

Foreshore and Seabed Act 2004 reaction, Marine and Coastal Area (Takutai Moana) Act 2011 and Constitutionalism

Constitutional Law 107-15Y (HAM) LAWS201-15Y (HAM,
TGA) – Public Law A

Dr Robert Joseph

University of Waikato

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THE UNIVERSITY OF
WAIKATO
Te Whare Wānanga o Waikato

Announcements

- Tutorial 5 this week, available on Moodle
- Essay – 20%, due 15 June 2015
- Quiz 5 next week, 5 June 2015
- Magna Carta 800th Anniversary week long public lecture series at Auckland University July 6-13th - see <https://magnacartanz.wordpress.com/university-of-auckland-lecture-series/>
- Lecture – Foreshore & Seabed local & international reaction, repealed and the recent Coastal Marine Area (Takutai Moana) Act 2011

Lecture Overview

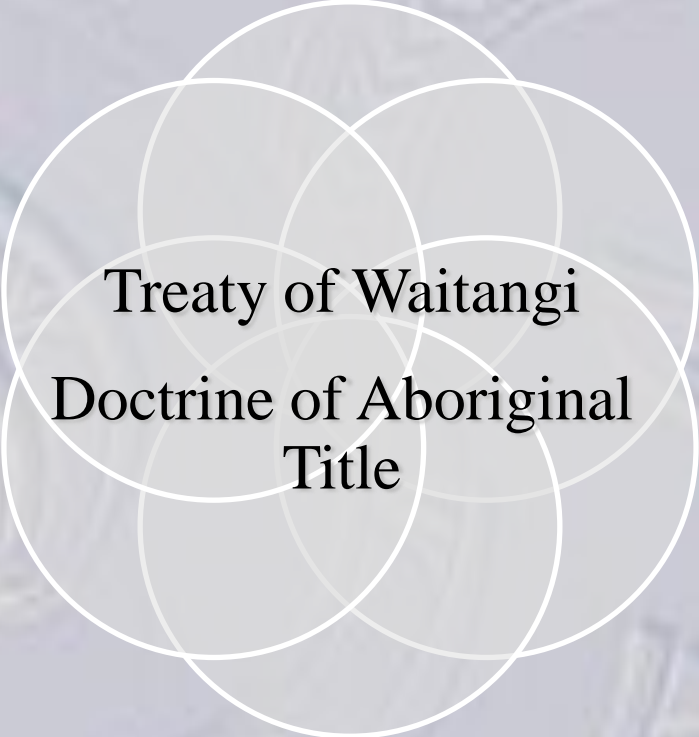


- Foreshore and Seabed Act 2004
- Waitangi Tribunal Report 2004 p 279
- Epstein Article p 285
- UN Special Rapporteur Report 2006 p 293
- Cullen's Response p 304
- UN CERD Report 2007 – p 305
- UN Special Rapporteur Report 2011-
Moodle – Dr James Anaya
- PFII NZ Report 2014 - Moodle
- **Marine and Coastal Area (Takutai
Moana) Act 2011**

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

International
Reaction - United
Nations
Responses

Waitangi Tribunal
Report

Foreshore and
Seabed Act
2004

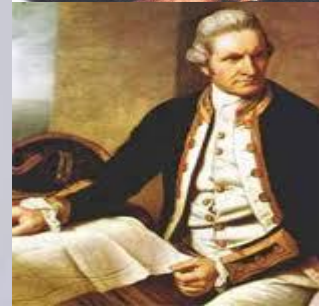
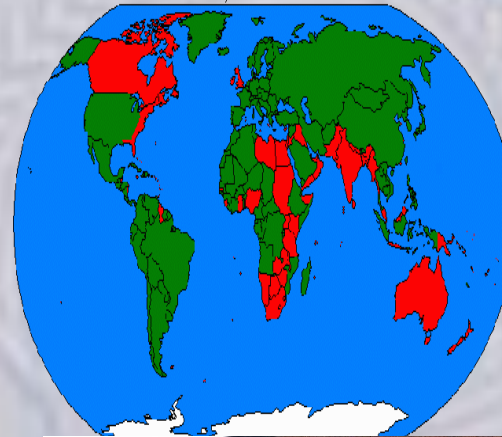
Foreshore and Seabed Case Study

- 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**?
 - My submission CMs pp 142-154



Aboriginal Title

- Age of Imperialism -1492
- Imperial powers claiming new lands – wealth
- Spanish, Portuguese, Dutch, French, English
- English common law
 - Assertion of sovereignty
 - Recognition of pre-existing property rights of Indigenous Peoples
 - Territory
 - Customary use rights
- Well-established body of common law, developed over centuries



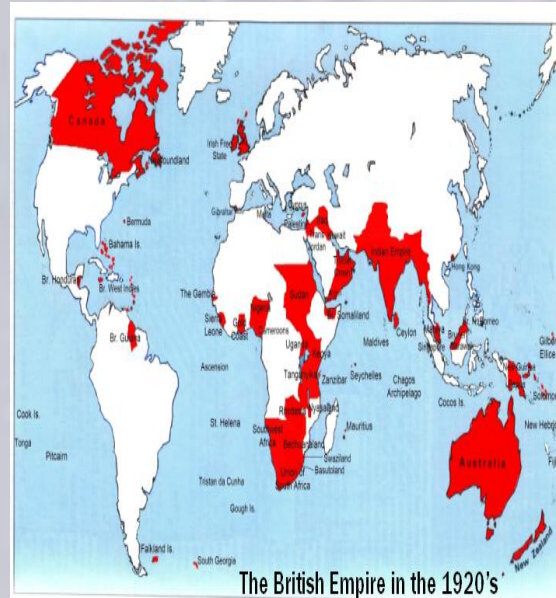
Ius Gentium – International Law

- Carving up of the globe by Imperial powers
- Doctrine of Aboriginal (Native) Title applies
- British common law follows the flag
- Recognise Indigenous sovereignty and realty (property rights) in land and water

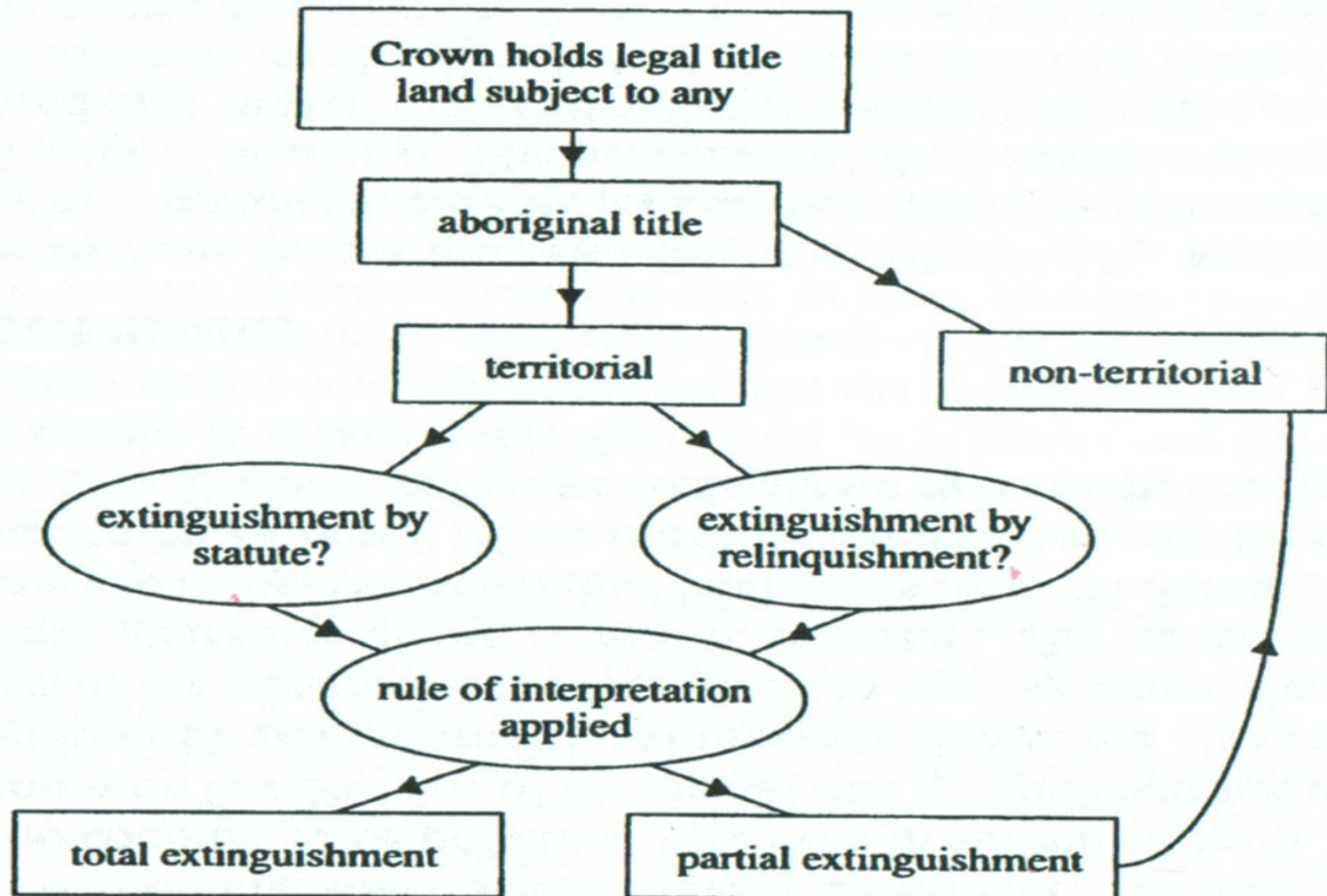


British Common Law Aboriginal Title?

- British Empire
- Feudal doctrine applies only by an ‘Act of State’
- North America – yes
- West Africa - yes
- Australia – no, yes
- New Zealand – yes, no, yes?
- Pacific Islands - yes



How is Aboriginal Title extinguished?



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



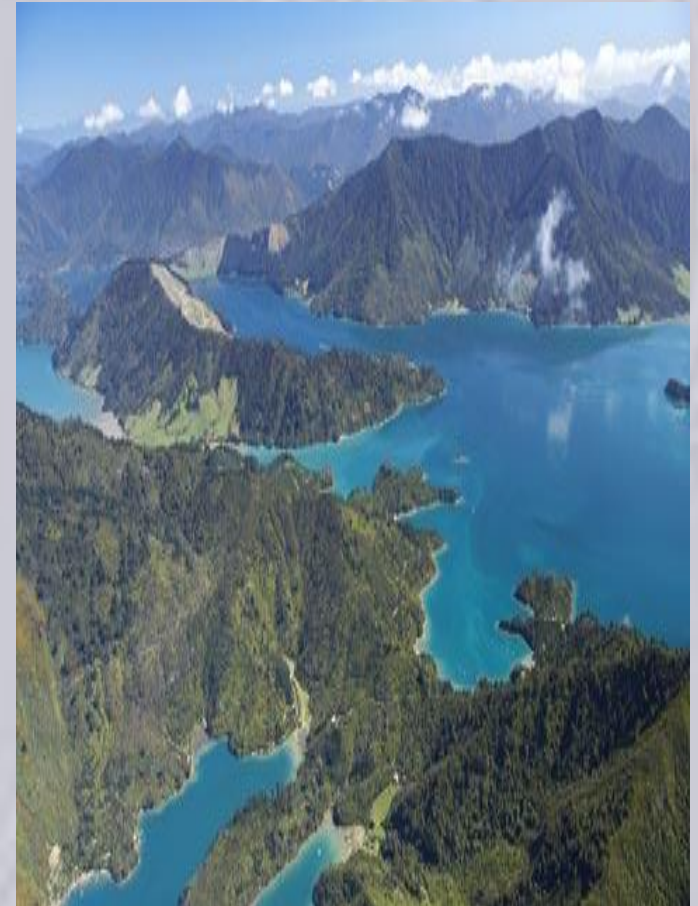
- *Wi Parata v Bishop of Wellington* (1877) SC: **NO!**
- Recognised in the s. 4, Native Rights Act 1865 as ‘the ancient Custom and Usage of Māori people.’
- ‘As if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. No such body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

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

AG v Ngati Apa [2003] 3 NZLR 643- CMs p 127

- 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



FASA – Justice? Maori



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



FASA – Justice? Crown



TREMAIN

Which View?



Waitangi Tribunal

- Waitangi Tribunal established to hear Maori grievances 1975 onwards – Treaty of Waitangi Act 1975
- Treaty of Waitangi Amendment Act 1986 allows investigations of grievances retrospectively to 1840
- This leads to the Treaty of Waitangi claims and Treaty settlements eg Waikato-Tainui and Ngāi Tahu settlements.



www.waitangi-tribunal.govt.nz

Foreshore and Seabed Waitangi Tribunal – CMs 279

- Treaty of Waitangi Act 1975
- Investigates claims by Māori against Crown only
 - Prejudicial effect of Crown legislation, bills, policies, actions and omissions
 - Which are inconsistent with the principles of the Treaty



Treaty of Waitangi ‘Principles’

- ‘Principles’ guide conduct and relationships in the future
 - Partnership
 - Protection
 - Participation
- Underpinning that both Treaties are valid there should be mutual benefit for Māori and Pakeha
- There must be reasonable protection given to Māori culture, customs and resources
- Māori have citizen rights too and have equity of access and outcomes

Foreshore and Seabed

Waitangi Tribunal Report 2004 – CMs pp 279-284

- **Reconciling Art 1 & 2**
 - Article 1 – Crown acquired kawanatanga, right to govern
 - right to make the present policy and enact it as legislation
 - Eg enact Foreshore & Seabed Act 2004
- BUT**
 - must be exercised in light of the Article 2 and 3 guarantees
- **Article 2 - Breached**
 - New regime confers fewer and lesser rights
 - Crown lacks necessary moral and legal grounds for overriding Article 2 guarantees
- **Article 3 – Breached**
 - Equal treatment under the Law
 - Protection of the rule of law

Foreshore and Seabed Waitangi Tribunal Report – Treaty Principles

- **Reciprocity and partnership**

- overarching
 - Crown's kawanatanga qualified by tino rangatiratanga
- require Crown to develop its policy to:
 - give meaningful effect to tino rangatiratanga; and
 - balance interests of both peoples



- **Active Protection**

- Embraces 3 key elements of Treaty relationship
 - Honourable conduct
 - Fair process
 - Recognition by both parties of one another's authority
- Falls very short of actively protecting tino rangatiratanga

Foreshore and Seabed Waitangi Tribunal Report – Treaty Principles

- **Equity and Options**

- one class of property (Māori customary land) is expropriated; and
- all other classes of private property are left intact
- As citizens, Māori are entitled to have their:
 - options under the law; and
 - property rights defined by the courts

- **Redress**

- Requires Crown to ‘restore honour and integrity of the Crown and the mana and status of Māori’
- Removal of legal rights = **compensation** not redress
- Crown’s Treaty breach cannot be discharged by redress alone

Foreshore and Seabed

Waitangi Tribunal Report – Constitutionalism – CMs p 283

- Good Governance
- Fairness, non-discrimination
- Rule of Law
- International Human Rights Norms
- Treaty Norms
- Treaty breaches
- Recommendations – longer conversation,
- Go back to drawing board,
- Engage with Maori in proper negotiations about the way forward
- Least intervention best intervention
- Path forward determined by consensus



FASA – Justice? Maori



Foreshore and Seabed Act

2004 – Ref Docs pp 140-157

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

Foreshore and Seabed Act 2004

- Removed ability of High Court and Māori Land Court to make status decisions of customary Māori Land – Aboriginal Title
- Did not effectively recognise & provide for customary or Aboriginal title because it took away the legal rights of Maori to have their interests determined by the Courts – due process
- Failed to properly balance customary and public interests.
- General public interests advanced at considerable expense of Maori interests.
- See my article – CMs p 241


FASA – Justice? Crown





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

CLICK!

A man with glasses and a bow tie is sitting at a desk, looking at a small object in his hand.

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!

A man with glasses and a bow tie is sitting at a desk, looking at a small object in his hand.

ARE THERE NO LIMITS
TO THEIR GREED AND
AVARICE?

CLICK!

A man with glasses and a bow tie is sitting at a desk, looking at a small object in his hand.

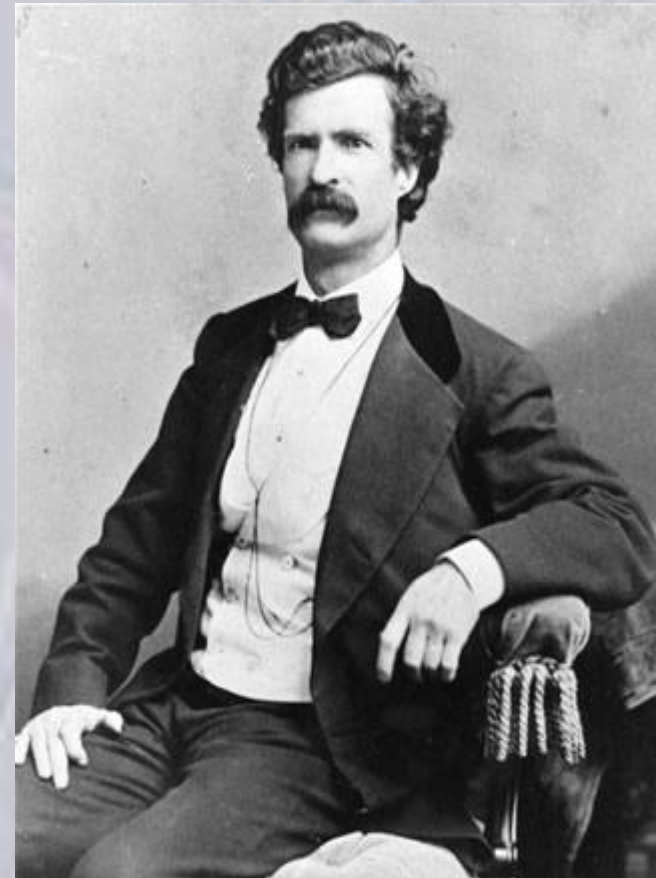
The Foreshore and Seabed Case Study

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

Mark Twain

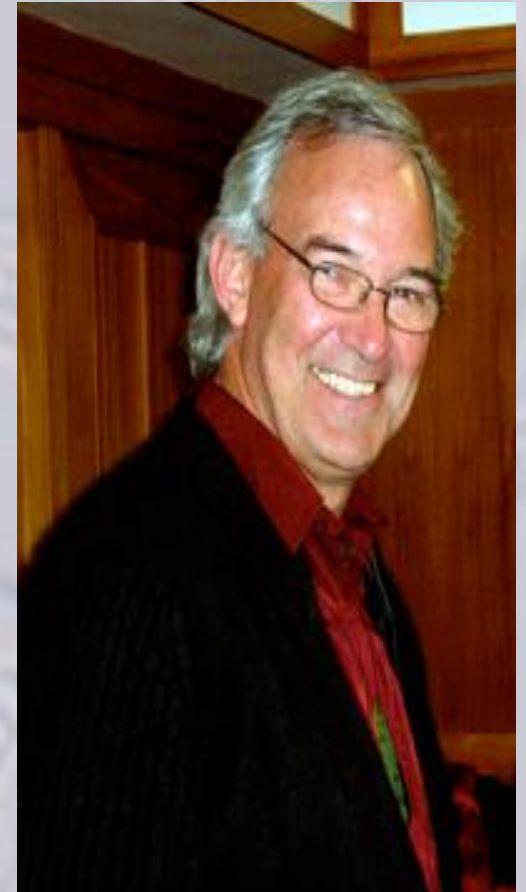
-Professor David Williams article- similar to Wi Parata & Kauaeranga decisions

CMs pp 255



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!



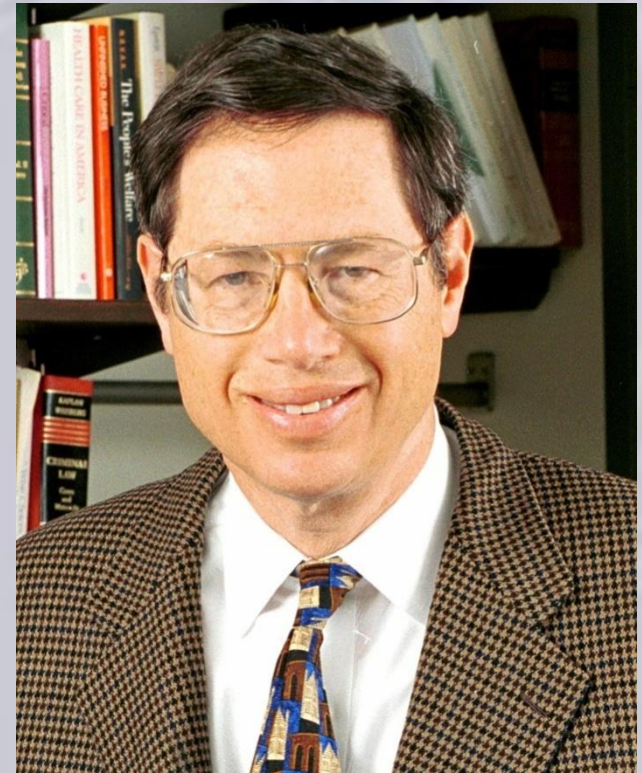
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Commentator Views – Epstein – CMs 285

- Richard Epstein – NZ Business Round Table
- Third Way – common property, no one owns the FSA - common good
- Same with air, water, beaches
- Use rights in FSA, non-exclusive rights
- Swap property rights for the right to participate in the political process.
- WT Report had too much romanticism within it
- Doctrine of prescription – allow status quo to be unraveled for limited time but public interest so allow existing title to be asserted.
- One political act of the judiciary justifies another through the legislature!



Epstein Article – CMs 285

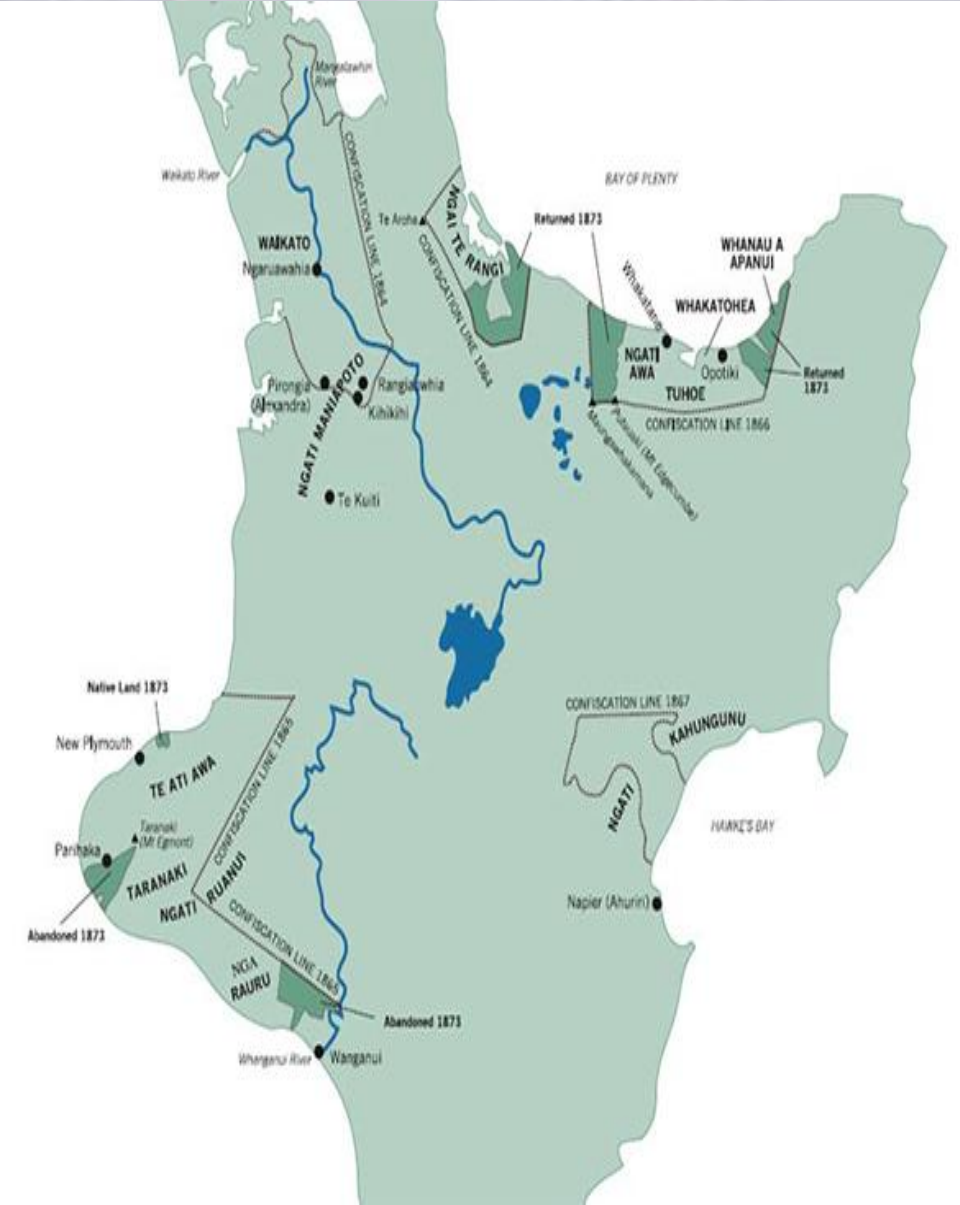
- Roman Law - common property – everybody has access to but no one has ownership
- Locke – surrender property rights – commit wrong, consent and forced taking
- Non-exclusive resources, difficult to find any coherent system of exclusive property rights
- Imperium (sovereignty) v dominium (absolute ownership) confused
- 2 versions of the Treaty confusing – Maori - intermediate state between sovereignty and ownership
- Crown not interfere on matters of Maori internal governance as it asserted sovereignty over the nation



FASA – Justice? Crown



Past Raupatu 1860s – Land Confiscations – FASA - Modern Raupatu?



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

Beaches

Iwi

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



Kiwi

Visiting rights?



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UN Response CERD 2005 – CMs p 254

- The New Zealand Foreshore and Seabed Act 2004 appeared to the Committee, on balance, to contain discriminatory aspects against the Māori, in particular in its extinguishment of the possibility of establishing Māori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress,
- Breach of Articles 5 and 6 of the Convention for the Elimination of all forms of Racial Discrimination 11 March 2005



United Nations CERD Decision 2005 – CMs 254

- The Committee on the Elimination of Racial Discrimination –
 - “political atmosphere”
 - “refrain from exploiting racial tensions”
 - “apparent haste”
 - “insufficient consideration of alternative responses”
 - “notes scale of opposition”
 - Para 6 – “on balance, contains discriminatory aspects against the Māori”
 - Para 7 – resume a dialogue with Māori
 - Legislative amendment



FASA – Justice? Maori



Crown Response to UN CERD 2005

"We are happy to comply with this request and hope to be in a position by then to include positive information from the negotiations currently underway with Ngāti Porou and Te Whanau-a-Apanui in relation to their customary rights to the foreshore and seabed within their traditional rohe."

Dr Cullen media statement 12
March 2005



FASA – Justice? Crown



UN Special Rapporteur Report 2006 Rodolfo Stavenhagen – CM 298

- Expressed concerns over the unjustifiable extinguishment of Maori customary title to the F&S, absence of a guaranteed right of redress, or criteria to guide compensation calculations.
- F&SA limits right to freedom from discrimination, infringes the right not to be arbitrarily deprived of property, and the right to development.
- F&S A provides differential treatment which breaches the NZ Bill of Rights Act 1990
- F&SA extinguishes Aboriginal Title rights as protected under the Treaty of Waitangi.
- F&SA -step backward for Maori in relation to the progressive recognition of their rights through the Treaty Settlement process over recent years.



UN Special Rapporteur Report 2006

Recommendations – Improvements? CMs pp 302-303

- Constitutional convention to design constitutional reform to regulate relationship between Maori and Government based on Treaty of Waitangi, international law right of peoples to self-determination
- Treaty be entrenched
- MMP system be entrenched
- Iwi and hapu self-governance with local & regional councils
- Waitangi Tribunal – granted legally binding powers & more resources
- NZ Bill of Rights be entrenched
- Foreshore and Seabed Act be repealed



FASA – Justice? Maori



Government Response- Dr Cullen

2006 – CMs – p 304

- Unbalanced, narrow, disappointing, wrong
- Only 8 days for making selective conclusions
- Settlements not coerced
- Telling us how to manage our political system
- Proud democratic tradition
- Specific areas of disagreement



FASA – Justice? Crown



UN CERD Report 2007 – CMs pp 305-306 – Improvements?

- Wider constitutionalism issues
- Treaty of Waitangi public discussion, entrenchment?
- Special temporary measures
- Treaty settlements
- Waitangi Tribunal binding powers, resources
- Foreshore and Seabed – renewed dialogue, mitigate discriminatory effects
- Legislative amendment



Ministerial Review 2009 – CMs pp 270-271

- Terms of Reference –
- Key findings –
- Options for balancing Maori property rights and public rights –
- Treaty of Waitangi framework and core principles –



Ministerial Review 2009 - Panel Recommendations

- Panel: Hon Sir Taihākurei Edward Durie DCNZM (Panel Chair), Richard Boast and Hana O'Regan.

The lawful customary interest. Prior to the Ngāti Apa case, the whole of the coastal marine area to the outer limits of the territorial sea, or to such outer limit as customarily could be controlled, was subject to Native or Aboriginal or customary Title unless it could clearly be shown that that Title to any specified part had been properly extinguished.

(Our advice here gives the legal position. Native or Aboriginal or customary title remains unless it has been clearly and plainly extinguished. Any future statutory regime would need to show that the customary Title was also “fairly extinguished having regard to the principles of the Treaty of Waitangi”).)

Ministerial Review 2009 - Realistic Options

- To appeal the decision to the Privy Council. We think an appeal should have been prosecuted
- To do nothing, leaving the courts to decide
- To amend the statute-based Māori land law
- To include foreshore and seabed settlements in Treaty settlements
- To negotiate a nation wide settlement with hapū and iwi
- **To substitute a special statute to govern customary and public interests in the coastal marine area**
- Conclusion

FASA – Justice? Maori



Marine and Coastal Area (Takutai Moana) Act 2011 – genuine power-sharing?



Property

EXCLUSIVITY



DURABILITY

QUALITY
OF TITLE

TRANSFERABILITY

Marine and Coastal Area (Takutai Moana) Act 2011

- **Part 1: Preliminary Provisions – ss. 3-10**
- Outlines the purpose of the Act - to establish a durable scheme to ensure protection of all legitimate interests of all New Zealanders in the marine and coastal area, including recognising the mana tuku iho (inherited right or authority derived in accordance with tikanga) of iwi, hapū and whānau as tangata whenua – ss. 4, 6-10.
- Defines key terms such as marine and coastal area – s. 9.
- Repeals the Foreshore and Seabed Act 2004 and restores the customary interests extinguished by that Act – s. 5.



Marine and Coastal Area (Takutai Moana) Act 2011 – Reference Documents - pp133

Section 4(1) Part 1 Preliminary Provisions:

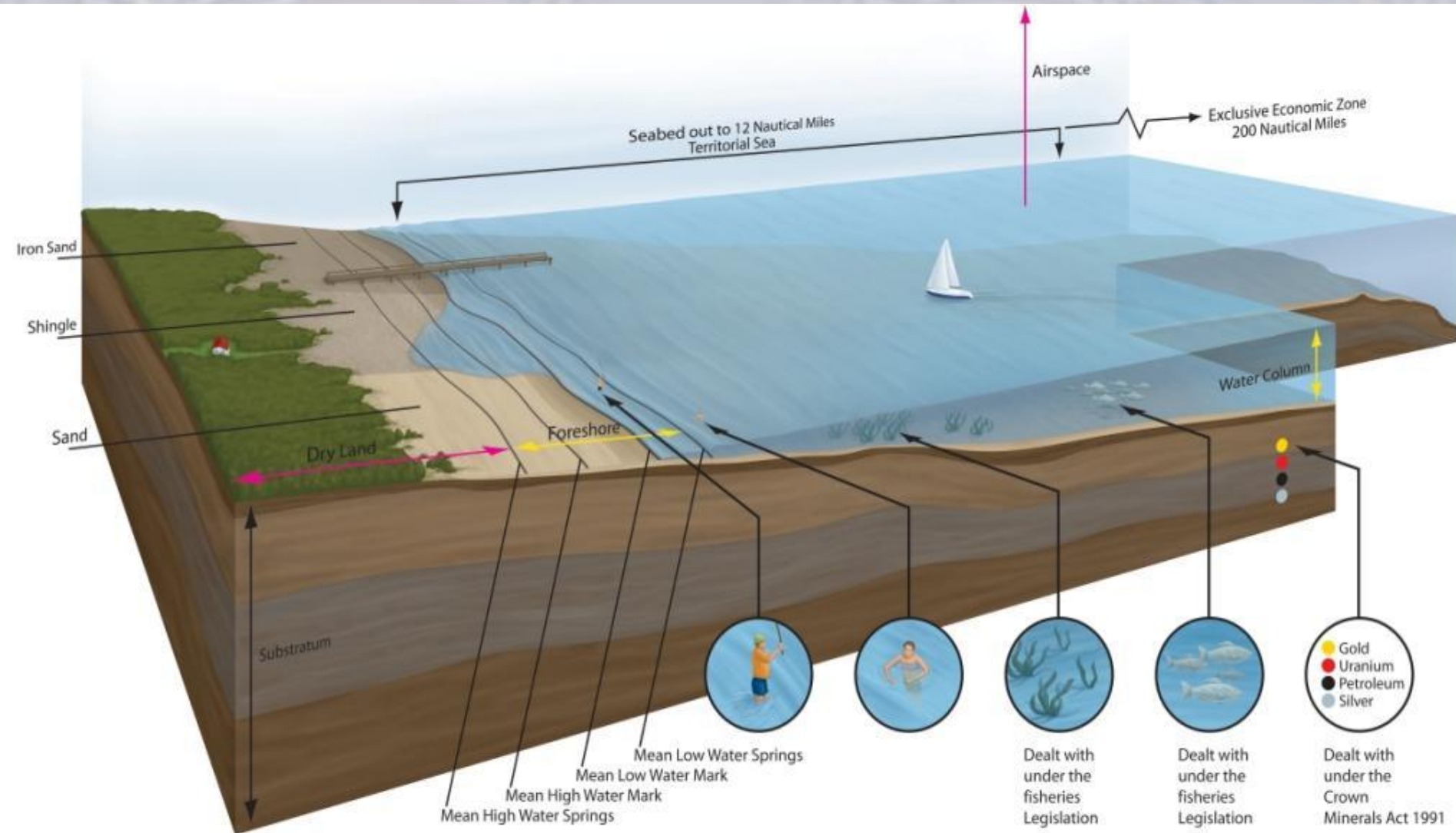
- a) establish a durable scheme to ensure protection of all legitimate interests of all New Zealanders in the marine and coastal area including Māori interests
- b) recognise the mana tuku iho exercised in the marine & coastal area by iwi, hapū and whānau as tangata whenua; and
- c) provide for the exercise of customary interests in the common marine and coastal area; and
- d) acknowledge the Treaty of Waitangi (Te Tiriti o Waitangi).

Marine and Coastal Area (Takutai Moana) Act 2011

- **Marine and coastal area?**
- The marine and coastal area is the 'wet' part of the beach that is covered by the ebb and flow of the tide. It does not include the dry part of the beach. The marine and coastal area is the area between the line of mean high water springs and the outer limits of the territorial sea (12 nautical miles from shore).
- The *common* marine and coastal area excludes existing private titles and certain conservation areas.
- River mouths – CMCA includes beds of rivers as defined in RMA – foreshore, seabed, coastal waters & airspace above water

Marine and Coastal Area (Takutai Moana) Act 2011

- the common marine and coastal area (CMCA) is from the mean high water mark out to 12 nautical miles



Marine and Coastal Area (Takutai Moana) Act 2011

- **Part 2: Common marine and coastal area – ss.11-25, 26-43**
- This part outlines the various interests in the common marine and coastal area and provides for:
 - the special status of the area as an area that cannot be owned – s. 11
 - ownership to continue (of roads -s. 14, structures – s. 18, minerals – s. 16)
 - the protection of existing interests (for example resource consents) – ss. 20-25
- Part 2 outlines public rights in the common marine and coastal area. It preserves or, in some cases, extends the public rights of access (s. 26), fishing (s. 28) and navigation (s. 27) and provides a new regime for reclamations (ss. 29-43).

Marine and Coastal Area (Takutai Moana) Act 2011

- The Act guarantees free public access in, on or over the entire common marine and coastal area and makes it an offence for anyone to interfere with free public access.
- Anyone can continue to go to the beach and walk, swim, sail, kayak, fish or have a picnic



Marine and Coastal Area (Takutai Moana) Act 2011

- The only restrictions on public access in the common marine and coastal area are the reasonable ones that already exist – for example, to working port areas or naval bases, or on recognised burial grounds.



Marine and Coastal Area (Takutai Moana) Act 2011

The Act also preserves and protects existing recreational fishing rights, navigation rights and all other existing uses.



MCATMA 2011 – Public Interest and Maori Interests



Marine and Coastal Area (Takutai Moana) Act 2011, – Māori Rights and Interests? - section 7

- **Section 7 -Treaty of Waitangi (te Tiriti o Waitangi)**
- In order to take account of the Treaty of Waitangi (te Tiriti o Waitangi), this Act recognises, and promotes the exercise of, customary interests of Māori in the common marine and coastal area by providing,—
- (a) in subpart 1 of Part 3, for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and
- (b) in subpart 2 of Part 3, for customary rights to be recognised and protected; and
- (c) in subpart 3 of Part 3, for customary marine title to be recognised and exercised.

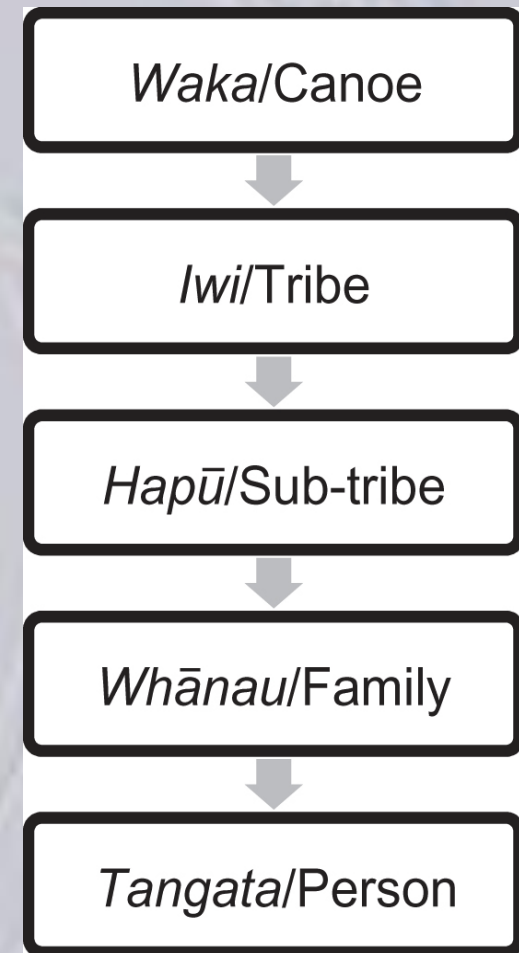


Marine and Coastal Area (Takutai Moana) Act 2011

- **Part 3: Customary interests – ss. 46-93**
- Part 3 sets out the legal rights and interests which give expression to customary interests in the common marine and coastal area.
- Part 3 also:
 - provides for affected iwi, hapū and whānau to participate in certain conservation processes – ss. 47-50
 - sets out the test for and rights associated with protected customary rights – ss. 51-55
 - sets out detailed procedures relating to resource consents in a protected customary rights area and controls on protected customary rights.
 - sets out the tests for rights associated with customary marine title.

Maori Socio-Political Organisation

- Genealogical Group-Kinship-based
- Eponymous ancestors
- Connection to kin, God and land
- Basis for Tribal identity
- Protect mana of the group!



Marine and Coastal Area (Takutai Moana) Act 2011, – Māori Interests?

- Customary rights recognised under the Act:
- 1) **Protected Customary Rights (PCRs)** – customary activity eg launchign waka., collecting hangi stones, sand, shingle, pumice, non-commercial fisheries eg whitebait & non-commercial aquaculture
- 2) **Customary Marine Title (CMT)** – allows the CMT holder, with some exceptions, to prevent activities which require resource consents or permits, a right to protect wahi tapu, right to provide views on marine mammal watching permits, ownership of minerals except pounamu & Crown minerals.

Marine and Coastal Area (Takutai Moana) Act 2011

- **Part 4: Administrative and miscellaneous matters – ss. 94-128**
- Sets out procedures relating to the recognition of customary interests via agreement - ss. 94-97, and court order and other administrative details – ss. 98-111.
- Part 4 also:
 - provides the procedure for recognition of customary interests
 - provides for the marine and coastal area register
 - provides for regulations and other miscellaneous matters
 - outlines the consequential amendments to other legislation.

Marine and Coastal Area (Takutai Moana) Act 2011

Ref Docs p 136

- **60 Scope and effect of customary marine title**
- (1) Customary marine title—
 - (a) provides an **interest** in land, but does not include a right to alienate or otherwise dispose of any part of a customary marine title area; and
 - (b) provides only for the **exercise of the rights** listed in section 62 and described in sections 66 to 93;
- (2) A customary marine title group—
 - (a) may use, benefit from, or develop a **customary marine title** area (including derive commercial benefit) by exercising the rights conferred by a customary marine title order or agreement, but is not exempt from obtaining any relevant resource consent, permit, or approval that may be required under another enactment for the use and development of that customary marine title area; and
 - (b) is not liable for payment, in relation to the customary marine title area, of—
 - (i) coastal occupation charges imposed under section 64A of the Resource Management Act 1991; or
 - (ii) royalties for sand and shingle imposed by regulations made under the Resource Management Act 1991.

Marine and Coastal Area (Takutai Moana) Act 2011

- **62 Rights conferred by customary marine title**
- (1) The following rights are conferred by, and may be exercised under, a customary marine title order or an agreement on and from the effective date:
 - (a) a Resource Management Act 1991 (RMA) **permission right** (*see sections 66 to 70*); and
 - (b) a **conservation permission right** (*see sections 71 to 75*); and
 - (c) a right to protect **wāhi tapu** and wāhi tapu areas (*see sections 78 to 81*); and
 - (d) rights in relation to—
 - (i) **marine mammal** watching permits (*see section 76*); and
 - (ii) the process for preparing, issuing, changing, reviewing, or revoking a New Zealand **coastal policy statement** (*see section 77*); and
 - (e) the prima facie ownership of **newly found taonga tūturu** (*see section 82*); and
 - (f) the **ownership of minerals** other than—
 - (i) minerals within the meaning of section 10 of the Crown Minerals Act 1991; or
 - (ii) pounamu to which section 3 of the Ngai Tahu (Pounamu Vesting) Act 1997 applies (*see section 83*); and
 - (g) the right to create a **planning document** (*see sections 85 to 93*).

Marine and Coastal Area (Takutai Moana) Act 2011

- **Section 62(2)** Subsection (3) applies if a person applies for a resource consent, a permit, or an approval in relation to a part of the common marine and coastal area in respect of which—
 - (a) no customary marine title order or agreement applies; but
 - (b) either—
 - (i) an applicant group has applied to the Court under section 100 for recognition of customary marine title and notice has been given in accordance with section 103; or
 - (ii) an applicant group has applied to enter negotiations under section 95.
- (3) Before a person may lodge an application that relates to a right conferred by a customary marine title order or agreement, that person must—
 - (a) notify the applicant group about the application; and
 - (b) seek the views of the group on the application.

Recognition of Customary Rights

- Iwi, hapū and whānau can apply to High Court or Crown to have rights investigated
- Two types of rights:
 - **Protected customary rights** (s51) – enable group to continue a customary activity
 - **Customary marine title** (s58) – recognise a group's exclusive use and occupation of an area since 1840
- Both routes require group to meet the tests in the Act and provide the same outcome if test met (set out in Part 3 of Act)

Marine and Coastal Area (Takutai Moana) Act 2011

– Aboriginal Title Tests

51 Meaning of protected customary rights

(1) A protected customary right is a right that—

(a) has been exercised since 1840; and

(b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or *evolves over time*; and

(c) is not extinguished as a matter of law.



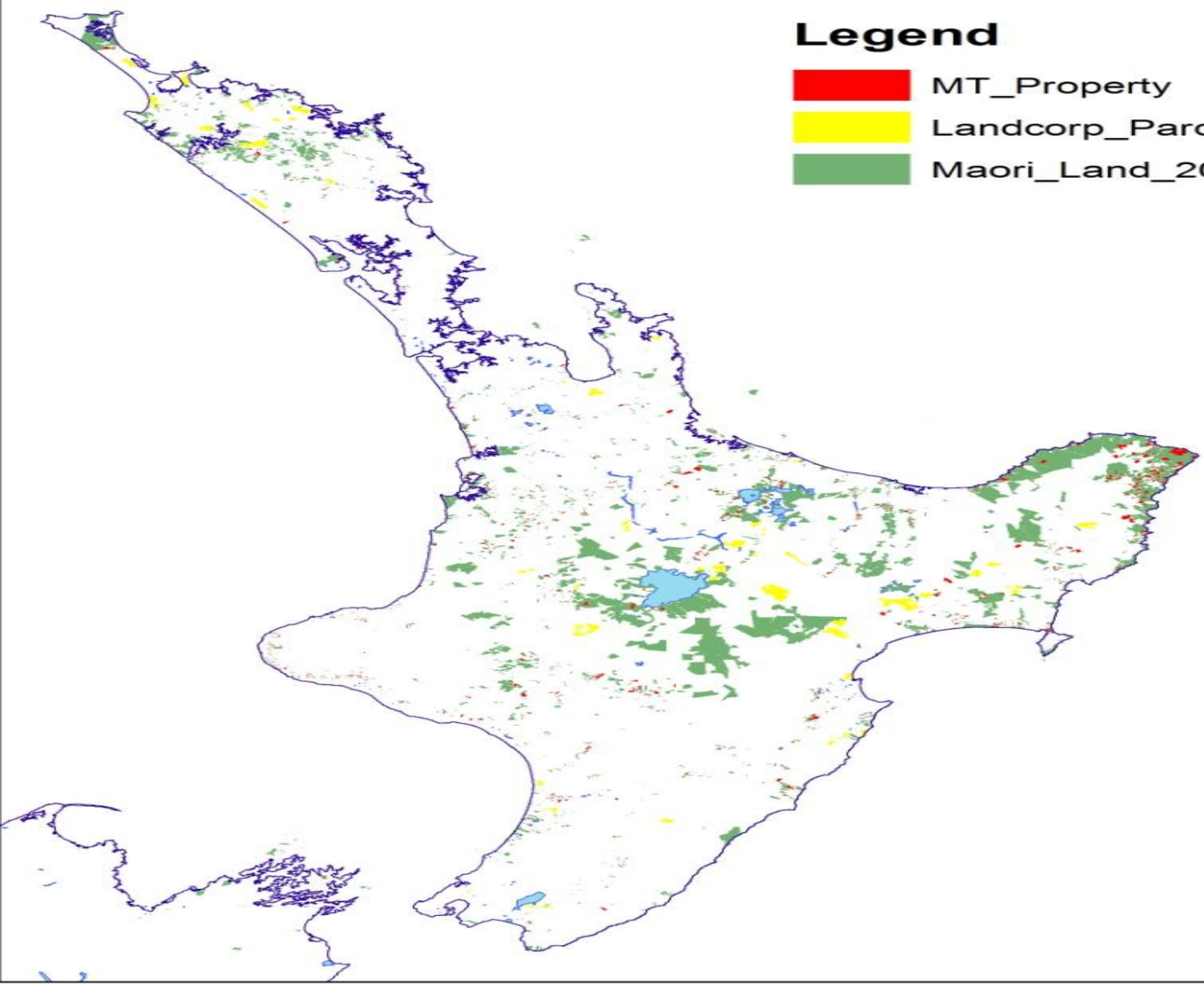
Marine and Coastal Area (Takutai Moana) Act 2011

- Hone Harawira challenged these threshold tests:
- This Bill should be called the Foreshore and Seabed Act Revisited; because Minister Finlayson's comment that 'Māori will have to show that they held exclusive use and occupation of the area since 1840, without substantial interruption, and that the area in question was held in accordance with tikanga'.
...
- 98% of Māori will NOT be able to prove unbroken tenure, [which] confirms the Prime Minister's view that Māori don't stand a Māori's chance in parliament of getting their land back



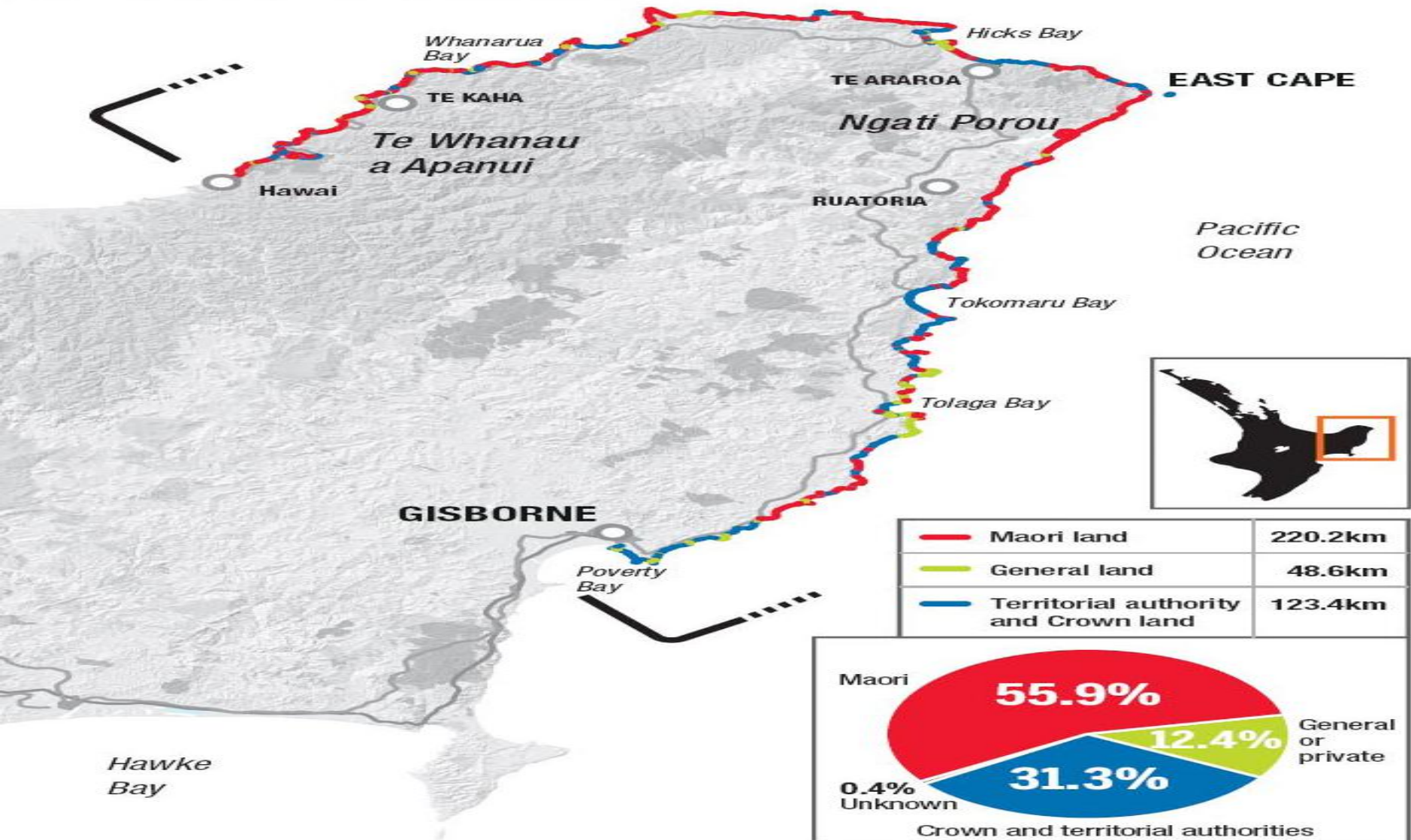
Legend

-  MT_Property
-  Landcorp_Parcels
-  Maori_Land_2010



Foreshore and Seabed Areas

EAST CAPE: WHO OWNS IT?

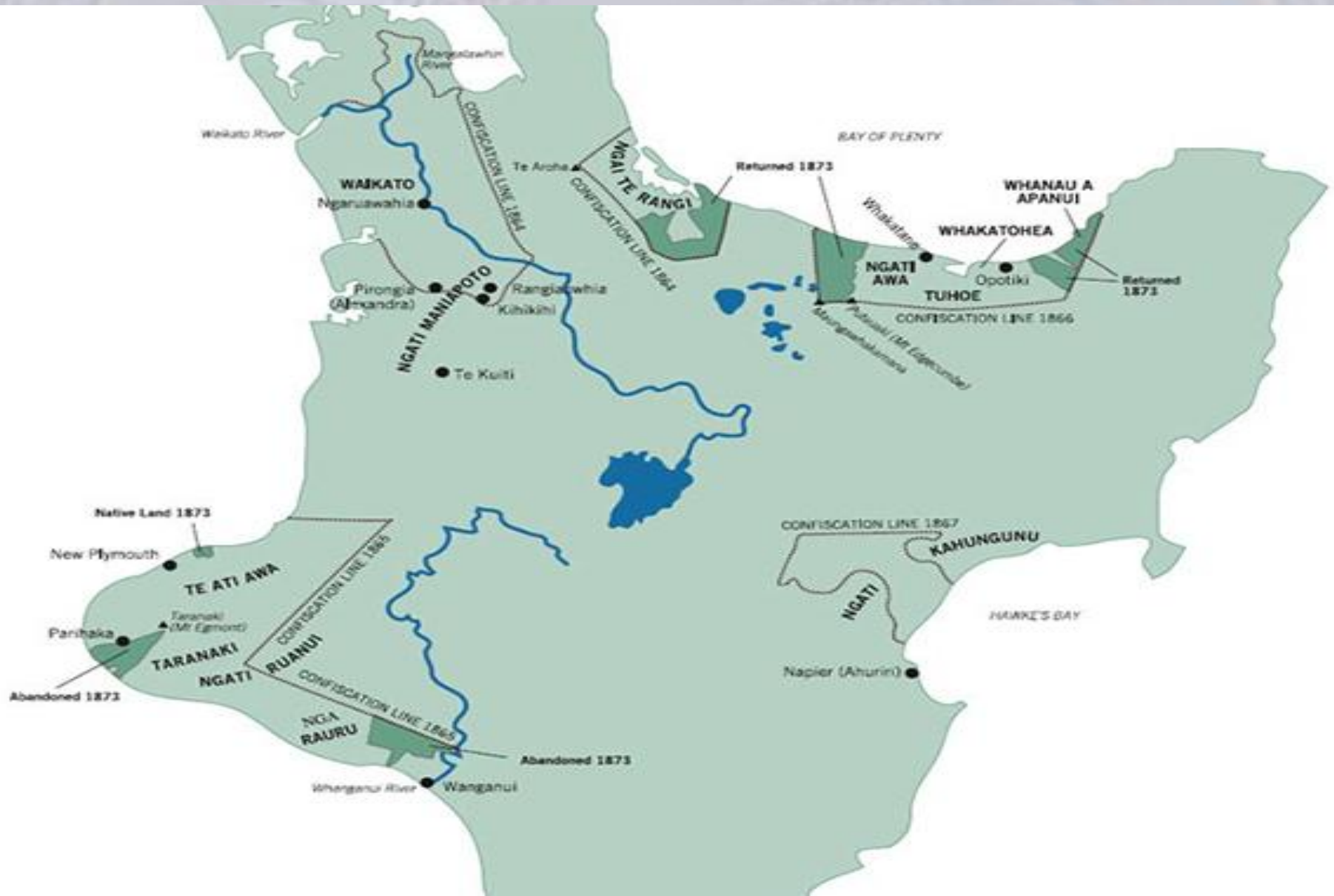


Rohe Pōtae Petition 1883

- Rangatira asserting sovereignty & property in Rohe Potae – Wahanui, Taonui, Rewi Maniapoto.
- “Your petitioners pray that you will fully look into and carefully consider the matters which are the cause of much anxiety to us, and are raising a barrier in front of us, because these matters that are causing us anxiety have principally emanated from you, the Europeans, in the form of legislation.”



Past Raupatu 1860s – Land Confiscations

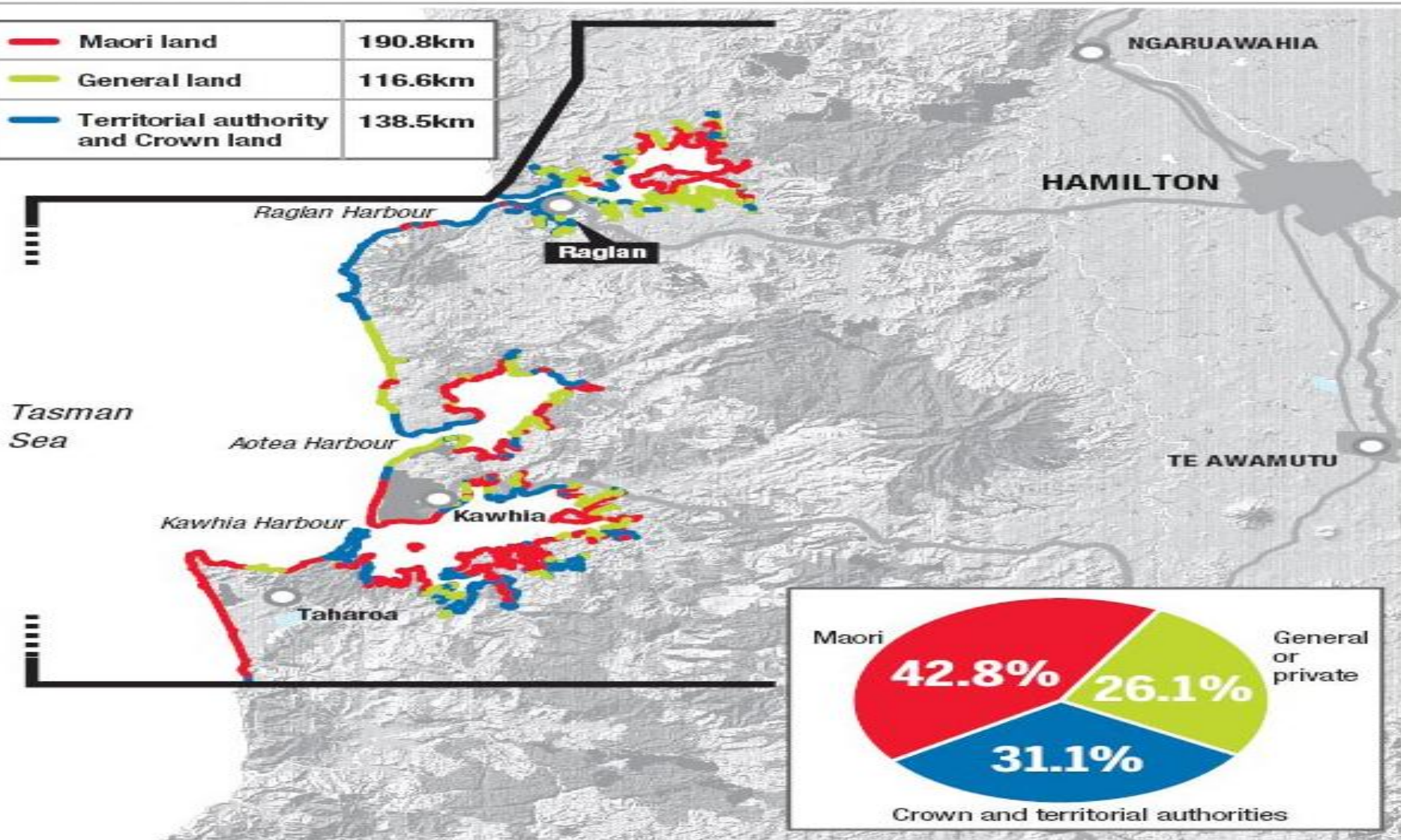




Coastal Marine (Takutai Moana) Act 2011 – Customary Rights Areas?

RAGLAN TO TAHAROA: WHO OWNS IT?

Maori land	190.8km
General land	116.6km
Territorial authority and Crown land	138.5km



Marine and Coastal Area Act 2011

- Responds to questions about customary title raised in Ngāti Apa (2003)
- Purpose of Act:
 - ensure the protection of the interests of all New Zealanders
 - recognise mana tuku iho of tangata whenua
 - provide for the exercise and recognition of customary interests
 - acknowledge the Treaty of Waitangi
- Repeals the Foreshore and Seabed Act 2004 and restores any customary interests extinguished by that Act
- Removes the ‘public foreshore and seabed’ from Crown ownership
- Creates a common space in the marine and coastal area – the area from the mean high water springs to the 12 mile limit, excludes private titles and certain conservation areas

Marine and Coastal Area (Takutai Moana) Act 2011, – Recent Statistics

- Application under the Act since 2011 (as at March 2014):
 - 36 applications received
 - 5 transferred from FASA 2004
 - 10 applications had a decision – 8 declined, 2 accepted
 - 10 new applications received by the Crown
 - 11 applications for recognition orders in the High Court (all transferred from FASA 2004)
 - Deadline for all applications to be received by 3 April 2017

Common Marine and Coastal Area

- has no fee simple title, and cannot be sold
- guarantees free public access
- maintains current ownership of existing structures and allows for future ownership of structures and reclamations
- guarantees existing rights for navigation, ports, fishing and aquaculture
- does not affect current permits and resource consents

MCATMA 2011 – Justice? Crown & Maori

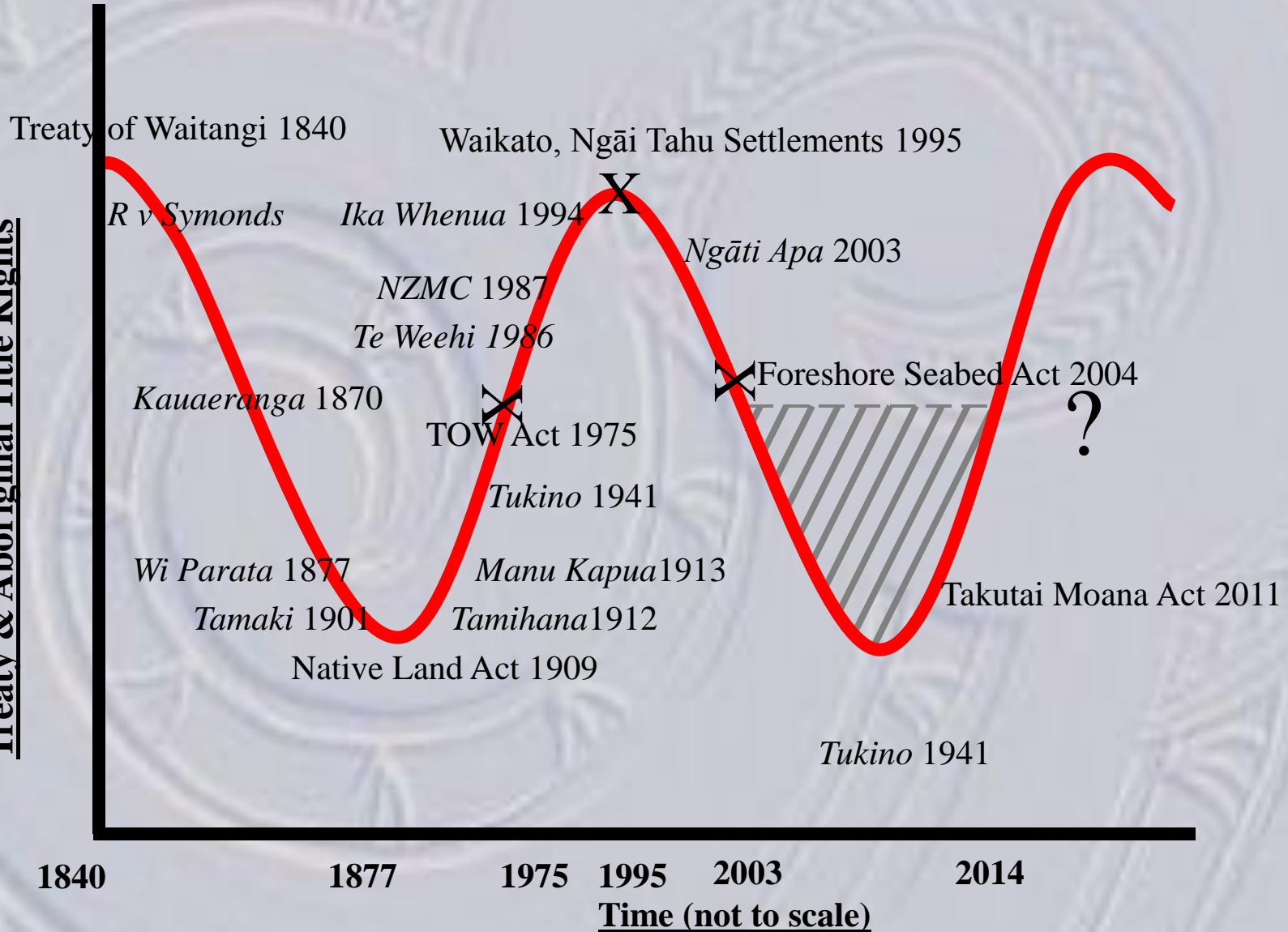


Constitutional Law, the Foreshore and Seabed, & the Marine and Coastal Area (Takutai Moana) Act 2011?

- Dimension involving the question of constitutionality or legitimacy.
- Establishes that the British legal system recognises traditional Maori property rights – Treaty of Waitangi, aboriginal title
- Important property guarantee
- Government should accord such property rights the same degree of protection as European property rights.
- Treaty of Waitangi guaranteed Maori the same rights and protections as ordinary British subjects (Article III).
- If the guarantee of protection of Maori property rights was/is not given the same respect as Europeans and Treaty of Waitangi guarantees are broken, the legitimacy of the Crown's government is then questioned.
- Constitutional and legal dimension of the doctrine of aboriginal title and the Treaty of Waitangi.

Litigation

Recognition of Māori Rights -
Treaty & Aboriginal Title Rights



Summary

- Treaty of Waitangi and aboriginal title - moral and legal force, 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
- Public power challenges
- Direct negotiations – partnership, participation, protection

Summary

- Constitutional significance of the Founding Documents of NZ – the Declaration of Independence 1835, Treaty of Waitangi 1840, Royal Proclamation 1840 - need to be debated and understood better
- Deserve considered and extensive debate and dialogue throughout New Zealand
- Clearer definition of that constitutional position
- Room for diversity
- Constitutional relationship



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