

FORESHORE AND SEABED, AGAIN

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This note considers the Marine and Coastal Area (Takutai Moana) Act 2011, the background to its enactment, the changes it brought about, and the consequences for the development of the law in this area.

The most recent, and perhaps the final, act in the long and interminable drama of the foreshore and seabed issue is the new Marine and Coastal Area (Takutai Moana) Act 2011 (MCAA), enacted on 31 March 2011. The new Act, like its predecessor the Foreshore and Seabed Act 2004 (FSA), is a political product. In November 2008 the National Party formed a minority government based on a Confidence and Supply Agreement with the Māori Party (and two other parties). The Māori Party emerged partly as a result of the foreshore and seabed crisis of 2003 and 2004, brought about in turn by the Court of Appeal's decision in *New Zealand Māori Council v Attorney-General (Ngati Apa)*¹ and the Labour Government's response to the decision in the form of the FSA. A key plank of Māori Party policy, reflected in the 2008 Confidence and Supply Agreement with National, was that the FSA would be revisited, and in 2009 the Attorney-General established a Ministerial Review Panel to review the FSA. The panel (consisting of Sir Tahakurei Edward Durie, Hana O'Regan, and the author) reported in June 2009 recommending the repeal of the FSA and the enactment of new legislation.² This has now been done. The new legislation is now before us. So what now?

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1 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643.

2 TE Durie, RP Boast and H O'Regan *Report of the Ministerial Review Panel: Ministerial Review Panel Review of the Foreshore and Seabed Act 2004* (Ministry of Justice, Wellington, 2009) [*Ministerial Review Panel Report*].

The pivotal question is whether Māori descent groups, hapū and iwi, can assert customary rights in the foreshore and seabed, that is to say the area between high water mark³ and the outer boundary of the territorial sea, currently fixed at 12 nautical miles. Put this way, the issue is one of customary rights and Native title, but in a sense to see the question in that way is deceptive. In fact, the core problem historically has been jurisdictional. The foreshore and seabed affair has been fought out in a way which reflects very clearly New Zealand's distinctive approach to questions of indigenous customary rights. In New Zealand, what is at stake is not so much the common law of Native title but the extent of the jurisdiction of the Māori Land Court. It is no accident that the two principal Court of Appeal decisions relating to Māori interests in the foreshore and seabed (*In re Ninety-Mile Beach*⁴ and *Ngati Apa*) were not primarily concerned with the application of the common law. The key question was whether the Māori Land Court's ordinary jurisdiction to issue freehold titles extended to land below high-water mark. In *Ninety-Mile Beach* the Court of Appeal concluded, for reasons that can no longer withstand critical scrutiny, that it did not. In *Ngati Apa*, 40 years later, the Court of Appeal reversed itself and found that it did. Given that the real question was the extent of the jurisdiction of the Māori Land Court, it is perhaps odd that the legislative response has largely been one of a statutory recasting of the common law discourse of Native title.

Why is this distinctiveness so pivotal? The answer lies deeply embedded in the structure of New Zealand's land law and the particular functions of the Māori Land Court, which has been in continuous existence in something like its present form since 1865.⁵ The Court is New Zealand's oldest statutory tribunal and arguably its most important. It was set up to convert Māori customary titles to freehold grants. Owners of a particular parcel of land held under customary tenure were able to apply to the Court to have their title investigated and, if made out to the Court's satisfaction, were able to gain a title to the area which would be in turn confirmed by Crown grant in freehold. The

3 However it is defined; there are a number of options. The inland boundary of the "foreshore" at common law is the "high water mark" or "mean high water mark". In their joint judgment in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at 673, Keith and Anderson JJ described the foreshore as "the area of beach frontage between the mean high water mark and the mean low water mark". To similar effect is the wording in the Crown Grants Act 1908. However, statutory definitions set out in more recent legislation depart from this formula. Section 9 the Marine and Coastal Area (Takutai Moana) Act 2011 defines the landward boundary of the marine and coastal area as the "line of mean high water springs", following the wording in Foreshore and Seabed Act 2004, s 5.

4 *In re the Ninety-Mile Beach* [1963] NZLR 647 (CA). The case began as an application to the Māori Land Court for an investigation of title to the foreshore of Ninety-Mile Beach. See generally RP Boast "*In re Ninety-Mile Beach* Revisited: The Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 VUWLR 145.

5 The Native (now Māori) Land Court was first established by the Native Lands Acts of 1862 and 1865. The current statute relating to the Court and its jurisdiction is Te Ture Whena Māori (Māori Land Act) 1993. On the earlier legal history see RP Boast "Foreshore and Seabed in New Zealand Law: A Legal-Historical Introduction" in Claire Charters and Andrew Erueti (eds) *Maori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007) 9.

Māori Land Court did not issue titles defined by customary law and it bears no resemblance to such institutions as the Native Title Tribunal in Australia. The Māori Land Court was an agency of title conversion. Very large areas have been investigated by the Court and freehold titles have been issued for much of the country. A significant component of the investigated land has since been sold, either to private buyers (the Native Lands Acts, which set up the Court, waived the doctrine of Crown pre-emption) or, more usually, to the state. Some investigated land has been retained however, accounting in fact for about 5.6 per cent of the surface area of the country and about 12 per cent of the North Island, and is now known as Māori freehold land. The significance of this to the foreshore and seabed should now be apparent. If the Māori Land Court's jurisdiction extended to land below high water mark, then that meant that at least some of the foreshore and seabed could become private land owned in freehold. Māori groups have repeatedly said that they would not ever want to exclude anyone from access to areas of the foreshore and seabed in the event of a successful claim to it. There is no reason to doubt the sincerity of such statements, but they are in a sense beside the point, because if Māori Land Court freehold titles were a possibility, then Māori would certainly be *able* to exclude. Ability to exclude others is of the very essence of a freehold grant.

Thus, by finding in 2003 that the Māori Land Court had jurisdiction to investigate freehold titles to areas below high water mark – an area generally assumed by the public and by politicians to be Crown land and open to all – the Court of Appeal opened the door to private titles to the foreshore and seabed. The possibility of private titles being made in the Māori Land Court, to at least some of this area, was undoubtedly a real one.⁶ Quite how much land might have been *privatized* in this way is anyone's guess, as the government moved quickly in 2004 to make sure that the Māori Land Court never got a chance to develop the jurisdiction that the Court of Appeal had found it possessed. Although it is sometimes said that Māori won nothing more in 2003 than a right to go to court, what in reality had happened was that the parameters had been decisively re-set by the Court of Appeal; a finding which was then supplanted by statute before its full implications had become clear.

The Court of Appeal's 2003 finding related both to the foreshore and the seabed which at that time were quite different areas with different legal regimes attaching to them. The Crown's title to the foreshore, the inter-tidal zone, rested on the common law and the effect of its earlier decision in *Ninety-Mile Beach*. The seabed was different. Here the Crown's title was statutory, based on the Territorial Sea Acts. The area between low-water mark and the territorial sea boundary – a vast area, given the configuration of the New Zealand coast – was already vested by statute in the Crown. The real surprise in *Ngati Apa* was not the Court of Appeal's conclusions about the foreshore which were highly predictable. However, in finding that the vesting language used in the Territorial Sea Acts was insufficiently clear and plain to extinguish customary title to the seabed, the jurisdiction of the

6 On the procedural and substantive options available to the Māori Land Court immediately after *Ngati Apa v Attorney-General* see RP Boast "Maori Proprietary Claims to the Foreshore and Seabed after *Ngati Apa*" (2004) 21 NZULR 1.

Māori Land Court was extended to this area as well. That finding was much more unexpected, although the Court of Appeal's reasoning is certainly compelling.

Probably the Government in 2003 would have been well-advised to have done nothing, and to wait and see how cases fared in the Māori Land Court and on appeal. Arguably the political crisis that developed in 2003 and 2004 was completely unnecessary. The Māori Land Court does not operate in interstellar space remote from the rest of the country's legal system. Its decisions can be appealed to the Māori Appellate Court and from there to the Court of Appeal, or they can be removed into the ordinary courts to determine points of law – as in fact happened in *Ninety-Mile Beach* and *Ngati Apa*. Probably, after a few appeals, a body of workable doctrine and a framework of basis tests could have been worked out and much trouble and difficulty avoided. But instead the response was a legislative one, the FSA.

It was clear Government policy, developed in a number of policy documents during the second half of 2003, that legislation was necessary to in effect reverse *Ngati Apa* by providing for a regime based on open access to the foreshore and seabed and the core principles of "access", "regulation", "protection", and "certainty". In response, Māori groups filed proceedings in the Waitangi Tribunal. Sitting under its urgency jurisdiction the Tribunal conducted an inquiry into the Government's foreshore and seabed policy in January 2004 and issued a comprehensive report on the subject on 4 March 2004.⁷ The Tribunal found that the Government's announced policy was in breach of the principles of the Treaty, unnecessary, and – importantly – that it was discriminatory. The policy was discriminatory as it targeted property rights that were by definition Māori and provided legal certainty only for non-Māori. In the Tribunal's words:⁸

[T]he common law rights of Maori in terms of the foreshore and seabed are to be abolished, and their rights to obtain a status order or a fee simple title from the Maori Land Court are also to be abolished. The removal of the means whereby property rights can be declared is in effect a removal of the property rights themselves. The owners of the property rights do not consent to their removal. In pursuing its proposed course under these circumstances, the Crown is failing to treat Maori and non-Maori citizens equally. The only private property rights abolished by the policy are those of Maori. All other classes of rights are protected by the policy. This breaches article 3 of the Treaty.

That the policy was discriminatory seems unarguable, and in fact when the Attorney-General, Margaret Wilson, presented her New Zealand Bill of Rights Act 1990 compliance report to Parliament on 6 May 2004 she conceded that it was discriminatory. "[T]o the extent that it [the Bill] treats the holders of "specified freehold interests" and Māori customary owners differently", she

⁷ Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004). The Tribunal members were Carrie Wainwright, Joanne Morris, and John Clarke. The author was one of the claimant counsel involved in this case. Among those giving evidence was PG McHugh.

⁸ *Ibid*, 129.

stated, the proposed legislation "may contain a *prima facie* breach of section 19 BORA".⁹ She concluded, however, that this *prima facie* infringement was "demonstrably justifiable in a free and democratic society" under s 5 of the New Zealand Bill of Rights Act 1990.¹⁰ The Human Rights Commission took a different view, both in its submissions made to the Fisheries and Other Sea-Related Legislation Select Committee in July 2004 and in submissions made to the Ministerial Review Panel in 2009, arguing that the legislation was discriminatory and not justified by s 5.¹¹

The FSA vested all foreshore and seabed in the Crown, using language that was designed to, and my opinion certainly did, extinguish all Native title to the public foreshore and seabed.¹² In so doing the FSA unified the two former legal regimes into just one, foreshore *and seabed*, vested absolutely in the Crown. The innovation of a single regime is retained by the 2011 Act. The FSA did not, however, set out simply to vest all foreshore and seabed in the Crown and leave it at that. It also set up mechanisms for the recognition of customary interests, using new statutory tests and processes instead of the former ordinary jurisdiction of the Māori Land Court or the ability of the High Court to determine cases under the common law of Native title. Following *Ngati Apa* the Māori Land Court had started to process the numerous cases relating to foreshore and seabed issues that had arisen in its wake,¹³ but these were in effect all cancelled by statute. Significantly there had been no

9 Attorney-General *Report on the Foreshore and Seabed Bill* (2004) at [56].

10 The Attorney-General argued that there were a number of reasons why s 5 applied, including the fact that the underlying purpose of the legislation was not to discriminate but rather to clarify the law in the interests of Māori and non-Māori. The decision in *Ngati Apa* had created a legal situation that was "radically indeterminate" (*ibid*, at [83]). Wilson also stated that there was a risk of two parallel streams of jurisprudence developing in the High Court and the Maori Land Court "thus creating the real possibility of conflicting and confusing approaches" (*ibid*, at [84]) – a risk that in my view was greatly overstated; there were no applications pending in the High Court as at May 2004 and there were unlikely to have ever been any (see discussion in text, below). On the principles applicable to limits on civil and political rights in the New Zealand Bill of Rights Act 1990 originating in the International Covenant on Civil and Political Rights see *Quilter v Attorney-General* (1997) 4 HRNZ 170.

11 In 2004 the Commission argued that the Bill breached both s 19 and s 20 of the New Zealand Bill of Rights Act 1990 as well as other rights recognised in international law: see discussion in RP Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 107. The 2004 submission was prepared by Diana Pickard, legal and policy analyst with the Commission. The Commission's view as expressed to the 2009 Panel was the same, and numerous other submitters argued that the legislation was discriminatory: see TE Durie, RP Boast and H O'Regan *Pākia ki uta, pākia ki tai: Ministerial Review Report on the Foreshore and Seabed Act 2004 Volume 3: Summary of Submissions* (Ministry of Justice, Wellington, 2009) at 60.

12 Foreshore and Seabed Act 2004, s 13(1): "the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown". The Foreshore and Seabed Act 2004 distinguished between "foreshore and seabed" and "public foreshore and seabed"; it was the latter which was vested in the Crown in *dominium*. The difference between the two was that areas of foreshore and seabed in private ownership as at 2004 were not "public" foreshore and seabed. On the vesting provisions of the Foreshore and Seabed Act 2004 see Boast, above n 11, at 6.

13 See *Re Applications by Tutekohi Nikora and others for Maori Customary Land* (2004) 2 Tairawhiti Conference MB 173 at 180.

pending cases in the High Court. Instead of these former options, Māori groups – and, indeed, non-Māori groups as well – could bring claims for the recognition of territorial customary rights (TCRs) and customary rights orders (CROs) in the Māori Land Court or the High Court, but governed strictly by the new statutory criteria. The FSA also contained provisions protecting public rights of access "in, over, or across the public foreshore and seabed" and public rights of access.¹⁴

The two kinds of orders reflected "macro" exclusive rights (TCRs) and "micro" activity-based localised rights (CROs), which were non-exclusive. The key provision relating to TCRs was s 32 of the FSA, well-nigh impenetrable, which laid down a formidable array of complex and challenging thresholds that had to be met before an order could be made. Applicants seeking a TCR had to show to the High Court they would have been entitled to a declaration of Native title at common law – an example of how the FSA used Native title discourse in response to a problem of jurisdiction and statutory interpretation – which meant that the entire common law relating to extinguishment and proof of Native title was retained by the legislation. However, the FSA imposed requirements additional to the requirements of the common law: the claim had to be based on proof of exclusive use and occupation of a particular area; the group had to show that they were entitled to such use; use and occupation had to be without "substantial interruption"; and, most importantly, the group seeking an order had to show that it had "continuous title to contiguous land".¹⁵ This latter requirement eliminated many groups at the outset; even those that could have shown that the reason for the loss of coastal land in Māori title was due to Crown actions such as (for example) confiscation of coastal land around Tauranga harbour. Added to the difficulty of getting a TCR order was their pointlessness: all that the successful group could obtain was a right to negotiate with the Crown or the establishment, under High Court supervision, of a foreshore and seabed reserve to which the public had full rights of access. During the five years the FSA was in operation no Māori group even bothered to apply for such an order, let alone incur the expense and trouble of progressing one through the High Court.

The other process mapped out in the FSA lay at the micro and non-territorial end of the customary rights spectrum. That was the CRO, which could be made either by the Māori Land Court, in the case of applications by whānau, hapū and iwi, or by the High Court in all other cases. The key phrase that recurs throughout the CRO provisions of the FSA, which were quite complex in their own right, was "activity, use or practice".¹⁶ The ostensible aim was to allow for the legal

14 Foreshore and Seabed Act 2004, ss 7 and 8; see now Marine and Coastal Area (Takutai Moana) Act 2011, ss 26 and 27. This was a right "in, over or across" the foreshore and seabed, not "to" the foreshore and seabed.

15 Foreshore and Seabed Act 2004, s 32(2). On Foreshore and Seabed Act 2004, s 32 see Boast, above n 5, at 144–159.

16 On Customary Rights Orders see Shaunagh Dorsett and Lee Godden "Interpreting Customary Rights Orders under the Foreshore and Seabed Act: the New Jurisdiction of the Maori Land Court" (2005) 36 VUWLR 229.

protection of actual behaviours and practices, such as – a favourite example of politicians – gathering hangi stones from the beach. It was not possible to secure recognition in this way of fishing practices, undoubtedly the most important form of customary practice associated with the foreshore and seabed, since Māori fishing rights had already been settled nationally by statute in 1992.

The 2009 Ministerial Review Panel found that no orders whatever had been made pursuant to the FSA for either TCRs or CROs. In the case of CROs there were a few applications making their way through the Māori Land Court, but none had actually been heard and determined. As noted, in the case of TRCs no group had thought it worth their while to apply for one. If the function of the FSA was to strike a balance between customary and public rights, it was clearly not working very well and indeed a number of groups pointed out to the Panel that the thresholds were almost impossibly high. Hohepa Mason on behalf of Ngāti Awa, for example, stated:¹⁷

[T]he Crown has set an extremely high threshold for securing a customary rights order ... On the face of it, these tests for us would be very difficult to satisfy ... Ngāti Awa, along with Whakatohea, lost a vast majority of its coastal lands through the confiscations of 1866, awards to other tribes outside the confiscation area and subsequent alienations resulting from individualisation of titles.

Similar criticisms were made by non-Māori organisations or commentators, for example by the New Zealand Institute of Surveyors. Emeritus Professor FM [Jock] Brookfield stated that the TCR and CRO tests were "far too severe".¹⁸

Although recommending repeal of the FSA, the Ministerial Review Panel did not favour a complete reversion to the post-*Ngati Apa* status quo to allow cases to the foreshore and seabed to simply run on in the Māori Land Court under its ordinary jurisdiction. The panel's view that dealing with the issue by means of a special-purpose statute was certainly defensible in a general sense. A special Act made sense in the circumstances, "assuming hapū and iwi support, [arising] from the uncertainty of what the Māori Land Court might have done (to the possible detriment of either or both of Māori and the general public) and the likely time and cost to secure settlements for the entire coast".¹⁹ The Panel concluded that the best option was to repeal the 2004 Act and craft new legislation based on a set of core principles, including recognition of customary rights, reasonable public access (some exclusion being justifiable, for example, for port operations or customary harvesting), due process, and good faith. The perceived risks of returning to the "judicial model" were that "rights in the foreshore and seabed would have to be litigated, on a case by case basis, over a long period of time", a process likely to be "protracted, laborious and expensive".²⁰ The

17 Cited in *Ministerial Review Panel Report*, above n 2, at 62.

18 Ibid.

19 Ibid, at 148.

20 Ibid, at 150.

Panel's general approach was that a balance had to be struck, or better struck, between public and customary rights, and that a process of judicial inquiry based on Native title doctrine and the ordinary jurisdiction of the Māori Land Court would not guarantee "our overall goal of seeking a reconciliation between competing approaches to the foreshore and seabed".²¹ To facilitate that, the Ministerial Review Panel favoured the immediate repeal of the FSA and the enactment of an interim statute which would retain ownership of the foreshore and seabed in the Crown for the time being while a new solution was worked out based on a further round of public consultation.

Not all of the recommendations of the Panel can be traversed here, but there is one aspect to the foreshore and seabed debate mentioned in the 2009 report which does merit some emphasis in this note; the sheer complexity of the law relating to the coast. This was a point stressed by many submitters to the 2009 panel. A review of the entirety of coastal law was outside the Ministerial Review Panel's terms of reference, but the comment was made nevertheless that it was desirable for the whole of coastal law to be reconsidered, and that "the development of final legislation on the foreshore and seabed should be integrated into such a review process".²² Coastal law now includes the Resource Management Act 1990 provisions relating to the coastal marine area, including the National Coastal Policy statement, the complex law relating to aquaculture and marine farming permits, the Marine Reserves Act 1971, the law relating to marine archaeological sites governed by the Historic Places Act 1993, various kinds of Māori marine reserves made under the Fisheries Act 1996, the effects of various specific Māori historic claims settlement statutes, and more. Added to this is now the Marine and Coastal Area Act 2011 itself, which in turn makes numerous amendments to the Resource Management Act 1990. In the absence of a full review of coastal law, it is one more piece of an increasingly complicated jigsaw puzzle. In view of current concerns about rising sea levels, marine hazards and climate change the case for better-designed and better-coordinated coastal law remains, in my view, imperative.

The new Act (the MCAA) is considerably longer than its predecessor, it is much clearer and better-structured. The more bizarre and meaningless aspects of the FSA have been dispensed with. The MCAA is also conceptually innovative, indeed radical, in demonstrating a willingness to depart from the usual principles of property law in order to experiment with new ideas. The MCAA certainly strikes a very different note from its predecessor in its introductory provisions. Its preamble refers to the Court of Appeal's decision in *Ngati Apa*, to the Waitangi Tribunal's 2004 report on government foreshore and seabed policy,²³ to the criticism made of the 2004 legislation made by the United Nations Committee on the Elimination of Racial Discrimination (CERD) and by a United Nations Special Rapporteur, and to the conclusions of the 2009 Ministerial Review Panel.

21 Ibid.

22 Ibid, at 158.

23 Referring to Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 37.

Section 4 of the MCAA sets out four new basic interpretive principles (including acknowledging the Treaty of Waitangi) and s 5 repeals the FSA in its entirety. These aspects of the new legislation are certainly significant, but it has to be said at the same time that structurally the FSA and the MCAA are very similar. At the most basic level there is the similarity that in the case of the FSA and the MCAA the foreshore and seabed is dealt with as a single juridical space in a special-purpose statute. Both Acts make provision for a general vesting of the entire foreshore and seabed, and for the protection of customary rights at the "macro" and "micro" levels. The provisions relating to public rights of access and navigation are very similar. The provisions relating CROs in the FSA and their counterpart in the MCAA ("protected customary rights") are more or less the same. Both Acts involve an array of consequential amendments to the Resource Management Act. Some claim that the MCAA gives too much away to Māori and some claim that essentially the two Acts do not differ significantly. Both views obviously cannot be correct, although it is probably the case that neither is.

The vesting provisions are the most interesting feature of the new legislation. The FSA vested the whole of the "public" (ungranted) foreshore and seabed in the Crown in *dominium*. This is reversed by s 11 of the MCAA, which gives to the "common marine and coastal area" a "special status". This status is sui generis and is defined and given effect to by the Act itself. It is defined as a juridical space that no one, including the Crown, owns or is capable of owning. It belongs, in short, to nobody or perhaps to everybody. A new category of land has in fact been invented, arguably the first since the enactment of the Land Transfer Act 1870. Is this area just Crown land by another name? That is not easy to answer, partly because "Crown land" is itself a complex category of land. Public foreshore and seabed under the FSA was not the same as Land Act Crown land, nor was it strictly speaking part of the DOC estate under the Conservation Act 1987. The MCAA states specifically that common marine and coastal land is not owned by the Crown or anyone else. The Crown can only grant land it holds in *dominium*, an important incident of Crown-held land; therefore it cannot grant marine and coastal land. However, the same was true of public foreshore and seabed under the FSA. Under the FSA public foreshore and seabed could be alienated only by a special Act of Parliament. This provision is not repeated in the MCAA, but Parliament can enact a special Act alienating land any time it feels so inclined.

In terms of alienability, there are no pronounced differences between the FSA and the MCAA. One key practical difference appears, however, to lie in the area of mineral ownership. In the case of ordinary Crown land the Crown will, in virtually all cases, hold the subsurface mineral estate, but in the case of common marine and coastal area land, as a result of another remarkable innovation, this is not exactly the case. By s 16(1) of the MCAA the Crown, unsurprisingly, continues to own all generally nationalised minerals as currently provided for in s 10 of the Crown Minerals Act 1991 (petroleum, gold, silver and uranium). Section 16(2) relates to the rest of the mineral corpus and deals with this quite elegantly by providing that ss 11 and 17 of the MCAA are "deemed to be an alienation from the Crown", meaning that the Crown has by this Act alienated the entirety of the common marine and coastal area. Under ordinary mining law, whenever the Crown alienates land

by Crown grant, the Crown is deemed to retain the mineral estate – in all post-1948 grants the Crown retains mineral ownership – and so this applies here as well. However, s 83 also provides that "a customary marine title group has, and may exercise, ownership of minerals (other than petroleum, gold, silver, and uranium existing in their natural condition) that are within the customary marine title of that group".²⁴ Thus for non-nationalised minerals the Crown's mineral estate is, in a sense, a temporary or interim one. Wherever there is a customary marine title order or agreement "the reservation of minerals in favour of the Crown continued by section 16(2) ceases".²⁵ Since the Crown has no ability to grant the area, then, and holds only a qualified mineral estate, common marine and coastal land is not Crown land as the term is normally understood. Then again, public foreshore and seabed under the 2004 Act was already "special", in a sense. The differences seem to be both symbolic, but also real, at least with respect to mineral titles.

Another interesting and innovative change can be found in the provisions relating to structures attached to the foreshore and seabed, an important problem under the FSA. Once the Crown had vested foreshore and seabed absolutely in itself, it seemed to follow that all jetties, piers, wharves, sea walls, moles, groynes and the like also vested in the Crown absolutely as fixtures, and – since many such structures were in a more than dilapidated state – were now the Crown's problem. To overcome this issue, s 18 now stipulates that all "structures" that are "fixed to, or under or over" the common marine and coastal area are "to be regarded as personal property and not as land or an interest in land". Property lawyers, already confronted with the startling proposition that there is now a large slice of the national territory which belongs to no one, may perhaps be further taken aback by the notion that a crumbling concrete seawall is a chattel, but such is now the law, demonstrating if nothing else that in New Zealand there is nothing that statute cannot do. The MCAA shifts the responsibility for installations of this sort by providing that any person who had "an interest in a structure to which this section applies continues to have that interest in the structure as personal property".²⁶

It is, however, the provisions relating to the two kinds of customary rights protection that will be studied most attentively by Māori groups who must now decide whether they can meet the various statutory tests and whether it is worth their while to make the effort to do so. The equivalent of a TCR order under the FSA is a customary marine title order (obtainable in both cases only from the High Court). The provisions cannot be analysed fully in this note, but it is fair to say that s 58 of the MCAA is clearer and less restrictive than its counterpart, s 32 of the FSA. The "continuous/contiguous" requirement has disappeared, but it remains necessary for an applicant group to show that the "specified area" is currently held "in accordance with tikanga" (Māori

24 Marine and Coastal Area (Takutai Moana) Act 2011, s 83(2).

25 Ibid, s 16(3).

26 Ibid, s 18(3).

customary values and practices) and that it has been "exclusively used and occupied" from "1840 to the present day without substantial interruption".²⁷

What does "exclusively used and occupied" actually mean? An important analytical point made by Dr McHugh with respect to the FSA remains equally true of the MCAA: whatever "exclusive" means, it cannot have the meaning ascribed to it by the High Court of Australia in *Commonwealth v Yarmirr*, where it was held that public rights of navigation are incompatible with Native title to the sea.²⁸ The MCAA, like the FSA, protects public rights of access and navigation, while at the same time insisting that uses of the marine and coastal area can nevertheless still be "exclusive". Thus, rights of access and navigation cannot be destructive of "exclusivity". If that were not so, then s 58 would be self-defeating. Both statutes lean toward Kirby J's dissent in *Commonwealth v Yarmirr*. My view is, that Kirby J's dissent in *Commonwealth v Yarmirr*, where he rejected the suggestion that public rights of navigation are not in fact destructive of the "exclusivity" aspects of Native title is, in fact, correct and fits best with law and practice in England and in British colonies.²⁹ It is clear, at least, what "exclusivity" does not mean; what it does mean, however, is rather less clear. Native title law, Australian and Canadian, will need to be drawn on to resolve this point, as the Act does not itself attempt to define exclusivity. The common law meaning of exclusivity is thus imported into the legislation, as are the common law rules relating to extinguishment of Native title.³⁰

Customary marine title is, in short, a bit easier to get than was formerly the case. It is also substantially more worth having. Section 62 of the MCAA defines the rights conferred by a customary marine title order or agreement with commendable clarity. Again, the provisions are too complex to be described here, but the benefits of holding such rights are both proprietary (mineral ownership, prima facie rights to ownership of newly found taonga tuturu), and managerial/consultative (conservation permission rights, rights to protect wahi tapu, particular rights with respect to the New Zealand coastal policy statement planning process). These could be really valuable and might appeal to at least some strategically placed coastal iwi. It can be said that the Act facilitates the continuing recasting of iwi as partners in local and regional government that is also developing under historic claims settlement legislation and other special-purpose statutes. Not

27 Ibid, s 58(1)(b)(i).

28 *Commonwealth v Yarmirr* [2001] 208 CLR 1; (2001) 184 ALR 113. See Paul McHugh "From Common Law to Codification: the Foreshore and Seabed Act 2004" in New Zealand Law Society *Foreshore and Seabed Act, the RMA and Aquaculture* (New Zealand Law Society, Wellington, 2005) at 13.

29 See Boast, above n 5, at 144–147.

30 Marine and Coastal Area (Takutai Moana) Act 2011, s 58(4). The standard test applied in Australian, New Zealand and Canadian law is that the instrument must reveal a clear and plain intention to extinguish: see for example per Brennan J in *Mabo v Queensland (No 2)* (1992) 107 ALR 1 at [47]; see also *Ngati Apa v Attorney General*, above n 1, at 684.

everyone will be pleased about this development perhaps, but it is certainly an increasingly important dimension of this New Zealand public and environmental law.

The equivalent of the former CRO under the FSA is now styled a protected customary rights order. The provisions are very similar to the CRO provisions of the FSA, but with two significant differences. Such orders could formerly be made by the Māori Land Court, but now can be made only by the High Court. This is likely to prove much more expensive than the Māori Land Court and perhaps somewhat off-putting to Māori claimant groups.³¹ The advice of the Māori Appellate Court can, however, be sought on a "question of tikanga" with respect to cases relating to either customary marine title or protected customary rights.³² Existing customary rights applications in the Māori Land Court, none of which were ever finalised, have now been transferred to the High Court under the transitional provisions of the MCAA. As with customary marine title, protected customary rights cease to exist if they have been extinguished as a matter of law.³³

Has the MCAA restored to Māori what the Court of Appeal bestowed by the *Ngati Apa* decision in 2003? In a word, no. Under *Ngati Apa* Māori could obtain freehold titles in the Māori Land Court applying its ordinary tests and perhaps other forms of recognition as well. In other words, the decision opened the door to rights that were, or could be, very valuable and which could be obtained relatively easily and in a forum which was cheap and Māori-friendly. That has never been restored, but of course it was the case that many uncertainties remained after *Ngati Apa* about how the Māori Land Court would go about exercising its powers as defined by the Court of Appeal and what might happen on appeal and on review. Nor did that option make any provision for other interests relating to the foreshore and seabed. The FSA replaced the options at common law and in the Māori Land Court with a very restrictive and difficult statute, itself replete with uncertainties, conferring rights of dubious value. The MCAA swings the pendulum away from the repressive framework of the FSA. It is a decided improvement, but analytical and practical difficulties remain. The "exclusivity" criterion remains in place, and remains intractable, at least to this writer. On the other hand, the benefits of obtaining customary marine title are defined clearly and seem to be relatively valuable and are certainly more valuable than the pitiful rewards of obtaining recognition of TCR under the FSA.

31 Foreshore and Seabed Act 2004, ss 48–51; Marine and Coastal Area (Takutai Moana) Act 2011, ss 98–105. Under the Marine and Coastal Area (Takutai Moana) Act 2011, the High Court may make "recognition orders" recognising protected customary rights or customary marine title. In either case the application must be filed no later than six years after the commencement of the Act (s 85).

32 Marine and Coastal Area (Takutai Moana) Act 2011, s 99. If an application for a recognition order raises a matter of tikanga, the High Court can refer the point either to the Māori Appellate Court under s 61 of Te Ture Whenua Māori Act 1993 or to a Pukenga (a court-appointed expert of tikanga) appointed under the High Court rules. The opinion of the Māori Appellate Court is binding on the High Court but that of the pukenga (if appointed) is not: Marine and Coastal Area (Takutai Moana) Act 2011, s 99(2).

33 Marine and Coastal Area (Takutai Moana) Act 2011, s 51(1)(c).

How much will the Act actually be used? There is little evidence of a flood of applications to the High Court so far. Maybe Māori people, like the rest of the country, have become tired of the whole subject of the foreshore and seabed; it is yesterday's controversy. Why worry about customary rights to collect hangi stones from the beach when so much more is at stake with respect to negotiating and settling historic claims? It is quite possible that the Act will result in nothing much. What it offers may seem to Māori to be less appealing than what they might obtain by negotiation with the Crown. Customary marine title can be recognised either by judicial determination or by negotiation. Maybe the real point of the legislation is to encourage Māori to opt for the latter, likely to be the preference of iwi and hapū in any case. But this, of course, remains to be seen. For now, Māori groups are considering the options. If it seems worthwhile to bring claims under the new legislation they will certainly do so.

