Fighting Them on the Beaches: the Struggle for Native Title Recognition in New Zealand

Geoffrey W G Leane*

I Introduction

In June 2003 the New Zealand Court of Appeal released the *Ngati Apa* decision[1] recognising the right of Maori to claim customary title over certain areas of seabed and foreshore. It was merely an acknowledgement that the Maori Land Court had jurisdiction to investigate such a claim. The implication was that customary native title was recognised at common law at least until it was lawfully extinguished.

What would have been a straightforward and conventional decision in, say, Canada or Australia, was less so given the New Zealand precedent of *In Re the Ninety-Mile Beach*.[2] In that decision the Court of Appeal held that once the Maori Land Court had investigated a claim of customary title to the high water mark then no such title in the foreshore beyond remained to be investigated. The same principle was said to apply where the Crown itself had purchased Maori customary coastal land to the high-water mark.[3] In other words the Crown was said to own the foreshore and seabed, unconstrained by any common law native title. Of even more concern was the Court's claim in *Ninety-Mile Beach* that customary native title depended on the 'grace and favour' of the Crown rather than being legally enforceable.[4] That was, at least according to relevant precedents in other jurisdictions and some in New Zealand, simply wrong in law. Hence the retreat in *Ngati Apa*.

* Senior Lecturer, University of Canterbury School of Law.

1 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (Court of Appeal).

2 *In Re The Ninety Mile Beach* [1963] NZLR 461 (Court of Appeal).

3 F M Brookfield, 'Maori Customary Title to Foreshore and Seabed' [2003] *New Zealand Law Journal* 295.

4 Brookfield, 'Maori Customary Title to Foreshore and Seabed', above n 3, 468 (North J).

The *Ngati Apa* decision is extraordinary for two reasons. First, that it took until 2003 for the New Zealand courts to resile from the dubious precedent of *Ninety-Mile Beach*.[5] Second, the outcry the decision has precipitated and the extraordinary political response. Both continue a long narrative in New Zealand of the denial of indigenous rights, a history still largely unrecognised and unreformed.

Indigenous rights derive essentially from two sources, namely the common law and treaty. New Zealand Maori signed the Treaty of Waitangi with the British Crown, but as well were theoretically free to avail themselves of the protection of common law native title. The story of the dishonouring of the Treaty is beyond the scope of this paper; rather the concern is with the treatment of common law native title and its latest manifestation in the *Ngati Apa* (or 'foreshore and seabed') case.

II The Response to *Ngati Apa*

The Court of Appeal decision resulted in an immediate and highly revealing response, both from the public and from politicians. Before considering that response it would be appropriate to observe that the court was merely affirming the *possibility* of a customary title which Maori should have been able to assert as a matter of English common law from the very arrival of English settlers (see below). There was no attempt to sketch the nature of any possible title, and the court expressed some scepticism as to the likelihood of title even being found on the facts.[6] The Court of Appeal's assertion that jurisdiction to determine title claims lay with the Maori Land Court also caused some confusion as that court normally deals in determinations of freehold title rather than the much more amorphous and nuanced native title. There was probably a fear that it would make some kind of doctrinally inappropriate finding on the native title as constituting a freehold title when in fact the jurisprudence (primarily from other jurisdictions such as Canada, Australia and the United States) indicates that that is typically not the case.

Within two days of the decision the Prime Minister hinted at legislation to vest ownership of the seabed and foreshore in the Crown.[7] Standard 'opening the floodgates' reactions came from opposition Members of Parliament.[8] Similarly editorial comments and letters to the editor from

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5 See, eg, Richard Boast, '*In Re Ninety Mile Beach* Revisited: The Native Land Court and the Foreshore in New Zealand Legal History' (1993) 23 *Victoria University of Wellington Law Review* 145; Brookfield, 'Maori Customary Title to Foreshore and Seabed', above n 3, 295–6.

6 See, eg, above n 2, [8–10] (Elias CJ) and [106] (Gault P).

7 See, eg, 'Seabed Owned by Crown says PM', *The New Zealand Herald* 23, June 2003.

8 Ibid (quoting National MP Nick Smith, claiming that the decision would 'open the floodgates to more Maori claims over beaches, estuaries, harbours and almost any stretch of coastline').

interest groups and the public invoked doomsday images of 'ordinary' New Zealanders losing any access to their beloved beaches.[9] The principle typically invoked was one of egalitarianism[10] — of equal rights for all New Zealanders and particularly of no 'special' rights for Maori by virtue of their indigeneity.

Maori leaders and Maori Members of Parliament, including those within the ruling Labour Party, moved quickly to assert the right of Maori to a determination of customary title by the courts, and were strongly critical of Government moves to legislate those rights away.[11] The storm of pakeha [non-Maori] protest continued, notwithstanding comments from the Land Information Minister that more than half of New Zealand's beaches were already effectively in the hands of private pakeha owners, though interestingly there was no suggestion that these owners should have their rights challenged.[12] The irony of a right-of-centre political party — the Opposition National Party — strongly committed to property rights, advocating legislation to quash even the suggestion of a property right in Maori was not entirely lost on Maori leaders.[13] Ironically a right-wing think tank proved to be the only institutional pakeha defender of Maori rights to a court hearing,[14] on the basis of protection of property rights. Politicians exchanged accusations of racism.[15]

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9 See, for example:

> Application of the Court of Appeal's decision could lead to the abomination of riparian apartheid, with the greater populous confined to narrow fenced-off strips of dry public land to watch a favoured few customary rights holders, invitees, and payees enjoying exclusive benefit of privatised beaches, tidal waters, and the sea.

The Press (Christchurch), 14 July 2003, 9.

In the same vein, B Mason stated that '[the *Ngati Apa* decision] threatens to open a Pandora's box of electoral horrors: Maori claims to exclusive ownership and thereby control or prohibition of every New Zealander's assumed right to fish, sail, walk, bathe, or kick a football around on the beach, anywhere, any time, for free'. See B Mason, 'It Will Be a Profound Shock to Most People to Learn That They Have No Rights of Recreation Over Foreshores', *Otago Daily Times* (Dunedin), 6 July 2003.

10 One of the most common values ascribed to New Zealanders is egalitarianism. Certainly that is reflected in its post-colonial history as (from 1935) a welfare state which 'fostered a social democratic ideal of the harmonious classless society ... cosseted by a benevolent government': Jane Kelsey, *The New Zealand Experiment: A World Model For Structural Adjustment* (1997), 20 — the state was to look after its citizens, in a famous phrase, 'from cradle to grave'. A characterisation of the essential nature of New Zealand society was articulated by the *Royal Commission on Social Policy* (1988) 454:

> [A] uniquely New Zealand statement of the good society; it is one in which one had a say and a chance to determine one's own destiny, where there is opportunity to express a choice, but where in the end there is a sense of community responsibility and collective values that provide an environment of security.

11 See, eg, 'Labour's Maori MPs Reject New Seabed Law', *The New Zealand Herald*, 25 July 2003.

12 See, eg, 'Third of Foreshore Off-Limits', *The New Zealand Herald*, 2 August 2003.

13 Ibid. Quoting Maori leader Sir Tipene O'Regan: 'iwi [Maori tribal grouping] would not be happy if farmers and others were allowed to keep private title to the foreshore, but iwi were denied the right to seek it over customary land they already claimed to hold'.

14 Business Roundtable 'Legitimate Property Rights Forgotten in Foreshore Debate' (Media Release, 6 October 2003).

15 See, eg, Michael Cullen, 'Cullen says National Party Winding Up 'Racial Hatred' *The New Zealand Herald*, 29 July 2003.

Opinion polls suggested that Maori did not support Crown ownership of the foreshore and seabed, and that they believed that they should be able to assert claims for customary title in the courts.[16] Almost half did, however, support the notion of the foreshore and seabed as 'public domain' though there was significant opposition to the Government proposal and to its handling of the controversy.[17] There was no doubt about the feelings of the general public — less than one third supported recognition of customary ownership even if accompanied by free access for recreational activities.[18] Perhaps most telling, only three percent were content to allow the Government to simply let claims of customary title go to the courts for a determination.[19] It is difficult to imagine a more powerful expression of the 'tyranny of the majority', that is to say the majoritarian impulse to deny minority rights which might in any way affect the self-interest of the majority. That is why certain rights are said to warrant constitutional protection even in liberal democracies, as is the case in, for example, Canada and the United States.

It might be useful to pause for a moment and, anticipating the discussion below, think about what that means. It means that the indigenous peoples of New Zealand should not, in the opinion of the non-indigenous majority, be left free to pursue a claim recognised by the law of the colonisers themselves and presently affirmed by the highest court (of the colonisers themselves) in the land. The pakeha majority are willing, indeed eager, to legislate away a right recognised by its own legal system before it can even be tried before its own courts. To put it bluntly, the non-Maori majority in New Zealand wishes to deny equality before its own law to Maori,[20] that is to say a race-based denial of the rule of law.

III The Policy response

The Labour government put forward four general principles which would drive its policy response to the *Ngati Apa* decision.[21] They were respectively the Principles of Access, Regulation, Protection and Certainty.

The Principle of Access aimed to make the foreshore and seabed 'public

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16 See, eg, Audrey Young, 'Maori: Hands off foreshore', *The New Zealand Herald*, 11 August 2003.

17 See, eg, Ruth Berry, 'Poll finds Maori split on foreshore', *The New Zealand Herald*, 25 August 2003.

18 See, eg, 'Majority opposed to customary ownership', *The New Zealand Herald*, 18 August 2003.

19 Ibid.

20 Richard Bartlett 'Native Title in Australia' in Paul Havemann (ed), *Indigenous Peoples' Rights* (1999), 408, stated that '[a]n examination of the degree to which a settler society recognises Aboriginal rights to traditional lands can be seen as an inquiry into the extent to which the society extends that most fundamental of human rights, equality before the law, to the traditional landowners'.

21 <http://www.beehive.govt.nz/viewDocument.cfm?DocumentID=18755>.

domain, with open access and use for all New Zealanders'. Current law vesting the foreshore and seabed in the Crown was to be replaced by a 'public domain title, vesting the full legal and beneficial ownership of the land in the people of New Zealand'.[22] This public domain title was to be held in perpetuity by the people of New Zealand, to be disposed of only under the authority of Parliament. Existing private titles in foreshore and seabed areas are exempt. It should be noted that some thirty percent of New Zealand's coastline is privately owned, at least to the high water mark.[23] Even where such private ownership does not extend to any part of the foreshore itself — the area between high and low tide marks — it means that public access is effectively restricted unless permission is granted by the landowner. Where some part of the foreshore or seabed is included in private title the public domain title would not apply — in fact this will be a significant portion as the definition of the land boundary of the foreshore is taken to be the high water springs level, which will be higher than the mean high water level to which private titles have been surveyed.[24] Thus existing private titles would be protected whereas indigenous titles wrongfully denied historically would be extinguished.

There is an issue here that goes to the more general point of recognition of native title. Existing private titles are held to be worthy of protection for all sorts of reasons, but primarily under the principle of protection of property rights generally in liberal democracies. Taking that as a starting point there remains the issue of what is surely a discriminatory stance toward native title, and one that inevitably goes to the issue of race. The point is that native title was not invented or created with the *Ngati Apa* decision, but rather has a provenance in the common law firstly of England and including New Zealand. Further, its content goes to the traditional practices and life ways of Maori before the assertion of English sovereignty under the 1840 Treaty of Waitangi, which historical practices will be *sui generis* with each claim. The response of the New Zealand government effectively treats the native title as some new aspect of property rights against which the (assumed) rights of 'all New Zealanders' must be protected, that is to say, access to the foreshore. As discussed above in the context of existing private property interests, that protection has not been a fact for substantial parts of the coast for a very long time. Depending on the content of particular native title claims, it must be recalled that it will not typically amount to the equivalent of a fee simple title and therefore would only constrain non-claimant access in very limited ways. So it seems contradictory to accept that existing private interests are inviolate yet legislate to limit lesser native title interests — indeed to not even allow

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[22] Government document, *Foreshore and Seabed: A Framework*, <http://www.beehive.govt.nz/foreshore>.

[23] Government Proposals for Consultation, *Foreshore Project Final Report*, (12 December 2003) <http://www.beehive.govt.nz/foreshore>.

[24] Above n 24, [17].

the determination of their content in the courts. Moreover the legislative limitations will fall on only one segment of the population and then on the basis of race, for by definition only Maori can claim native title.

The second principle of Regulation simply reiterates the government's responsibilities under international law to regulate in respect of internal waters, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf including its treaty obligations — for example, in respect of navigation rights and rights of innocent passage. The third principle of Protection stresses the need for new processes to identify Maori customary interests and rights within the framework of existing legislation, for example in respect of negotiated fisheries settlements, Treaty of Waitangi settlements, and so on. The preference is for a jurisdiction dedicated to establishing customary rights in the foreshore and seabed through the existing Maori Land Court. Actions which would have an 'undue adverse effect' on a customary right would not be permitted to proceed. The final Principle of Certainty affirms the legality of the status quo for private parties and administrative bodies, who may only be accountable for future acts in respect of determinations by the courts.

IV The Legislative Response

The government finally introduced the Foreshore and Seabed Bill 2004 (NZ) in April 2004. Broadly speaking it adheres to the original policy guidelines but with a number of changes forced on the government as political compromises in order to obtain the necessary parliamentary majority. For example, the original nomenclature was one of 'public domain' over the foreshore and seabed — at the insistence of one of the minority parties it vests (at s 11(1)) the 'full legal and beneficial ownership of the public foreshore and seabed ... in the Crown', though there appears to be little meaningful legal distinction between the terms. More bizarre is the provision (in s 29), again included at the behest of a minority party, for 'a group' — that is to say, including non-Maori — to claim in the High Court 'territorial customary rights' which 'would have been recognised at common law' (s 28). In addition to arguably demeaning the historical tradition of common law native title, one wonders how the courts will apply common law *native* title, as they are required to do, to non-indigenous peoples who by definition were never subjects of that aspect of the common law.

Less comprehensive rights — that is to say not going to something like fee simple rights in land — derived from 'ancestral connections' and 'customary rights' of Maori can be adjudicated by the Maori Land Court and may give rise to orders through which the rights can be asserted (s 37(1)). The requirements to show rights are set out in s 42. They are drawn from the common law and are illustrative of the difficulties faced by indigenous people in litigating such rights — they must relate to 'an

established and identifiable group of Maori', the practice must be integral to customary Maori values and practices, it must have been followed substantially uninterrupted since 1840 (when settler sovereignty was asserted through the Treaty of Waitangi) and continue in the present, and it must not be prohibited by law or have been extinguished by law. Such extinguishment can occur by a variety of means — the exercise of a conflicting activity, inconsistent Crown grants, statutory vesting or administrative action or any legally inconsistent interest. There is provision for Maori to derive a commercial benefit from the exercise of a customary right depending on its nature (s 46).

But for the purposes of this paper the important provisions relate to 'territorial customary rights' in s 28, a new descriptor seemingly designed to cover those aspects of the common law native title which are analogous to a fee simple title in land. They represent the most empowering rights in terms of content — that is to say, 'exclusive occupation and possession of a particular area' (s 28(b)). It was these rights (the Bill never uses the terminology of 'title') and their exclusive nature which precipitated the scaremongering and public alarm following the *Ngati Apa* decision. It is these rights which are extinguished by the assertion of the Crown's 'full legal and beneficial ownership', though existing private titles are exempt. The likelihood of Maori ever being able to successfully establish such rights is unknown though presumably not high — as noted the traditional common law native title is usually usufructuary in nature and difficult to show.

The Bill does provide for a finding by the High Court that this territorial customary right, amounting to exclusive occupation and possession, *would* have been recognised at common law *but for* the legislative vesting of full legal and beneficial ownership in the Crown (s 29). In such a case the High Court must, under s 33(1), refer such a finding to the Attorney-General and Minister of Maori Affairs. The Ministers must in turn 'enter into discussions ...to consider the nature and extent of any redress that the Crown may give' (s 33(2)). Here then is quid pro quo for the loss of a property right — a right to enter into discussions! In all but name it amounts to an expropriation without compensation.

It might be appropriate to pause for a moment here and consider this Alice-in-Wonderland legal moment. Maori have been told that their common law native title (whatever it may be but possibly including an element of 'exclusive use and occupation) did exist historically, was wrongfully denied them (for example in *In Re the Ninety Mile Beach*), is now 're-recognised' by the courts in *Ngati Apa*, but now extinguished (in respect of the 'territorial' aspect) by the government in the new Bill, yet may be hypothetically recognised again by the courts for the purpose of 'discussions' about possible 'redress' by the government.

Just how this extraordinary piece of legislation might play out in the High Court and in the political arena is almost beyond imagining, though it seems likely that given these kinds of difficulties and given

the political exigencies still to come before the Bill is enacted there will almost certainly be further amendments. An example of the disdain in which the government policy is held in some quarters can be seen in the report of the primary institutional defender of indigenous rights in New Zealand, the Waitangi Tribunal.

V Waitangi Tribunal Report

The Waitangi Tribunal is a quasi-judicial body established under the *Treaty of Waitangi Act 1975* (NZ). It was initially a political response to increasing Maori nationalism, and was presumably meant to fill the vacuum left by the failure of the legislature and the courts to address Maori aspirations (discussed below). Its rulings are recommendatory only, its *modus operandi* is inquisitorial rather than adversarial, and it is expected to weigh the competing interests of parties including the wider community — that is to say, it is supposed to take account of the practical effects of its findings. Its initial jurisdiction was prospective but a 1985 amendment permitted retrospective claims back to the signing of the Treaty of Waitangi in 1840. It has come to be recognised as a credible forum for recognising Treaty claims, both by Maori and by successive governments who have generally taken its rulings seriously. It was asked to consider the Treaty implications of the government's proposed policy response to the *Ngati Apa* case. It is of some significance that before the Tribunal's report was even released, however, the government signalled its intention, and its majoritarian motivations, with the following statement: 'The Crown is happy to cooperate with the Tribunal ... [b]ut in the end, this matter will be resolved in the legislative arena so any solution must be able to attract a Parliamentary majority'.[25]

In the event the Tribunal produced a damning report.[26] It properly focuses on the government's refusal — overwhelmingly supported by the public — to allow Maori to have their native title claims, particularly those relating to the 'territorial customary rights', fully explored in the courts. In removing the means by which these rights can be asserted the Tribunal held that in effect the rights themselves were being removed. This is something of an exaggeration in that the government anticipates the rights, as proscribed by its legislative response, being determined in the courts. Nonetheless the pre-emptive legislative move against the content of native title remains a serious, if not egregious, breach of the rule of law. The government's policy response does not have the consent of Maori, it is not driven by any overriding national interest and so, says the Tribunal, it lacks any moral or legal legitimacy.

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[25] Michael Cullen, '*Response to* Ngati Apa' (Press Release, 23 October 2003), <http://www.beehive.govt.nz>.

[26] Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (8 March 2004), <http://www.waitangi-tribunal.govt.nz/>.

As to breaches of the Treaty of Waitangi — the core business of the Tribunal — the government's response to *Ngati Apa* is said to breach Article II of the Treaty, namely the protection promised by the English Crown to Maori of 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties'.[27] Note that Article II is actually an affirmation of common law native title, which arrived with the settlers on the signing of the Treaty. There is an historical breach of Article II in that the Crown has failed to protect Maori rights by assuming Crown ownership of the foreshore and seabed until the present, and of course now an ongoing breach in respect of the Crown's response to *Ngati Apa* in refusing to accept the decision. There is as well a breach of Article III of the Treaty — which guarantees equal citizenship rights to Maori — in the denial of equal protection under the rule of law, as it is only Maori property rights which are being legislated away. The absence of Maori consent to the government policy also suggests a breach of established Treaty principles of partnership and good faith. It is difficult to argue the Tribunal's conclusion that the government response represents an effective expropriation of property rights and is a serious breach of the Treaty of Waitangi.

Unsurprisingly the government reacted negatively to the report, describing it as 'disappointing', rejecting some of its central conclusions and re-asserting the supremacy of Parliament.[28]

VI History and Nature of Customary Native Title in New Zealand

The response to *Ngati Apa* will be shocking to even a casual, far less a legal, observer in a twenty first century Western liberal democracy, but it has a provenance going back to the early days of colonisation and, less understandably, extending to the present. The rejection of customary native title has been expressly and consistently practiced for well over a century in New Zealand, and continues notwithstanding more enlightened jurisprudence in Canada, the United States and even Australia.

Generally, land policy in the colony was based on the assumption that Maori owned the entirety of the country and thus it was necessary to extinguish Maori title by some means or other, although the principle was not always religiously followed.[29]

As with indigenous peoples generally, Maori notions of land tenure did not fit readily into those of the European settlers — Maori 'title' was

[27] From the English version. The Maori version — signed by an overwhelming proportion of chiefs — suggests a considerably stronger protection. Reconciliation of the linguistic tensions is, however, beyond the scope of this paper.

[28] Michael Cullen, '*Response to* Ngati Apa', above n 25.

[29] Peter Spiller, Jeremy Finn and Richard Boast, *A New Zealand Legal History* (1995) 139: 'for example there was an attempt in 1846 to restrict Maori ownership to inhabited or cultivated areas and treat the balance as wilderness available for settlement, but this was rejected as inflammatory by the then Governor Grey.'

in varying degrees communal and often overlapping, making transfers between Maori and settlers fraught with difficulty. The Crown had a right of pre-emption from the Treaty of Waitangi and from prior colonial practice in North America. It variously chose to exercise and waive the right as a matter of policy with respect to facilitating land transfers and revenue raising. The *Native Lands Act 1865* (NZ) created a Native Land Court which was to determine customary ownership and translate it into individual titles within the English legal tradition, thus fragmenting the communal title into small individual holdings which facilitated their sale. Such policies were overtly assimilationist and had profound effects on the communal culture of Maori.[30]

By 1860 some two thirds of New Zealand, including most of the South Island, was conveyed into settler hands.[31] Other lands were confiscated under the *New Zealand Settlements Act 1863* (NZ), following military conflicts between Maori and settlers. Generally the statutory process for direct land transfers between newly individualised Maori ownership and settlers became chaotic.[32] Some clarification came with the *Native Land Act 1909* (NZ), though for present purposes the Act is noteworthy for its s 84, which precludes claims of common law native title unless otherwise expressly provided.[33] The section was later included as s 155 of the *Maori Affairs Act 1953* (NZ) and not repealed until 1993. The present controversy over the *Ngati Apa* decision in fact echoes this earlier 'outrageous' breach of the Treaty of Waitangi.[34]

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[30] See, eg, these assimilationist policies were rather brutally articulated by the Minister of Justice, Henry Sewell, in the Legislative Council of 1870 (at 41):

> The other great object [of the Native Lands Act] was the detribalisation of the Maoris — to destroy, if it were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Maori race into our social and political system. It was hoped by the individualisation of titles to land, giving them the same individual ownership which we ourselves possessed, they would lose their communistic character, and that their social status would become assimilated to our own.

Paul McHugh, 'Maori Land Laws of New Zealand: Two Essays' (1983) *University of Saskatchewan Native Law Centre*, 2–4.

[31] McHugh, 'Maori Land Laws of New Zealand', above n 30, 139.

[32] Ibid 150.

[33] Section 84 states that '[s]ave so far as otherwise expressly provided in any other Act, the Native customary title to land shall not be enforceable as against His Majesty the King by any proceedings in Court or in any other manner.' Note that its intent may not have been as draconian as may appear — see Sewell, above n 30, 160, suggesting that the section was aimed only at a few impending claims, though that does not of course diminish the sweeping scope and enduring presence of the section.

[34] See, eg, Paul McHugh 'The Role of Law in Maori Claims' [1990] *New Zealand Law Journal* 16, at 19:

> Even the Crown has conceded the unconstitutionality of this [s84] provision. It disqualifies a section of Her Majesty's subject, her Maori subjects, from vindicating their property rights in her Courts. Section 155 is now regarded amongst the most outrageous breaches of the Treaty of Waitangi and has been universally condemned as such.

Section 155 was not repealed until the *Maori Land Act 1993* (NZ), but the sentiment expressed above might equally be applied to the present government's to *Ngati Apa*.

Of course this s 84 constraint on the native title implied that it did in fact exist, though that was presumably not the intent of the provision. There was a context for this extraordinary section, and it is here that we see the evolution of common law native title in New Zealand. Although the nature of that title is a reasonably complex and ambiguous subject its history in New Zealand is relatively simple to trace, for the unfortunate reason that it has been given such short thrift.

The notion of indigenous peoples holding certain rights, grounded in natural law, in the face of European colonisation goes back at least to the sixteenth century — an oft-cited example being the writings of the Spanish scholar de Vitoria.[35] The legal status of the rights was securely grounded in English common law, in the colonial practices of the North American colonies[36] and in New Zealand itself in the early *Symonds*[37] decision. That decision not only confirmed the existence of common law native title in New Zealand but as well its affirmation in the country's founding document — the Treaty of Waitangi.[38] *Symonds* was the first and sadly the highest moment in native title jurisprudence in New Zealand. It was on its face a straightforward application of an existing and uncontroversial principle of common law.[39] It has to be mentioned as well that its sympathetic stance to Maori interests probably reflected the *realpolitik* of the day — the Maori population at the time, though reduced from an estimated 125–135 000 on Captain Cook's 'discovery' in 1769,[40] was still vastly greater than the estimated 2000 settlers and no doubt could not be trifled with.

But the next moment was disastrous for Maori. The case of *Wi Parata*[41] still causes one to cringe some one and a quarter centuries later. Again, it should be noted that population demographics had moved dramatically against Maori and the 1858 census revealed that, even nineteen years

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35 See, eg, Catherine Iorns Magallanes. 'International Human Rights and Their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada, and New Zealand' in Paul Havemann (ed), *Indigenous Peoples' Rights* (1999), 235–6.

36 As early as the judgements of Marshall CJ in the United States in the early nineteenth century, as well as in Canada including the *Royal Proclamation of 1763*, the tone of which can be distinguished in the Preamble is that '[the Indians] ...should not be molested or disturbed in the Possession of such part of our Dominions and Territories as, not having ceded to, or purchased by Us, are reserved to them, as their Hunting Grounds ...' The Royal Proclamation was not, however, the source of the rights, which were in the common law and whose content derived from original occupation and use (see *Calder v Attorney General of British Columbia* [1973] SCR 313 and *Guerin v The Queen* [1984] 2 SCR 335).

37 *R v Symonds* (1847) NZPCC 387.

38 Chapman J said that '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 ...the Treaty of Waitangi ...does not assert either in doctrine or in practice any thing new and unsettled': (1847) NZPCC 387, 390.

39 See, eg, F M Brookfield, 'The New Zealand Constitution' in Ian Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989) 10–11. See also dicta of the Court of Appeal *In re 'The Lundon and Whitaker Claims Act 1871'* (1872) 2 NZCA 41, 49: 'The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right'.

40 Alan Ward, *A Show of Justice* (1973) 13.

41 *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) SC 72.

before the judgement, settler numbers substantially exceeded the reduced Maori population of 55 000. There had been, unsurprisingly, relentless pressure to free up land for the growing settler population. Another context is provided by the prevailing jurisprudential climate of Positivism,[42] which arguably influenced the judge to denigrate the capacity of Maori, as an underdeveloped 'civilization', to either enter into a valid treaty — the Treaty of Waitangi — or to assert any kind of proprietary rights under the rubric of common law native title.

In any event the court in *Wi Parata* held that in purporting to cede sovereignty from Maori to the Crown the Treaty of Waitangi was a 'simple nullity'.[43] The implications of that decision, profound as they were, are beyond the scope of this paper. But the judge also took the opportunity to diminish rights derived from 'ancient custom and usage', referred to in the *Native Rights Act 1865* (NZ), simply denying that 'some such body of customary law did in reality exist ... a statute cannot call what is non-existent into being'.[44] In a stroke a single judge negated the founding treaty of the country — in effect imputing the most cynical and dishonourable motives to the English Crown in entering into it[45] — and denied to Maori the common law protection of native title which was properly theirs. He did so, it might be noted, in explicitly racist terms.[46] Thus the recognition of common law native title was left at the discretion of the Crown rather than as of right.

The reluctance of New Zealand courts to acknowledge common law native title was later addressed by the English Privy Council in *Nireaha Tamaki v Baker.*[47] The Privy Council went so far as to rebuke the New Zealand court's reading down of native title.[48] A second rebuke followed

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[42] Frederika Hackshaw, 'Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi' in Ian Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, (1989) 92.

[43] Hackshaw, above, n 42, 78.

[44] Hackshaw, above, n 42, 79.

[45] That this was not the case is evident in an oft-quoted despatch from Lord Stanley of the English Colonial Office to Lieutenant Governor Grey in 1845 that 'I repudiate, with the utmost possible earnestness, the doctrine ...that the treaties with these people are to be considered as a mere blind to amuse and deceive ignorant savages ... You will honourably and scrupulously fulfil the conditions of the treaty of Waitangi'.

[46] Hackshaw, above, n 42, 77: 'New Zealand [was] ...a territory thinly peopled by *barbarians* without any form of law or civil government ...*uncivilised tribes* ...[at 78] *primitive barbarians* ...a territory inhabited only by *savages*' (emphasis added). One commentator more kindly describes the judgement as 'redolent with ethnic chauvinism': John Hookey, 'Milirrpum and the Maoris: the Significance of the Maori Lands Cases Outside New Zealand' (1973) 3 *Otago L Rev* 63, 74.

[47] (1901) NZPCC 371.

[48] *Nireaha Tamaki v Baker* (1901) NZPCC 23, 382. With respect to the argument 'that there is no customary law of the Maoris of which the Courts of law can take cognizance' the Privy Council replied that 'it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of ss 3 and 4 of the *Native Rights Act 1865* (NZ) [referring to native title derived from 'custom and usage'] by saying (as the Chief Justice said [in *Wi Parata*]) that 'a phrase in a statute 'cannot call what is non-existent into being'.

two years later.[49] The response from the New Zealand legal establishment was one of outrage,[50] and took the form not only of the *Native Land Act 1909* (NZ) (referred to above) but a continuing adherence by the courts to the *Wi Parata* judgement, notwithstanding the Privy Council's rebuke. Thus, for example, in the 1963 case of *In Re The Ninety Mile Beach*[51] the court relied on *Wi Parata* in continuing to deny the justiciability of Maori rights. It was this case that the Court of Appeal finally overturned in *Ngati Apa*, wherein the court referred to the 'discredited authority of *Wi Parata* ...'[52] and noted its rejection by the Privy Council.[53] In a clear attempt to forestall charges of judicial activism the Chief Justice claimed that this new recognition of native title was 'not a modern revision' but rather was grounded in 'higher authority'.[54] Note that the Australian case of *Mabo* (see below) involved a similar backtracking from the earlier *Milirrpum* decision.

Thus were Maori statutorily disenfranchised with respect to native title. The relevant section was later preserved in s 155[55] of the *Maori Affairs Act 1953* (NZ) and not repealed until the *Maori Land Act 1993* (NZ). Even then the right to claim for wrongful breach of native title was circumscribed by a limitation period of twelve years. This refusal of both the courts and then the legislature to recognise a right to claim native title stands as an extraordinary indictment of New Zealand's colonial institutions,[56] but one not saved by historical context given its enduring

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[49] *Wallis v Solicitor-General* (1903) NZPCC 23, which offered a damning characterisation of the New Zealand superior courts and government.

[50] See, eg, Paul McHugh, *The Maori Magna Carta* (1991) 117–22: after '[t]he Privy Council blasted the Court of Appeal's willing acceptance that Crown administration of the native title was a non-justiciable regal discretion' and characterised it as 'a position 'certainly not flattering to the dignity or the independence of the highest Court in New Zealand' the 'local reaction ...was dramatic ...In ...the only recorded instance of New Zealand judges publicly criticizing the Privy Council ...local legal luminaries gathered in the Court of Appeal buildings in Wellington to deliver a public refutation of the Council's advice'. Other texts put it that 'the colonial judiciary reacted in outrage': Morag McDowell and Duncan Webb, *The New Zealand Legal System: Structures, Processes and Legal Theory* (1995) 197 and that the New Zealand response was 'an unprecedented protest of local bench and bar': Philip Joseph, *Constitutional and Administrative Law in New Zealand*, (1993) 57 (omitted in 2nd edition).

[51] [1963] NZLR 461, 475. For discussion see, for example, Richard Boast 'In Re Ninety Mile Beach Revisited: The Native Land Court and the Foreshore in New Zealand Legal History' (1993) 23 *Victoria University of Wellington Law Review* 145; Hookey, above n 46, 74.

[52] Above n 2 [13] (Elias CJ).

[53] *Nireaha Tamaki v Baker* (1901) NZPCC 23; McHugh, *The Maori Magna Carta*, above n 50.

[54] *Nireaha Tamaki v Baker* (1901) NZPCC 23; McHugh, *The Maori Magna Carta*, above n 50.

[55] Described as 'grossly unjust' by one commentator. F M Brookfield, 'The New Zealand Constitution' , above n 39, 11.

[56] See, eg, a comment by a Professor of Law and former Dean of Law at Auckland University Law School (Brookfield 'The New Zealand Constitution', above n 39, 10):

> [T]he courts cannot be exonerated in their refusal to recognize at common law ...Maori customary rights in respect of land and fisheries ...[there is] no doubt that *since the late 1870's successive New Zealand judges have misunderstood the law ...on the whole they did indeed get it wrong* ...[and] notwithstanding correction by the Privy Council around the turn of the century ...this view has prevailed into our own time ...now little customary land remains'. (emphasis added)

status.[57] It was also, as we have seen in the Waitangi Tribunal report on the proposed foreshore legislation, a serious (if not 'outrageous'[58]) breach of the Treaty of Waitangi.

Note that with respect to non-territorial claims there has been a negotiated resolution with respect to fisheries. The *Te Weehi* case[59] recognised a Maori customary fishing right, the court being empowered to do so by statutory recognition in s 88(2) of the *Fisheries Act* stating that 'nothing in this Act shall affect Maori fishing rights'. The Waitangi Tribunal recognised a commercial component to the customary right and the government responded with a negotiated agreement in the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* (NZ). The Crown financed a Maori share in the fishery in return for Maori agreement to extinguish commercial fishing rights and to forego legal claims to non-commercial fishing rights. The present *Foreshore and Seabed Act 2004* (NZ) takes the settlement into account (for example in s 41 limits to the Maori Land Court jurisdiction).

In summary it seems reasonable to assert that the present legislative response to common law native title issues raised by the *Ngati Apa* decision is in fact consistent with legal history in New Zealand. As a corollary the confusion over the nature of the title, reflected in the clumsiness and probable unworkability of the Bill as it stands, reflects the lack of an evolutionary jurisprudence through which the courts might have articulated a coherent and workable scheme for native title, as for example in Canada.[60] The past returns to haunt. But this is the twenty first century not the nineteenth, and surely there are other means of recourse available to Maori.

VII Human Rights legislation

An issue not yet addressed in the foreshore and seabed debate is the conflict between the legislative reading down of a possible native title — or 'territorial customary right' — and existing anti-discrimination legislation. It is not possible here to canvass the full range of rights arguments that can be brought to bear, but a cursory glance might serve to anticipate some of the problems the foreshore and seabed legislation can be expected to encounter.

By way of introduction it should be noted that New Zealand is a unitary (as opposed to federal) state with a unicameral legislature — the Upper

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[57] Ibid: 'The error carried through from *Wi Parata's* case until 1986 has been the failure of New Zealand judges to understand the common law status of customary rights, despite formal tributes to Chapman J's judgement in *Symond's* case ... '.

[58] Magallanes, above n 35.

[59] *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682.

[60] Henry Reynolds, 'New Frontiers: Australia' in Paul Havemann (ed), *Indigenous Peoples' Rights*, (1999).

House was abolished in 1950. It does not have a written constitution, nor therefore a constitutionally entrenched Bill of Rights. The legislature wields extraordinary power, unconstrained as it is by a division of powers between central and regional governments or a written constitution. As a corollary the courts have not enjoyed the power to declare legislation *ultra vires* a constitution, and have arguably not been a powerful counterbalance (in a separation of powers sense) to the legislature. That institutional relationship might be said to have played out in the area of indigenous people's rights, where we have seen that the Treaty of Waitangi and common law native title have been afforded little protection by the courts in the face of majoritarian legislatures. Thus, New Zealand can be seen as an extreme version of a legislative supremacy model as opposed to models of constitutional supremacy such as the United States and Canada. An attempt to adopt a Canadian style Bill of Rights in 1985 failed, though a Bill of Rights was enacted in 1990 as ordinary legislation.

It is worth noting some fundamental differences in the institutional context in Australia. It too lacks an entrenched Bill of Rights. Most notably it is a federal system with a written constitution articulating a division of powers between the central and regional governments. The High Court of Australia has an original jurisdiction (as specified in s 75 and s 76 of the *Constitution*) enabling it to rule on matters of constitutional interpretation, including conflicting federal and state legislation — indeed that was the issue in *Mabo v State of Queensland (Mabo No 1)* (1988) 166 CLR 186. More importantly, it thereby derives a certain power and legitimacy from its history of (effectively) challenging and often overruling legislatures in this process of judicial review. The same is true of Canada and the United States[61] as federal states. New Zealand courts simply lack that dense history of judicial review and its resulting empowerment of the judiciary itself. Therein may lie one reason for the reluctance of New Zealand courts — so long in the shadow of *Wi Parata* — to recognise a basic minority right to claim native title in the face of an unsympathetic legislature. Indeed there could be no better example than the *Ngati Apa* case itself — a relatively cautious and legally sound decision has provoked, as we have seen, a public furore and the implied rebuke of a legislative override.

Briefly the rights regime in New Zealand might apply in the following way. The *New Zealand Bill of Rights Act 1990* (NZ), according to the preamble, seeks to 'affirm, protect, and promote human rights and fundamental freedoms in New Zealand by underwriting various civil and political rights'. It applies to governmental and public bodies. It is ordinary (if not subordinate) legislation whose application is constrained in various ways, but most particularly by s4 which preserves parliamentary sovereignty by subordinating the Bill of Rights to any other inconsistent legislation. It is in other words a very weak Bill of Rights compared to, for example,

[61] The elevated role of judicial review was of course an outcome of Chief Justice Marshall's judgement in *Marbury v Madison* (1803) 5 US 137 (Cranch).

constitutionally entrenched Bills in America and Canada. Its application is further confused by s 5 (setting 'reasonable limits' on the rights) and s6 (requiring the adoption of meanings which are consistent with the Bill of Rights).[62] Finally s 7 requires that the Attorney-General bring to the attention of the legislature any inconsistency between a proposed Bill and the Bill of Rights, the point being to ensure that the legislature is aware of any inconsistency and as well to (presumably) make governments accountable for any breach.

Section 19 of the Bill of Rights incorporates the right to freedom from discrimination under the *Human Rights Act 1993* (NZ). That Act in turn enumerates various prohibited grounds of discrimination in s 21, including s 21(f) 'race'. The proposed legislation limiting native title before any judicial determination would seem fairly clearly to fall within the category of discrimination on the grounds of race — only Maori are being denied the right to litigate whatever the full measure of native title rights might be. In any event s 65 of the *Human Rights Act 1993* (NZ) makes indirect discrimination unlawful — that is to say where the *effect* of the practice constitutes discrimination, as it surely must here.

If that is the case the Crown may still argue under s 5 of the Bill of Rights that it is a 'justified limitation' or, in the wording of the provision, a reasonable limit 'prescribed by law as can be demonstrably justified in a free and democratic society'. The section is taken directly from s1 of the Canadian Charter of Rights and Freedoms, and the relevant test is taken in turn from the Canadian case of *R v Oakes*.[63] The *Oakes* test requires that the legislation serves important objectives — questionable here on many grounds, not least that the scope of the rights in question and therefore their impact on the population at large have yet to be determined. As well the means used to achieve the objective must be rational and proportional to the objective. Again, it is surely difficult to rationalise the legislative override of a property right that has not yet been shown to exist, far less to show that extinguishment was a justifiable and proportionate response. From both a political and legal perspective the government should surely have waited for the courts to tease out the meaning of customary title — and particularly the possibility of exclusive use and occupation which so vexes the public and therefore politicians — before taking a blunt instrument to a chimera. To put it mildly, s 5 arguments would seem difficult to support.

Another government response, at least on the rule of law question, might be that the legislation does not inhibit Maori access to the courts — indeed it specifically provides for it — but merely 're-defines' the content of the rights to be asserted, that is to say by excluding rights of exclusive use and occupation (defined as 'territorial customary rights' in s 28 of

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[62] For a full discussion of the application of ss 4–6 see, for example, Philip Joseph, *Constitutional and Administrative Law* (2nd ed, 2001) 1033–48.

[63] (1986) 26 DLR (4th) 200 (SCC).

the Act) should they be available. On the other hand that would seem to amount to an expropriation of a property right — one that in this case approaches fee simple — and would call for appropriate compensation. Yet that is not provided for in the Act — rather s 29 only provides for a High Court ruling that 'territorial customary rights' would have existed had the Crown not asserted ownership, and then provides for the ruling to go to the Attorney-General and Minister of Maori Affairs for *'discussions* ...to consider the nature and extent of any *redress* that the Crown *may* give' (emphasis added). Property rights are not specifically protected in the Bill of Rights, but they (together with the right to just compensation) may well constitute a norm of international law and in any event are probably protected in New Zealand by the common law.[64]

If the above reading is correct in asserting a rather obvious and surely serious breach of the Bill of Rights then the Attorney-General is required under s 7 to report the inconsistency to Parliament upon the introduction of the Bill. There are, however, ways around this. One would be to introduce an inconsistent provision at committee stage, that is to say after the Bill has been introduced.[65] A second option is for the Attorney-General to obtain legal advice as to whether a s 5 'justified limitation' argument applies — if so, such as to avoid a *prima facie* infringement, then no s 7 notification is required. Finally the Bill may simply proceed notwithstanding a *prima facie* infringement, as happened with four of five such infractions between 1990 and 1999 — the implication being that s 7 has not been an effective deterrent with respect to breaches of the Bill of Rights.[66] In any event the passage of any piece of legislation that conflicts with the Bill of Rights is of course assured by s 4 of the Bill of Rights itself, specifically subordinating it to any other inconsistent legislation. In short, the Bill of Rights will not prove fatal to the proposed legislation.

There is another option available to Maori under the *Human Rights Amendment Act 2001* (NZ). Recall that the original *Human Rights Act 1993* (NZ) forbade discrimination on the grounds of 'race' in s 21 (g), and if necessary Maori might also invoke the prohibition on indirect discrimination in s 65. The *Human Rights Act 1993* (NZ) anti-discrimination provisions are incorporated into the Bill of Rights in s 19(1). A *prima facie* finding of discrimination under the *Human Rights Amendment Act 2001* will be subject to the s 5 test from the Bill of Rights Act — if it satisfies that (*Oakes*) test then it will not constitute discrimination,[67] the rationale being that government at least must have some discretion in policy making. If a complainant can establish discrimination under the *Human Rights Act*

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64 See Philip Joseph, 'The Environment, Property Rights, and Public Choice Theory' (2003) 20 *New Zealand Universities Law Review* 408, 422–3.

65 This happened on one occasion with respect to the introduction of a retrospective criminal penalty in violation of s 25(g) Bill of Rights — see *R v Poumako* [2000] 2 NZLR 695.

66 See, eg, *R v Oakes* (1986) 26 DLR (4th) 200 (SCC), 1048–54.

67 See P Joseph 'Constitutional Law Update' (2003) *New Zealand Law Review*, Part III 408, 410–12.

1993 (NZ) there is a process by which the Human Rights Commission can provide mediation services which, if unsuccessful, can lead to civil proceedings before the Human Rights Review Tribunal. The Tribunal can grant various forms of relief, including a declaration of inconsistency. In response to such a declaration the relevant Minister must table a response in Parliament within 120 days. However, that will not repudiate the legislation as s4 of the Bill of Rights itself preserves inconsistent legislation — rather the motivation is one of accountability. Of course to even reach this stage assumes that the government has not been successful in its s 5 'justified limitations' defence to a *prima facie* inconsistency.

Again, there is no fatal constraint in these arguments to the proposed legislation, merely the threat of political accountability and embarrassment.

VIII Comparative Perspectives

A comprehensive review of the treatment of native title in other jurisdictions is beyond the scope of this paper, but a few comments might be appropriate.

Anyone sympathetic to the aspirations of indigenous peoples, at least those grounded in law, would no doubt cast a yearning glance toward Canada. The modern jurisprudence on native title arguably began there with the 1973 case of *Calder,* and there has subsequently been a rich vein of jurisprudence on both common law native title and treaty law.[68] Even more significantly was the inclusion of aboriginal and treaty rights in s 35 of the *Constitution Act 1982* (NZ), thus affording them substantial protection from the whims of passing majoritarian legislatures. New Zealand has not chosen to follow suit.

In respect of native title at least, it might be more useful to make reference to the Australian experience — there were no treaties signed there, but the aboriginal people have had some success in claiming native title in the courts.

From the beginning, British settlers in Australia were not instructed to treat with the aborigines, nor obtain their consent, in asserting sovereignty and possession of the continent. From 1788 the land was claimed not by conquest, cession or purchase but under the doctrine of *terra nullius* — that is to say, the principle that the lands were simply uninhabited,[69] notwithstanding the clear presence of an aboriginal population. Under

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[68] For example, modern cases recognising and articulating the nature of common law aboriginal title include *Calder v AG of BC* [1973] SCR 313; *Guerin v The Queen* [1984] 2 SCR 335; *R. v Sparrow* [1990] 1 SCR 1075; *R v Van Der Peet* [1996] 137 DLR (4th) 289; *Delgamuukw v The Queen* [1998] 153 DLR (4th) 193. Modern treaty interpretation has similarly been given an expansive treatment by the Supreme Court of Canada —see, eg, *R.v Sioui* [1990] 1 SCR 1025.

[69] See, eg, Reynolds, above n 60, 129–31.

this legal fiction native title could not of course be asserted since there was no holder of the claim. In any event jurisdiction over aborigines was exclusively vested in the states, whose interests were most inimical to them, rather than the federal government. Traditional lands were simply taken without consent or compensation. The federal government obtained a concurrent jurisdiction in 1967 via a constitutional amendment.

The principle of *terra nullius* was upheld in the first modern land rights claim — the *Milirrpum* case in 1971,[70] brought in the federally administered Northern Territory rather than a state. The judge in that case held that the 'doctrine of communal native title' had never formed part of the law of Australia.[71] In that he was said by the Supreme Court of Canada to be 'wholly wrong as the mass of authorities ... establishes'.[72]

It was more than twenty years before the next decision on native title in the *Mabo* case. The claimants sought to enforce common law rights to traditional lands. The state of Queensland enacted legislation to extinguish such claims. The High Court ruled that the legislation was discriminatory under the *Racial Discrimination Act 1975* (Cth) as denying the claimants equality before the law[73] — an interesting portent for the New Zealand *Foreshore and Seabed Act 2004* but for the subordinate status of the *New Zealand Bill of Rights Act 1990* (see above). (That is to say the New Zealand *Foreshore and Seabed Act 2004* (NZ)would be unconstitutional in this Australian context.) The Queensland legislation was sufficient on its face to extinguish native title were it not for the conflict with federal anti-discrimination legislation. But the question remained as to whether there was in fact still an unextinguished native title. The High Court ruled that there was in *Mabo No 2*.[74] Thus ended two centuries of denial of common law native title. The judgement was not, however, wholly sympathetic to aboriginal claims in that it did not recognise requirements of consent and compensation on extinguishment.[75] But it did finally recognise common law native title and the requirement that those claiming it be accorded equality before the law (at least since the *Racial Discrimination Act 1975* (Cth)). It is the lack of this latter protection that allows the discriminatory New Zealand legislation to stand.

The status of native title in Australia was further strengthened in *Wik v State of Queensland*[76] wherein it was held that it could co-exist with a

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70 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (NTSC).

71 Ibid.

72 See above n 21, 409, quoting Hall J in the Canadian case of *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145. Note that the judge in *Milirrpum* unfortunately placed significant reliance on the lower (British Columbia) Court of Appeal decision in *Calder* which was subsequently unanimously overturned by the Supreme Court of Canada on the question of common law native title.

73 *Mabo v State of Queensland (Mabo No 1)* (1988) 166 CLR 186.

74 *Mabo v State of Queensland (Mabo No 2)* (1992) 107 ALR 1.

75 See, eg, Richard Bartlett 'Native Title in Australia: Denial, Recognition, and Dispossession' in Paul Havemann (ed), *Indigenous Peoples' Rights* (1999) 413.

76 (1996) 187 CLR 1.

pastoral lease, and it was affirmed as having equal status with other rights and interests at common law in that extinguishment required a clear and plain legislative intent.[77]

The Australian situation is thus superficially similar to New Zealand. Common law native title claims were historically rejected but later accepted by the courts, seemingly filling a vacuum left by majoritarian legislatures (federal and state). In the case of New Zealand, however, the courts' historical rejection of native title was, as we have seen, impliedly overruled by the Privy Council at the beginning of the twentieth century. The New Zealand legislature responded with a specific legislative override of the Privy Council — an extraordinary response not replicated elsewhere. Of course nothing of the kind was required in Australia, there being no historical threat of successful native title claims. It is noteworthy, however, that in Canada, Australia and now New Zealand the courts have been a catalyst for the recognition of native title claims in the face of majoritarian settler legislatures.

But the contemporary response to *Mabo* in Australia resonates with that of the non-indigenous majority in New Zealand in the *Ngati Apa* case — that is to say, an expressed willingness to override the newly empowered indigenous claimants with majoritarian legislation 'in the interests of all Australians'.[78] The irony of course is that such cries for 'equal treatment' distort the very principle of equal treatment before the law upon which the native title claims themselves are based. They amount to a denial of equal treatment of legal rights for a particular group of claimants by virtue of their indigeneity — a breathtaking hypocrisy that one hopes is grounded in ignorance of the nature of native title and the rule of law rather than racism, though its effect is the same.

Post-*Mabo* legislatures in Australia have shown a willingness to at least compromise the rights[79] by validating past grants before 1994 — that is to say, including those between 1975 and 1994 that contravened the findings in *Mabo*. No consideration was given to backdating the *Racial Discrimination Act 1975* (Cth) to provide a retroactive equality before the law prior to 1975. Native title holders have only a limited right under the federal *Native Title Act 1993* (Cth) ('NTA') to negotiate with respect to

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[77] See above, n 21, 415. With regard to the evolving characterisation of native title by the Australian courts see, eg, James Cockayne 'Members of the Yorta Yorta Aboriginal Community v Victoria Indigenous and Colonial Traditions in Native Title' (2001) 25 *Melbourne University Law Review* 786; Lisa Strelein 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95. Regarding the difficulty of establishing proof of title see Richard Bartlett 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta' (2003) 31 *University of Western Australia Law Review* 35.

[78] See above, n 21, 417, quoting the Premiers of the states of Victoria and Western Australia.

[79] See generally above n 21, 418–26 and broadly speaking 408: '[the Australian] ...High Court is prepared to extend equality before the law to traditional landowners, but ...the settler society of Australia, through the state and Commonwealth Parliaments, only accepts such decisions marginally and with the greatest reluctance'.

future grants over their lands, and not even that for off-shore grants.[80] Similarly the National Native Title Tribunal, established under the Act to hear claims in a more informal mediation context, has not proven sympathetic to aboriginal claimants.[81]

Further narrowing of the common law native title in Australia has come from both the legislature in amendments to the NTA and the High Court in a trilogy of decisions (see below). The federal *Native Title Amendment Act 1998* (Cth) followed the High Court decision in *Wik*, which had raised the possibility of native title existing across vast areas of Australia. The effect of the amendments, which were rejected by aboriginal peoples, was to further limit possible native title claims and diminish the legal status of native title itself — described by one commentator as 'a substantial, complex and *specific* disapplication of the protection of the *Racial Discrimination Act 1975* (Cth)' (original emphasis).[82]

The High Court of Australia has also seen fit to limit the scope of native title in a trilogy of cases (*Ward*[83], *Wilson v Anderson*[84] and *Yorta Yorta*[85]) which emphasise the primacy of the NTA at the expense of the common law native title originally articulated in *Mabo* and *Wik*, and seemingly deferred to in the original 1993 legislation.[86] In that sense the *Mabo* decision may now appear to be a false dawn for aboriginal aspirations, or to mix the metaphor a little by quoting aboriginal leader Noel Pearson, 'ten years in the sunshine of the Rule of Law was all that black Australians were fated to enjoy'. Nonetheless *Mabo* did provide a critical catalyst for subsequent negotiated agreements although the urgency to conclude them as a risk-management tool by industry and state governments may now be diminished.[87] But the High Court did at least animate a new era in the relationship between aborigines and settlers.

If the Australian experience is to be seen as a cautionary tale for New Zealand Maori it would be in this sense — that common law native title, always vulnerable to legislative intrusion, is likely to be more so when 'codified' into legislation as with the NTA. That is a second-order risk with the current *Foreshore and Seabed Act 2004* (NZ). The primary effect is of course the refusal of the New Zealand government to even permit Maori their day in court at least with respect to 'territorial customary rights'. Recall that *Ngati Apa* merely raised (somewhat sceptically) the possibility and not the fact of a native title in the foreshore and seabed. Whatever its scope may have been we are unlikely to know as future determinations

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80 See above, n 21, 421 for discussion.
81 Above, n 21, 422–3.
82 Richard Bartlett, *Native Title in Australia* (2000) 53.
83 *Western Australia v Ward* (2002) 213 CLR 1.
84 *Wilson v Anderson* (2002) 213 CLR 401.
85 *Yorta Yorta v Victoria* (2002) 214 CLR 422.
86 For a more extensive discussion see Maureen Tehan 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' [2003] *Melbourne University Law Review* 523, 556–63.
87 See, eg, above n 87, 564–71.

will have to be made in the context of the legislation. Even the Australian aborigines had their day in court, most notably in *Mabo* and *Wik*, before the recent legislative intrusions. Not so in New Zealand.

Finally and more pointedly for present purposes the Australian High Court found in *Yarmirr*[88] that a non-exclusive title could exist in the seas and seabeds, including fishing for personal, domestic or non-commercial community needs but subject to, for example, rights of navigation and innocent passage. The court observed that the NTA was a starting point for any enquiry but that it was to be seen as supplementing the common law.[89] Note however that the court did not rule on the foreshore, nor did it acknowledge anything like the exclusive use and occupancy which so preoccupies the New Zealand legislature. Oddly the New Zealand Court of Appeal made no mention of *Yarmirr* in its *Ngati Apa* judgement.

IX Conclusion

In *Ngati Apa* we see an example, rare in New Zealand but characteristic of appellate courts in Canada and Australia, of the judiciary empowering indigenous peoples. The government's legislative response, however, is peculiar to New Zealand but consistent with its history in refusing to acknowledge the full entitlement of common law native title.

The legislative extinguishment of what are called 'territorial customary rights', effectively without compensation and without a full judicial exploration of what the rights might be, is surely a breach of the rule of law and certainly of the Treaty of Waitangi, as well as being inconsistent with anti-discrimination legislation. None of these breaches need prove fatal, however, since there is no constitutional protection of such rights in New Zealand. It is a paradigmatic example of the importance of constitutional protection of minority (and individual) rights in liberal democracies, particularly one at the extreme of legislative supremacy such as New Zealand. It is a salutary example of the tyranny of the majority.

Finally, if the Australian experience is indicative, the creation of a legislative regime of common law rights may well lead to a narrowing of even non-territorial customary rights as the courts become increasingly deferential to the legislature. There is arguably an accelerated version of the Australian experience.

[88] *Commonwealth v Yarmirr* (2001) 208 CLR 1.