and seabed contiguous to land whose title has been investigated through the Mãori Land Court.
247 Keal above n12 and accompanying text.
248 See comment chapter 1.4 above.
constitutional role as an apolitical, independent arbitrator, chapter four will consider the implications of a politically brave decision in the context of New Zealand's constitutional arrangements, with specific reference to post-Ngati Apa developments.

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249 Judicial independence represents a fundamental value of the liberal democracy and the rule of law. It is a conduit for achieving fair and just decisions and is a necessary condition for impartiality, see P A Joseph Constitutional and Administrative Law (2nd ed, Brookers, Wellington, 2001) 262.
Chapter Four

New Zealand's Constitution: Conflicting Legitimacies

Chapter three exposed *Ngati Apa* as a 'brave' decision because, unlike the courts in *Mabo* and *Delgamuukw*, the Court of Appeal in *Ngati Apa* remained true to its constitutional role as an apolitical, independent arbitrator (as McNeil strongly implies a court should) and it was not swayed by "current political and economic power structures".\(^{250}\) Whilst such an observation would be particularly significant in Canada where Indigenous rights are constitutionally entrenched,\(^{251}\) a politically brave decision does not have the same influence in New Zealand where Parliament is supreme.

This chapter begins by providing an overview of parliamentary sovereignty, the British constitutional doctrine which governs the relationship between the courts and Parliament in New Zealand and which, by virtue of embodying the notion of popular sovereignty, bestows the orthodox concept of legitimacy on our Government. The Government’s reaction to *Ngati Apa*, culminating in the *Foreshore and Seabed Act 2004*, is then examined. The importance of this reaction lies in considering the doctrine of parliamentary sovereignty in action, particularly emphasising the power of the legislature vis-à-vis the judiciary, when a politically brave judicial decision is reached.

The second part of this chapter calls for improvements to our constitutional structure; improvements that would reflect the unique circumstances of New Zealand and confer a

\(^{250}\) See above n105 and accompanying text.

\(^{251}\) Canadian courts have the power to strike down legislation that is inconsistent with the *Constitution Act 1982* (the *Canadian Charter of Rights and Freedoms*). Note however that that power can be overridden by explicit legislative that is enacted "notwithstanding" the Charter (s33). Thus, although the courts' constitutional powers are significantly expanded, the legislature formally retains the final word. See for example Michael L Ross *First Nations Sacred Sites in Canada's Courts* (UBC Press, Vancouver, 2005) 19, 115, 177, 124; Peter C Oliver *The Constitution of Independence* (Oxford University Press, Oxford, 2005) 252-259; Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 194-232; James (Sakej) Youngblood Henderson and others *Aboriginal Tenure in the Constitution of Canada* (Carswell, Scarborough, Ontario, 2000).
fuller form of legitimacy on our society by allowing the courts a greater role in the adjudication of Indigenous land rights. This chapter concludes, however, that the current political climate means that the constitutional changes proposed are not likely to be on Parliament's agenda. This has implications for the continued vulnerability of Indigenous land rights.

4.1 NEW ZEALAND'S CONSTITUTION IN ACTION

4.1.1 A summary of orthodoxy

A constitution governs the exercise of public power and sets out the rules under which the various branches of government (executive, legislative and judicial) interact. New Zealand's constitution is an unwritten one. Meaning that instead of being in one single document, the rules are found in a variety of places. Sir Kenneth Keith's introduction to the Cabinet Office Manual has been described as the "most authoritative current treatment" of the sources of New Zealand's constitution. There, Keith identifies the Constitution Act 1986 as the principal formal statement of the Constitution and identifies other major sources as including the prerogative powers of the Queen, other relevant New Zealand statutes, relevant decisions of the courts, the Treaty of Waitangi and the conventions of the constitution.

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253 Compare the written constitution of the United States, Constitution of the United States of America 1787.

254 Report of the Constitutional Arrangements Committee above n252, 19.

255 Rt Hon Sir Kenneth Keith "Introduction: On the Constitution of New Zealand" in Cabinet Office Cabinet Office Manual 2001 (Wellington, 2001), 1-2. See also McDowell and Webb above n252 who cite six primary sources: "the rule of law; legislation (both of New Zealand and United Kingdom origin); constitutional conventions; common law; Letters Patent; and the Treaty of Waitangi" (p 127); and Joseph above n249, who cites imperial legislation, New Zealand legislation, customary common law, judicial precedent, statutory interpretation, customary international law, prerogative instrument, land and custom of Parliament, authoritative works, conventions of the Constitution (pp 17-31). Note that these statements do not pretend to be definitive or exhaustive, see Report of the Constitutional Arrangements Committee above n252, 19; and Joseph above n249, 17.
New Zealand’s constitution adheres to the rare doctrine of parliamentary sovereignty which ascribes supreme power to Parliament as law makers, even regarding questions of constitutional importance. New Zealand inherited this doctrine from Great Britain where it can be traced to the Glorious Revolution of 1688 and the outcome of the struggle between King and Parliament. The classic statement of parliamentary sovereignty belongs to the nineteenth century United Kingdom Constitutional Lawyer, Professor Albert Venn Dicey: “Parliament ... [has] the right to make or unmake any law whatever; and further ... no person or body is recognised ... as having a right to override or set aside the legislation of Parliament”.

The rationale behind parliamentary sovereignty is linked to the democratic idea of popular sovereignty - the principle that all legitimate political authority within a society derives ultimately from the generalised consent of the subject people. The origin of popular sovereignty in the modern legal tradition stems from the social contract school of

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258 Dicey above n79, 39-40. Note however that there are a number of extra-legal constraints on Parliament’s law making powers. For example, the legislative processes contain procedural limits on how Parliament can make laws. Further, it is generally accepted that Parliament is able to bind the manner and form in which future Parliament may make law (for example the requirement for a 75% majority of the House to amend certain provisions of the Electoral Act 1993, s268). There are also practical constraints on how Parliament can legislate, for example, international obligations and lack of international power constrain the effectiveness in practice of legislation that purports to have extra-territorial effect. Public opinion, international condemnation and democratic electoral incentives also act as restrictions. See, for example, Report on the Constitutional Arrangements Committee above n252 147-148; and Joseph above n249, 115.

the late seventeenth to mid-eighteenth centuries. Writers from this school articulated the notion that this generalised consent amounts to an implied social contract to govern.

The practical application of this theory does not mean that every member of a society must accept the incumbent government in order for it to attract legitimacy. Rather, it is enough that elected politicians will articulate and pursue the interests and values of the majority, as expressed in general elections. From this basis the structure of the democratic process itself gives legitimacy to the powers of (representative) government. Because Parliament is accountable to its subjects through the electoral process, its sovereignty is justified. As long as the incumbent Parliament continues to have majority support, it will maintain its legitimacy.

4.1.2 Government Reaction - The Foreshore and Seabed Act 2004

The Prime Minister moved quickly to assert Parliament’s right to legislate following the release of the Court of Appeal’s decision in Ngati Apa. On 23 June 2003, a mere three days after the decision, the Government declared it would enact legislation to ensure Crown ownership of the foreshore and seabed. Following the publication of discussion

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260 Thomas Hobbes (1588-1679), John Locke (1632-1704) and Jean-Jacques Rousseau (1712-1788) are some of the founders of this theory. Locke’s conception most closely reflected in the idea of Parliamentary sovereignty. See Morris, above n259; and Maurice Cranston and Richard S Peters (eds.) Hobbes and Rousseau: a collection of critical essays (Anchor Books, New York, 1992).
261 Morris above n259.
262 Joseph above n249, 127.
263 NZPA Political Reporter “Law to confirm status of seabed and foreshore” Otago Daily Times (24 June 03) 14.
papers, a Waitangi Tribunal hearing, and a Select Committee process, the Foreshore and Seabed Act was enacted on 24 November 2004. The Foreshore and Seabed Act is an intentionally comprehensive mechanism for the recognition of rights over the foreshore and seabed. Its comprehensiveness is not accomplished by a provision that expressly extinguishes common native title but by a jurisdictional one that effectively achieves the same result. The Foreshore and Seabed Act identifies two potential types of rights: the territorial customary right and the customary rights order.

4.1.2.1 Territorial Customary Rights (TCRs)

TCRs are the nearest equivalent to exclusive ownership. The Foreshore and Seabed Act puts TCR jurisdiction in the High Court, including the authority to confirm TCR agreements negotiated with the Crown. Section 32(1) defines a TCR as:

265 Report on the Crown’s Foreshore and Seabed Policy, above n14. The Waitangi Tribunal has this jurisdiction under s6 Treaty of Waitangi Act 1975. The Tribunal found the policy to have clearly breached the principles of the Treaty of Waitangi.
266 Department of the Prime Minister and Cabinet The Foreshore and Seabed of New Zealand. Report on the Analysis of Submissions (Wellington, 2003).
269 “From Common Law to Codification” above n268, 11. Section 10 limits the jurisdiction of the High Court to hear “any customary rights claim”, whether “under any rule of law or by virtue of its inherent jurisdiction”, to that inside the Foreshore and Seabed Act. Those claims are defined as exhaustively as possible in subsection 10(2) to any claim that is “based on, or relies on, customary rights, customary title, aboriginal rights, aboriginal title, the fiduciary duty of the Crown, or any rights, title or duties of a similar nature”.
270 Reflecting the common law’s differentiation between “territorial” and “non-territorial” rights (the spectrum of rights).
271 Note that this right is not limited to Māori; under s68 any “group” may apply for a TCR.
272 Section 37(2).
... a customary title or an aboriginal title that could be recognised at common law and that—

(a) is founded on the exclusive use and occupation of a particular area of the public foreshore and seabed by the group; and

(b) entitled the group, until the commencement of this Part, to exclusive use and occupation of that area.

Section 32 thus sets up two standards that the High Court must apply in determining TCRs. It must refer to those of the common law *and* the statutory criteria set out in paragraphs 32(1)(a) and (b). While reference to the “common law” suggests scope for judicial development of the TCR jurisprudence,²⁷³ the dominance of subsections (a) and (b) leaves the common law very little room to breathe.²⁷⁴ Section 32(2) further qualifies this by adding:

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

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

(b) the group had continuous title to contiguous land.

Additionally, in assessing whether a group had exclusive use and occupation of an area “no account may be taken of any spiritual or cultural association with the area, unless that association is manifested in a physical activity or use related to a natural or physical resource”.²⁷⁵

²⁷³ With reference to other jurisdictions or the development of a distinctly New Zealand element, for example. “From Common Law to Codification” above n268, 14.
²⁷⁴ “From Common Law to Codification” above n268, 14.
Notably, in the event of a TCR determination the *Foreshore and Seabed Act* makes little provision for redress,\(^{276}\) as no Māori group will gain ownership of the foreshore and seabed. It is deemed to be Crown land.\(^{277}\) Essentially, the legislation has introduced a 'but for' test: if a Māori group can prove that they would have had exclusive use and occupation of the foreshore and seabed in accordance with the common law doctrine of native title but for the commencement of this Act, then the High Court must either refer its finding to the Attorney-General and the Minister of Māori Affairs for negotiating an agreement as to the nature and extent of the redress or may order the establishment of a foreshore and seabed reserve.\(^{278}\)

4.1.2.2 Customary Rights Orders (CROs)

The CRO mechanism prescribes a statutory process for the identification of non-territorial aboriginal title-rights by creating dual jurisdictions for the High Court\(^{279}\) and Māori Land Court.\(^{280}\) The foundation of the CRO lies in its definition and in the statutory standards of proof and extinguishment.\(^{281}\) As far as the question of proof is concerned, CROs can only be issued in respect of an association that “is manifested by the relevant whānau, hapū or iwi in a physical activity or use related to a natural or physical

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\(^{276}\) Especially if you recall that any determination is founded on exclusive use and occupation, effectively an equivalent to fee-simple title.

\(^{277}\) “What Could Have Been: The Common Law Doctrine of Native Title in Land Under Salt Water in Australia and Aotearoa/New Zealand” above n181, 2. See also *Foreshore and Seabed Act* s13 (although note that this only applies to ‘public’ foreshore and seabed. Significantly, that land which is subject to a specified freehold interest remains in private ownership). For a thorough discussion of the TCR jurisdiction see “From Common Law to Codification” above n268, 12-28. Note that redress is not guaranteed under the *Foreshore and Seabed Act*.

\(^{278}\) “What Could Have Been: The Common Law Doctrine of Native Title in Land Under Salt Water in Australia and Aotearoa/New Zealand” above n181, 2. See *Foreshore and Seabed Act* ss 33 and 36.

\(^{279}\) *Foreshore and Seabed Act*, part 4.

\(^{280}\) *Foreshore and Seabed Act*, part 3. Under s73(1)(a) the High Court has no jurisdiction to entertain such claims when they are “able to be recognised and protected by an order made by the Māori Land Court under Part 3” or subject already to processes inside the Māori Land Court. Since the High Court is obliged to divert all CRO-looking matters to the Māori Land Court, it remains unclear in what circumstances Part 4 might run when Part 3 does not, see “From Common Law to Codification” above n268, 29. Note that pursuant to sections 48(2) and 68(2)(a) any application must be made before 31 December 2015.

\(^{281}\) “From Common Law to Codification” above n268, 29.
The physically manifested activity must meet the statutory requirements of s50(1):

(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 Maori; and

(ii) has been carried on, exercised, or followed in accordance with tikanga Maori 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 area of the public foreshore and seabed in accordance with tikanga Maori; 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.

Essentially, the core requirement for a CRO is physical manifestation of a particular use or activity under tikanga Māori in a substantially uninterrupted manner since 1840.283

Each CRO applies to a specific use or activity proven to the statutory standard. Apart from the indication that there may be special CROs with added protection in for wāhi tapu,284 indication in the *Foreshore and Seabed Act* of the potential rights encompassed by a CRO is more notable for what it excludes than for what it prescribes.285

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282 Section 9(2).
283 "From Common Law to Codification", above n268, 29.
284 According to s54.
285 "From Common Law to Codification", above n268, 30. For example, a CRO cannot involve the exercise of sea fishing rights (commercial or non-commercial), as governed by ss9 and 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 or any matter regulated by the Fisheries Act 1996 or wildlife or marine mammals.
4.1.3 Comment

The *Foreshore and Seabed Act* puts the verification in *Ngati Apa* of potential Māori property rights in the foreshore and seabed (whether that would have amounted to fee-simple title or not) to a highly legalistic, property-based test of proof and non-extinguishment.\(^{286}\) Despite extensive Māori opposition\(^{287}\) Government's response was perfectly constitutional on the orthodox account: Parliament has the final authority to "make and unmake any law whatever".\(^{288}\) Government's response was also legitimate in terms of the concept of popular sovereignty. Māori are a minority population, so as long as the general majority is agreeable, as was the case in the foreshore and seabed saga,\(^{289}\) Māori discontent alone is ineffectual to negate the government's legitimacy.

This reality brought home the impact that a lack of any constitutional protection has for Māori and aroused debate around the parameters of judicial activity and Parliament's legislative ability.

In December 2004 a Constitutional Arrangements Committee was established (as a result of events separate from the foreshore and seabed saga)\(^{290}\) to undertake a review of New

\(^{286}\) "From Common Law to Codification", above n?, 33. Debate exists over whether the *Foreshore and Seabed Act* does more or less than the common law would have. Paul McHugh has argued that generally all proprietary interests below low water mark, except those under grant, were limited to a "bundle of rights" and could not carry possession because the foreshore and seabed is a special juridical space, see Paul McHugh, "Aboriginal Title in New Zealand: A Retrospect and Prospect" (2004) 2 NZJPIL 139. On the other hand, Jock Brookfield and Jacinta Ruru both essentially argue that whilst the presumptive title of this special juridical space lay in the Crown at common law, that title must yield to other (prior) interests based on the special circumstances of New Zealand, such as Māori customary title under the common law doctrine of native title, and the Treaty of Waitangi. See FM (Jock) Brookfield, "Māori Claims and the "Special" Juridical Nature of Foreshore and Seabed" (2005) 2 NZLR, 179, 179-188; and "What Could Have Been: The Common Law Doctrine of Native Title in Land Under Salt Water in Australia and Aotearoa/New Zealand" above n181, 21-41.

\(^{287}\) 15,000-30,000 people marched on Parliament grounds in a hikoi (protest) in 2004, protesting the foreshore and seabed policy. Cabinet Minister Tariana Turia also resigned because of the Government's foreshore and seabed policy.

\(^{288}\) To use Dicey's words, see above n258 and accompanying text.

\(^{289}\) For example, a poll released by Deputy Prime Minister Hon Michael Cullen showed that a majority of New Zealanders believed the *Foreshore and Seabed Act* is fair: see Michael Cullen "Media Statement: Poll finds foreshore and seabed policy fair" 6/2/05, on-line at <www.behive.govt.nz> [last accessed 5/10/05].

\(^{290}\) Such as the establishment of the new Supreme Court, see Cox, above n7; and Don Brash's infamous Orewa Speech "Nationhood: An address by Don Brash Leader of the National Party to the Orewa Rotary
Zealand's existing constitutional arrangements. Significantly, the Select Committee Report, released two months ago, August 2005, found that almost identical issues lie at the heart of New Zealand's constitutional debate in general. As expressed in the Report these issues were:

- the balance of authority between the judicial and legislative branches of government; and
- the authority of Parliament in relation to the Treaty of Waitangi.

The following discussion delves into these duel concerns.

### 4.2 CALLS FOR A MORE 'FITTING' CONSTITUTION

A number of writers have canvassed limitations on Dicey's absolute concept of parliamentary power in relation to New Zealand's unique circumstances - an area that has been the subject of heated debate in recent years, not only in relation to the foreshore and seabed issue. This paper will focus on the role of the Treaty of Waitangi and international human rights mechanisms as a means for accommodating a greater role for the courts, with a particular emphasis on the concept of legitimacy.

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293 The writer acknowledges that this is an extensive topic which cannot be exhaustively addressed in this paper. For further discussion see The Hon Bill English "The Treaty of Waitangi and New Zealand Citizenship" NZLJ [2002] 254; The Hon Justice Kirby 'The Robin Cooke Lecture 2004. Deep Lying Rights - A Constitutional Conversation Continues” on-line <http://www.hcourt.gov.au> [last accessed 12/10/05], reported in Kate Gibbs "Judges be cool in times of temper" (2004) 7 NZ Lawyer 4; The Hon Sir Stephen Sedly "Human Rights: a Twenty-First Century Agenda" [1995] PL 386; E Thomas "The Relationship of Parliament and the Courts: A Tentative thought or two for the new millennium" (2000) 31 VUWLR 5. The writer also notes the series of decisions in the 1970s and 1980s in which Cooke J explored the extent to which, in the New Zealand constitutional context, courts might in the case of extreme legislation hold that an apparent parliamentary law is not law at all because it is in breach of fundamental common law rights, see L v M [1979] 2 NZLR 519, 527; Brader v Ministry of Transport [1981] 1 NZLR 73, 78; NZ Drivers' Assn v NZ Road Carriers [1982] 1 NZLR 574, 390, Lord Cooke, McMullin and Ongley JJ;
4.2.1  Te Tiriti O Waitangi / The Treaty of Waitangi

In 1990 the President of the Court of Appeal, Cooke P, stated that the Treaty of Waitangi "is simply the most important document in New Zealand's history".294 Like Cooke P, an increasing number of academics and judges writing extra-judicially have drawn on the significance of the Treaty of Waitangi in order to distinguish New Zealand's public jurisprudence from the British parliamentary system.

In 1995, in writing "The Treaty of Waitangi and Separation of Powers in New Zealand",295 Sian Elias (now the Chief Justice of the Supreme Court) examined the status of the Treaty against the concept of parliamentary sovereignty. Elias stressed that the doctrine of parliamentary sovereignty grew out of specific historical circumstances which makes it absurd to expect its literal transplantation into another context.296 This assertion can also find support in the accepted notion that the common law was only introduced to New Zealand subject to local circumstances.297 On that basis the Treaty of Waitangi can be said to modify the way in which the rules of parliamentary sovereignty apply.

Returning to Elias, she explains the promises made to Māori by the Treaty: the guarantee of existing rights of property; the promise of authority; the promise of equal treatment; the acknowledgement of relativity; and the promise to use the Crown's powers of

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296 "The Treaty of Waitangi and Separation of Powers in New Zealand" above n295, 224-226. Elias substantiated this with reference to the Scottish case of MacCormick v Lord Advocate [1953] SC 396, 411 Lord President Cooper where it was stated that the doctrine is "a distinctly English principle which has no counterpart in Scottish constitutional law". For recent judicial consideration of this point see Ngati Apa above n6, paras 17 and 49 Elias CJ; 124 Keith and Anderson JJ; and 212 Tipping J.
297 English Laws Act 1858, preamble and s1, where the laws of England are said to apply in New Zealand "only so far as applicable to the circumstances of the colony". For recent judicial consideration of this point see Ngati Apa at paras 17, 49 Elias CJ; 124 Keith and Anderson JJ; 212 Tipping J.
sovereignty to secure tikanga Māori and rangatiratanga within New Zealand society.298 Elias observes that these Treaty promises are a guarantee of the type of “special position”299 increasingly recognised in international law as necessary to secure the culture of Indigenous peoples. “Protection of Māori authority”, she says, “is fundamental to the legitimacy of our political and legal structures”.300

This theme of legitimacy was developed earlier by Brookfield, in 1989, in his work “The New Zealand Constitution: the Search for Legitimacy”,301 where Brookfield examined the legitimacy of the New Zealand constitution in relation to Māori. Whilst Brookfield acknowledged that in a substantially mono-cultural Western society (such as the United Kingdom) it might be legitimate to base the Constitution simply on majoritarian principles, he questioned whether this is appropriate in New Zealand, where the source of legitimacy stems from the Treaty of Waitangi.302 On this account one could see the bounds of government’s legitimacy confined by an express social contract which provides the basis for balancing Māori rights against the democratic majority.

Brookfield’s work continues by pointing to the vulnerability of legislation to appeal, and to the successive failures of Parliaments and courts to stand up for Māori interests.303 Because of this vulnerability, his thesis is that the legitimacy of the Constitution rests on the proper incorporation of the Treaty of Waitangi into New Zealand’s constitutional structure.304

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303 “The New Zealand Constitution: the search for legitimacy” above n301, 16. Brookfield also considered the legitimacy of the New Zealand constitution on relation to the United Kingdom Crown and Parliament from which once the authority for New Zealand government proceeded (though he thinks is does so no longer). Whilst this is an interesting and worthwhile topic of study, it will not be discussed in this paper.
Brookfield developed this concept further in 2005 in “Waitangi and the Legal Systems of Aotearoa New Zealand: Conflict and Change”, where he emphasises the concept of a “fuller legitimation”. In this work Brookfield addresses the proposition that time might legitimise historic wrongs – an argument that leader of the National Party, Don Brash, employed last year in his infamous ‘Orewa speech’ when he said: “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”. Whilst Brookfield expressed that the passing of time, including benefits such as a better rule of law, have partly legitimated the contemporary constitutional order, he argues that a more balanced approach is required for fuller legitimation because the “ledger has not been balanced between the colonists and colonised”. Again, Brookfield calls for constitutional reform that will give better effect to the Treaty of Waitangi. This approach rings strong similarities with Keal’s challenge of “confronting the dark side of the story of expansion” in order to become “morally legitimate” states.

4.2.2 International Human Rights Law

A number of writers have drawn on the international concept of minority rights which grew in the twentieth century in response to a fear that majoritarian governments might erode the privileges which serve to protect the freedoms enjoyed by minority groups. From the orthodox paradigm, minority rights are completely at odds with majoritarian rule as legitimacy requires governments to be swayed by the minority vote, or, to use

306 The Orewa Speech above n290.
309 Keal above n12 and accompanying text.
310 Keal above n20 and accompanying text.
McNeil's words, the "current political and economic power structure".\textsuperscript{312} In this respect minority concerns can be legitimately swept aside in order to appease the interests of the majority. However, a modern push for bills of rights points to a widespread judgment that democratic processes by themselves may not adequately protect fundamental values in the community, particularly those of minority groups.\textsuperscript{313} As one commentator has put it: "To be the same is not to be equal. To be equal is to be treated as equal based on relevant differences".\textsuperscript{314}

With very little protection of minority rights available within the New Zealand legal system it is not surprising that Māori have relied on the international arena for protection. In fact, a number of non-governmental organisations sought review of the \textit{Foreshore and Seabed Act} in accordance with the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).\textsuperscript{315} The Committee on the Elimination of Racial Discrimination (CEDR) strongly criticised the \textit{Foreshore and Seabed Act}, concluding that, on balance, it contains discriminatory aspects against Māori.\textsuperscript{316} CERD noted the scale of opposition to the legislation by Māori\textsuperscript{317} and expressed concern about the political atmosphere that developed in New Zealand following the Court of Appeal's decision in the \textit{Ngati Apa} case, commenting that "it

\textsuperscript{312} McNeil above n105 and accompanying text. 
\textsuperscript{313} "Sovereignty in the 21\textsuperscript{st} Century: Another spin on the merry-go-round", above n300, 158. 
\textsuperscript{314} Rosalie Abella "From Civil Liberties to Human Rights: Acknowledging the Differences" in K & P Mahoney (eds.) \textit{Human Rights in the Twenty-First Century: A Global Challenge} (Martinus Nijhoff Publishers, London, 1993), 66. For an example of this approach at international law see, for example, Article 1(4) of the Convention on the Elimination of All Forms of Racial Discrimination: "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination provided, however, that such measures do not, as a consequence, lead to the maintenance of a separate right for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved". 
\textsuperscript{315} CERD/C/66/NZL/Dec 1 2004. 
\textsuperscript{316} Para 6. In particular criticisms were targeted at extinguishment of the possibility of establishing Māori customary title of the foreshore and seabed and a lack of guaranteed redress, notwithstanding New Zealand's obligations as a State party under articles 5 and 6 of the Convention. For further analysis of breaches of international human rights documents in relation to the Foreshore and Seabed Act see: Andrew Erueti "The Use of International Rights Fora to Protect Māori Property Rights in the Foreshore and Seabed and in Minerals" (2004) 7 YB of NZ Juris 86. 
\textsuperscript{317} Para 5.
hoped that all actors in New Zealand will refrain from exploiting racial tensions for their own political advantage".318

The Government's response to CERD's report is indicative of their discomfort with minority rights. When the report was released the Deputy Prime Minister, Michael Cullen, urged caution in interpreting it.319 The Prime Minister, Helen Clark, belittled both CERD and the complainants:

I don't think we should elevate this to a statement that the UN is making a finding against New Zealand ... [CERD are a] ... committee that sits on the outer edge of the UN system ... This isn't a statement that New Zealand is a terrible country in breach of international conventions that those who went trotting off to it wanted to hear.320

Regrettably, despite the fact that the Prime Minister's comments have been criticised by human rights experts,321 this shows that the current political climate dictates that concern for minority rights are not the New Zealand government's priority. Moreover, Don Brash based a major component of his party's 2005 election campaign on the notion of 'one rule for all', arguing that there should be "no special privileges for any race".322 With the

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318 Para 3.
319 Michael Cullen, Media Release “Cullen on UN foreshore and seabed decision”, on-line <www.beehive.govt.nz> [last accessed 12/10/05].
- the absence of an entrenched provision to ensure protection from racial discrimination
- provisions in the Native Title Act 1998 which could reduce further the protection of the rights of native title holders
- the extent of continuing discrimination faced by indigenous Australians in the enjoyment of their economic, social and cultural rights.
Like New Zealand, the Australian government condemned CERD, claiming that it gave too much emphasis to non-governmental submissions and took a 'blatantly political and partisan approach that 'ignored the significant progress made in Australia across the spectrum of Indigenous policies' (Press release, Minister of Foreign Affairs, Alexander Downer, 30 March 2000).
322 Orewa Speech, above n290 where Don Brash said "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
leaders of both New Zealand’s political parties taking such a stance, constitutional protection of minority rights is unlikely to be forthcoming.

4.3 COMMENT

The foreshore and seabed controversy illustrates that Māori land rights are being debilitated by politics. They are exposed to a Government who is politically forced, if they wish to stay in power, to legislate in order to appease the political majority.

Within New Zealand there is support for the proposition that the orthodox concept of parliamentary sovereignty does not quite fit our unique circumstances. Instead, concerns over the “vulnerability of the indigenous people of New Zealand”323 (concerns which have continually emerged in this paper in relation to Indigenous peoples)324 have led a number of writers to advocate for the constitutional protection of Māori rights. These arguments have often been based on the special status of the Treaty of Waitangi as the document that ceded sovereignty to Great Britain, and to the increasing level of protection given to minority rights at international law.

Constitutional protection of Māori rights (either through entrenchment of the Treaty or some other form of legislative protection) would at least shield Māori land rights from the power of Parliament, from which political concerns are inseparable. In that manner, our society would be responding to Keal’s challenge of confronting the “dark side of the story of expansion” in order to become “morally legitimate”,325 and to McNeil and Tully’s concerns about the vulnerability of Indigenous property rights.

However, it seems there is little prospect that well-intentioned dialogue will lead to a consensus for a new constitution. The “Building the Constitution” conference held at

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324 Starting with McNeil’s article in chapter one.
325 Keal above n12 and accompanying text.
Parliament in April 2000 was intended to settle the issues for constitutional reform based on common understanding, but the conference was a spectacular failure. Discussions faltered on deep seated divisions among the 100 participants who exercised speaking rights. Attitudes expressed this year by the leaders of New Zealand’s two main political parties indicate that more positive discussion is unlikely to be forthcoming in 2005. Moreover, the Report of the Constitutional Arrangements Committee concluded that: “Although there are problems with the way our constitution operates at present, none are so apparent or urgent that they compel change now or attract the consensus required for significant reform”.

If this is to be the case the status quo will linger and New Zealand’s constitutional arrangements will continue to hinder the “morally legitimacy” of our society by perpetuating the vulnerability of Indigenous land rights to the popular majority.

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327 Joseph above n 249, 128
328 Report of the Constitutional Arrangements Committee above n252, 6.
329 Keal above n13 and accompanying text.
Conclusion

Collaborative Lessons

The highest courts in Australia, New Zealand and Canada have now recognised Indigenous land rights pursuant to the doctrine of native title. However, in these colonised countries with majority settler populations the tension between majority rule and minority rights is highly charged. In the midst of this tension, combined lessons are insightful for understanding the relationship between constitutional choices and the protection of Indigenous land rights.

As the foreshore and seabed debate exemplified, New Zealand’s constitutional arrangements do little to advance New Zealand’s ability to become a “morally legitimate society”.330 For although Ngati Apa was ‘braver’ than Mabo and Delgamuukw, Indigenous land rights remain vulnerable to a Government who is forced to legislate in order to appease the political majority. In Australia the rights of that country’s Indigenous peoples are even more vulnerable. They are susceptible to both politically swayed courts, as the Mabo decision showed, and to a Parliament who, like the New Zealand Government, enacted the Native Title Act 1993 in response to that decision. In contrast to New Zealand and Australia is Canada, where Indigenous rights are protected by section 35 of the Constitution Act 1982. This section is ensuring much greater protection for the Indigenous peoples of Canada.

These differences suggest that the protection of Indigenous rights is a collaborative exercise between courts and Parliament, and that constitutional protection is a vital starting point. This message should be bought home to the Constitutional Arrangements Committee as it contemplates New Zealand’s constitutional future.

330 Keal above n12 and accompanying text.
Bibliography

A. Legislation

Australia

Racial Discrimination Act 1975 (Cth).
Native Title Act 1993 (Cth).

Canada

Canada Act 1982.
Royal Proclamation 1763.

New Zealand

English Laws Act 1858.
Fisheries Act 1996.
Foreshore and Seabed Act 2004.
Harbours Act 1955.
Harbours Act 1955.
Harbours Act 1978.
Land Act 1948.
Land Transfer Act 1952.
Native Land Act 1909.
Native Land Act 1931.
Native Land Act 1862.
Maori Affairs Act 1953.
New Zealand Settlements Act 1863.
Public Works Acts 1873.
Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977.
Territorial Sea and Fishing Zone Act 1965.
Other
Constitution of the United States of America 1787.

B. Table of Cases

Australia

*Attorney-General v Brown* (1847) 1 Legge 312.
*Cooper v Stuart* (1889) 14 App Cas.
*Mabo v Queensland (No 2)* (1992) 175 CLR.
*Milirrpum v Nalbalco Pty Ltd* (1971) 17 FLR 141.
*New South Wales v The Commonwealth* (1975) 135 CLR 337.
*Randwick Corporation v Rutledge* (1959) 102 CLR 54.

Canada

*Apsassin v Canada (Department of Indian Affairs and Northern Development)* (1993) 100 DLR (4th) 504.
*Calder v Attorney-General of British Columbia* [1973] SCR 313.
*Delgamuukw v British Columbia* [1997] 3 SCR 1010.
*R v Côté* [1996] 3 SCR 139.
*Guerin v The Queen* [1984] 2 SCR 335.
*St Catharines Milling and Lumber Company v The Queen* (1888) 14 App Cas 46.

New Zealand

*Attorney-General v Ngati Apa* [2003] 3 NZLR 643.
*Brader v Ministry of Transport* [1981] 1 NZLR 75.
*Cooper v A-G* [1996] 3 NZLR 480.
Hoani Te Heu Heu Tukino v Aotea District Maori Land Board [1941] AC 308.
In Re Ninety Mile Beach [1963] NZLR 461.
NZ Drivers’ Assn v NZ Road Carriers [1982] 1 NZLR 374.
Te Runanga o Muriwhenua v Attorney-General [1990] 2 NZLR 641.
Te Runanga o Wharekauri Rekohu Inc v Attorney-General [1993] 2 NZLR 301.
Te Weehi v Minister of Fisheries [1986] 1 NZLR 680.
L v M [1979] 2 NZLR 519.
Mc Ritchie v Taranaki Fish and Game Council [1999] 2 NZLR 139.
Nireaha Tamaki v Baker PC 1900 [1901] AC 561.
R v Symonds (1847) NZPCC 387.
Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) 72.

United Kingdom

Entick v Carrington (1765) 19 St Tr 1029.
Ex p Selwyn (1872) 36 JP 54.
Proclamations Case (1610) 12 Co R 74.

Other
Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399 (Nigeria).
MacCormick v Lord Advocate [1953] SC 396 (Scotland).

C. Books


Perry, Melissa and Stephen Lloyd *Australian Native Title Law* (Lawbook Co, Sydney, 2003).


Spillar, Peter Jeremy Finn and Richard Boast (eds.) *A New Zealand Legal History* (2nd ed, Brookers, 2002).


Youngblood-Henderson, James (Sakej) and others. *Aboriginal Tenure in the Constitution of Canada* (Carswell, Scarborough, Ontario, 2000).

D. Articles


Yurkowski, Rachel. “‘We are all here to stay’: Addressing Aboriginal Title Claims After Delgamuukw v British Colombia” (2000) 31 VUWLR 85.
E. Reports, Publications and Government Documents


Report of the Constitutional Arrangements Committee “Inquiry to review New Zealand’s existing constitutional arrangements” [2005] AJHR I 24A.


F. Newspaper Articles

NZPA Political Reporter “Law to confirm status of seabed and foreshore” Otago Daily Times (24 June 03) 14.


G. Unpublished Works

McHugh, Paul. “Submission by Br PG McHugh to the Select Committee Hearing of the Foreshore and Seabed Bill” (August 2004).


F. Electronic References


GLOSSARY OF MĀORI TERMS

hapū tribe, descent group, wider kin group than whānau
kawanatanga governance
pā fortified village, or more recently, any village
taonga treasured possession, property
taonga tuku iho absolute treasure
tikangaMāori customary values and practices
tino rangatiratanga full (chiefly) authority
wāhi tapu sacred place, repository of sacred objects
whānau family, extended family