

# Aboriginal Title Case Law and Constitutionalism

Constitutional Law 107-15Y (HAM)

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# Announcements

- Tutorial 5 next week, available on Moodle tomorrow
- Essay – 20%, due 15 June 2015
- Quiz 5 next week, 29 May 2015
- Lecture – Foreshore & Seabed case law and statutes



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DAD, I'M  
CONSIDERING  
A CAREER IN  
ORGANISED  
CRIME.

GOVERNMENT OR  
PRIVATE SECTOR?



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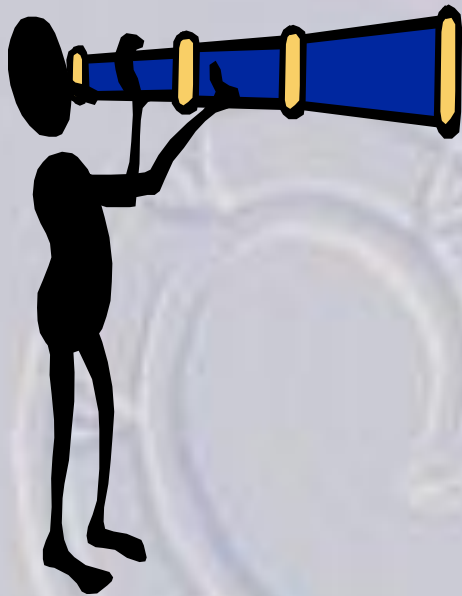
# Foreshore and Seabed Case Study

- What's happening constitutionally?
- What does this case study reflect about:
  - Whose interests are being **served** and whose are being **limited**?
  - The key obstacles to the recognition and realisation of the **constitutional status** and **relationship** between tāngata whenua and the New Zealand public and state?
  - What this means for the possibilities of developing a relationship between tāngata whenua and the New Zealand public and state based on principles of **constitutionalism**?





# Overview



- Aboriginal Title
- Context – Historical, comparative
- Case Law
- Challenges
- Foreshore and Seabed Act 2004

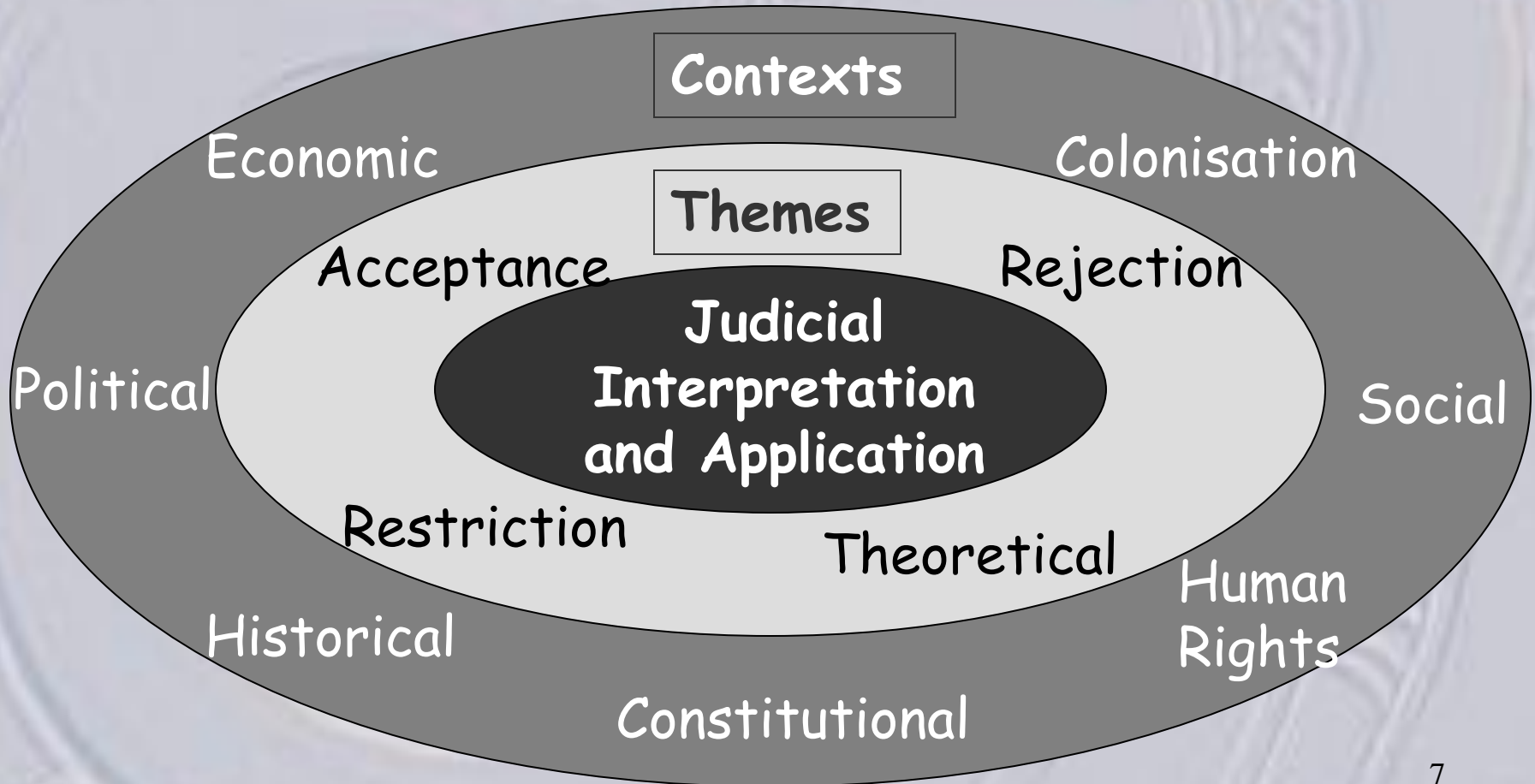


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# Overview



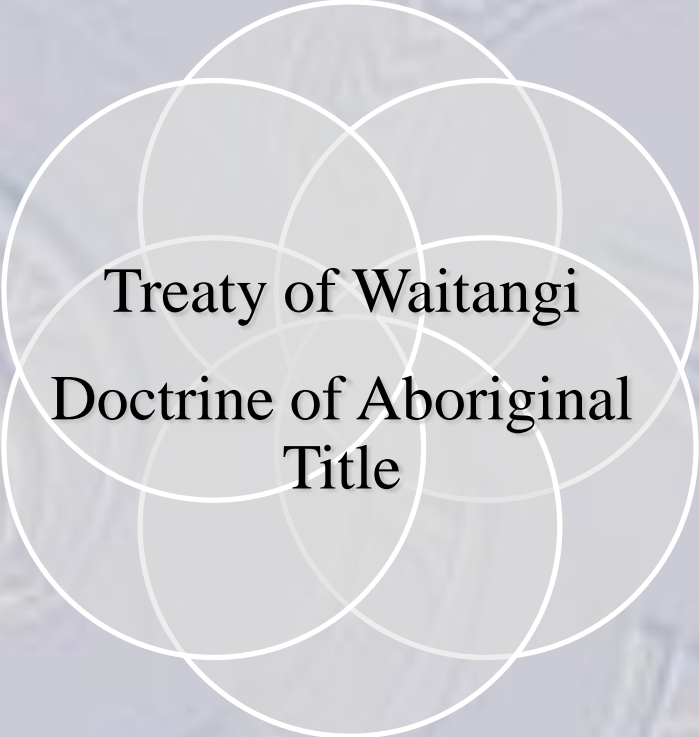
# Today's Lecture



Court of Appeal Case  
*Ngati Apa*

Ministerial  
Review - Marine  
and Coastal Area  
(Takutai Moana) Act  
2011

Government's  
Framework



Treaty of Waitangi  
Doctrine of Aboriginal  
Title

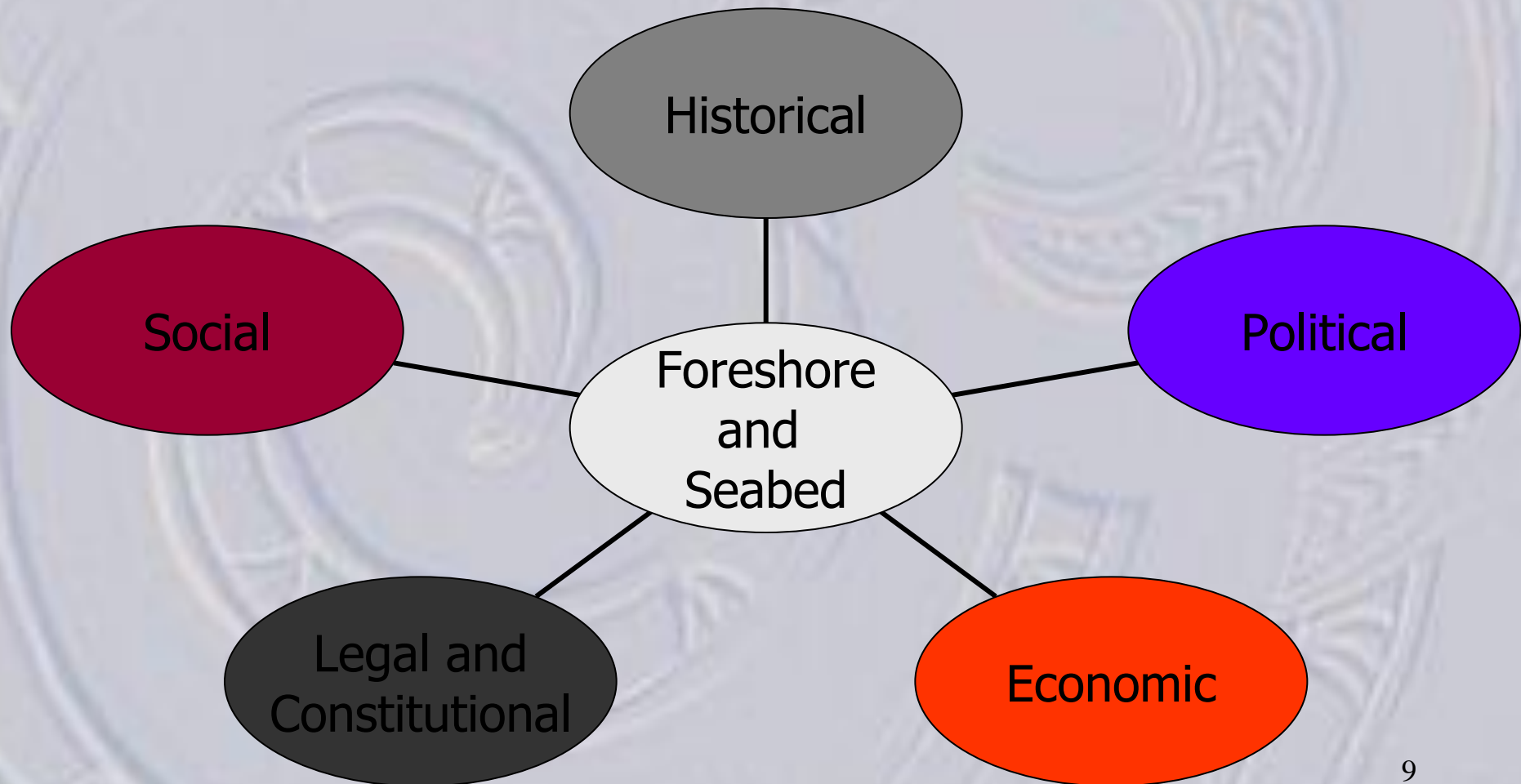
Waitangi Tribunal  
Report

United Nations  
Responses

Foreshore and  
Seabed Act  
2004




# Foreshore and Seabed Context





ONCE UPON A TIME, MAORI  
OWNED ALL THE LAND IN  
NEW ZEALAND...

CLICK!



THEN THEY DIDN'T, SO THEY APPLIED FOR  
SOME RIGHTS TO THE SAND BETWEEN THE  
HIGH WATER MARK AND THE LOW WATER  
MARK AT THE SEA...

CLICK!



ARE THERE NO LIMITS  
TO THEIR GREED AND  
AVARICE?

CLICK!



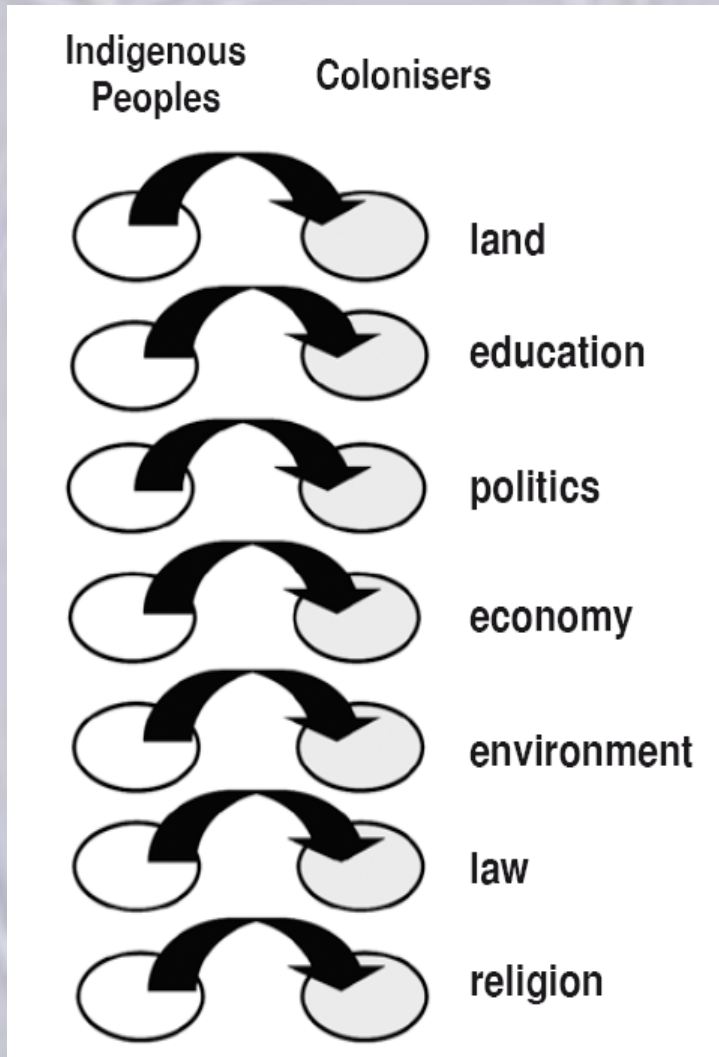
Tom Swack.

Bishop Manuhuia Bennett often asked the question: ‘What did Māori call New Zealand before the arrival of the Pākehā [Europeans]?’

After a deliberate pause, he would then simply utter: ‘Ours.’



# Colonisation



- Colonisation occurs when control in these areas is taken over by the colonising power and away from the Indigenous peoples.
- The Indigenous peoples then struggle to maintain their own institutions.



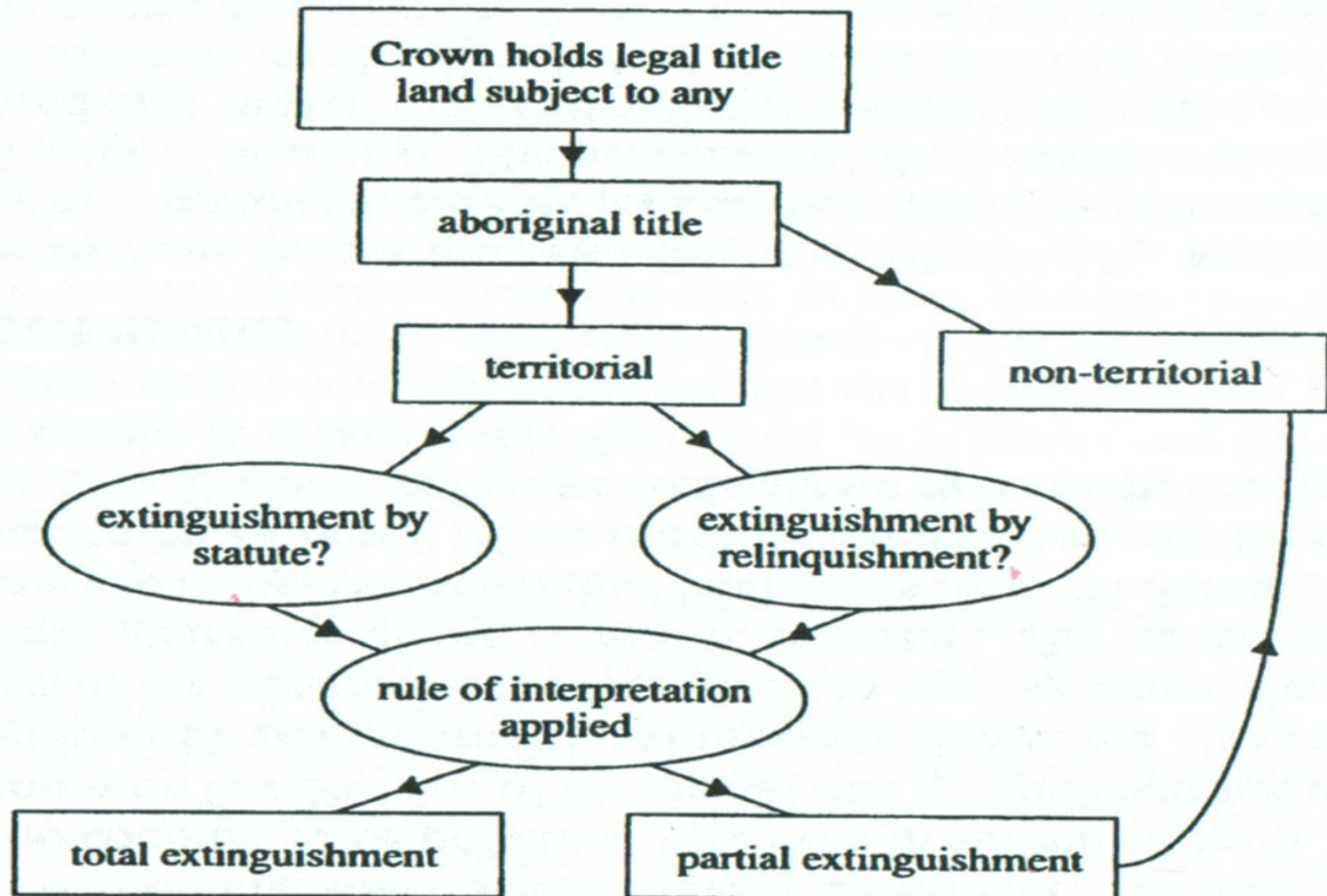
# Land – Crucial for settlement and Colonisation

- Ever increasing arrival of land hungry settlers
- Crown purchasing and speculating in land to satisfy the demand from settlers and to finance the colony.
- Crown's right of pre-emption allowed Hobson in 1840 to purchase 3,000 acres in Auckland for 281 pounds worth of goods and cash. 9 months later he sold 44 acres for 24,275 pounds.
- Grey purchases most of the South Island for less than 15,000 pounds.





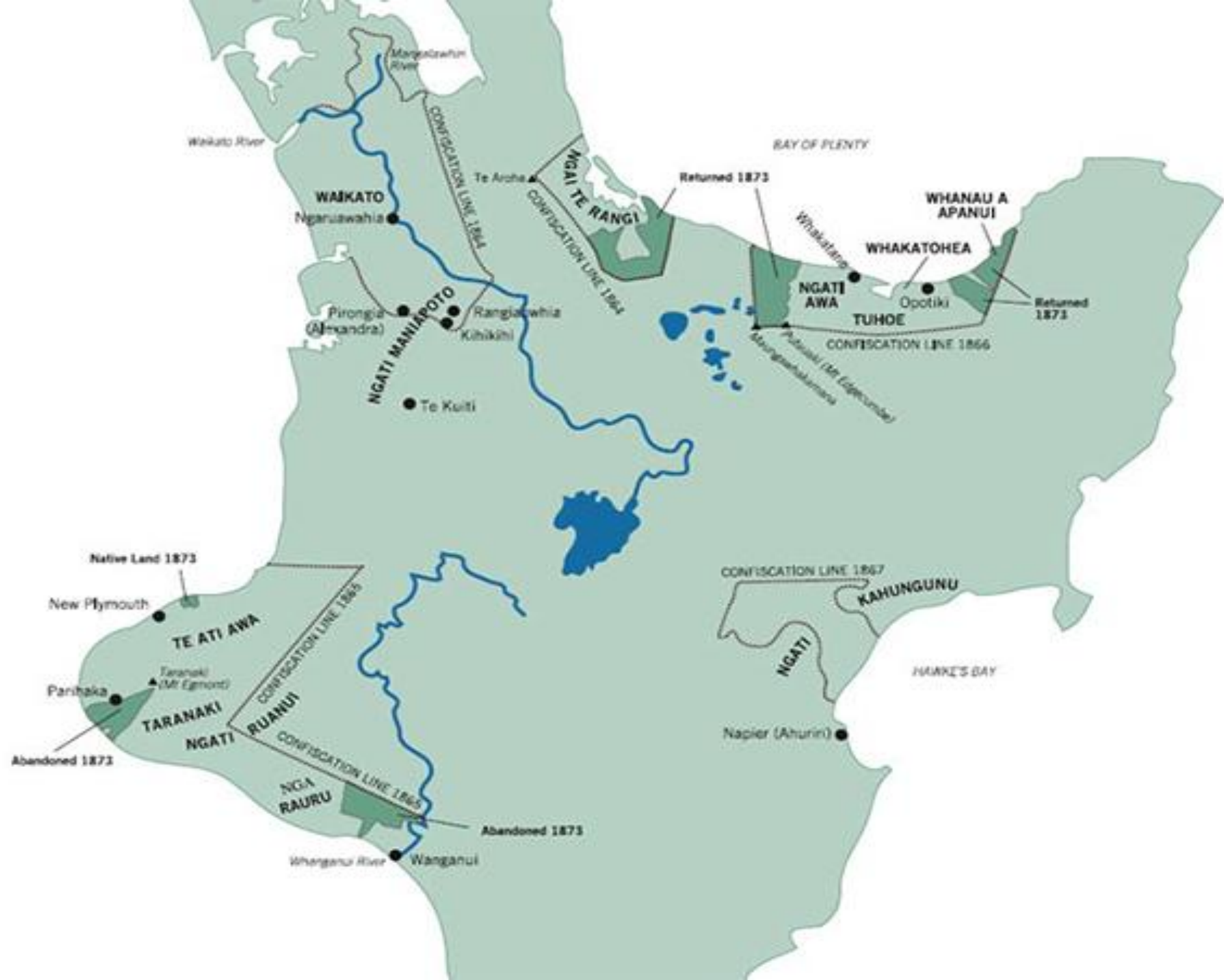
# How is Aboriginal Title extinguished?



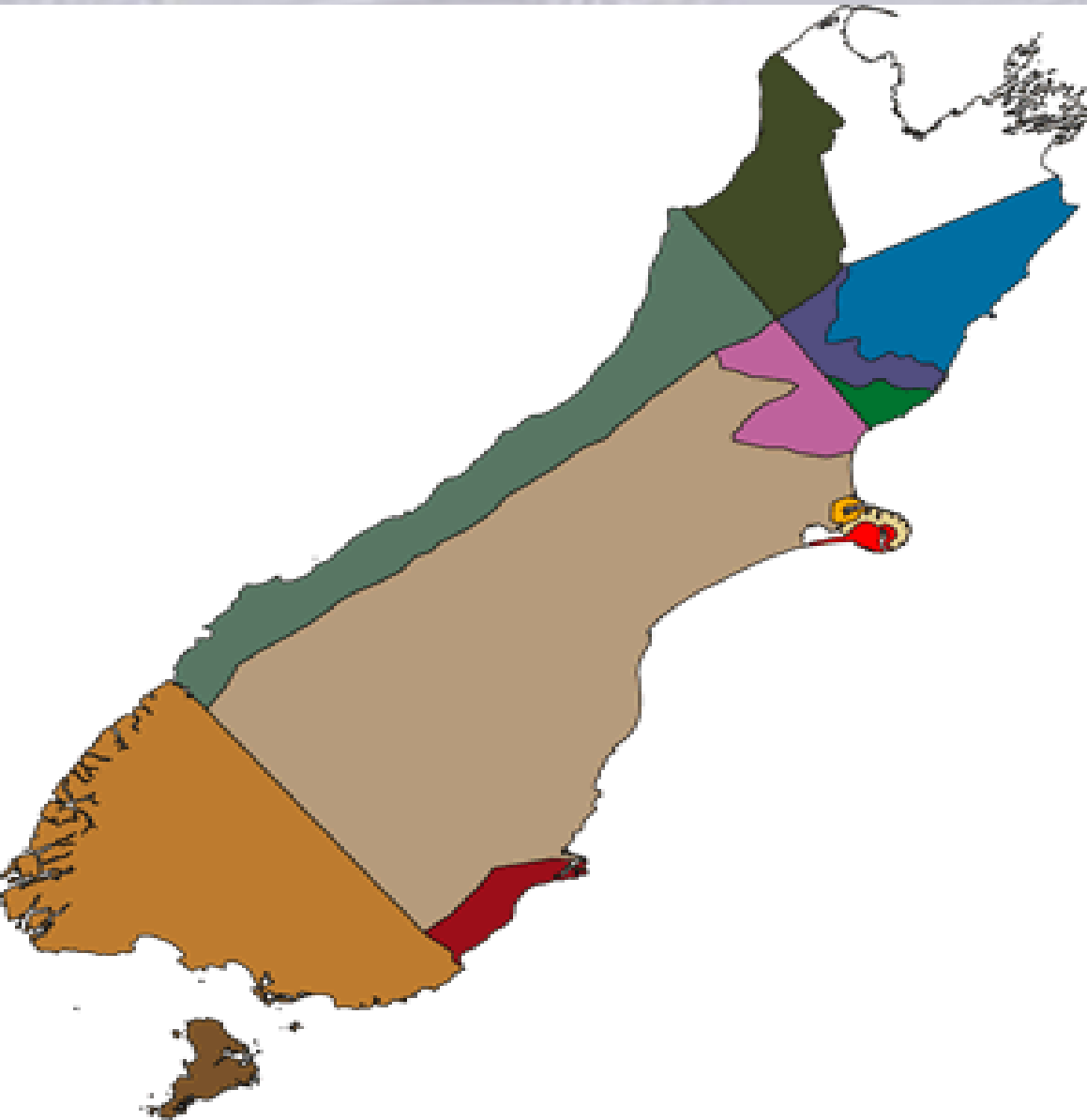
# Extinguish Aboriginal Title?

- New Zealand Settlements Act 1863 and Suppression of Rebellion Act 1864
  - Allows Crown to confiscate land and punish by death, penal servitude or whatever he deems necessary, any Māori who countenanced rebellion without trial.
  - *Extinguish aboriginal title by statute – raupatu (confiscation)*
- Native Land Court established 1865
  - Individualise Land title
  - Break Māori ‘communism’ – different system
  - Māori to either turn up or lose any claim to title.
  - Survey costs, court costs paid through land.
  - Secure title to land and then sell to satisfy debts
  - *Extinguish aboriginal title by sale or cession (voluntary?)*





# Ngāi Tahu Land Loss



## Land Sales

Akaroa 1856

Arahura 1860

Arahura 1860 / Kemp 1848

Kaikōura 1859

Kemp 1848

Murihiku 1853

1857

1857 / Kaikōura 1848

1857 / Kemp 1848

Ōtākou 1844

Port Cooper 1849

Port Levy 1849

Rakiura 1864

Promise to establish reserves 10%, schools, hospitals, first claim 1849



# Native Land Court

- Hearings to register title
- Contentious process
- In cities, towns – hearings for weeks
- Attend hearings, costs, surveys, lawyers, accommodation, debt,
- Diseases contracted
- Don't turn up, lose property rights to those who attended
- 10 owner rule – individualise title
- Fragmentalise title with succession in equal shares to children





# Maori Land 1860

**Land in Maori ownership 1860**



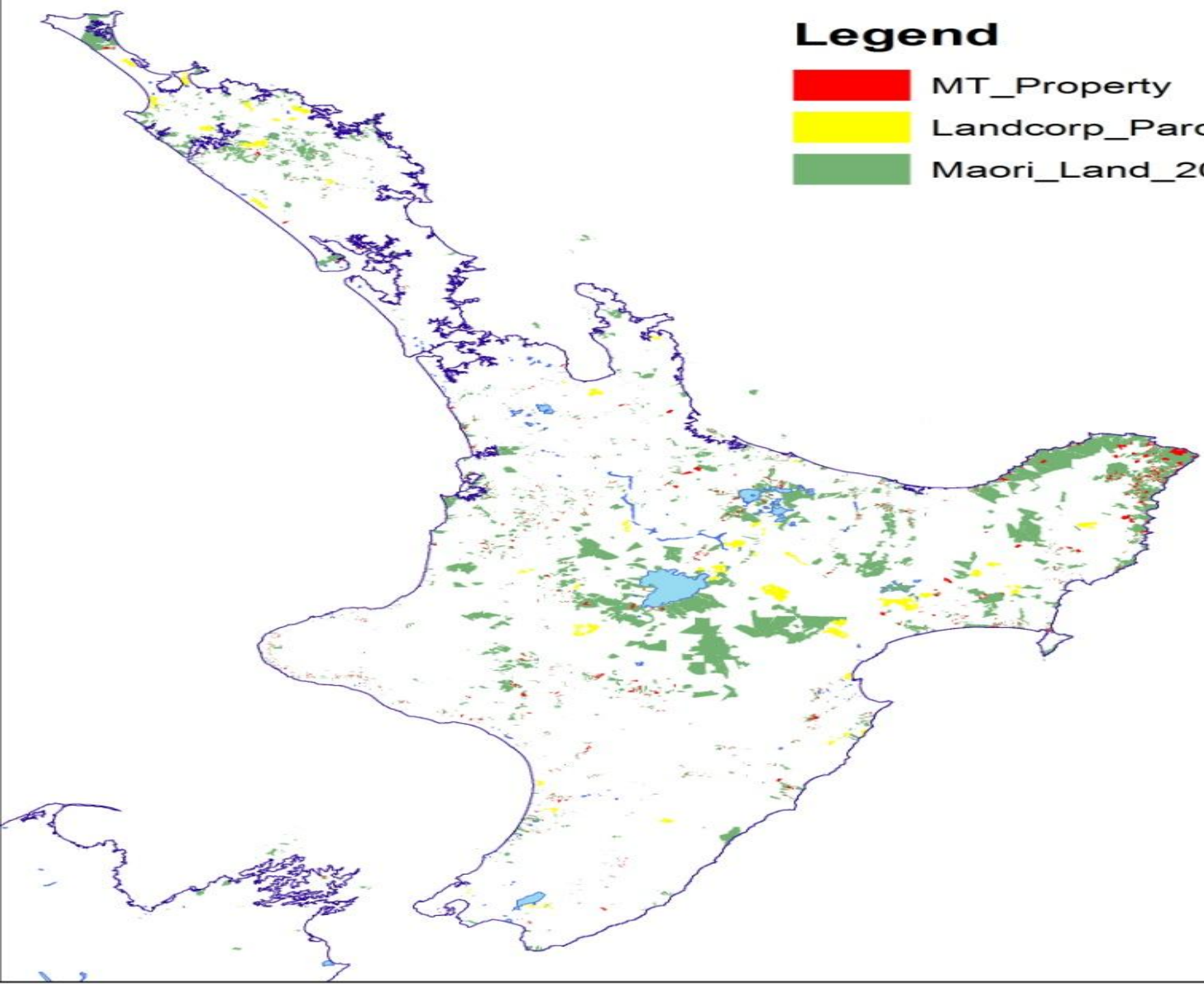
# Maori Land 1960

**Land in Maori ownership 1960**



## Legend

-  MT\_Property
-  Landcorp\_Parcels
-  Maori\_Land\_2010





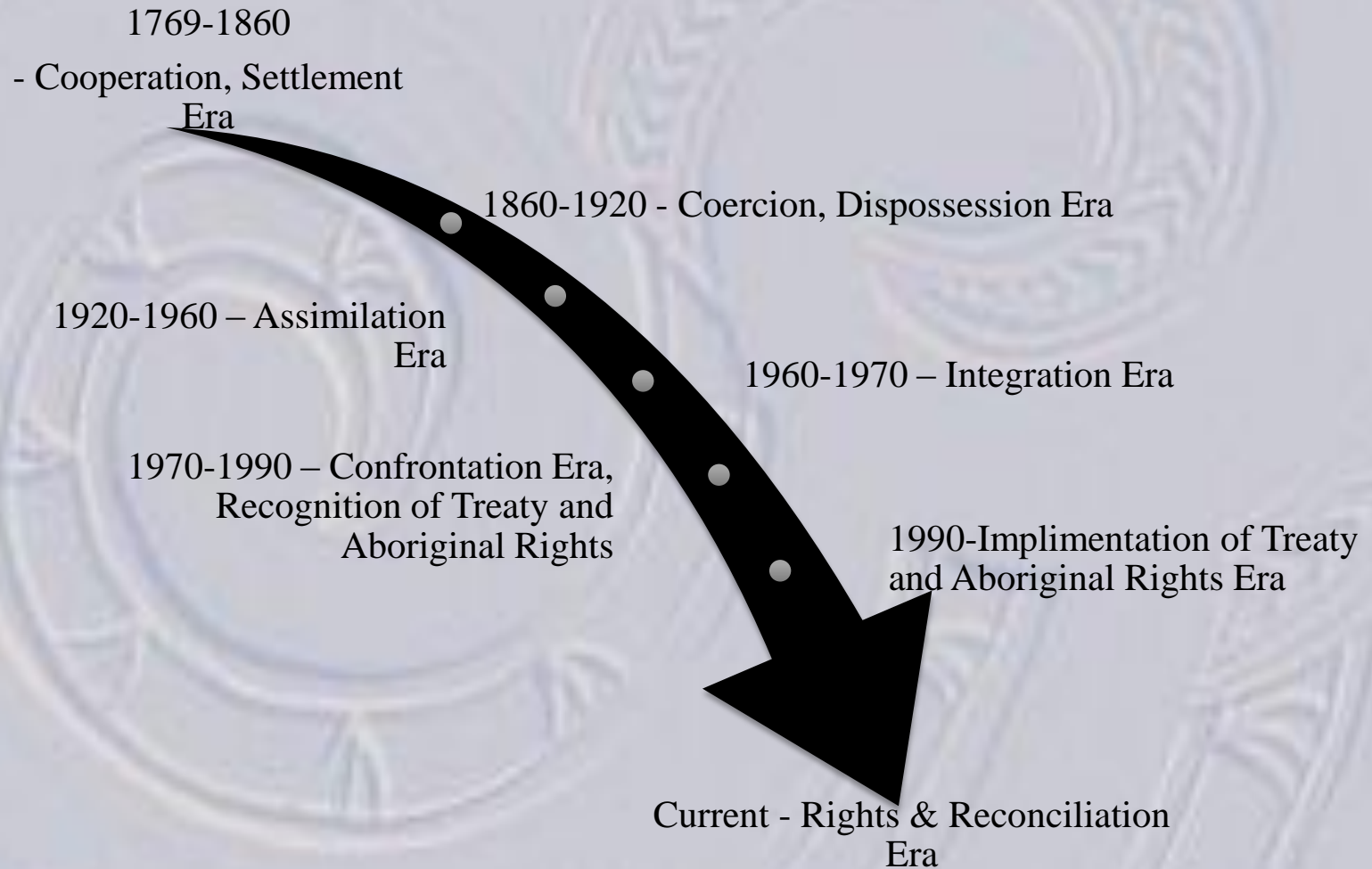
# Breakup Māori Land, Corporate Existence Policy

- **Restrictive legislation, public policy**
- ‘The object of the Native Lands Act was twofold: to bring the great bulk of the lands of the northern island which belonged to the natives into which, before the passing of this Act, were extracomercium, within the reach of colonisation. The other main object was the detribalisation of the natives; to destroy, if it were possible, the principles of communism which ran through the whole of their institutions, upon which their social system was based and which stood as a barrier in the way of all attempts to amalgamate the native race into our own social and political system. It was hoped the individualisation of titles to land, giving them the same individual ownership that we ourselves possessed, they would lose their communistic character and their social status would become assimilated into our own.’ (NZPD 1877, Vol 24, at 254)



Henry Sewell 1807-79

# Recognition of Indigenous People's Rights in Aotearoa/New Zealand





# Māori & Pākehā – Past Relationship

- Marked dispossession of land and resources
- Breakdown of social systems
- Imposition of English Common Law
- Suppression of Māori Customary Law – Tikanga Māori
- Assimilation assumption - Integration into English society

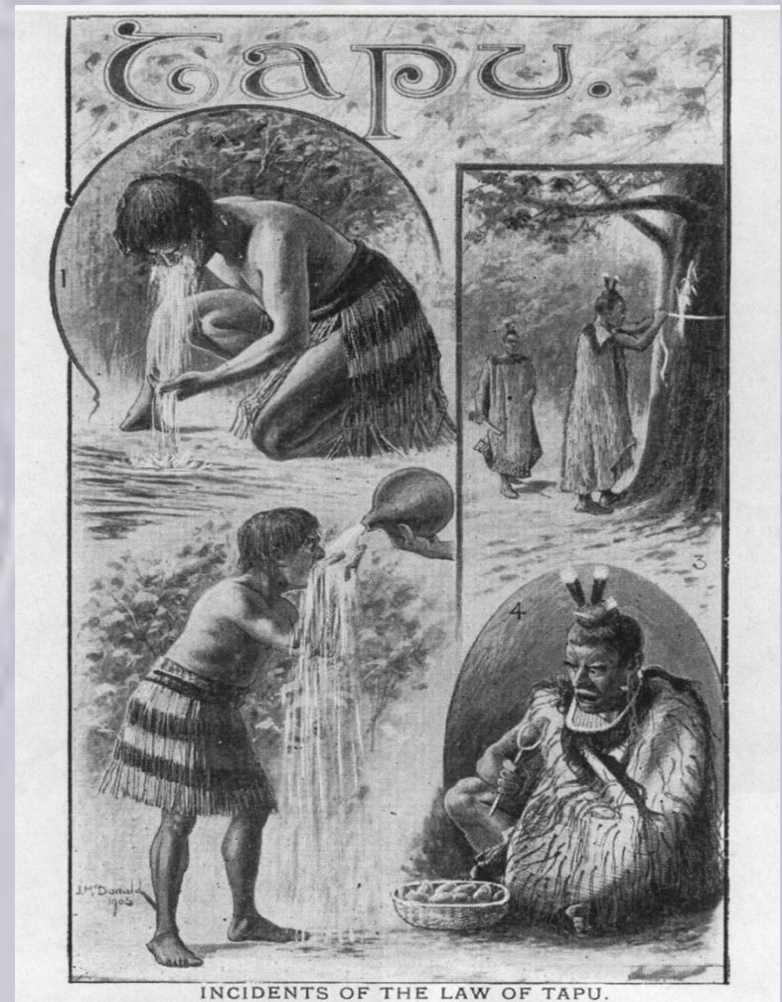


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# Repugnancy Doctrine

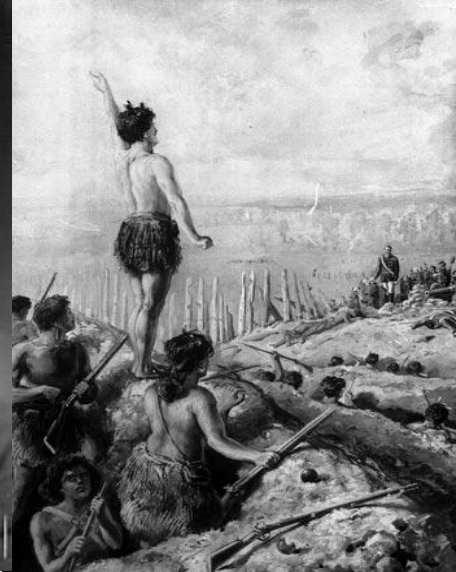
- Maori customary law could co-exist but principles that were not consistent with the fundamental, individualistic principles of English common law were outlawed eg laws relating to breach of tapu, collective ownership





# Māori Propensity for Litigation

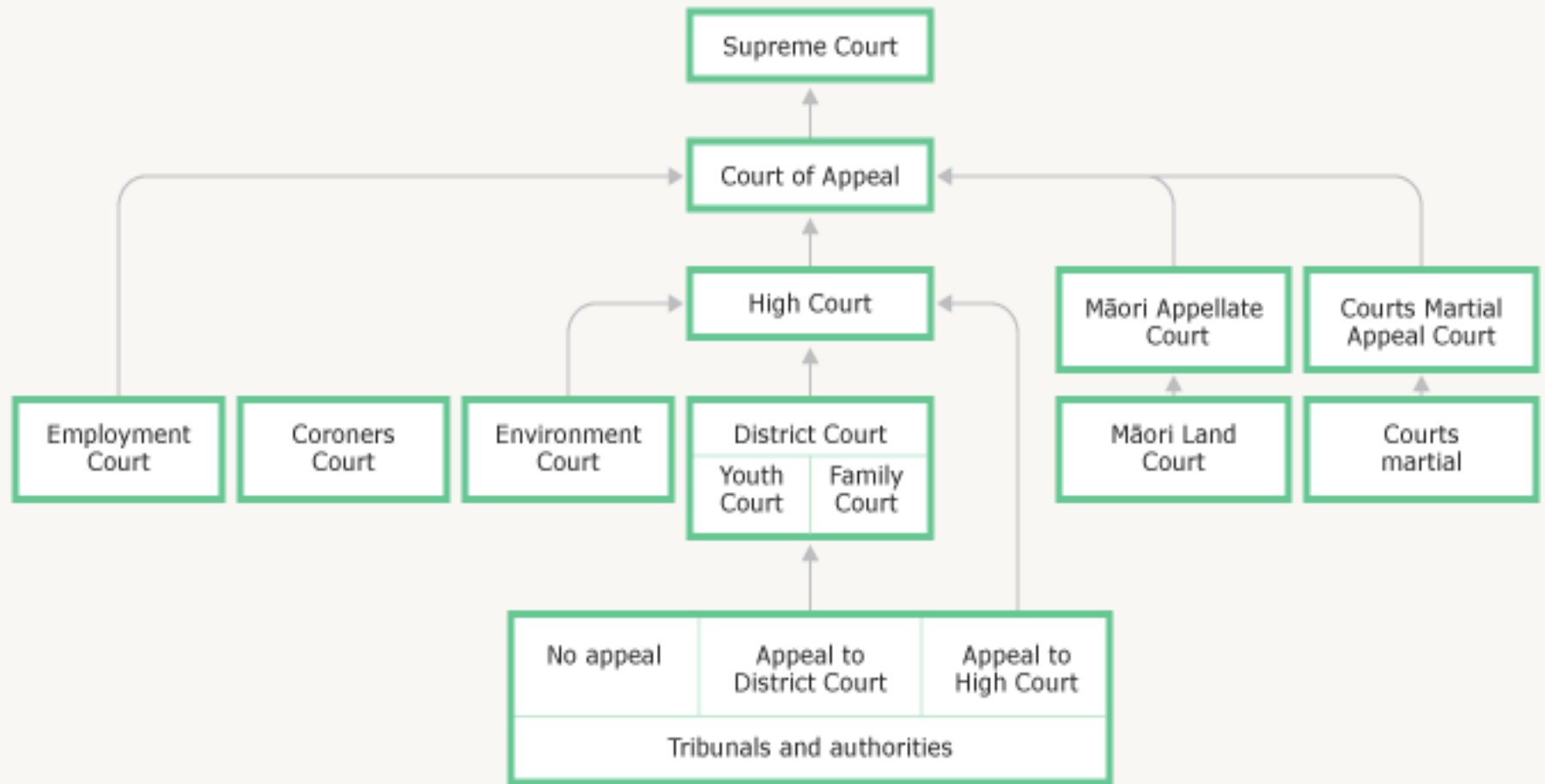
- “If there is one thing a Native loves more than another it is a Court case, and if there were only Courts above Courts, and other Courts above them again which they can still carry their litigation, then it seems to them a matter of absolute enjoyment.”
- Thomas Wilford M.P.,  
*Hansard*, 1912, p. 941



By courtesy Mr. S. P. Andrew]

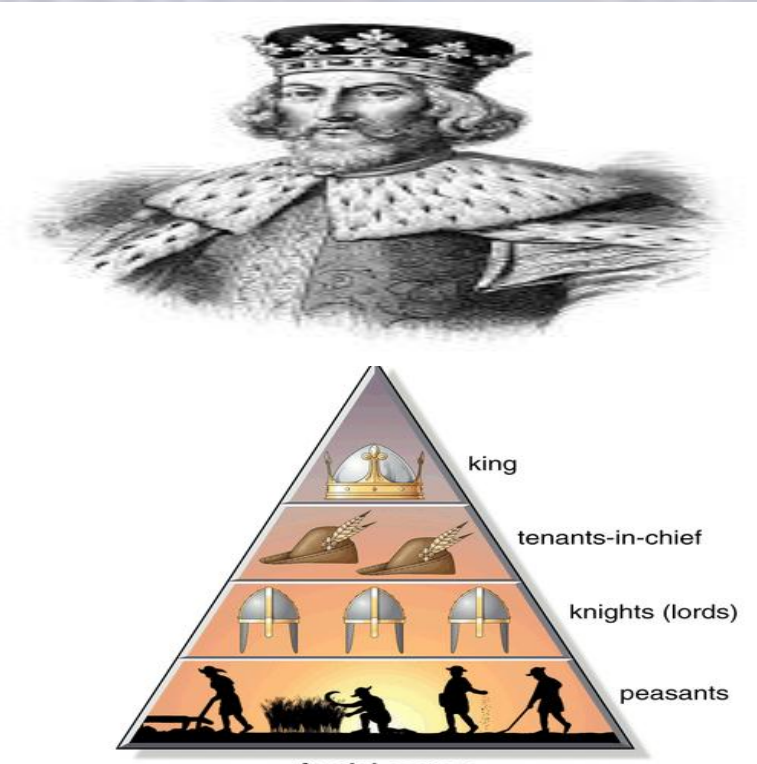
Fig. 243.—Group of Mayors of Wellington, 1892-1928.  
Names are, from left to right (sitting): Hon. R. A. Wright, M.P. (1921-1923), Hon. Sir F. H. Dillon Bell (1892-1893 and 1897), G. A. Troup, Esq. (present Mayor, 1929), and A. de Bathe Brandon, Esq. (1894). Standing: Sir John Luke, M.P. (1913-1920), Hon. T. M. Wilford (Minister for Justice) 1910-1911, D. McLaren, Esq. (1912), C. J. B. Norwood, Esq. (1923-1927), and C. M. Luke, Esq. (1895).

# Hierarchy of Courts



# What is the Doctrine of Aboriginal Title?

- What is the effect of Feudalism?
  - Crown = ultimate owner of all land in its territory
    - takes legal title
    - BUT subject to or ‘**burdened**’ by the ‘aboriginal title’
  - Doctrine of eminent domain or tenure, legal constitutional fiction
  - Notional basis of realty property rights, Crown grant – doctrine of estates
  - Crown radical, underlying, paramount title
  - Ignores “vital rule” of common law
    - English law to be applied subject to local circumstances
    - *Ngati Apa* para 28





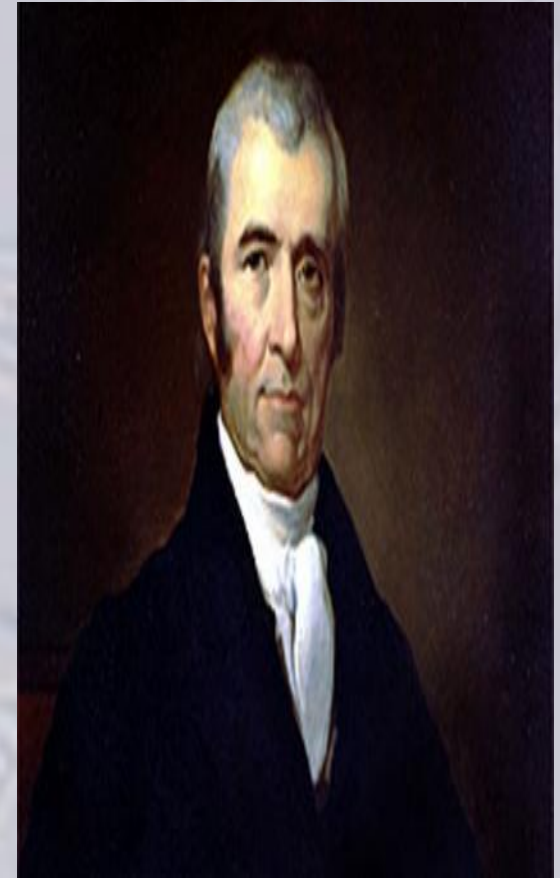
# What is the Doctrine of Aboriginal Title?

## *Johnson v M'Intosh* (1823) 8 Wheat 543

Marshall CJ *Johnson v McIntosh* (1823) Re Indians,  
European 'discoverer' took no more than an  
exclusive right of treating with the Indians :

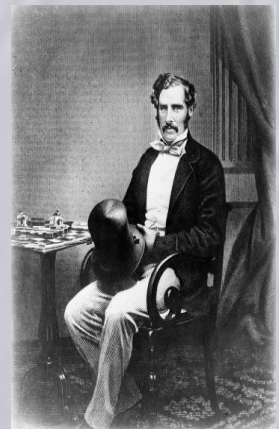
“In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded. ...They were admitted to be the **rightful occupants of the soil**, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.

... Discovery gave exclusive title to those who made it. While different nations of Europe respected the right of the natives as occupants, they **asserted the ultimate dominion to be in themselves ... and claimed a power to grant the soil while yet in possession of the natives.**”



# *R v Symonds* (1847) NZPCC 387

- It can not be too solemnly asserted” that Native title “cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.”
- The Crown’s radical title is held subject to the Aboriginal rights of Māori
- Judicial affirmation of the Treaty of Waitangi obligations and aboriginal rights
- Crown power to extinguish aboriginal title
- Minimal recognition of land rights; no recognition of residual sovereignty



# NZ Constitution Act 1852

Titles of Natives to lands reaffirmed the Crown's pre-emptive right

Section 73: – It was unlawful for any Person other than Her Majesty ... to purchase or in anywise acquire or accept from the Natives land of or belonging to or used by them in common as Tribes or Communities'

Recognition of Māori legal rights (Aboriginal title) to traditional lands and property rights

# *Kauwaeranga Judgment* (1870) (NLC)

- Judge Fenton acknowledges the Treaty of Waitangi 1840 (Eng)
- Reconciles Article 1 (sovereignty) and Article 2 (Māori property rights) of the Treaty of Waitangi – Aboriginal Title
- Natives kept – the “useful domain”
  - Natives yielded – the “high domain”
  - A compact - contract



Treaty of Waitangi



## *Wi Parata v Bishop of Wellington* (1877) 3Jur (N.S) 72

- Prendergrast CJ held:
- **Treaty of Waitangi**– Dismissed as a ‘simple nullity’ (void), Māori lacked legal capacity
- Treaty affirmed rights & obligations devolved upon Crown (not Māori)
- **Aboriginal title** - recognised s. 4, Native Rights Act 1865 -‘the ancient Custom and Usage of Māori people.’
- No Māori custom existed and any recognition in the legal system by statute can be disregarded because it does not exist!
- ‘In the case of primitive barbarians, the Supreme Government must acquit itself of the obligations to respect native proprietary rights and of necessity must be the sole arbiter of its own justice.’
- Hegemony of the settler state consolidated
- Treaty lay legally dormant until 1975, just under 100 years!



# Māori Response? Litigation

- “If there is one thing a Native loves more than another it is a Court case, and if there were only Courts above Courts, and other Courts above them again which they can still carry their litigation, then it seems to them a matter of absolute enjoyment.”
- Wilford M.P., *Hansard*, 1912, p. 941





# Māori Response

- Litigation: *Nireaha Tamaki v Baker* (1901)  
P.C ‘... no customary law of the Māoris ... this argument goes too far, and it is rather late in the day for such an argument to be addressed to a New Zealand Court.’
- *Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] AC 308 – Treaty of Waitangi needs statutory recognition



# Crown Response



- Protest of Bench (Judges) and Bar (Lawyers)
- Lordships ignorant of local laws and practices re Native land
- Codified *Wi Parata* in *Native Land Act 1909, 1931, 1953*.
- Repealed in 1993
- Joseph Ward attended Imperial Conference 1911



# The Treaty More Recently

- 1970s – civil rights movement
- Waitangi Tribunal 1975
- Is the Treaty still relevant?
- An ambiguous document for contemporary circumstances
- Which version takes precedence?
- The ‘Principles’ of the Treaty
- Māori-Pakeha relations
- Waitangi Celebrations



# *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 116 (HC)

- Can fishing rights exist separately from ownership?
- English Common Law
  - Fishing rights could exist independently of the ownership of soil – non-territorial aboriginal title!
  - *Attorney-General v Emerson*
- Fishing rights could be separated from ownership
  - Native rights *Inspector of Fisheries v Weepu* followed by *Keepa v Inspector of Fisheries*
- Aboriginal title re-incorporated into NZ law!



## *Te Rūnanga o Te Ika Whenua Inc. Society v AG* [1994] 2NZLR 20

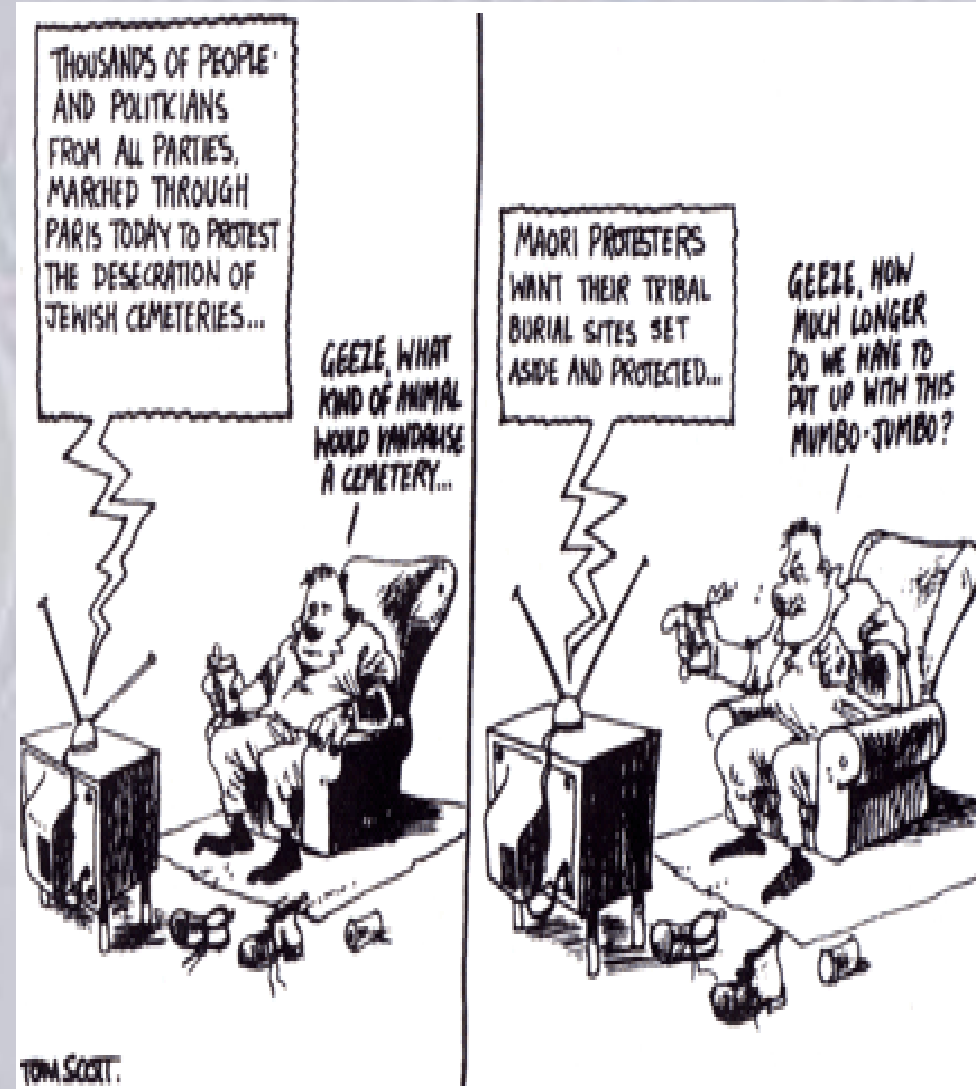


- Treaty of Waitangi 1840, Article 2 intended to preserve Māori customary title
- Courts are increasingly recognising the justiciability of the claims of Indigenous peoples
- Acquiring some permeating influence in New Zealand law
- Treaty rights and Māori customary rights partly the same in content



# Summary

- Law is a tool
- Can be oppressive
- Disputes over land and resources – cause of wars, litigation
- Treaty has moral and legal force
- Resurrected in 1975 but power in the hands of Judges and Parliament
- Constitutionalism
- Judicial activism to judicial conservatism

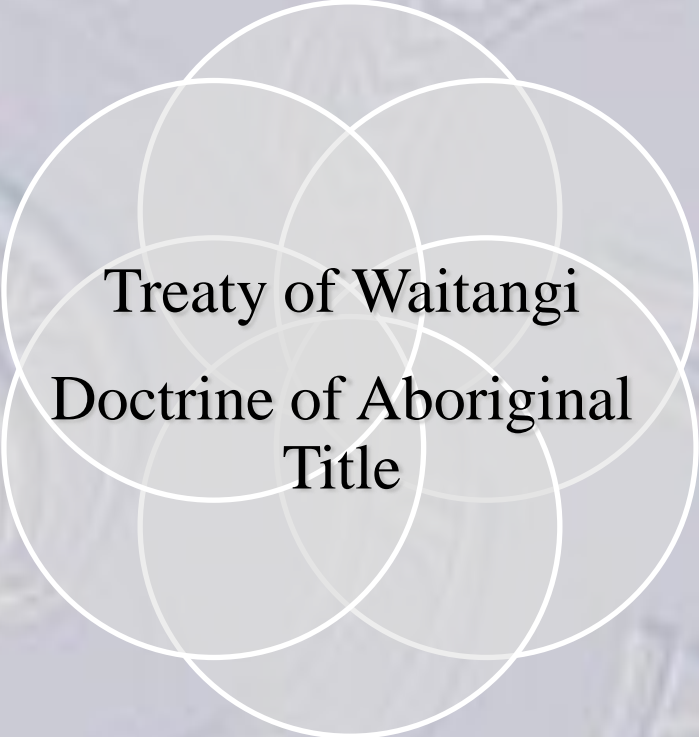




Court of Appeal Case  
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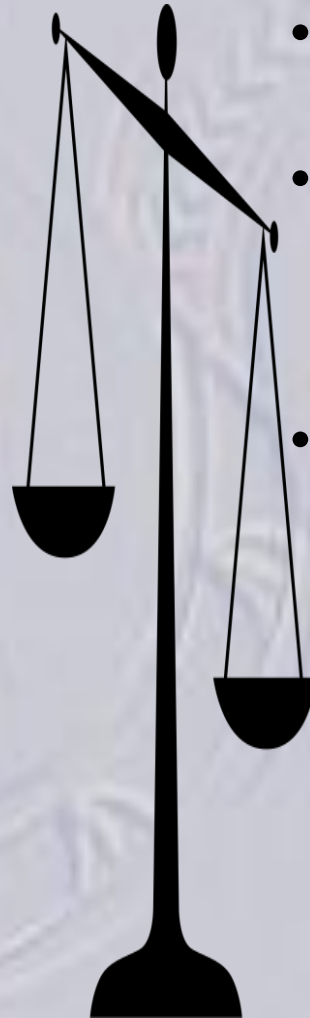
Foreshore and  
Seabed Act  
2004

# What about the Treaty of Waitangi/ Te Tiriti o Waitangi and the Doctrine of Aboriginal Title?



# Two Approaches to Aboriginal Title

- *R v Symonds* (1847)  
NZPCC 387 – **YES!**
- It can not be too solemnly asserted” that Native title “cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.” Therefore, in New Zealand, the Crown’s radical title is held subject to the rights of Māori

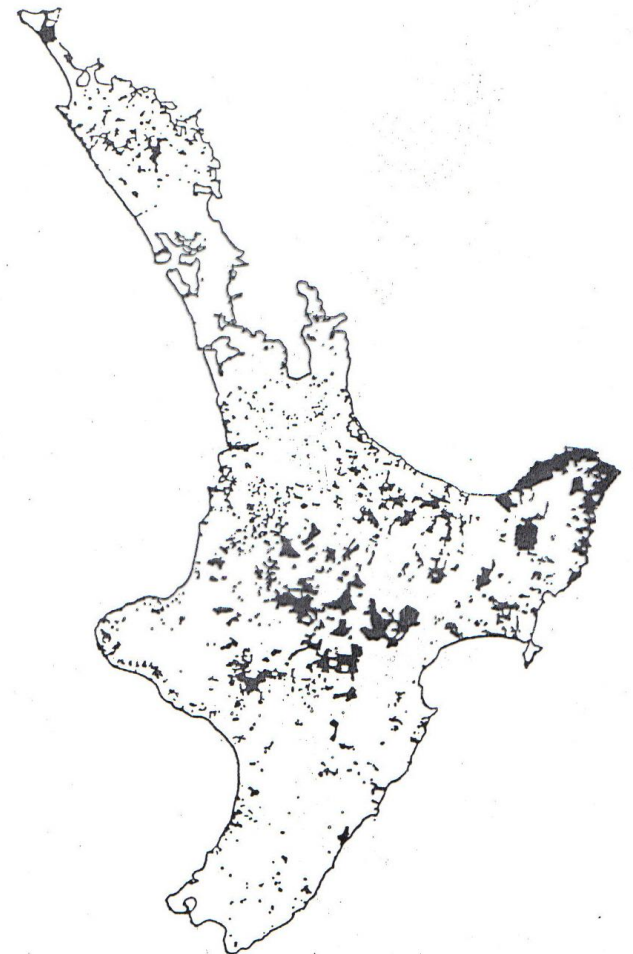


- *Wi Parata v Bishop of Wellington* (1877) SC: **NO!**
- Recognised in the s. 4, Native Rights Act 1865 as ‘the ancient Custom and Usage of Māori people.’
- ‘As if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. No such body of law existed.’



- Property is the legal right, not the thing to which the right refers.
- Property is a relationship between an owner and others in reference to a thing (Cohen 1927).

Land in Maori ownership 1960





# Property

EXCLUSIVITY



DURABILITY

QUALITY  
OF TITLE

TRANSFERABILITY

# Foreshore and Seabed – Who should decide?

Legislature?

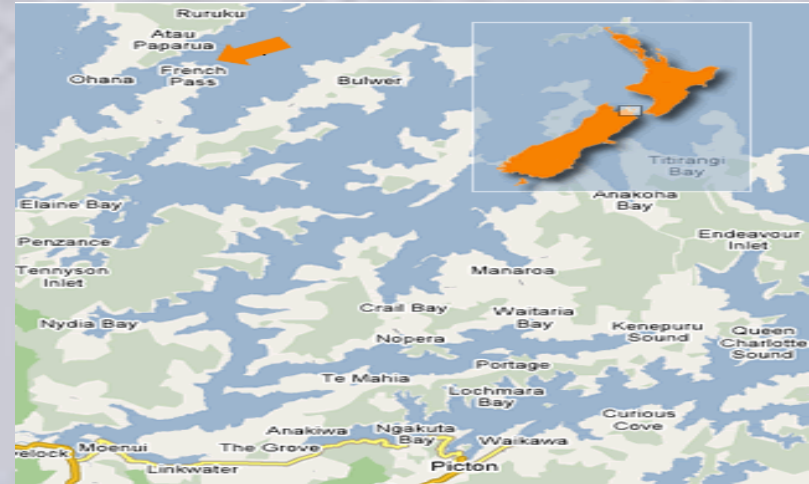
Parliament under  
the rule of law,  
sovereignty

Parliament as the  
elected body?

Judiciary? –  
unelected judges,  
Court of Appeal,  
Māori land Court  
– Te Ture  
Whenua Māori  
Act 1993

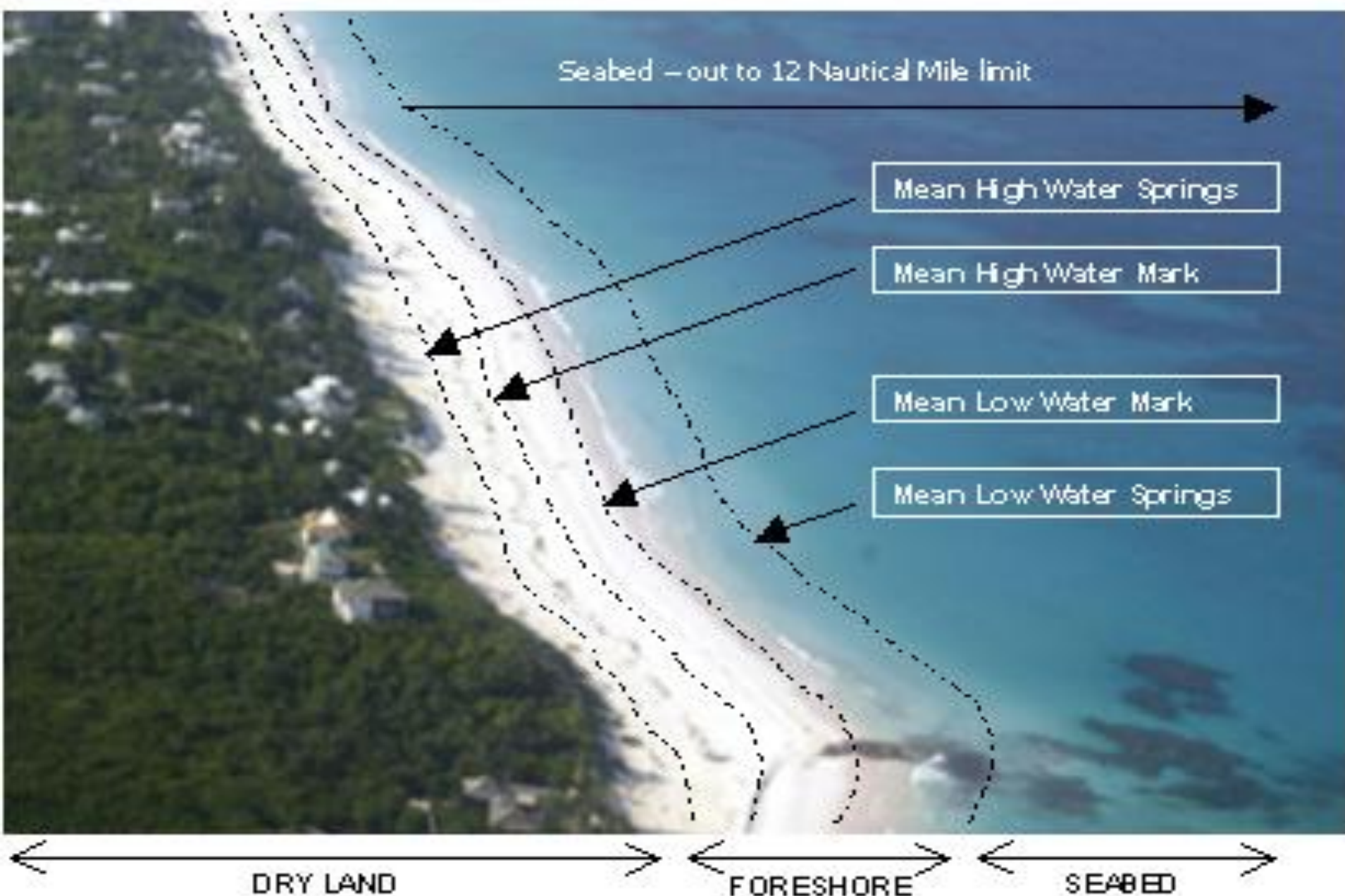
# *AG v Ngāti Apa* [2003] 3NZLR 643-670 – CMs 226

- Several iwi applied to Maori Land Court for declarations re status of foreshore & seabed lands Marlborough area
- Rich seafood area
- Maori land court jurisdiction to hear application?
- AG appealed to High Court
  - no jurisdiction
- High Court – CMs 229





# “Foreshore and Seabed”





*AG v Ngāti Apa* [2003] 3NZLR 643-670 – CMs 228

## **Issues**

- MLCt has jurisdiction to investigate title to Maori customary land (via doctrine of aboriginal title) and to grant an order vesting it in those found on investigation to be entitled to it?
- Effect - change Maori customary land (held according to tikanga) – to Maori freehold land (held in fee of the Crown) land registrar must issue fee simple title
- Cover foreshore and seabed area?
- Has aboriginal title been extinguished?

# *AG v Ngāti Apa* [2003] 3NZLR 643-670 – CMs 229

## 8 Questions

1. MLCt jurisdiction hear determinations re status foreshore & seabed
2. NZ law recognise Maori customary title to all or any part of the foreshore and seabed?
3. Aboriginal title extinguished if Maori customary land title having sea boundary extinguished?
4. Would NZ law recognise Maori customary title to all or part of the foreshore and seabed?
5. Statute extinguished aboriginal title?
6. Does statute prevent MLCt making a declaration re foreshore and seabed?
7. Does specific legislation extinguish Maori customary title in foreshore and seabed?
8. Does other legislation extinguish Maori customary title in foreshore and seabed?

# *AG v Ngāti Apa* [2003] 3NZLR 643-670 – CMs 229

- High Court – Ellis J 2002?
- Foreshore and seabed beneficially owned by the Crown at common law
- Declared so by legislation
- Therefore, Maori customary title in the foreshore and seabed was extinguished.
- Quote p 229 , line 22-30 – *Wi Parata* approach
- Extinguished by *Re the Ninety Mile Beach* [1963] NZLR 461





# *AG v Ngāti Apa* [2003] 3NZLR 643-670 – CMs 226

- Elias CJ discusses the doctrine of Aboriginal title
- CMs pp 230-234
- Aboriginal title over the foreshore and seabed CMs 235-236
- Extinguished by statute? CMs 236-238
- Extinguished by case law? CMs 238-239 based on *Wi Parata* but of dubious authority CMs p 239.
- Conclusions CMs 240
- Appeal allowed
- Maori Land Court has jurisdiction to determine status of foreshore and seabed
- Whether the whole of foreshore and seabed of Marlborough Sounds Maori customary land?





## Foreshore and Seabed

Court of Appeal– *AG v Ngati Apa* [2003] 3 NZLR 643-670

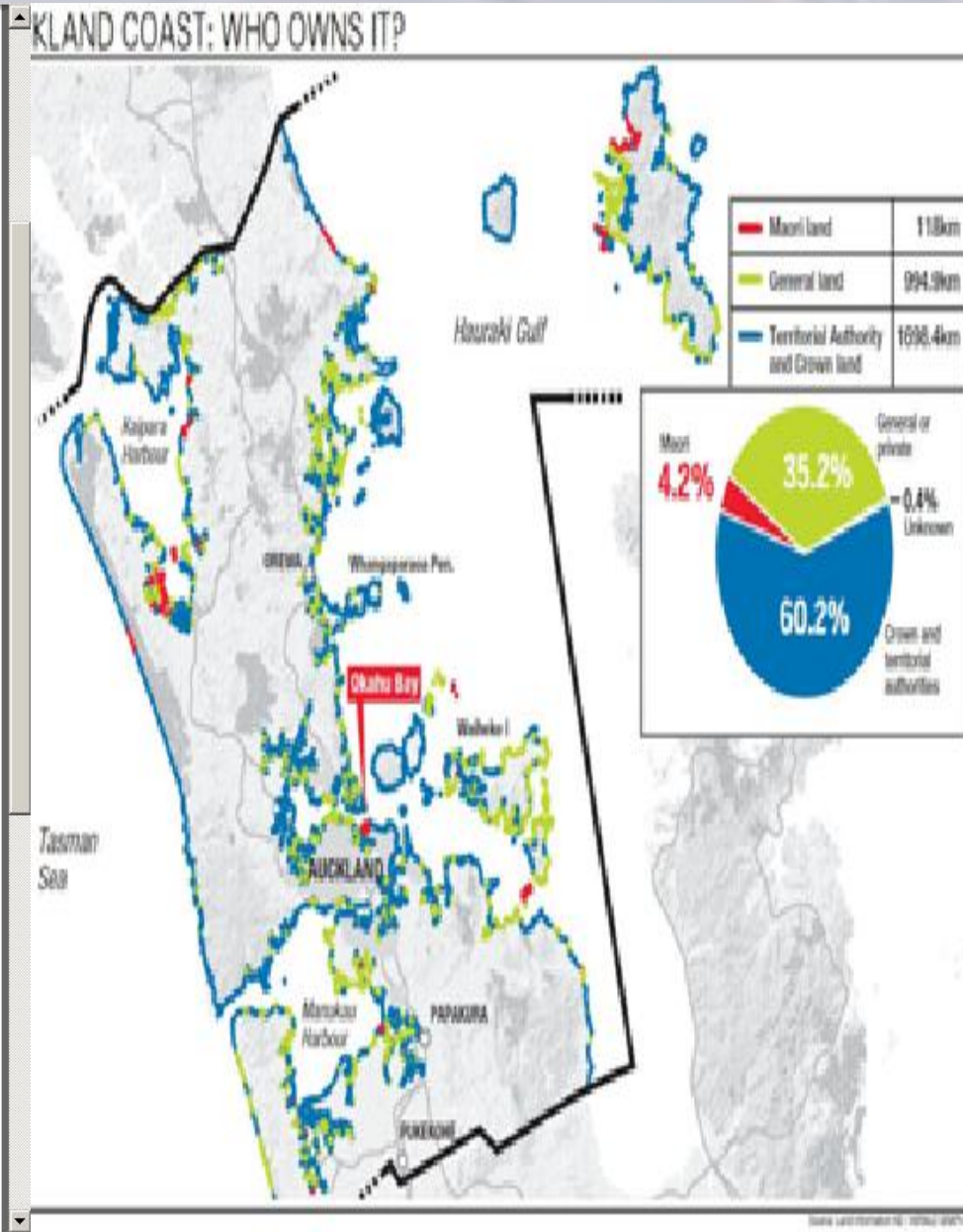
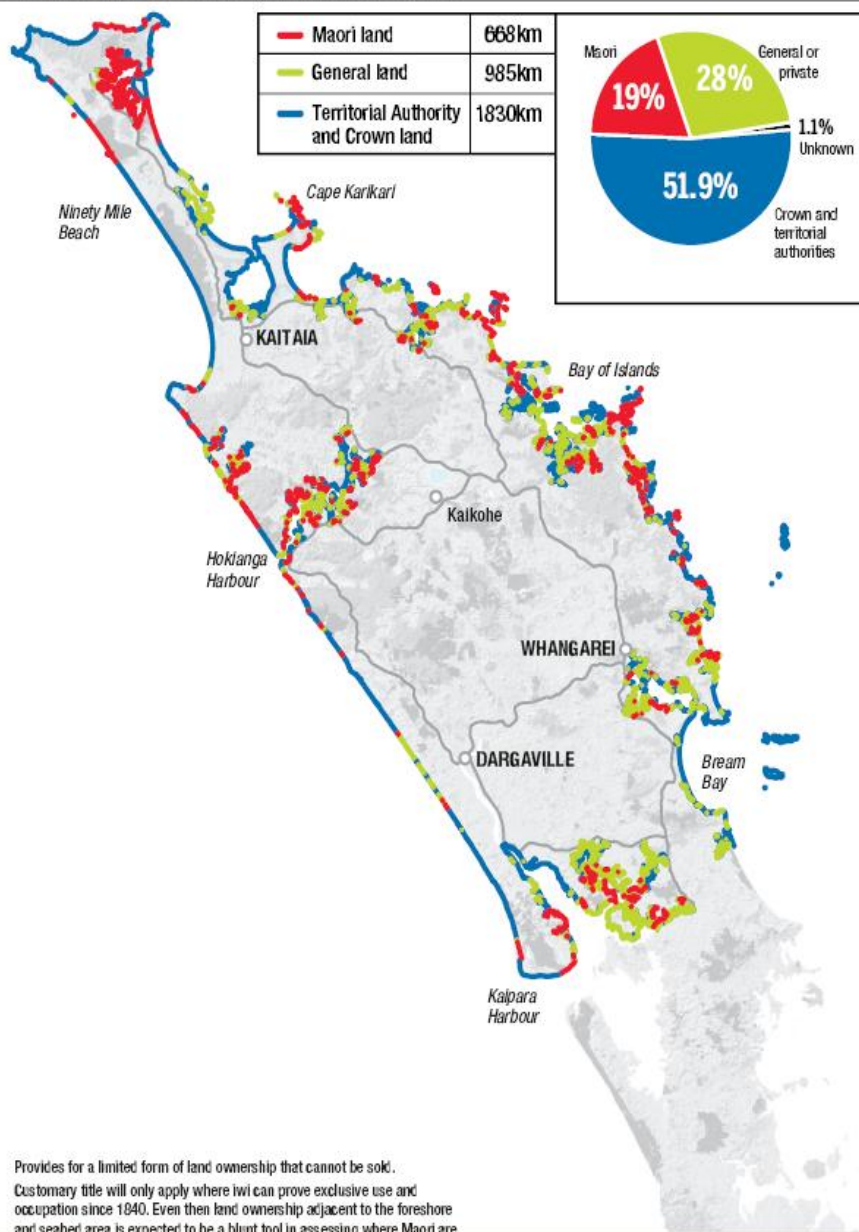
- Cession of Sovereignty, but not property rights.
- Extinguishment of Aboriginal title rights?
- Local Legislation?
- Sold?
- Tikanga altered since 1840?
- If not fee simple, then what is the interest?
- Would the MLC have jurisdiction? Yes!



# Ngati Apa [2003]

- Four main points:
  - 1. MLC has jurisdiction to make declaratory orders as to Māori customary land
  - 2. Overruled itself in *In Re Ninety Mile Beach*
  - 3. Held Māori customary land is recognised by NZ courts
  - 4. Held legislation did not expressly extinguish customary title

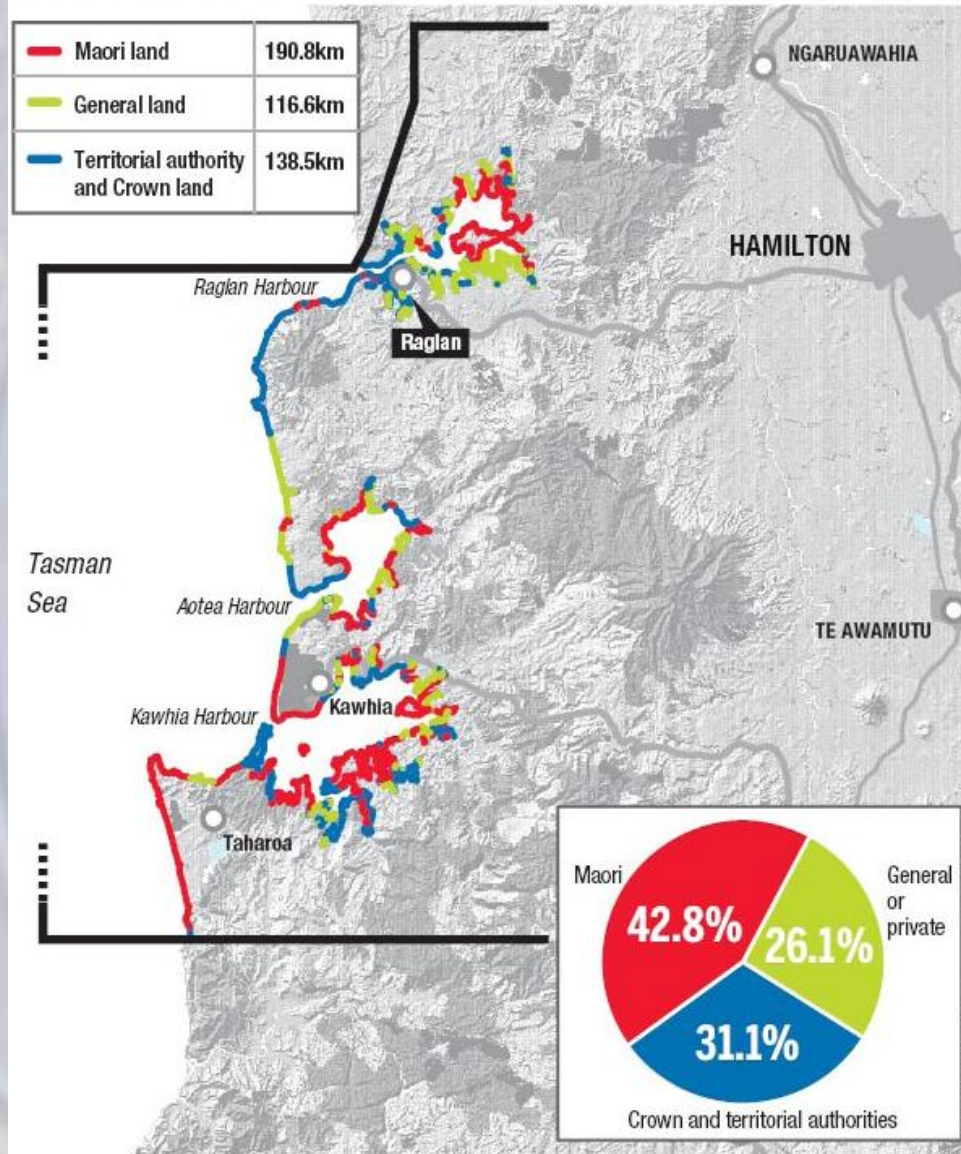
# Foreshore and Seabed



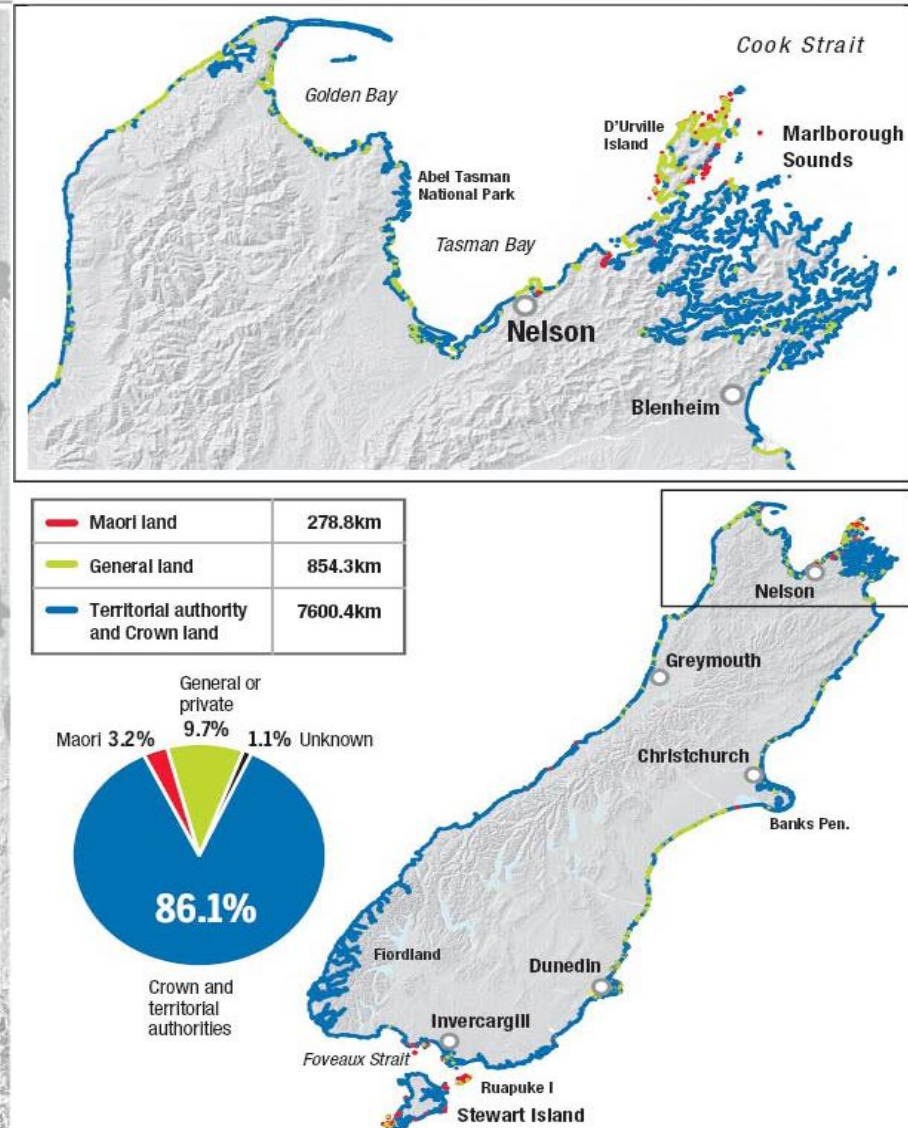


# Foreshore and Seabed Areas

## RAGLAN TO TAHAROA: WHO OWNS IT?



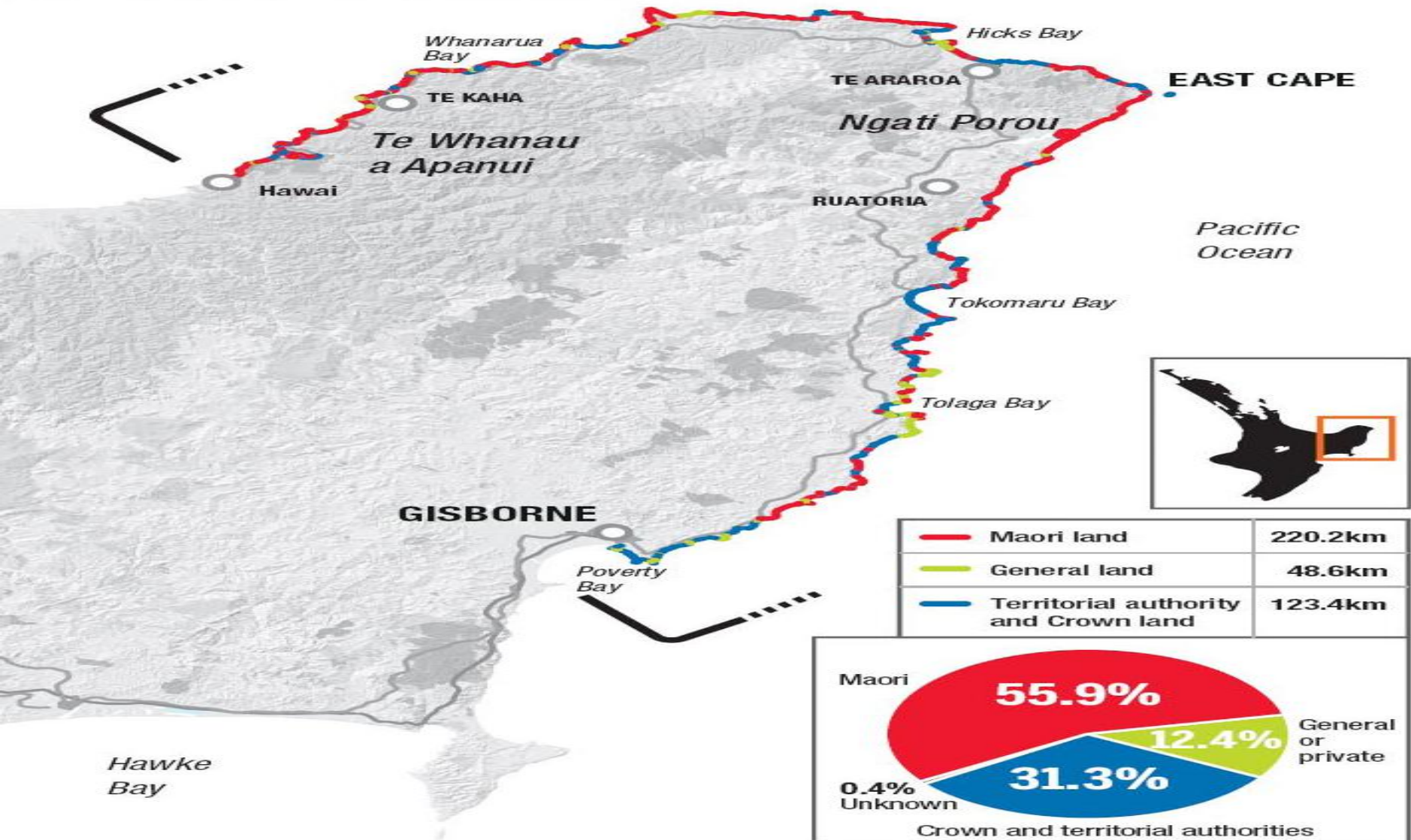
## SOUTH ISLAND: WHO OWNS IT?





# Foreshore and Seabed Areas

## EAST CAPE: WHO OWNS IT?







# Foreshore and Seabed Media Coverage

Beaches

TRAITOR



Beaches

Iwi

Kiwi

Iwi

Kiwi



*National*

Authorised by Simon Joyce, 14th Floor, 57 Wille Street, Wellington



Ownership rights,  
development rights,  
mining rights,  
veto rights...

Visiting rights?



Join the  
[www.CoastalCoalition.co.nz](http://www.CoastalCoalition.co.nz)



# Beaches

## Iwi

Ownership rights,  
development rights,  
mining rights,  
veto rights...



## Kiwi

Visiting rights?



Join the  
[www.CoastalCoalition.co.nz](http://www.CoastalCoalition.co.nz)



# Post-Ngāti Apa - Government Response - Foreshore and Seabed Framework Extinguish Māori Customary (Aboriginal) Rights

## Government's Foreshore and Seabed Framework

- Principles
  - Certainty
  - Regulation
  - Access
  - Protection



Labour's Customary Right to ignore the Treaty

# Foreshore and Seabed Case Study

- What's happening constitutionally?
- What does this case study reflect about:
  - Whose interests are being **served** and whose are being **limited**?
  - The key obstacles to the recognition and realisation of the **constitutional status** and **relationship** between tāngata whenua and the New Zealand public and state?
  - What this means for the possibilities of developing a relationship between tāngata whenua and the New Zealand public and state based on principles of **constitutionalism**?



# Foreshore and Seabed Act 2004



# Foreshore and Seabed Act 2004

- Removed ability of High Court and Māori Land Court to make status decisions of customary Māori Land based on Aboriginal Title
- See my article CMs p 241-242 – FASA discriminatory
- Breach common law, justice, equity, international human rights, due process, right to property, right to enjoy culture, etc



# Foreshore and Seabed Act 2004

Section 3 Object: The object of this Act is to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whānau, hapū and iwi with areas of the public foreshore and seabed.

# Foreshore and Seabed Act 2004



- Key Provisions
  - Recognised Territorial Customary Rights ‘Tests’ (ss 32, 33, 36-38)
  - Established Customary Rights Orders
    - Māori Land Court jurisdiction (ss 46, 48, 50-53, 55-57)
    - High Court jurisdiction (s 68)
    - Time limit (s 48) – 31 December 2015

TREMAIN

# Which View?



JUST BECAUSE  
IT'S LEGAL  
DOESN'T MEAN  
IT'S OKAY,  
YOU KNOW !!

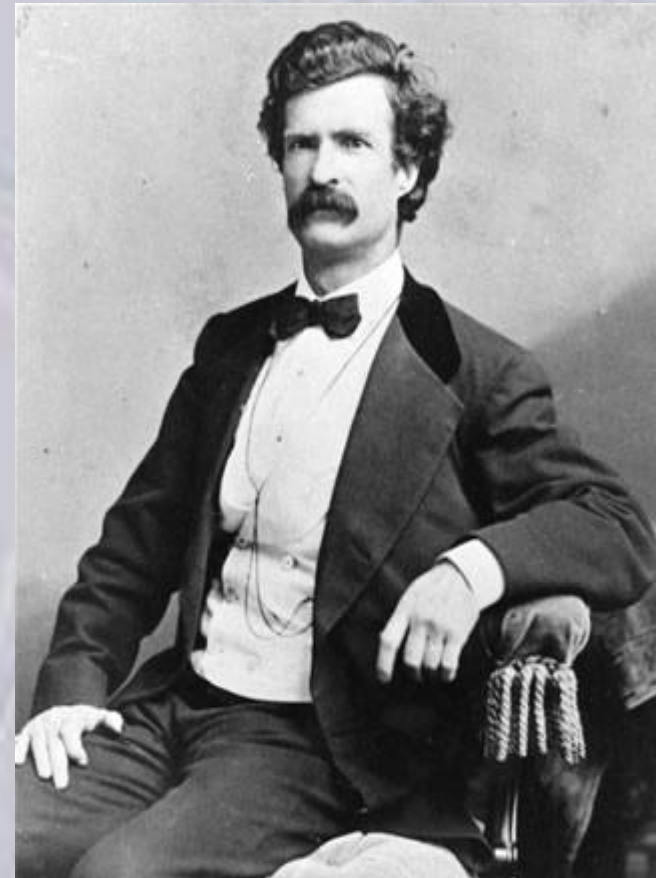


# The Foreshore and Seabed Case Study

-‘History does not repeat itself,  
but it does rhyme a lot’

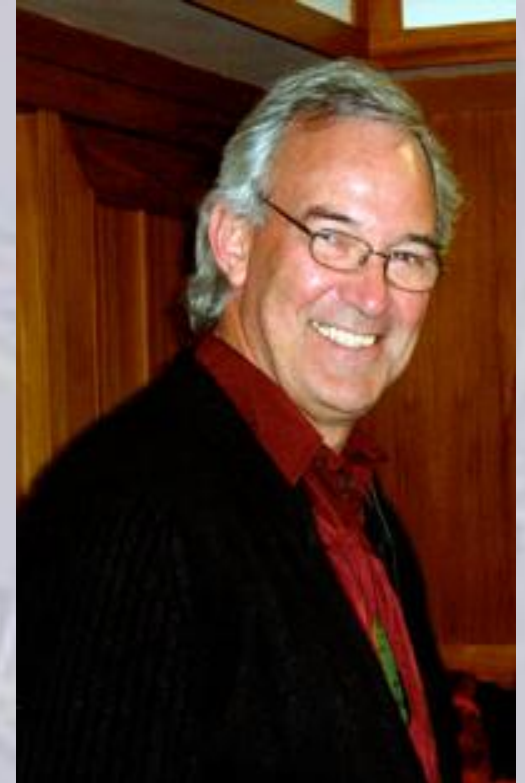
*Mark Twain*

-Professor David Williams  
article- similar to Wi Parata &  
Kauaeranga decisions



# Commentator Views


- Dr David Williams
- *Ngati Apa* overrode *Wi Parata*
- But FSA part of NZ law so the *Wi Parata* approach lives on!
- History does not repeat itself but it does rhyme a lot!
- Parliament does not like the reasoning of judges
- FSA extremely restrictive nature of Maori proprietary rights
- Parliamentary supremacy – disputes settled by Parliament!





ONCE UPON A TIME, MAORI  
OWNED ALL THE LAND IN  
NEW ZEALAND...

CLICK!



THEN THEY DIDN'T, SO THEY APPLIED FOR  
SOME RIGHTS TO THE SAND BETWEEN THE  
HIGH WATER MARK AND THE LOW WATER  
MARK AT THE SEA...

CLICK!



ARE THERE NO LIMITS  
TO THEIR GREED AND  
AVARICE?

CLICK!



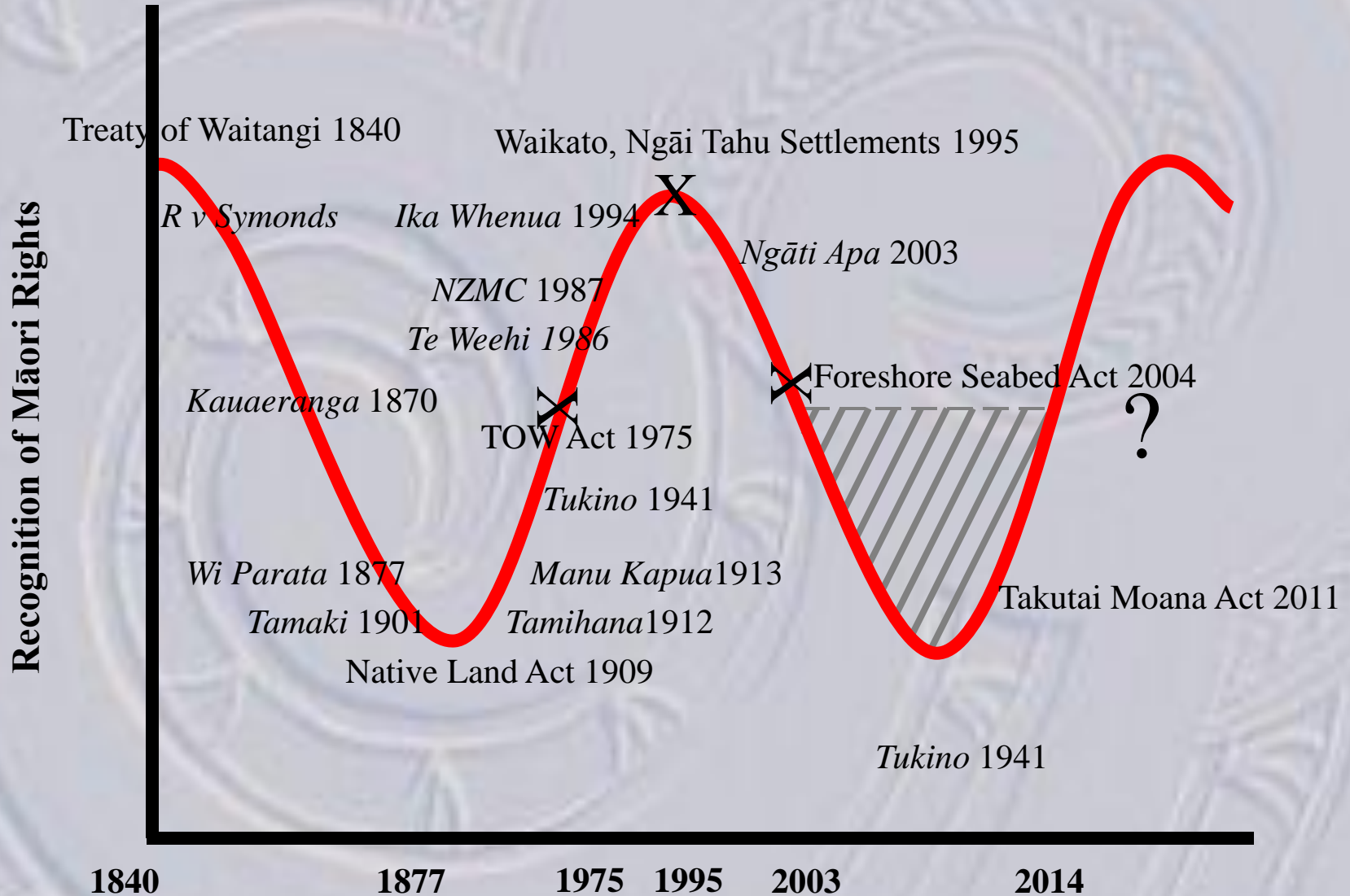
Tom Scott.



# What about Aboriginal Title in Aotearoa/New Zealand?

- *R v Symonds* (1847)
  - Doctrine of aboriginal title applies
- *Kauwaeranga* (1870)
  - Fenton CJ finds that Māori do have property rights to the foreshore and seabed of Thames but won't award title, just use rights – public interest
- *Wi Parata* (1877)
  - Prendergast CJ finds that Māori can not enforce aboriginal title property rights against the Crown, Treaty a nullity
- Native Lands Act 1909
  - Prendergast CJ's legal principle was incorporated into statute
- *Te Weehi* (1986)
  - Williamson J finds that Māori can claim customary rights to fisheries
- *Ngāti Apa* (2003)
  - Court finds that aboriginal title does apply and Māori can go to court to ascertain their property rights to the foreshore and seabed
- Foreshore and Seabed Act 2004
  - Crown legislates to extinguish aboriginal title to the foreshore and seabed

# Summary



# Summary

- Treaty of Waitangi and aboriginal title - moral and legal force, constitutional convention
- Resurrected in 1975 but power in the hands of Judges and Parliament
- Maori have aboriginal property rights which are to be respected, respect more honored in breach than in observance.
- Judicial activism to judicial conservatism
- Challenges between Parliament and judiciary
- Litigation victories – mixed, hollow?
- Dialogue to move forward
- Use and abuse of public power
- Challenges



# Next Week

- Marine and Coastal Area (Takutai Moana) Act 2011
- Constitutional Law developments



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