Aboriginal servitudes and the Land Transfer Act 1952

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The thesis of this article is that there exist two systems of land tenure in New Zealand as a matter of law, each independent of the other. In consequence, "aboriginal servitudes" (fishing rights, homage to urupa — burial grounds — flora collection, etc.) continue to affect land throughout the country, irrespective of the indefeasibility of title under the Land Transfer Act. The doctrine of aboriginal title is taken to its logical extent, albeit novel and judicially untested.

I. INTRODUCTION

The doctrine of aboriginal title has revised the prevailing approach towards the legal status of Maori rights under the Treaty of Waitangi. Under the received orthodoxy adopted by New Zealand courts since the late nineteenth century, any Maori claims to their traditional land, forests and fisheries (that is traditional property rights) subsequent to British annexation are treated as having no legal basis absent statutory recognition. This "statute-based approach", as it has become termed, is challenged by the doctrine of aboriginal title, the name given to the corpus of constitutional principles governing the status of tribal property rights upon annexation of their territory by the British Crown. The doctrine of aboriginal title turns the received approach on its head: the Common Law recognised the (modified) continuity of tribal property rights upon British annexation, it is found, and so one must screen statutes not for the recognition but (express) extinguishment of such traditional rights.[1]

The implications of the Common Law doctrine of aboriginal title for Maori claims are immense. Were New Zealand courts to follow the Canadian precedents it would mean that statutes such as the Fisheries Act 1983, the Coal Mines Act

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1 The writer first argued the applicability of the doctrine to New Zealand in "The Treaty of Waitangi — a judicial myth revisited" (1981) and "The Legal and Constitutional Position of Maori Customary Land from 1840 to 1865" in *Maori Land Laws of New Zealand* (University of Saskatchewan Native Law Centre, Saskatoon, 1983). These accounts are unsophisticated. More recently and in greater detail, see "Aboriginal Title in New Zealand Courts" (1984) 2 Canta L.R. 235; "The legal status of Maori fishing rights in tidal waters" (1984) 14 V.U.W.L.R. 247; "Aboriginal rights and sovereignty — Commonwealth developments" [1986] N.Z.L.J. 57. This article should be read in conjunction with these later articles.

1979, the various planning statutes as well as the Land Transfer Act 1952, to name but a few of the statutes enacted on the implicit acceptance of the fallacious "statute-based approach", would now be read subject to the doctrine of aboriginal title.

In part the process has already begun. The doctrine has recently been pleaded before the High Court[2] in defence to a prosecution under the Fisheries Act 1983 drafted in such a manner as not to affect "Maori fishing rights".[3] The doctrine may in the future be used as a basis for actions in tort against miscreant grantees of water discharge rights under the Water and Soil Conservation Act. More generally, it has given Maori claims at large the constitutional basis they previously lacked.[4]

This paper is intended as a further step in the process by which local statutes are assessed in terms of their relationship to the Common Law doctrine of aboriginal title. Previous assessments have looked at the consequences of the doctrine for tidal and navigable land, the legal title to which is vested in the Crown.[5] This article progresses onto a consideration of the effect of the doctrine upon the regime of private land ownership in New Zealand. To what extent do the remaining incidents of traditional tenure, of which fishing, flora collection and homage to urupa (burial grounds) are important examples, fit, if at all, into New Zealand's system of private land ownership? This system has been largely constructed by statute and upon the Torrens system of registration and indefeasibility of title.

A. The Survival of Customary Land Tenure

Maori evidence before the Waitangi Tribunal's hearing of the Kaituna River claim made it plain that the traditional system of land use and tenure remains practiced throughout the country, albeit necessarily modified by the one and a half centuries of European contact.[6] Apart from the customary law applicable on the marae, the most important examples put before the Waitangi Tribunal were the traditional fishing rights exercised along tribal rivers, the flora collection rights practised both for tohunga (medicinal) and decorative purposes, and the ancient burial sites (urupa) tended and honoured as sacred (tapu) by the tribe. The Maori evidence relating to these rights before the Waitangi Tribunal established certain points crucial to the proof of an aboriginal title.

2 *Department of Agriculture and Fisheries* v. *Te Weehi,* heard 17 April 1986 in the High Court, Christchurch. (Since this article was written, Williamson J. has given judgment and quashed a conviction for possessing undersized paua, on the basis that the appellant was exercising a customary Maori fishing right. See *Tom Te Weehi* v. *Regional Fisheries Officer* (unreported, Christchurch Registry, M. 662/85, 19 August 1986). Editor.)

3 The Fisheries Act 1984, section 88(3).

4 It has been used, for example, by Chief Judge E. T. J. Durie of the Maori Land Court "Part II and cl. 26 of the Draft New Zealand Bill of Rights" in *A Bill of Rights for New Zealand* (Legal Research Foundation, Auckland, 1985) and his opening address to the Seminar on a Bill of Rights for New Zealand, 10 May 1985.

5 "The legal status of Maori fishing rights in tidal water", supra n.1.

6 *Finding of the Waitangi Tribunal on the Kaituna Claim* (1984).

First, the evidence of the elders (kaumatua) made it clear that these traditional rights are governed by customary law. For instance, fish can be harvested only at certain times of the year and the collection of certain herbs and selection of flax for the traditional decorations honouring ancestors are limited to certain persons of appropriate status. Secondly, the exercise of these rights is limited to the tribal territory. A Maori collecting flora or fauna within the territory of his ancestors (that is, territory of the sub-tribe or hapu) will usually consider himself to be exercising an ancestral right. Evidence before the Tribunal disclosed the existence of customary rules regarding the extraterritorial exercise of a fishing right by members of the same tribe in the territory of a neighbouring hapu.[7] No evidence was presented, however, on the question of the customary law affecting the exercise of such rights by a member of an alien tribe in the territory of another. The limitation of these traditional rights to tribal territory and the vesting of the stewardship in the local hapu is, of course, a manifestation of the first feature already noted of such practice, namely, the continued regulation by customary law. Thirdly, and this again is but a further function of regulation by customary law, such practices are exercised solely for traditional (that is to say, Maori) purposes. For example the medicinal herbs will be used by the tohunga, fish and puha (native watercress) will be distributed amongst the members of the hapu, particularly the elderly and infirm unable to collect the kai (food) for themselves and family, delicacies will be saved (often thanks to the modern invention of the freezer) for important occasions such as hui (formal meetings),[8] tangi (funerals) or weddings. There is no question of any of the traditional rights being claimed for commercial exploitation or extra-tribal reasons. Fourthly, the Ngati Pikiao insisted and the Tribunal agreeing with them found that these traditional rights continue to be executed within the traditional territory (especially along and upon the Kaituna River) irrespective of the ownership of the land defined by Pakeha (European) law.[9] Despite this attitude, the Ngati Pikiao observe wherever possible the civilities of the Pakeha world: permits are (begrudingly) obtained from fishery officials and farmers' permission obtained for the search upon their land for the traditional flora and fish. Such steps, it was insisted, are taken merely in the interests of non-confrontation and do not legitimate the exercise of the right. To the Ngati Pikiao way of thinking, and this is plainly one shared with Maoridom at large, the traditional right derives its legitimacy not from Pakeha permission but from ancestral ownership and usage.

B. Aboriginal Servitudes

These remnants of the traditional use and occupation of tribal territory are to be termed "aboriginal servitudes". The term "servitudes" is used to indicate that the claim made by the Maori people to the legal recognition of these ancestral rights is not to be treated as synonymous with a claim to an exclusive title over the land in question. It is used to indicate the survival of some incidents of a

7 Evidence of Mr. W. Vercoe, Secretary of the Arawa Maori Trust Board, 24 July 1984.
8 Guests of the Ngati Pikiao were treated to various Kaimoana (seafood) delicacies during the lunch recesses of the Kaituna River hearing on the marae.
9 First finding of the Tribunal, supra n.6.

bygone right of exclusive use and occupation. The term "aboriginal" is used as a crucial means of identifying the source of such claims. In legal usage, the term "aboriginal" is associated with the claim by indigenous tribal societies to rights deriving from the tribal use and occupation of ancestral lands since pre-European times.[10] The claims of the New Zealand Maori, of which those of the Ngati Pikiao over the Kaituna River and the Waikato-Tainui confederation over the Manukau Harbour[11] may be taken as representative, to the legal recognition of their traditional tenure over tribal territory (at least so much of that tenure as remains) would appear to be an aboriginal claim par excellence.

The first purpose of this paper is to investigate the extent to which the Common Law doctrine of aboriginal title might accommodate such claims. Secondly and having found this recognition to exist, this article investigates the extent to which the recognition is affected by the regime of private land ownership in New Zealand. The conclusion reached is that aboriginal servitudes continue to exist at law as unextinguished incidents of the Maori's aboriginal title over New Zealand. These servitudes are unaffected by and not subject to the Land Transfer Act 1952.[12] Even if these servitudes are subject to the Act, some may well qualify as "omitted easements" which under section 62(b) of the Act bind the title of the registered proprietor.

II. THE DOCTRINE OF ABORIGINAL TITLE

A. Two Independent Self-contained Systems of Land Tenure

The applicability of the doctrine of aboriginal title to the New Zealand setting has been established elsewhere — however some preliminary clarification of it is necessary.

The basis of the doctrine is that the Crown acquired sovereignty over New Zealand, expressed in feudal terms blending imperium (the right to govern) and dominium (the Crown's position as paramount owner of all land within the colony). This dominium, irrespective of the Common Law mode of acquisition of the colony, was taken subject to pre-existing traditional property rights enjoyed by tribal peoples.[13] This aboriginal title comprised all the traditional incidents of the land so that rights of hunting, fishing and flora collection were as equally protected as rights over ground in actual occupation or cultivation. This aboriginal title is usually expressed as some burden or qualification upon the Crown's ultimate

10 For instance, Hall J. in *Calder* v. *Attorney-General (British Columbia)* (1973) 34 D.L.R. (3d) 145 (S.C.C.), 173 refers to the aboriginal title "the Indians possess as occupants of land from time immemorial".

11 *Finding of the Waitangi Tribunal on the Manukau Claim* (19 July 1985).

12 The Land Transfer Act 1952.

13 "Aboriginal title in New Zealand courts", supra n.1.

title to land within its colonies.[14] The cases recognise that this Common Law title can be extinguished bilaterally through voluntary sale or cession by the aboriginal owners, or unilaterally through the passage of expropriatory legislation.[15] The Crown enjoyed the sole capacity to silence the native title, this was its pre-emptive right, but held no prerogative power to extinguish that title unilaterally.[16] The power to make a partial but unilateral extinguishment of the Maori's aboriginal title was conferred by section 84 of the Native Land Act 1909 and its 1931 and 1953 successors.[17]

This leaves the Treaty of Waitangi in a very simple position: it was no more than declaratory of rules which would have applied in any event. This was obvious to New Zealand lawyers during the 1840s. In *R* v. *Symonds* (1847), Chapman J. observed that "in solemnly guaranteeing the native title, and in securing what is called the Crown's pre-emptive right, the Treaty of Waitangi . . . does not assert anything new or unsettled".[18] Unfortunately, this view was not shared some years later. Rudimentarily mixing feudal with Austinian legal theory, local judges from the late nineteenth century saw all property rights as deriving from some notional grant by a sovereign.[19] Since Maori society lacked sovereignty, it lacked property rights upon British annexation. This is the (flawed) equation underlying the "statute-based approach" which is contradicted by the doctrine of aboriginal title.

Aboriginal title is usually formulated as some form of burden upon the legal title to land. A grant of the legal title to land by the Crown is taken subject to the pre-existing aboriginal title.[20] The aboriginal title binds all land ownership ab initio.

14 The classic formulation of aboriginal title is that of a "personal and usufructuary" right burdening the Crown's title to land which upon extinguishment of the Indian title becomes a *plenum dominium: St. Catherines Milling and Lumber Co.* v. *The Queen* (1888) 14 A.C. 46, 54-55, 59, aff'd *A-G Quebec* v. *A-G Canada* [1921] A.C. 401, 410-11 (the *Star Chrome* case), but note Haldane's warning in *Amodu Tijani* v. *The Secretary, Southern Rhodesia* [1919] A.C. 211, 233-35 against rendering the aboriginal title into English law equivalents. The *sui generis* character of aboriginal title is affirmed in *The Queen* v. *Guerin* [1983] 2 F.C. 656, 143 D.L.R. (3d) 416 (F.C.A.), [1984] S.C.R. 335, 13 D.L.R. (4th) 321 (S.C.C.).

15 *R.* v. *Symonds* (1847), [1840-1932] N.Z.P.C.C. 387 (S.C.), at 388; *Nireaha Tamaki* v. *Baker* (1900-01), [1840-1932] N.Z.P.C.C. 371; *A-G (British Columbia)* v. *Calder,* supra n.10, 208 per Hall J.; *The Queen* v. *Guerin* [1984] S.C.R. 335 (S.C.C.).

16 Supra n.15. A neglected New Zealand authority is *Re Application by Ripi Wi Hongi and other Natives for Investigation of Title to Omapere Lake,* Judgment of Native Land Court, Judge F.O.V. Acheson, 1 August 1929 (hereinafter *Omapere Lake*) at 11. (The writer is grateful to Mr. Paul Temm Q.C. for supplying a copy of this judgment).

17 Discussed, supra n.1, 250.

18 Supra n.15.

19 "Aboriginal title in New Zealand courts", supra n.1.

20 *Fletcher* v. *Peck* (1810) 6 Cranch 87 (U.S.S.C.); *Johnson and Graham's Lesee* v. *M'Intosh* (1823) 8 Wheat 543 (U.S.S.C.), 574; *Clark* v. *Smith* (1839) 13 Pet 195; *Beecherby* v. *Wetherby* (1877) U.S. 517; *Cramer* v. *United States* (1923) 261 U.S. 219 approved per Hall J. in *Calder,* supra n.10, 200-01; the grant of title from the federal to provincial governments was taken subject to the unextinguished aboriginal title: *St. Catherine's Milling,* supra, n.14 (P.C.) and per Strong J. (1887), 13 S.C.R. 577, 602-38; *Calder,* supra n.10, 376 and 378-9 per Hall J. And see Viscount Haldane in *Amodu Tijani,* supra n.14,, 409-10: the aboriginal title reduces any radical right in the sovereign (such as the power to make grants of land) "to comparatively limited rights of administrative interference".

Most recently, this aboriginal burden on the legal title has been identified as placing some sort of fiduciary obligation upon the Crown.[21] The precise extent to which this fiduciary duty affects successors in title to the Crown grantee awaits judicial analysis, nonetheless it is clear that those taking direct from the Crown a title to land subject to an unextinguished aboriginal title take it subject to the latter. In other words, the grant from the Crown does not extinguish the aboriginal title.[22]

In many respects the formulation of aboriginal title as a unique kind of burden upon the legal title to land is deceptive. It is a useful analogy where the land is held by the Crown or its immediate grantee but the analogy becomes strained when one considers the position of successors in title to the Crown and first grantee. Is the aboriginal title some form of equitable ownership subject to the doctrine of notice or is it a legal interest binding successors in title irrespective of notice? Such an inquiry turning on the fine points of English law's classification of property rights not only has an air of unreality to it as far as the aboriginal claimants are concerned but it makes the fundamental mistake of incorporating the doctrine of aboriginal title into the traditional concepts of English property law. This is a tendency against which the courts have warned.[23]

The doctrine of aboriginal title is not a means by which tribal property rights are assimilated into English law but a means by which that law recognises those rights. This distinction is axiomatic to the Common Law doctrine and is apparent from the first principles of the doctrine: When the Crown acquired new territory, the Common Law presumed the continuity of local property rights under the established, local tenure. Thus, the seigneurial system of tenure in Quebec[24] and the Roman-Dutch system in Cape Colony[25] were not disrupted by the Crown's sovereignty over these regions. French and Dutch law continued to regulate the acquisition and transmission of property rights in the respective regions and English people resident or coming to live in such lands took title to land according to these local rules. This continuity was well and good in territory where the tenurial

21 *Guerin* v. *The Queen* [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, aff'd *Kruger* v. *The Queen* (1985) 17 D.L.R. (4th) 591 (F.C.A.). See Hurley "*Guerin* v. *The Queen:* The Crown's Fiduciary Duty" (1985) 30 McGill L.J. 559.

22 This must be qualified as a result of section 158 of the Maori Affairs Act which provides, in effect, that a Crown grant extinguishes the territorial aboriginal title. This does not affect the non-territorial aboriginal title. Below text accompanying notes 36-40.

23 *Amodu Tijani* per Viscount Haldane, supra n.14.

24 The Royal Proclamation of 1763, R.S.C. 1952, VI, p.6127 suspended French law in Quebec but the French civil law was restored in 1774 by the British North America (Quebec) Act 1774. As to the recognition of seigneurial tenure, see *Labrador Company* v. *R.* [1893] A.C. 104 (P.C.).

25 The continuity of Roman-Dutch law in Cape Colony was recognised by the Cape Articles of Capitulation 18 January 1806 and royal charters of Justice of 1827 and 1832. Generally, see Lee *An Introduction to Roman-Dutch Law* (5 ed, Clarendon Press, Oxford, 1953) 9-10; Hahlo and Kahn *The Union of South Africa, The Development of its Laws and Constitution* (Stevens, London, 1960) 36-38. An example is *R.* v. *Harrison* [1922] S.A.L.R. (App. D.) 320, 330 per Innes C.J. Roman-Dutch law was also applied in the courts of the British colonies of Ceylon (Proclamation 23 September 1799) and British Guiana (articles of capitulation of Essequibo and Demerara 18 September 1803 and letters patent 4 March 1831).

system was one under which all the local population might transact comfortably. However, the unqualified continuity of tribal laws of tenure was clearly impossible in North America and New Zealand in the face of large-scale European settlement for this would have meant the native laws of tenure would govern the acquisition and transmission of title. This conundrum was only notional, however, and was avoided through what became known in the New Zealand context as the Crown's pre-emptive right. This right, which was recognised in the second article of the Treaty of Waitangi, was and remains the gate between the two systems of tenure — Maori and English. The rule is that tribal tenure continued after British annexation but any non-Maori person claiming title to land must establish it through a grant from the Crown. The Crown recognised the traditional tenure of the tribal occupants and the customary law regulating it but limited this tenure to the indigenous owners. In this sense, one can talk of a principle of "modified continuity"[26] underlying the doctrine of aboriginal title: the native title continues subsequent to British annexation (absent any act of state suspending the tenure during the assumption of sovereignty which, in New Zealand's case, plainly there was not) but its continuity is modified by its inalienability to anyone save the Crown and its grantees. On the other hand, so far as the English population was concerned, their land ownership was to be governed by the traditional doctrine of tenures requiring a grant from the Crown. Thus the acquisition of territorial sovereignty by the Crown over tribal territory resulted in the formation of a dual system of land tenure, the one aboriginal based on tribal use and occupation of ancestral land, the other feudal and based upon English law applying to the land titles alienated from the Crown. The aboriginal system of tenure could be extinguished in one of two ways; these being either the passage of legislation or the voluntary relinquishment by the native owners of their title over a particular region.

An aboriginal title is, therefore, independent of a title from the Crown — it is Crown-recognised (as were the tenurial systems of Quebec, Cape Colony and the many other territories acquired by the Crown in which the local system of land-holding continued after British sovereignty[27]) but it is not Crown-derived. Thus any alienation of land from the Crown in such territory is, on general principles, subject to the maxim *nemo dat quod non habet* — the title of the grantee is in the words of the Crown's grants of extensive tracts of the New World, only as good as "that which wee by oure lettres patent maie or cann grante".[28] If the land alienated from the Crown is subject to an unextinguished aboriginal title that land will be held by two systems of tenure, one aboriginal, the other Crown-derived. So far as the Crown grantee's relationship with the aborginal tenure is concerned, the Crown grant simply operates as the assignment of the Crown's pre-emptive right to obtain Maori agreement to the relinquishment of the traditional title.

26 The term belongs to B. Slattery *Judicial Perspectives of Aboriginal Title* (University of Saskatchewan Native Law Centre, Saskatoon, 1983).

27 Many such examples are given in M. B. Hooker *Legal Pluralism An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press, Oxford,, 1975) ch.II, III and VI.

28 These charters are referred to in "Maori fishing rights and the North American Indian", supra n.1, n.41.

Thus, when it is said that the aboriginal title is a burden upon the legal ownership of land alienated from or held by the Crown, this is only to say that the land is subject to a dual system of tenure. It follows that this aboriginal title is not affected by changes in the ownership of the land resulting from the machinations of the English system. Such changes in legal ownership merely describe the person presently entitled to exercise the pre-emptive right. Given this independence and duality of tenure, each a self-contained set of rules separate from the other save where they meet in the exercise of the pre-emptive right, it is misleading to analyse aboriginal title solely as though it were a species of equitable right. It is not. It is an independent system of tenure recognised by the Crown and its courts, the extinguishment of which requires legislation or the voluntary relinquishment by the traditional owners to the appropriate person (abandonment excepted).

Aboriginal title can be considered a form of legal pluralism. The tribal ownership of the traditional land, even in its residual form, comprises a servient system of tenure accommodated within the dominant legal culture by the common law doctrine of aboriginal title.[29]

B. The Form of Aboriginal Title

An aboriginal title comprises all the traditional incidents of tenure. Such incidents are important proof of the title. In North America, hunting and fishing rights have long been recognised as evidence and part of an aboriginal title.[30] Thus, the exercise by tribe members of the aboriginal servitude(s) will be both the proof and part of the content of the aboriginal title.

The aboriginal servitudes practised by the Maori might constitute either a territorial or non-territorial aboriginal title.[31] A territorial aboriginal title is a claim to ancestral rights of use and occupation of such a character as to amount to a claim to the exclusive ownership of the land. It is a title which is so comprehensive in the enjoyment and exercise as to leave little or no possibility of any

29 Hooker *Legal Pluralism,* supra n.27, ch.I discusses the jurisprudential aspect of legal pluralism, however his discussion of its applicability to the indigenous (tribal) societies of North America and Australia (ch.VI) is more descriptive than analytical.

30 Generally, "Maori fishing rights and the North American Indian", supra n.1.

31 The Canadian cases have always recognised a distinction between a territorial and non-territorial aboriginal title (consider, for instance, *R* v. *Sikyea* (1964) 43 D.L.R. (2d) 150, 152 per Johnson J.A., and generally "Maori fishing rights and the North American Indian"). Recently they have been required to amplify their recognition of the latter and are moving to the position that an aboriginal hunting and/or fishing right is an aboriginal profit á prendre: *Dick* v. *R.* [1986] 1 W.W.R. 1 (S.C.C.), 7 per Beetz J. referring to K. Lysyk "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513, 518-19 and A. Jordan "Government, Two - Indians, One" (1978) 16 Osg. Hall L.J. 709, 719; *Bolton* v. *Forest Management* (1985) 21 D.L.R. (4th) 242, aboriginal profit á prendre supporting an action in private nuisance; *Palmer* v. *Nova Scotia Forest Industries* (1983) 2 D.L.R. (4th) 397 (N.S.S.C.), a proven non-territorial aboriginal title (not established in this case) may be entitled to protection by injunction (at 489). Generally on the distinction between the two forms of aboriginal title "Maori fishing rights in tidal water", supra n.1.

title derived from the Crown becoming vested in non-traditional owners.[32] It will be seen that the statutory regime governing "customary land" is the means by which the Crown has created by legislation a crucial contact point between this fulmost form of aboriginal title and English law concepts of land tenure. The statutory provisions concerning customary land provide a means by which the territorial aboriginal title is partially transformed into a title derived from the Crown.

A non-territorial aboriginal title will arise in circumstances where the aboriginal claimants are precluded from asserting the fullest form of title to the land which, nonetheless, remains subjects to some traditional right. The aboriginal servitudes with which this paper is concerned fall into this category of non-territorial rights. Essentially, the non-territorial form of aboriginal title arises when residual traditional incidents continue to be exercised over certain land, despite the preclusion of any claim to the larger territorial title. These residual rights would normally comprise part of the territorial title but may have become severed from it in one of several ways, each of which will be considered presently.

C. The Holders of the Aboriginal Title

Since aboriginal title is an independent system of land tenure recognised by but not derived from the Crown, those persons entitled to participate in the traditional tenure are identified by reference to Maori customary law. To the extent that the rights will be vested in the tribe and tribal custodians (hapu) it is possible to speak of the quasi-corporate status of the tribe. Nonetheless it is important to recall that the aboriginal system of land tenure is independent to, albeit concurrent with, the English Crown-derived system and so the temptation to jump the tracks from the customary to the English system must be avoided. Most especially, one must not attempt to take the equation of aboriginal title with a fiduciary obligation or burden upon the land to the extent of applying the equitable rules concerning the certainty of the class entitled in equity[33] to the identification of the aboriginal owners. Such fallacious cross-fertilisation could be used as a basis upon which the scope of the aboriginal right might be severely restricted if not totally undermined.

The identification of the persons entitled to exercise the aboriginal servitude must be made by reference to Maori customary law. This process of identification will involve the presentation of the appropriate evidence of the custom and those who might exercise it. In everyday situations, that is in the field where farmers and fisheries' officials are confronted with Maoris claiming to exercise an aboriginal right, the problem will not usually be fraught with the problems of identification voiced by departmental officers during the Waitangi Tribunal's

32 The Maori Land Court has long treated a claim to "customary title" as a claim to the exclusive use and ownership, that is the territorial aboriginal title, for instance *The Kauwaeranga Judgment* (3 December 1870) by Chief Judge Fenton, reprinted in (1984) 14 V.U.W.L.R. 227; *Omapere Lake,* supra n.16.

33 Generally Baker and Langan (eds.) *Snell's Principles of Equity* (28 ed., Sweet & Maxwell, London, 1982) 117-18.

hearing of the Ngati Pikiao claim regarding the Kaituna River. Generally speaking, local landowners and fisheries officials have become familiar with the Maoris who exercise such traditional rights and by experience are able to differentiate "local" from "non-local" Maoris. Since the concept of aboriginal title discussed in this paper would extend only to the former persons who will be members of the local hapu, it is suggested the practical problems of administration of the aboriginal servitudes will in reality be minimal. This argument is simply an argument for the legal recognition of an existing state of affairs, the enjoyment of the traditional incidents of tribal tenure by Maoris in their ancestral region, rather than a basis upon which all farm gates, rivers and creeks would be opened to Maoridom at large.

D. The Judicial Assessment of Maori Customary Law

Faced with a claim to an aboriginal title, it is apparent New Zealand courts will needs have to inquire into the character of tribal customary law since those rules breathe life into and determine the character of the (territorial and non-territorial) aboriginal title. This task, it is suggested, is a straightforward matter of judicial inquiry. The doctrine of aboriginal title, to take the words of the Privy Council in *Nireaha Tamaki* v. *Baker*, "plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them in evidence".[34]

Should New Zealand courts of ordinary jurisdiction feel some diffidence over an inquiry into the character of customary law, it can be noted that section 50 of the Maori Affairs Act 1953 gives courts of superior jurisdiction an opportunity to state a case for the Maori Appellate Court wherein the appropriate expertise for such an inquiry may be found.[35] This section allows a case to be stated if "any question of fact or of Maori custom or usage relating to the interests of Maoris in any land or in any personal property arises in the High Court". This jurisdiction to assess the customary law would apply to both the non-territorial and territorial forms of aboriginal title. Nonetheless the Maori Appellate Court's power to answer a case stated on questions of customary law should not be confused with the Maori Courts' powers under Part XIV of the Maori Affairs Act which, it will be seen, are limited to questions of territorial aboriginal title.

III. THE PARTIAL AND COMPLETE EXTINGUISHMENT OF ABORIGINAL TITLE

It has been seen that aboriginal title has two points of contact with the English system of land tenure: these being, first, where the title has been voluntarily extinguished and, secondly, where it has been affected by legislation. Such contact is capable of producing either the partial or complete extinguishment of the aboriginal title.

34 Supra, n.15, 382.

35 The oldest function of the Maori (formerly Native) Land Court has been to transform customary into freehold title throughout ascertainment of the traditional owners according to Maori custom. The judicial approach to customary law is epitomised by N. Smith *Native Custom and Law Affecting Land* (Maori Purposes Fund Board, Wellington, 1942).

A partial extinguishment will occur where a territorial title has been reduced to a non-territorial title. This means that whilst certain incidents of the traditional system of tenure might remain over the land in question, the aboriginal owners are precluded from laying claim to the exclusive use and occupation of the land in question. The severance of the traditional incidents of title from the right to exclusive use and occupation, the transformation of a territorial to a non-territorial aboriginal title, might occur in one of three ways.

A. Transformation of Maori Customary into Maori Freehold Land

Historically the function of the Maori Land Court has been to transform the Maori's Crown-recognised aboriginal title into a Crown-derived title under English law principles of tenure. This transformation of tenure was accomplished through the Court's investigation of the traditional title subsequent to which a freehold order and eventual Crown grant in favour of the tribal "owners" would eventuate. The land would then change status from "customary" to "Maori freehold" land.[36] The New Zealand courts have acted on the basis that the customary title recognised by Part XIV of the Maori Affairs Act and its predecessors encompassed all the traditional incidents of use and occupation and have ruled that upon the grant of a freehold order the traditional tenure becomes completely assimilated into the English format of land ownership. Thereafter the traditional owners hold no rights in relation to the ancestral land, apart from those held by non-Maoris.[37]

This supposition is flawed in two respects.

First, it completely overlooks any doctrine of aboriginal title and applies the statute-based approach. Since the customary title is the only form of statutorily-recognised aboriginal title, the orthodox approach of the courts runs, they can only recognise traditional incidents attached to a subsisting, statutorily-created "customary title". Once this title disappears, the reasoning concludes, so does the possibility of any non-European incidents of ownership. This reasoning is fallacious in that it supposes Maori rights to traditional land must rest solely upon statutory (as opposed to Common Law) recognition.

Secondly, if one looks at the terms in which the statutes have constructed this "customary title" it is plain that the statutory "title" comprehends something less than the complete system of traditional tenure in that it does not accommodate important aspects of the Common Law aboriginal title. Part XIV of the Maori Affairs Act, the present statutory formulation of customary title and in substance unchanged from its 1909 and 1931 predecessors, indicates that "customary title" deals with the title to traditional land rather than the identification and enumeration of the incidents attaching to that title. This is clearly seen in section 161 which defines the jurisdiction of the Court to make freehold orders in respect of "customary land":

36 Maori Affairs Act 1953, section 162.

37 *Inspector of Fisheries* v. *Ihaia Weepu* [1956] N.Z.L.R. 920; *Keepa* v. *Inspector of Fisheries* [1965] N.Z.L.R. 322 (S.C.); *In re the Ninety Mile Beach* [1963] N.Z.L.R. 461 (C.A.).

"1. The Court shall have exclusive jurisdiction to investigate the title to customary land, and to determine the relative interests of the owners thereof.

2. Every title to and interest in customary land shall be determined according to the ancient customs and usages of the Maori people, as far as the same can be ascertained.

3. On any investigation of title and determination of relative interests under this section the Court shall make an order (in this Act called a freehold order) defining the area so dealt with, naming the persons found entitled thereto, and specifying their relative interests in the land".

This section makes it plain that Part XIV is concerned with identification of the traditional ownership of the land and specification of the relative shares of the tribal owners inter se. No allowance is made for the freehold order to contain a description of the incidents of the native title. In other words, Part XIV provides the machinery for the ascertainment of legal title to traditional land without providing for the specification of the tribal incidents of that title. Since the doctrine of aboriginal title recognises both the title itself and the traditional incidents of Maori land tenure, it would follow that the rules of customary title defined and regulated by Part XIV do not encompass all of the Maori's aboriginal title. Part XIV must be read in tandem with rather than as a statutory supplanter of the Common Law title.

The transformation of a customary into Maori freehold title under Part XIV precludes any claim to a territorial aboriginal title. However, in failing to accommodate thoroughly the Common Law's recognition of all the traditional incidents of tribal title, the change of status of itself produces at best the partial extinguishment of the Common Law aboriginal title. The Act's machinery to bring the traditional tenure into the English Crown-derived system is incomplete and the traditional incidents survive as a non-territorial aboriginal title.

It is theoretically possible for the aboriginal title to be wholly incorporated into the English system where the freehold order of the Maori Land Court includes a comprehensive enumeration of the traditional incidents.[38] It appears, however, that the general practice of the Court in making freehold orders has been to exclude the traditional incidents from the order. This practice would confirm the view that Part XIV is limited to questions of titular ownership. Moreover, it would appear that the Court has no general jurisdiction to make orders recognising a subsisting aboriginal servitude. The Maori Land Court's jurisdiction under section 30(1)(a) to "hear and determine as between Maoris any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any *right, title, estate, or interest in any such land* or in the proceeds of the alienation thereof" would appear to be limited to Maori claims under the Pakeha system of tenure (that is, disputes concerning the titular ownership).[39] Moreover it would be strange if the

38 The Waitangi Tribunal, *Manukau Report,* supra n.11, 51 refers to the inclusion of a customary fishing right in a freehold order and subsequent Crown grant which was subsequently lost as a result of the Manukau Harbour Control Act 1911 vesting tidal land in the Harbour Board. With respect, it is submitted this conclusion is incomplete: the customary rights over the shell-banks would subsist as a non-territorial aboriginal title, and thus "encumber" the Harbour Board's legal title.

Court were to have the power under its general jurisdiction to make an order in recognition of aboriginal servitudes not given to it under Part XIV.

It should be mentioned that the owners of this Common Law non-territorial aboriginal title (in other words, those entitled to the enjoyment of the aboriginal servitudes over Maori freehold land) must be distinguished from the owners of the Maori freehold land. Although the owners of the statutorily-fixed Maori freehold title will be drawn from the tribal group, it is probable, especially given the imperfect and rudimentary way in which the Maori Land Court transformed the traditional ownership into ownership of Maori freehold land,[40] that the persons entitled to the benefit of an aboriginal servitude will comprise a larger class than the owner of the Maori freehold title. This re-emphasises the independence of the two systems of tenure: Maori freehold title providing rights within a Pakeha system of tenure, the subsisting aboriginal title giving rights drawn from customary law.

B. The Statutory Vesting of Titles

Aboriginal servitudes may become severed from a territorial aboriginal title through the passage of legislation precluding a claim to a territorial title. This statutory demotion of aboriginal title to non-territorial status may occur in one of two ways.

First, it will arise in situations where the legal title to certain land has been statutorily fixed, thus precluding any viable claim to territorial title over such land. A good example of this is the land subjacent to tidal and navigable rivers, the legal title to which is statutorily vested in the Crown. The statutes declare the title to be vested in the Crown but make no disruption of private rights over that land. Hence, it has been argued elsewhere, these statutes demote to non-territorial status but do not extinguish any aboriginal title subsisting over tidal land.[41]

Secondly, land alienated from the Crown not being Maori freehold land and being granted without the express saving of a subsisting aboriginal title cannot be subject to a territorial aboriginal title. Section 158 of the Maori Affairs Act 1953 provides that no Crown grant, Crown lease, or other alienation from the Crown shall "in any Court or in any proceedings be questioned or invalidated by reason of the fact that the customary title to that land has not been duly extinguished". This means that a territorial title, that is a claim to "customary title", cannot be set up against a Crown grant nor can it be pleaded in any other way against the Crown. This does not, however, affect the claim to a non-territorial aboriginal title. As commented earlier, Part XIV of the Maori Affairs Act is a statutory severance of the Common Law aboriginal title into two distinct forms — the territorial and non-territorial.

39 Emphasis added. But were such jurisdiction to exist, the court's order would be registrable against the land irrespective of its status as Maori or general land: section 36, Maori Affairs Act 1953.

40 "Constitutional and Legal Position", supra n.1, 31-33.

41 "Maori fishing rights in tidal waters", supra n.1.

C. The Voluntary Sale or Cession of Aboriginal Title

In many if not most cases, the land subject to an aboriginal servitude will have been sold or ceded by Maoris. It is necessary, first, to be sure of the title the Maori owners have purported to sell. If it is the title under the Pakeha tenure of Maori freehold land, it will not follow at all that the non-territorial aboriginal title thereover has also been relinquished. As has been noted, the owners of the aboriginal servitudes comprising the non-territorial title enjoying rights under a tenure defined by customary law will be a class separate and therefore not synonymous with the owners of Maori freehold land. The capacity of the latter to make a cession of aboriginal title according to Maori customary law must be open to considerable doubt. In short, the alienation of Maori freehold land and the alienation of (any form of) aboriginal title are separate transactions governed by different codes.

Since most alienations of Maori land will have been of Maori freehold land (it was, after all, a device to facilitate the sale of Maori-owned land), it follows that in theory a large portion of New Zealand will remain subject to an unextinguished non-territorial aboriginal title, that is aboriginal servitudes. Whether or not the non-territorial aboriginal title over a particular block has been relinquished by sale, cession or abandonment will in each case require proof as to the tribes' transactions with the Crown and Crown grantees of that land. Most typically, however, the land in question will have gone from Maori customary to Maori freehold and, by alienation, general land.[42] Each of these stages involve transactions under the Pakeha system of tenure devised by statute and based upon the Crown-derived principle of English tenure. Given the exclusion of non-territorial aboriginal title from this system, in principle much land within New Zealand may remain subject to unextinguished aboriginal servitudes.

Where, however, the sale or cession of the land in question was made in relation to the aboriginal rather than Pakeha title, a court will be required to investigate whether the sale or cession by the traditional owners extinguished *all* incidents of the aboriginal title. Two preliminary comments can be made upon judicial approaches to transactions involving the relinquishment of an aboriginal title.

First, the New Zealand courts have refused in the past to interpret such transactions, considering them "acts of state" beyond the judicial purview. This approach is crucially flawed in that it mistakes the Crown's prerogative power in foreign relations with the exclusive right to silence aboriginal title (the pre-emptive right). Since the Crown can make no "act of state" against its own subjects, one wonders how post-annexation sales or sessions of aboriginal title can be so characterised.[43] The Canadian courts have not treated such transactions similarly but have considered such transactions as unique types of contract (the term "treaty" used in Canada is, in this sense, a misnomer) between Crown and indigenous subject.[44]

42 Until the Maori Purposes Act 1975, section 16 known as "European land", which (Maori Affairs Act 1953, section 2) is all land in New Zealand other than customary and Maori freehold land.

43 "Aboriginal title in New Zealand Courts", supra, n.1, 245-263.

44 "Maori Fishing Rights and the North American Indian", supra n.1, 74-82.

Secondly, one must remember that though such transactions are one of the (two) meeting points of the two systems of tenure, they are not assessed strictly in terms of rules drawn from the English law of contracts for the sale of land.[45] The courts do not, for example, imply covenants by the tribal owners as to their title nor do they presume a tribal intention to part with the fullest title they enjoy. These are presumptions applicable to the sale of land under English law which have never been applied to transactions involving the relinquishment of an aboriginal title.

The earliest and leading guideline for the interpretation of the sale or cession of an aboriginal title is that such transactions "must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians".[46] This approach emanates from the relative inequality of bargaining position of the aboriginal owners. The evidence must show "a clear and plain intention"[47] that the aboriginal owners relinquishing their title intended to forego all their traditional rights. A recent example of the judicial approach to such transactions may be seen in the Canadian case *R* v. *Taylor* (1981).[48] This case involved the interpretation of an Indian treaty (Treaty 20 of 1918) which did not contain an express exception[49] of fishing and hunting rights from the aboriginal title being ceded. The oral negotiations had led the Chippewa Indians to believe, however, that they were preserved by the Treaty. This belief was supported by minutes of a tribal council meeting preceding and immediately following the signing of the Treaty, as well as the continued exercise of the traditional hunting and fishing practices. Moreover, the Indians had trusted the Crown's negotiator and so had taken as a guarantee of their traditional hunting and fishing rights the noncommittal statement that the "rivers are open to all and you have equal right to fish and hunt on them". The Ontario Court of Appeal held that a review of such treaties, that is agreements between tribal owners and the Crown by which the tribal title is surrendered, must have regard not only to the written text but the surrounding circumstances of its conclusion and inter-

45 *Town of Hay River* v. *The Queen* [1980] 1 F.C. (T.O.) 262, 265; *Pawis* v. *R* (1979) 102 D.L.R. (3d) 602 (F.C.T.D.); *R* v. *Taylor* (1981) 62 C.C.C. (2d) 227 (Ont. C.A.); *Attorney-General (Ontario)* v. *The Queen* (1984) 15 D.L.R. (4th) 321 (Ont. H.C.); *R* v. *White and Bob* (1965) 50 D.L.R. (2d) 613 (B.C.C.A.); *R.* v. *Cooper* (1969) 1 D.L.R. (3d) 113 (B.C.S.C.); *R* v. *Johnston* (1966) 56 D.L.R. (2d) (749 (Sask. C.A.). Generally, Cumming and Mickenberg *Native Rights In Canada* (2 ed, General Pub. Cor., Toronto, 1972) 61-62.

46 *Johnson* v. *M'Intosh,* supra n.20.

47 *Lipan Apache* v. *United States* (1967) 180 Ct. Cl 487, 492.

48 Supra n.44.

49 The term "exception" is used in contradistinction (one often overlooked) to the term "reservation". An "exception" excepts something out of that which is granted and is actually in existence at the time of the grant. Thus an exception is not included in the grant (*Doe d. Douglas* v. *Lock* (1835) 2 A. & E. 705). A "reservation" creates a new benefit, that is, acts as a reservation of a thing *not* in existence at the time of the grant. Thus a reservation consists of a grant and re-grant. In many transactions using the term "reservation" an "exception" is often intended — the courts will investigate what meaning is appropriate: generally *Farran Emmett on Title* (Oyez Longman, London, 18 ed., 1983) 490-491 and cases therein cited.

pretation by the Indian signatories. Any ambiguity is to be interpreted in order to uphold the honour of the Crown and the rights of the signatory tribe.

In some instances the exception of the traditional fishing rights will be expressly identified in the agreement by which the aboriginal title is relinquished. The best local examples are the agreements which have found some recognition in statute. One would be the abandonment of the claim to the bed of Lake Taupo, subject to the right of the Tuwharetoa tribe to fish and hunt for their own use the indigenous fish of the lake.[50] Similarly, the Ngati Tarawhai and Ngati Pikiao hapu of the Arawa tribe have ceded traditional land in the Rotorua subject to a right of access to their urupa.[51] In the past, New Zealand courts have termed such cessions of the aboriginal title to the Crown "acts of state" and, absent statutory recognition, have refused to enforce them. The Canadian case law indicates the Crown may be liable in contract for the breach of such agreements (questions of limitations aside). This may also be the case in New Zealand since Part XIV only inhibits the enforcement of a customary title against the Crown. It does not restrain an action in contract against the Crown (subject to the doctrine of executive necessity and/or any statutory authorisation) for breach of an agreement with the tribe ceding its aboriginal title.

In any event, and *R* v. *Taylor* illustrates the proposition perfectly, many purported sales of tribal title will be made on the basis of an exception of certain traditional incidents of title, such as homage to urupa and the collection of fish and flora. The best evidence of this will be the continued exercise of these rights by tribe members irrespective of the titular ownership (by Pakeha law) of the land. The finding by the Waitangi Tribunal upon the Ngati Pikiao claim that this evidence exists in relation to the Kaituna River provides an important preliminary point from which a (non-territorial) aboriginal title along the river may be proven.[52]

Where it can be shown that the aboriginal owners of a particular territory have not by sale, cession or abandonment relinquished their non-territorial aboriginal title over that land, the aboriginal servitudes will be unaffected by transactions in relation to the Pakeha or Crown-derived title. These transactions merely identify the person presently holding the pre-emptive right to silence the title. Where no voluntary relinquishment of the aboriginal title has been made, the issue becomes whether there has been a legislative extinguishment of the title. It has been seen that the transformation of aboriginal land from customary to Maori freehold land partially extinguishes the aboriginal title to the extent it reduces it to non-territorial status. Thus Maori freehold land remains subject to the aboriginal servitudes subsisting as remnants of traditional tenure. A more crucial question, because nearly all land in New Zealand is subject to this regime including most Maori freehold land, is presented by the Land Transfer Act which governs the country's Crown-derived system of title to land. Does this statutorily constructed regime extinguish

50 Maori Land Amendment and Maori Land Claims Adjustment Act 1926, No. 64, section 14.
51 Maori Purposes Act 1959, No. 90, section 3.
52 Supra n.9.

any non-territorial aboriginal servitudes over land subject to its provisions?

D. The Effect of the Land Transfer Act 1952

1. *The legislative extinguishment of aboriginal title*

The rules regarding the legislative extinguishment of aboriginal title have grown up in North America where there is a long tradition of the judicial screening of statutes to assess their effect upon a subsisting aboriginal title. The American position has been to treat congressional legislation similarly to executive transactions (that is, federal treaties containing a cession of the aboriginal title) in relation to the tribal title. The American courts require a "clear and plain indication" that Congress has intended to extinguish the tribal title.[53] This requirement of express extinguishment has been adopted by the Supreme Court of Canada in the *Calder*[54] and strong implication from the *Guerin* judgments.[55] Although some cases have insisted that extinguishment may arise from "necessary"[56] implication, this finding is incompatible with the status of aboriginal title as a Crown-recognised property right. The requirement of express expropriation, for that is what the legislative extinguishment of an aboriginal title will be, treats the property rights of indigenous peoples under their customary law "as sacred as the fee simple of the whites",[57] to use a venerated American turn of phrase. To most Maori the loss of traditional property rights will be no less an injury than the loss by a European person of his own property right. The requirement of express extinguishment acknowledges this fact.

This is not to exclude altogether the possibility that legislation may affect the aboriginal title without express reference. Here, however, one has to draw a distinction, and at times it may be a thin line, between legislation imposing some regulation or "negative prohibition" upon the enjoyment of property rights and that which is confiscatory in character.[58] One should bear in mind Wright J.'s dictum in *France Fenwick* v. *The King*:[59]

> I think that the [rule of compensation for the expropriation of property rights] can only apply . . . to a case where property is actually taken possession of, or used by, the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the state.

53 *Lipan Apache,* supra n.47; *Choate* v. *Trapp* (1912) 224 U.S. 665; *United States* v. *Santa Fe Pacific Railroad Company* (1941) 314 U.S. 339.

54 Supra n.10, 208-9 per Hall J.

55 Supra n.21. Also *R.* v. *Kruger,* supra n.21, and see Hurley, supra 6.21, 592-95.

56 *Calder,* supra n.10, 167 per Judson J.; *Baker Lake* v. *Minister of Indian Affairs and Northern Development* [1980] 1 F.C. 518; *Macmillan Bloedel* v. *Mullin* [1985] 2 W.W.R. 722, 740; *Attorney-General (Ontario)* v. *Bear Island Foundation* (1984) 15 D.L.R. 4th) 321 (Ont. H.C.).

57 *Mitchel* v. *United States* (1935) 34 U.S. (9 Pet.) 711, 746.

58 For instance, *Kruger and Manuel* v. *R* [1978] 104, 109. Also *The Queen* v. *Tener* (1985) 17 D.L.R. (4th) 1 (S.C.C.): the absolute denial of a right to exercise a profit á prendre will be expropriation.

59 [1927] 1 K.B. 458, 467.

2. *The Land Transfer Act — two approaches*

Most of the rural land over which some aboriginal servitude might be claimed will have become subject to the Land Transfer Act 1952. This Act regulates New Zealand's Torrens system of land ownership and is founded upon the concept of indefeasibility of title. The indefeasibility of title of a registered proprietor, although not expressly termed such by the Act, is embodied in section 62 of the Act. This important section stipulates that the registered proprietor of land or of any estate or interest in land under the provisions of the Act shall hold the same subject only to such encumbrances, liens, estates or interests as may be notified on the register but absolutely free from all other encumbrances, liens, estates, or interests whatsoever.

It should be noted by way of an important aside that the Act simply holds the title of the registered proprietor is not affected by the unregistered encumbrances. Even if an aboriginal servitude cannot be enforced against a registered proprietor, a moot point to which we return, it might still be used as a basis for an action in tort against some neighbouring or adjoining landowner whose activity is deleteriously affecting the traditional right. In other words, the non-territorial aboriginal title will be enforceable against all save the registered proprietor. At their least favourable to the tribe holding an aboriginal servitude, sections 62 and 182 may be considered as similar to section 155 of the Maori Affairs Act which provides that a customary (that is a territorial aboriginal) title cannot be pleaded against the Crown. Both sets of provisions do not extinguish the aboriginal title so much as limit the classes of persons against whom it may be pleaded.

It is, of course, distinctly possible that the registered proprietor holds his land subject to a non-territorial aboriginal title, notwithstanding the indefeasibility of title provisions of the Land Transfer Act. This may result from one or two approaches to the relationship between the Land Transfer Act and aboriginal title. These approaches suppose either that the Act does not touch the Common Law aboriginal title or, alternatively, that the Act does have some effect upon the Common Law doctrine.

(a) *Limitation of the Land Transfer Act to Pakeha tenure*

It was stressed earlier that the tribal and Pakeha systems of tenure are two independent, self-contained regimes, the former governed by customary law, the latter by Pakeha rules, the contact point of the two being statutory intrusion and the common law doctrine of aborignal title. Given the essential independence of the two regimes, it may be that the Land Transfer Act is limited to claims in relation to land which arise from rules of the Pakeha system of tenure. The Act constantly speaks of "estates" and "interests" in land — terminology which one associates with the Crown-derived system of tenure. The Act was certainly enacted on what can now be seen to have been the fallacious basis that the only system of land tenure in the country was Crown-derived. The Act provides for the recognition and regulation of rights under the one system of tenure: it stipulates that a certificate of title has effect in lieu of a Crown grant.[60]

60 The Land Transfer Act 1952, section 12.

If the Land Transfer Act is so limited to regulation of the Crown-derived title, this would mean that Maori claims arising from a non-territorial aboriginal title are not affected by the indefeasibility of title provisions. The servitudes surviving as an aboriginal title must be extinguished by voluntary relinquishment or express legislation. The status of registered proprietor merely puts that person in the place of a Crown grantee to whom has developed the Crown's pre-emptive right to obtain the traditional owners' relinquishment of the right. In short, the land of the registered proprietor is subject to two, separate regimes of tenure, one Crown-derived and governed by the Land Transfer Act and the other Crown-recognised and governed by the common law rules of aboriginal title. The aboriginal title, and not the permission of the owner under the Pakeha system of tenure, gives the authority for the exercise of the traditional servitude and so would protect the tribe member from an action in trespass by the registered proprietor.

(b) *The subjection of aboriginal title to the Land Transfer Act*

Suppose, however, that the indefeasibility of title provisions of the Land Transfer Act affect both the Crown-derived and Crown-recognised systems of tenure, a theoretical starting point tending toward the position that aboriginal title can be extinguished by implication of statute. In order that a subsisting non-territorial aboriginal title might be enforced against a registered proprietor, it must fall within one of the exceptions to the principle of infeasibility recognised by the Act.

(1) It is thoroughly established that a registered proprietor who holds the land upon trust cannot plead his title is indefeasible as against in personam claims.[61] In *Tataurangi Tairuakena* v. *Mua Carr* Skerret C.J. observed that the "Provisions of the Land Transfer Act as to indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations under trusts created by him or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his interest".[62]

It has been seen that a non-territorial aboriginal title (as indeed a territorial) aboriginal title runs with the land as a right in rem, to use English legal terminology, until voluntarily or legislatively extinguished but being an unregistered interest may not bind a registered proprietor. The election by a registered proprietor to recognise any aboriginal servitudes over his land may, however, place him in a fiduciary position vis-à-vis these rights and so expose him to the inpersonam exceptions to indefeasibility of title. In other words, a registered proprietor may chose not to rely upon the indefeasibility of his title recognised by the Land Transfer Act so far as any subsisting aboriginal servitudes over his land are concerned. It is, however, quite unclear what would constitute sufficient election. In the case of Maori freehold land, it might not be straining the concept of fiduciary duty to find that tribal connection between those individuals holding the Maori freehold title and those enjoying the tribal aboriginal title was sufficient basis. The problem, however, is much more complicated where the person holding the legal title to the

61 *Frazer* v. *Walker* [1967] 1 A.C. 569.
62 [1927] N.Z.L.R. 688, 702 (C.A.). Generally Hinde, McMorland and Sim *Land Law* (Butterworth, Wellington, 1978), I, para. 2.104.

land has no tribal affiliations from which an in personam exception to indefeasibility of title might be inferred. In such cases what will be sufficient proof of the assumption by the landowner of such a duty? Must there be a history of past and regular, if passive acquiescence or is some express and perhaps written recognition of the aboriginal right required? The passive recognition of the exercise of aboriginal rights upon the land will give rise, at least, to a bare licence but how, if at all, might this licence become irrevocable and binding upon the registered proprietor in personam? Since aboriginal title is a form of tenure recognised at Common Law, it may even be that permission to enter the land to exercise the traditional right gives rise to a licence coupled with a recognised interest in land. Such a licence is irrevocable.[63]

Such questions relating to the in personam exceptions to indefeasibility of title under the Land Transfer Act will need judicial determination if the position is taken, incorrectly it is believed, that the Land Transfer Act affects all tenures within the country, Crown-derived and Crown-recognised.

(2) It is possible that certain aboriginal servitudes may be classified as an "omitted easement", against which the title of the registered proprietor is not indefeasible by section 62(b) of the Land Transfer Act. It has been noted that it "has always been clear that easements created by deed or *otherwise existing at common law over the servient land prior to its being brought under the Land Transfer Act* falls within the scope of section 62(b)".[64] In *Inspector of Fisheries* v. *Ihaia Weepu,* F. B. Adams J. indicated that a traditional Maori fishing right could not be an "omitted easement" since this right had no existence at Common Law.[65] Quite apart from the inaccurate association of a fishing right with an easement (it will be a profit à prendre), this approach neglects the doctrine of aboriginal title. Adopt the doctrine and Adams' objections disappear for he ruled that a traditional fishing right based solely on the Treaty of Waitangi could not fall under section 62(b). Aboriginal title, it has been seen, is recognised by but not derived from the Treaty of Waitangi.

Given that aboriginal servitudes exist as part of a Common Law aboriginal title and presupposing that the Land Transfer Act covers all forms of tenure, one is left with the exercise of placing these incidents of traditional tenure into the English law categories of easement or profit à prendre. There is, of course, an air of artificiality about such an exercise and it seems farcical that the enforceability of an aboriginal servitude should turn upon such grounds. It is necessary, however, given the present supposition as to the wide ambit of the Land Transfer Act. A profit à prendre has been described as a right to take something off another person's land.[66] However, not all such rights will be profits for "the thing taken must be either part of the land, e.g. minerals or crops, or the wild animals existing on it; and the thing taken must at the time of taking be susceptible to ownership".[67] The traditional

63 Mcgarry and Wade *The Law of Real Property* (5 ed., Stevens & Sons, London, 1984) 800-01.
64 Hinde, McMorland and Sim, supra n.62, 2.080. Emphasis added.
65 Supra n.37, 926.
66 *Duke of Sutherland* v. *Heathcote* [1982] 1 Ch.475, 484.
67 Megarry and Wade, supra n.63, 850.

right to fish and collect flora will be a profit à prendre and hence incapable of being an omitted easement. An easement is a right to enter and use the land of another in a particular way "without any right to the possession of the land or to take any part of the soil or its produce".[68] In New Zealand an easement can exist in gross[69] so a dominant tenement is not required as at Common Law.[70] Examples of traditional rights apt to classification as an easement will be the right to come onto the land to pay homage to urupa and the right to traverse the land to exercise an aboriginal profit à prendre on adjacent land, the title to which is in the Crown. In the main this nearby land will be subjacent to tidal or navigable water so that a right to cross coastal farmland to get to traditional sea fisheries, for example, will be an omitted easement within section 62(b) and hence capable of registration against the title of the registered proprietor.

(3) An aboriginal title is not a prescriptive right because it is a right over land arising prior rather than subsequent to the alienation of the land from the Crown.[71] An aboriginal title subsists over the land from the moment of the Crown's sovereignty over the territory. It derives its status from tribal use and occupation according to the customary rules of tenure practised since pre-European times. It is not a right acquired after annexation through the prescriptive use of the land in a manner adverse to the rights of the person holding legal title.

(c) *The registrability of aboriginal servitudes*

An aboriginal servitude subsisting as an unextinguished non-territorial aboriginal title enjoys no right of registration against the certificate of title of the land over which it runs unless it can be shown to be an omitted easement under section 62(b) of the Land Transfer Act. This non-registrability is in many ways logical if one limits (correctly, it is submitted) the Land Transfer Act to the registration of encumbrances arising from the Crown-derived system of land tenure. If, however, one takes (incorrectly, it is submitted) the position that the Land Transfer Act governs encumbrances over land under both the Crown-derived (Pakeha) and Crown-recognised (Maori) systems of tenure, the shortcoming is a serious failure to accommodate such rights. Thought should be given by Parliament to the amendment of the Act so as to make the title of the registered proprietor subject to these subsisting traditional incidents of Maori tenure. This registrability could be achieved by grant of a special jurisdiction to the Maori Land Court to investigate claims to aboriginal servitiudes and to make appropriate orders which the District Land Registrar would be obliged to follow. In any event, the failure of the Land Transfer Act to incorporate any positive recognition of aboriginal servitudes (regardless of whether the Act protects a registered proprietor from the servitudes or not) is one which would probably sustain a complaint to the Waitangi Tribunal.[72] This might

68 Hinde, McMorland and Sim, supra n.62, para.6.002.
69 Property Law Act 1952, section 122.
70 *Rangeley v. Midland Failway* (1968) 3 Ch.App. 306, 310; *Hawkins* v. *Rutter* [1892] 1 Q.B. 668; Megarry and Wade, supra n.63, 835.
71 *Calder,* supra n.15, 174 per Hall J.
72 Being an Act "for the time being in force" under section 6(1)(a), The Treaty of Waitangi Act 1975, No. 114.

be the best way of ensuring an eventual parliamentary response.

IV. CONCLUSION

There are two systems of land tenure within this country each self-contained and governed by their own rules. The Maori system of tenure is recognised by the Common Law doctrine of aboriginal title. Aboriginal servitudes governed according to customary law subsist throughout the country. This system of tribal tenure can be extinguished only by voluntary relinquishment by the traditional owners (sale, cession or abandonment) or by legislation. The Land Transfer Act does not affect this system of tenure but simply makes provision for another independent system of tenure styled on the Crown-derived (feudal) basis of English land law (as modified by the Torrens principle). Accordingly, the title of a registered proprietor is indefeasible against other claims and rights arising within the Pakeha Crown-derived system of tenure but this system co-exists with the Maori one and so the registered proprietor's title is concurrent with the Maori tenure. Even if one supposes that the Land Transfer Act covers both systems of tenure, a supposition which this paper has laboured to reject, certain aboriginal servitudes may be enforceable and registrable against the title of a registered proprietor as omitted easements under section 62(b) of the Act. In any event and even were this last supposition adopted, the Act does not extinguish aboriginal servitudes surviving as part of a non-territorial aboriginal title but simply limits the classes of persons against whom it may be pleaded.

Finally this paper makes two points with which it should probably have opened.

First, the above conclusions are speculative. They are conclusions which are based on the application of the principles of the Common Law doctrine of aboriginal title which, in the writer's view, flow logically from the basic premise of the continuity of indigenous systems of tenure subsequent to British annexation. To some, the argument of this paper will be an exercise in artifice for the duality of tenure found to exist in New Zealand as a matter of law is both novel and a serious challenge to the prevailing orthodoxy. The conclusions offered await judicial scrutiny although, it may be added, the Waitangi Tribunal[73] and Government departments[74] have been receptive to the basic argument in relation to aboriginal rights of fishery in tidal and navigable water. The paper is but the extention of the same principles to privately-owned land subject to the Land Transfer Act.

Secondly, it is stressed that this argument will produce no change in the usual state of affairs in the rural and coastal districts of New Zealand. The Waitangi

73 *Manukau Report,* supra n.11, and *Kaituna Report,* supra n.6. And see the public comments of the Chairman, Chief Judge E. T. J. Durie: "Part II and Clause 26 of the Draft New Zealand Bill of Rights" in *A Bill of Rights for New Zealand,* supra n.4, Introduction to a Seminar under the auspices of the International Commission of Jurists on a Bill of Rights, Wellington 10 May 1985. Also S. Kenderdine "Statutory Separateness I: Maori issues in the planning process and the social responsibility of industry" [1985] N.Z.L.J. 249.

74 Interdepartmental Committee (Departments of Justice and Maori Affairs) on Maori Fishing Rights *First Report* (1985), terms the argument "attractive" at para.24.

Tribunal's Report on the Kaituna River claim made it plain that aboriginal servitudes continue to be practiced irrespective of the titular ownership of the land according to the Pakeha system of tenure. This shows there are in fact two systems of tenure within the country. The conclusions of this paper simply recognise and give legal garb to an existing state of affairs. The doctrine of aboriginal title provides a means by which the Maori can be shown the Treaty of Waitangi was no fraud yet, when assessed pragmatically in terms of the results which might ensue from its judicial recognition, the result is essentially conservative. It produces no radical or inconvenient result by which the countryside suddenly becomes vulnerable to aboriginal servitudes. Given that the application of the doctrine merely confers a legal blessing upon the general situation presently obtaining in rural and coastal regions, its overdue judicial recognition has little to lose and a lot to gain.