

# Foreshore and Seabed Bill

Attorney-General

6 May 2004

1. I set out below my views on the consistency of the Foreshore and Seabed Bill (the Bill) with the New Zealand Bill of Rights Act 1990 ("BORA"). In summary, I consider that the Bill is consistent with BORA.

2. My approach in this opinion is:

2.1 to consider whether there is any prima facie breach of a provision of the Bill. I conclude there is no prima facie breach of sections 20, 21 or 27(3) but accept there is a significant argument for a prima facie breach of section 19, and

2.2 on the assumption there is a prima facie infringement of section 19, to consider whether the section 5 test is met i.e. whether the prima facie infringement is "demonstrably justifiable in a free and democratic society". I conclude that it is.

## Background to the Bill

3. The Bill is the Government's response to the substantial uncertainties created by the Court of Appeal's decision in *Ngati Apa v Attorney General* [2003] 3 NZLR 643 (CA). In that case the Court of Appeal held that:

3.1 No legislation could be said to have definitively extinguished a claim that particular iwi might have at common law [\[1\]](#) to exclusive customary title to foreshore and seabed since the nature and incidents of such title would be fact specific and their potential extinguishment by legislation would depend to a great extent on the factual findings, (see, for example, paragraphs 90, 129, 181, 184, 186, 192).

3.2 The Maori Land Court has jurisdiction, under Te Ture Whenua Maori Act 1993, to determine claims that foreshore and seabed is "Maori customary land". There was some disagreement among the judges as to whether the Court would be able to declare (under section 131 of the 1993 Act) seabed as Maori customary land yet decline to issue a certificate of title in respect of that "land" (under section 132 of the 1993 Act).

3.3 Some of the judges indicated it was unlikely that significant amounts of foreshore and seabed would ultimately be found to be subject to (exclusive) common law customary title (see eg paragraphs 107, 129).

4. In the course of the decision the Court of Appeal overruled a long-standing earlier decision of the Court, *In re the Ninety-Mile Beach* [1963] NZLR 461 (CA). Much policy-making in relation to foreshore and seabed has, in the past, been based on the analysis of the Court in *Ninety-Mile Beach*.

## Aboriginal Title at Common Law

5. At the outset it is helpful to consider the nature of aboriginal/customary title at common law.

6. In relation to dry land, aboriginal rights at common law can be viewed as falling along a spectrum with aboriginal title at one end and aboriginal rights less than title at the other end. Aboriginal title denotes a right in land and, as such, is more than the right to engage in specific activities (which may themselves be aboriginal rights to undertake certain activities, practices and customs but are not rights to the underlying land itself). Aboriginal title at common law gives the relevant group a right to the exclusive occupation and possession of the land. It is conventionally seen as a *sui generis* form of property in that it cannot be transferred, sold or relinquished to anyone other than the Crown and, in consequence, is not alienable to third parties.

7. According to Canadian case law, the group would be free to use the land in question in ways not necessarily "customary" or "traditional" in an historical sense. That is, while the holders of aboriginal title may have used the relevant land for the purposes of hunting, fishing or gathering material at the time when the Crown acquired sovereignty, aboriginal title would permit them to farm that land or to use it for eco-tourism activities in 2004.

8. In spite of this, the group would not be allowed to use the land in a manner irreconcilable with the fundamental nature of the group's connection with the land. The Supreme Court of Canada has said that "if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip-mining it)". (*Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 247 per Lamer CJC.)

9. In relation to foreshore and seabed the position is similar but with differences. Dr McHugh gave evidence at the Waitangi Tribunal hearing on the Crown's foreshore and seabed policy that while the common law would recognise a range or spectrum of customary interests in foreshore and seabed it would not recognise interests equivalent to an estate in fee simple. Dry land and foreshore and seabed were, he said, different juridical spaces. According to Dr McHugh, however, the common law may recognise bundles of rights in foreshore and seabed that, while not amounting to ownership in a fee simple title sense, would be extensive and to some extent exclusive.

10. It is also noteworthy in this context that several of the judgments in *Ngati Apa* indicate that, at common law, private interests in foreshore and seabed would be qualified by public rights (see paragraphs 76, 123, 135 and 192).

### **Any *Prima Facie* Breach?**

11. In light of the findings of the Waitangi Tribunal and the views expressed by some commentators, I set out first those rights that are *not*, in my view, affected by the Bill, viz, sections 27, 21 and 20 BORA. I then deal with section 19 BORA (discrimination) where there is a significant argument of a *prima facie* infringement by the Bill. As a result, the section 5 "justifiable limitation" analysis becomes critical.

## **BORA Rights not Engaged/Infringed**

### *Depriving litigant of fruits of litigation (s 27 BORA)*

12. While it is not clear that Ngati Apa and the other plaintiffs in the Marlborough Sounds litigation could in fact establish an exclusive claim to seabed or foreshore either in the High Court under common law or in the Maori Land Court under Te Ture Whenua Maori Act, legislation barring any such claim has the potential to deprive the plaintiffs of the benefit of the *Ngati Apa* decision. Depriving a party of the fruits of its litigation is claimed by some to engage section 27(3) BORA. The Crown has consistently taken the view that legislation of this type does not breach section 27(3), and I maintain that position here.

13. Section 27(3) BORA, provides:

"Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals."

14. Both Sir Geoffrey Palmer and Professor Michael Taggart have suggested the principle of equality in section 27(3) should be interpreted to prevent Government from overturning unfavourable judgments by legislation, while Professor Philip Joseph has suggested that section 27(3) would have this effect but for section 4 BORA.<sup>[2]</sup> The Legislation Advisory Committee has suggested that section 27(3) may be engaged by legislation where bilateral contractual disputes (where the Government is one of the parties to the contract) are concerned.<sup>[3]</sup>

15. By contrast, other commentators have suggested that section 27(3) is only concerned with *procedural* equality, a view that appears to be supported by the White Paper:<sup>[4]</sup>

"This provision...is designed to give constitutional status to the core principle recognised in the Crown Proceedings Act 1950: that the individual should be able to bring legal proceedings against the Government, and more generally to engage in civil litigation with it, without the Government enjoying any procedural or jurisdictional privileges. This is central to the rule of law.

In many cases the substantive powers, rights and responsibilities of the State and the individual will necessarily differ and that will affect the result of litigation. The paragraph is not designed to alter this, but with that inevitable difference...the provision declares the right of the individual to take legal disputes with the Crown to court and to have the case dealt with in terms of the process to be followed essentially in the same way as in private litigation."

16. The interpretation of section 27(3) as limited to procedural equality was also adopted by McGechan J in *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC), 55:

"Section 27(3) cannot extend so far. It cannot restrict the power of the legislature to determine what substantive rights the Crown is to have. Section 27(3) merely directs that the Crown shall have no procedural advantage in any proceedings to enforce rights if such rights exist."

17. Both the Crown Law Office and the Ministry of Justice have previously advised me that legislation reversing the effect of judgments is not inconsistent with section 27(3) BORA. (This is particularly so in relation to the Maori Land Court, which exercises a statutory jurisdiction.) I see no reason to depart from that view here.

18. Nor, for the same reasons, is it a breach of section 27(3) BORA for Parliament to effectively decide the result of pending proceedings; for this reason, the definition of "foreshore and seabed" (clause 4) as including the bed of Te Whaanga Lagoon in the Chatham Islands, thereby determining the lagoon's legal status (which is currently a matter of dispute before the Maori Land Court) is no breach of section 27(3) BORA.

*Deprivation of property rights (ss 21 and 27 BORA)*

19. Second, if the plaintiffs or any other claimant could as a matter of fact establish a customary interest sufficient to support an exclusive right of possession or occupancy, the Bill has the effect of removing the property right of any such claimant. Some would claim such removal amounts to "seizure" under section 21 BORA and would have to be accompanied by compensation in order to be reasonable for the purposes of that section. As with section 27(3), the Crown has consistently adopted a different interpretation. The Crown's view is that removal or deprivation of property rights are not affected by section 21 BORA.

20. Section 21 BORA reads:

"Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise."

21. In both *Westco Lagan*, above at 53-55, and *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 633, the High Court has rejected the argument that section 21 BORA establishes a protected property right or a corresponding right to compensation in the case of deprivation/interference with property rights. The Supreme Court of Canada has taken a similar view of the equivalent protection under section 8 of the Canadian Charter, holding in *R v Arp* [1998] 3 SCR 339, 386 that the protection against seizure is concerned with interference with property rights in the context of personal privacy.

22. Furthermore, this view of section 21 BORA is consistent with the White Paper commentary.

23. Second, in relation to section 27(1), it has been held in both *Lumber Specialities v Hodgson* [2000] 2 NZLR 347, 374-375 (HC) and in *Westco Lagan*, above at 53-55, that the right to natural justice does not extend to a protection against deprivation of property rights or a right to compensation. It may be noted that Elias CJ, in a minority

opinion in *Ngati Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659 (CA) (at para. 82), observed that deprivation of property rights did in that instance engage section 27, but that case arose from a court process in which the appellant claimed to have been unable to participate.

#### *Right to enjoy (minority) culture (s 20 BORA)*

24. Third, the potential deprivation of exclusive title may, according to the particular facts of any claim, be alleged to engage the right of members of minority groups (accepting Maori to fall within that concept)<sup>[5]</sup> to enjoy their cultural practices as affirmed by section 20 BORA.

25. Section 20 BORA provides:

"A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority."

26. This section has not been the subject of much meaningful discussion in New Zealand case law, and my view on its proper interpretation, scope, and application has been influenced by the decisions of the United Nations Human Rights Committee ("UNHRC") under article 27 ICCPR on which section 20 BORA is based.<sup>[6]</sup>

27. In my view, the removal or failure to protect land rights may engage section 20 where those rights are necessary for the conduct by members of a minority group of activity that is essential to the culture of that group. For example, in *Ngati Apa Ki Waipounamu Trust v R*, above, Elias CJ observed that the obstruction of a Ngati Apa claim to land by the Ngai Tahu Claims Settlement Act 1998 engaged section 20 on the basis that the claim implicated the mana of Ngati Apa; the remainder of the Court did not address the point.<sup>[7]</sup>

28. More definitively the UNHRC has stated that the equivalent protection under article 27 ICCPR applies to minority group rights to land use, observing that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples".<sup>[8]</sup>

29. There are three significant limits on the protection accorded land rights under article 27 ICCPR relevant to the Bill and which I believe are likely to be adopted by New Zealand courts in determining the true scope and application of section 20 BORA.

30. First, and most importantly, the UNHRC has emphasised the need for a connection between the right claimed (ie in this case, exclusive title) and the cultural practice. For example, the issue of quarrying rights by the Finnish government over

land traditionally used by a minority group for reindeer herding has been found to be consistent with article 27 because the quarrying did not significantly interfere with the traditional use.<sup>[9]</sup> In contrast, the issue of oil extraction rights over indigenous lands in Canada was held to breach article 27 because, as a matter of fact, those rights conflicted with traditional hunting and related uses.<sup>[10]</sup>

31. In the present situation, before a *prima facie* breach of section 20 would be found to have occurred, it would be necessary to show that the cultural practice depended on or required exclusive title. My understanding is exclusive title is not *necessary* for the enjoyment of any of the practices raised by Maori before the Waitangi Tribunal or in representations to government.

32. Second, the UNHRC has indicated that protection of cultural practices can, at least in some part, be achieved through procedural measures that allow for involvement by minority representatives in decision-making and ensure rights to cultural practice are taken into account. In this regard, I note that Australian native title legislation was criticised for its deficiencies on this aspect by the UNHRC when considering Australia's compliance with article 27.

33. In the case of the Bill, I consider the combination of Ancestral Connection Orders and Customary Rights Orders which Maori can obtain, and the rights such orders give Maori under the Resource Management Act, together with the Ministerial power to exempt customary rights from a public foreshore and seabed access prohibition or restriction notice (clause 21 of the Bill), recognise the imperative of involving Maori in decision-making with the potential to affect Maori cultural practices. Indeed, the effect of Ancestral Connection Orders is to ensure that, where Maori have ancestral connection with foreshore and seabed, they are consulted in the preparation of important planning documents and those documents record Maori views on matters affecting the foreshore and seabed. At the same time, Customary Rights Orders provide powerful protection to customary practices and activities within the resource management and resource consent processes.

34. Third, it is not incompatible with article 27 ICCPR for a government to seek to develop land resources on which indigenous peoples have traditionally practised their customs. In interpreting article 27, the UNHRC has indicated that where the development of land resources has the effect of interfering with indigenous cultural practices, it is legitimate to balance that interference against the wider community interest such development serves.<sup>[11]</sup> In the practice of the UNHRC, that balancing has typically taken the form of engagement with the affected indigenous group in formulating relevant policy but, even where efforts towards such engagement have not succeeded, it is nevertheless legitimate for Government to assess the appropriate balance. For example, in *Lansman v Finland*, which concerned the authorisation of logging activities on land customarily used for herding by the minority Sami people, the UNHRC noted the Finnish government had made considerable efforts both to engage with, and to make provision for, the practices of those affected, and considered that, while the complainants did not consider those

efforts sufficient, the Government had in fact balanced article 27 rights against wider considerations.<sup>[12]</sup> Similarly, in *Mahuika v New Zealand*, which concerned a challenge to the Sealords settlement in part under article 27, the UNHRC accepted the balancing process had been adequate despite the strong objections of some of those affected.<sup>[13]</sup> Although the engagement with Maori in this instance may be viewed as having been less than in either of these instances, the balancing process can still be seen to be adequate in light of the relatively less profound impact of the Bill on cultural practices.

35. A final point to note is this, that the Maori Land Court and/or High Court when granting Ancestral Connection Orders and/or Customary Rights Orders will have to exercise their powers in a manner consistent with section 20 BORA (subject of course to reasonable limits permitted by section 5 BORA). The fact the phrase "activities, uses and practices" in both Parts 3 and 4 of the Bill is undefined means the extent of customary practice that can be recognised and protected under the Bill will be substantial (once those practices have been proven to the Court's satisfaction) and will be interpreted in a BORA consistent manner (see section 6 BORA).

36. In short, I accept section 20 BORA does require that Government provide means by which Maori may assert and protect their cultural practices.<sup>[14]</sup> However, this right is only affected to the extent that a particular cultural practice is dependent on the recognition of an exclusive title. While cultural practice has been defined very broadly to include, for example, use of natural resources, international precedent indicates most cultural practices can be accommodated without the need for exclusive title to land and I am not aware of any relevant Maori cultural practice in respect of the foreshore and seabed necessitating retention of exclusive ownership.

## **Discrimination: the Framework for Legal Analysis**

### *Background to discrimination analysis*

37. Section 19 BORA provides that everyone has the right to be free from discrimination on the grounds set out in the Human Rights Act 1993 ("HRA"). In turn, one of those proscribed grounds of discrimination is "race" (s 21(1)(f) HRA).

38. I approach the question of what is discrimination for the purposes of section 19 BORA by considering whether:

38.1 a prohibited ground of discrimination is used (either directly or indirectly);

38.2 to produce an effect (whether intentional or inadvertent);

38.3 that is detrimental to a protected group.

If the answer is affirmative, there is a *prima facie* discrimination which requires to be justified in terms of section 5 BORA. Before turning to the question of whether the

Bill discriminates, I set out a number of important, basic propositions of discrimination law.

*Discrimination is about effects, not simply intention*

39. It is sometimes argued in response to an allegation of discrimination, that the alleged discriminator did not intend, or was not motivated by a desire, to discriminate. In discrimination law that is not usually regarded as a relevant response. In *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218, 241 (HC) Cartwright J stated that: "[E]ven if the intention is legitimate but the effect is discriminatory, then the [impugned] behaviour is unlawful." [\[15\]](#) (This case concerned indirect discrimination under section 65 HRA and section 19 BORA.)

40. Furthermore, the UNHRC has frequently adopted similar views in respect of article 26 ICCPR (which is the equivalent of section 19 BORA); so in one case the UNHRC stated that "the intent of the legislation is not alone dispositive in determining a breach of [article 26 ICCPR]. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory." [\[16\]](#)

41. In *Western Australia v Ward* (2002) 191 ALR 1 (paragraph 105) the majority of the High Court of Australia held (in a case concerning the compatibility of state legislation, purporting to abrogate various forms of aboriginal title, with the Racial Discrimination Act 1975 (Cth)) that since the International Convention on the Elimination of All Forms of Racial Discrimination (on which the Racial Discrimination Act was based) required states' parties to nullify laws having the "effect of creating or perpetrating racial discrimination" it would be "wrong to confine the relevant reach of the Racial Discrimination Act to laws whose purpose can be identified as discriminatory." [\[17\]](#)

*Comparative disadvantage*

42. A claim of discrimination requires proof of comparative disadvantage. This is clear from the seminal judgment of McIntyre J in *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1 where His Honour stated:

"[Discrimination] is a comparative concept, the condition of which can only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises." (at p 10)

43. The same point was emphasised by Tipping J in *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) (the same sex marriage case). His Honour said the essence of discrimination "lies in the difference of treatment in comparable circumstances. For discrimination to occur one person or group of persons must be treated differently from another person or group of persons" (at p 573). The Judge further noted that, although the HRA does not expressly identify the person or group with whom the necessary comparison is to be made, it must be a person or group



whose treatment is "logically relevant" to the allegation of discrimination.

44. It is also clear from both *Andrews* and from subsequent decisions of the Canadian Supreme Court that any comparative difference in treatment or effect must result in disadvantage. One of the elements of discrimination identified by McIntyre J in his definition of discrimination in *Andrews* was that, amongst other things, the impugned distinction must impose burdens, obligations or disadvantages not imposed on others, or withhold or limit access to opportunities, benefits or advantages available to others.<sup>[18]</sup> Moreover, any consideration of such disadvantage needs to be assessed in the legal, social and political context of the claim.<sup>[19]</sup>

*Comparative disadvantage can arise directly or indirectly*

45. Comparative disadvantage can arise directly through a failure to treat different groups consistently. Alternatively, comparative disadvantage can arise indirectly. To determine whether there is indirect comparative disadvantage, also known as "adverse effects discrimination", the analysis is not the consistency of treatment but the disparate impact a seemingly neutral act might cause. For an action to constitute "adverse effects discrimination" it must be shown the effects of the action are more adverse to a complainant than its effects on the dominant or main group. Furthermore, the adverse effects must be significant.<sup>[20]</sup>

*Emphasis on substance not form*

46. In discrimination cases, the emphasis is on substance not form, particularly when it comes to identifying the effects of an impugned measure and in determining comparability of rights/interests/obligations in those cases where the impugned measure affects a range of rights/interests/obligations unique to one race (or other group).

*Justification of prima facie discrimination (s 5 BORA)*

47. As noted, where a *prima facie* infringement of a BORA right is made out it is still capable, in principle, of being justified as a reasonable limitation on a guaranteed right or freedom, under section 5 BORA. The section 5 inquiry requires:<sup>[21]</sup>

"consideration of all economic, administrative and social implications. In the end it is a matter of weighing:

(1) the significance in the particular case of the values underlying the Bill of Rights Act;

(2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;

(3) the limits sought to be placed on the application of the Act provision in the particular case; and

(4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits."

48. In assessing proportionality, I consider the test is whether the law or action infringes the right in question "as little as is reasonably possible".[\[22\]](#)

49. It is also important to note courts traditionally grant governments a margin of appreciation in assessing issues of justification. The reasons for permitting such a margin of appreciation have been described by the Supreme Court of Canada as follows:[\[23\]](#)

"Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.

Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude...

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function..."

50. Or, as the majority of the same Court have said:[\[24\]](#)

"This Court has often stressed the importance of deference to the policy choices of the legislature in the context of determining whether the legislature has `discharged its burden of proof under s1 of the Charter [s 1 of the Charter is equivalent to section 5 of NZBORA]..."

These policy choices may be of the type that the legislature is in a better position than the court to make, as in the case of difficult policy judgments regarding the claims of competing groups or the evaluation of complex and conflicting social science research."

51. The Privy Council in relation to Bills of Rights has also stressed that:[\[25\]](#)

"inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced...It must be remembered that questions of policy remain primarily the responsibility of the legislature".

52. Where, however, the proscribed ground of discrimination in issue is race, the scrutiny applied by the courts is more searching and, correspondingly, the margin of appreciation allowed to government is narrower:[\[26\]](#)

### **Does the Bill Discriminate?**

53. I begin by acknowledging that, while nothing in BORA guarantees property rights as such nor the right to enjoy the fruits of litigation, section 19 BORA does mean that where legislation affects the enjoyment of property rights it must do so in a non-discriminatory manner, which does not unfairly target or affect one racial group as against another.

54. For example, in a series of cases, including *Des Fours Walderode v Czech Republic* Communication 747/1997, 2 November 2001 and *Simunek v Czech Republic* Communication 516/1993, 31 July 1995, the UNHRC has held that the Czech Republic acted in a discriminatory manner by stipulating Czech citizenship as a requirement for the restitution of property confiscated by a Czech Communist regime decree, even though property is not a right guaranteed by the ICCPR.[\[27\]](#) In *Simunek* the UNHRC pithily observed (at paragraph 11.3):

"[T]he right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of article 26 ICCPR [the equivalent to section 19 BORA]."

55. That approach appears to be equally applicable under section 19 BORA.

56. On that approach, I consider there is a significant argument that the Bill, to the extent that it treats the holders of "specified freehold interests" and Maori customary landowners differently (the latter's rights are extinguished, while the former's rights are preserved), may contain a *prima facie* breach of section 19 BORA, for the reasons that follow.

#### *Comparability of "specified freehold interests" and common law Maori customary title*

57. An essential element of the discrimination analysis is a determination of the comparability of the rights held by those who hold specified freehold interests over foreshore and seabed on the one hand and, on the other, those who hold common law customary land title over foreshore and seabed. The analysis must indicate a reasonable level of comparability between the two concepts for a meaningful discrimination analysis to be applied.

58. A comparison shows:

58.1 A fee simple title (or Maori freehold land status) over the foreshore and seabed (ie, a "specified freehold interest", as defined in clause 4 of the Bill) involves

exclusive ownership (and therefore occupation rights) over the particular piece of foreshore and seabed to which the fee simple attaches. It is an alienable land interest and entitles the fee simple titleholder to deal with the land as he or she wishes, subject to any applicable restrictions on use, development, cultivation, and obligations to maintain, avoid nuisances, etc imposed by common law and/or statute.

58.2 Because of its very recent recognition in the *Ngati Apa* case, not much is known about the metes and bounds of common law customary title over the foreshore and seabed in New Zealand. For the purposes of the issues for decision in that case, it was unnecessary for the judges to go beyond recognising that such title was, in principle, part of New Zealand common law and had not been expressly extinguished by statute. The Court was clear, however, that everything would depend on the facts and evidence that an individual applicant could adduce about customary practices, activities, and so on in relation to the relevant area. However, it seems from at least some of the judgments of the Court of Appeal<sup>[28]</sup>, from Canadian authority<sup>[29]</sup> and from the definition of "territorial customary rights" in clause 28 of the Bill that such title would, *if proven*, be capable of amounting (in at least some cases) to a right of exclusive occupancy (subject to public rights and restrictions on use, development, etc imposed by common law and/or statute), would entitle the occupants to use, develop and extract the resources from the particular area of foreshore and seabed<sup>[30]</sup>(subject, of course, to any restrictions imposed by common law<sup>[31]</sup>and/or statute<sup>[32]</sup>), but would not be alienable<sup>[33]</sup>.

59. In my view, it is arguable that a fee simple estate or Maori freehold title over the foreshore and seabed are sufficiently different to common law customary rights (at the "exclusive" end of the spectrum) in respect of foreshore and seabed to mean they cannot be regarded as truly comparable. However, I accept it is also arguable they are sufficiently comparable in nature that any general reform package in respect of the foreshore and seabed ought, in principle, to treat various rights holders affected by the law reform package in a reasonably comparable way. Given the weight of overseas authority, I proceed on the basis that the latter view is correct.

60. As to the overseas authorities, the US Supreme Court has long held that aboriginal title "is as sacred as the fee simple, absolute title of whites" (*Cherokee Nation v Georgia* 30 US 1, 48 (1831) (per Baldwin J), and see also *Beecher v Weatherby* 95 US 517, 526 (1877)). Closer to home, the important High Court of Australia cases of *Mabo v Queensland* (1988) 166 CLR 186, (*Mabo (No. 1)*), *Western Australia v Commonwealth* (1995) 183 CLR 373 (the Native Title Act case) and *Western Australia v Ward* (2002) 191 ALR 1 indicate that for the purposes of a race discrimination analysis native title and fee simple are to be equated with one another. It will be recalled these three cases concerned the compatibility of various forms of state legislation with, inter alia, section 10(1) Racial Discrimination Act 1975 (Cth).

61. In *Mabo (No. 1)*, Dawson J held (in dissent) that even if the plaintiffs could show that aboriginal land rights in the Murray Islands, and the surrounding seabed, had survived the assertion of Queensland sovereignty, to deprive the aboriginal owners of such rights "would not necessarily be to deprive them of rights enjoyed by persons of another race, colour or national or ethnic origin" (although His Honour did recognise the possibility those rights might be "equivalent" to rights enjoyed by the

general populace ("albeit in different form") in which case a discrimination claim might have a foundation ((1988) 166 CLR 186, 243)).[\[34\]](#)

62. This issue was faced squarely by the High Court in *Western Australia v Ward* (2002) 191 ALR 1 and Dawson J's approach (requiring a high level of equivalence) was rejected. In their reasons, Gleeson CJ, Gaudron, Gummow and Hayne JJ stated (at 48), having referred to Dawson J's comments in *Mabo (No. 1)*:

"120. Only if there were some basis for distinguishing between different types of ownership of property or different types of inheritance might it be correct to say, in the context of section 10(1) of the Racial Discrimination Act, that to deprive the people of a particular race of a particular species of property or a particular form of inheritance not enjoyed by persons of another race is not to deprive them of a right enjoyed by persons of that other race. No basis for such a distinction is apparent in the text of the Convention [on the Elimination of All Forms of Racial Discrimination]. Nor is any suggested by the provisions of the Racial Discrimination Act.

121. Because no basis is suggested in the Convention or in the Racial Discrimination Act for distinguishing between different types of property and inheritance rights, the Racial Discrimination Act must be taken to proceed on the basis that different characteristics attaching to the ownership or inheritance of property by persons of a particular race are irrelevant to the question whether the right of persons of that race to own or inherit property enjoyed by persons of another race is a right of the same kind as the right to own or inherit property. In this respect the Racial Discrimination Act operates in a manner not unlike most other anti-discrimination legislation which proceeds by reference to an unexpressed declaration that a particular characteristic is irrelevant for the purposes of that legislation.

122. For present purposes, however, the point of chief importance is not the validity of the analysis we have just described; it is to recognise what was held in *Mabo (No. 1)* and the *Native Title Act Case*. As has been pointed out earlier in these reasons, the Court has rejected the argument that native title can be treated differently from other forms of title because native title has different characteristics from those other forms of title and derives from a different source. This conclusion about the operation of the Racial Discrimination Act should not now be revisited."

#### *Some further preliminary points*

63. Several further preliminary points have to be made to set a proper context within which the question of discrimination can be sensibly considered.

64. First, the effect of the provisions in Part 2 of the Bill is to leave undisturbed the rights enjoyed by all persons who currently have a "specified freehold interest" in foreshore and seabed. As the definition of "specified freehold interest" indicates, such an interest can be held by a person either as the owner of an estate in fee simple for which a certificate of title has or is to be issued (ie Maori and non-Maori, and natural and legal persons, can hold a specified freehold interest of this type) or as the owner of Maori freehold land. The point of note here is that to the extent that specified freehold interests over foreshore and seabed are preserved by the Bill, the

benefit of that specific preservation is available to all persons, regardless of their race.

65. Second, of its nature common law customary title to land (and, after *Ngati Apa*, now foreshore and seabed) is a particular type of interest that can only be held by persons/groups of a particular race, viz the aboriginal race of a colonized territory.

66. The significance of this second point is twofold.

67. First, in my view, it cannot legitimately be argued that any alteration or re-regulation of the law relating to common law customary land title is discriminatory (where the re-regulation may to some degree be seen as detrimental) simply because the nature of customary interests is race-specific. Such a proposition would be stretching the concept of discrimination too far, because it fails to recognize the need for a relevant comparator group to be identified which is being treated better than Maori. In short, I do not accept that any measure taken to reform the law relating to Maori customary interests must, ipso facto, discriminate in terms of section 19 BORA.

68. In my view, it is legitimate for the Government to remove the Maori Land Court's jurisdiction to determine claims for the recognition of customary title over foreshore and seabed and repose that jurisdiction in the High Court, even if, by doing so, the possibility has been removed that a successful applicant could have the recognised customary title converted into a freehold title under section 132 Te Ture Whenua Maori Act. The reason for this is that the Maori Land Court is a specialist tribunal exercising statutory jurisdiction in relation to Maori land. It cannot be that any adjustment of its jurisdiction (by either adding to it or subtracting from it) ipso facto raises issues of discrimination; adjustments to its jurisdiction would only raise issues of discrimination if at the same time different more favourable changes were made to some other court's jurisdiction of a type that could fairly be described as causing comparative disadvantage.

69. Further, the fact the Maori Land Court exercises a statutory jurisdiction is important. If Parliament considers the Court in *Ngati Apa* did not interpret Te Ture Whenua Maori Act in accordance with Parliament's intention, Parliament is entitled to correct the erroneous interpretation by amending the Act. It seems clear Parliament never intended the 1993 Act would apply to the full range of potential customary interests in foreshore and seabed. If that is so, there can be no constitutional/human rights objection to Parliament amending the 1993 Act to make that clear (the Bill, of course, does not go that far).

70. Second, where as part of a general property reform package, Maori customary interests are treated in a manner different to, and substantially more detrimental than, the way in which comparable interests held by others are being treated under that reform legislation, section 19 BORA is engaged. This is so even if the words "others" in the preceding sentence includes both Maori and non-Maori. In other words, when conducting a general land reform, Parliament should, in principle, ensure customary rights holders are treated with reasonable equality and parity when compared with other landowners; that is the essential message of the

Australian cases referred to earlier.

71. On this last point *Western Australia v Ward* is, again, particularly valuable. In their majority joint judgment Gleeson CJ, Gaudron, Gummow and Hayne JJ observed (paragraphs 123-126):

123. As is apparent from the foregoing, discrimination can occur in a variety of circumstances. In addition to the operation of section 10(1) to which reference has been made, the sub-section may also be engaged by legislation which regulates or impairs the enjoyment of native title without effecting extinguishment...

124. Finally, the legislation may attract section 10(1) of the RDA because it purports on its face to extinguish native title without compensation or on less stringent conditions (including lesser compensation than those which govern the expropriation of the property of the people of another race). *Mabo (No. 1)* and the *Native Title Act Case* were concerned with legislative extinguishment that resulted in the "arbitrary deprivation of property"; the force of the adjective "arbitrary" appears to have been to emphasise the absence of (and need for) compensation. In such cases, it is appropriate to compare that lack of compensation in respect of native title with what it appears are rights of compensation generally afforded to holders of other forms of title. In this respect, Toohey J in *Mabo (No. 2)* said:

"Ordinarily, land is only acquired for a public purpose on payment of just terms, whatever may be the precise statutory language employed."

125. In the joint judgment in the *Native Title Case*, a similar approach was taken. However, it should be noted that that case concerned State legislation purporting on its face to extinguish native title and to replace it with rights derived from that very legislation. This provided that those (statutory) rights could be extinguished, suspended or impaired by action taken under the general laws of the State...

126. In other cases, involving different legislation, it will be appropriate to compare the effect of that legislation upon native title holders with the effect on other title holders. This will not necessarily involve any analysis of the general laws of the State or Territory. If, under the relevant legislative scheme, no provision is made respecting compensation for interference with, or abrogation of, any rights and interests in land, then the failure to compensate in respect of native title would not be sufficient to engage section 10(1). However, it may be that the power conferred by the legislation is exercised in a manner that, as a matter of fact, is discriminatory and thereby engages section 10(1)".

72. A final third point needs to be addressed. Under the Bill it is not just common law customary rights and title to the foreshore and seabed which will be extinguished by the terms of clause 11. Also extinguished (without compensation) are:

72.1 Titles to the foreshore and seabed currently vested in local authorities (even if these are registered freehold titles) (clause 11 and 19);

72.2 Titles held to the foreshore and seabed held in unregistered form by a squatter

(of any race) (clause 18).

73. The deprivation of local authorities' rights over the foreshore and seabed is neutral on the race discrimination issue as local authorities are not individuals and have no race.

74. The elimination (without compensation) of squatters' rights to the foreshore and seabed is, in my view, unlikely to be sufficient to characterise the Bill's reform as non-discriminatory. While the equal treatment of squatters' freehold interests and Maori customary titles might be thought to reflect a desire to merely reform foreshore and seabed titles on a non-discriminatory basis, (viz the *elimination* of all forms of *unregistered* title and the *preservation* of all forms of *registered* title (and see here the definition of "specified freehold interest" which includes Maori freehold land)), in substance the purpose of the Bill (as the Explanatory Note itself makes plain) is to deal with Maori customary rights (including title) in foreshore and seabed.

75. At this point it is important to acknowledge the first contextual point noted above (i.e. that some Maori will hold "specified freehold interests" and will, accordingly, be among the group of landowners whose rights are preserved through the operation of clause 11). However, I accept it cannot be said there is no discrimination because, within the group of general landowners who are protected, there may be persons of the indigenous race who are treated as well as the majority populace.<sup>[35]</sup> The point of an indirect discrimination analysis is to look at substance not form; and in substance, it can be argued, the reforms contained in the Bill do not treat all land interests in the same or equivalent manner - arguably, particular interests uniquely held by Maori are treated less favourably as explained below.

#### *Key issue in "prima facie" discrimination analysis*

76. The argument which supports a "*prima facie* breach" analysis is as follows. The most obvious and key difference in treatment under the Bill is that owners of "specified freehold interests" have those existing rights protected by the Bill. They lose no beneficial interest in the fee simple estate they currently hold by way of certificate of title, or, in the case of Maori freehold interest, under a vesting order under Te Ture Whenua Maori Act. In contrast, Maori who at common law currently enjoy Maori customary title in respect of foreshore and seabed (even though such rights have yet to be "recognised" by the Maori Land Court and/or the High Court) are to be deprived of their title. For one group to be deprived of a (potentially significant) existing source of rights or title, yet another not to be similarly deprived, reaches the threshold of a *prima facie* infringement of section 19 BORA.

77. There is, of course, a countervailing argument, which is that the Bill sets up a replacement regime for customary interests, operating through Customary Rights Orders and Ancestral Connection Orders. In other words, the Bill contains mechanisms which seek to recognise and protect Maori customary interests in foreshore and seabed. It seeks to create certainty where there is currently uncertainty, both procedurally and substantively. In addition, the Bill provides a process for redress where customary rights are lost in the transition from the existing regime to the new regime (i.e. where the new regime does not adequately reflect the



rights that would have existed under the common law).

78. However, I accept Maori customary title holders have no *right* to redress, nor any right of access to an independent body or person in the event that negotiations with the Crown fail. Under the Bill, the decision as to whether or not any redress/relief should be made available to a group of Maori who are deprived of Maori customary title (referred to as "territorial customary rights" in clause 28 of the Bill) is a matter which is ultimately at the discretion of the Crown, although the Crown will negotiate in good faith. By contrast, the holders of "specified freehold interests" cannot lose their property rights without either consent or redress.

79. On balance, I accept it is seriously arguable that these two features of the Bill, i.e., extinguishment of the possibility of Maori customary title and the absence of a guaranteed right of redress, are likely to lead to a finding that the Bill *prima facie* infringes section 19 BORA. Accordingly, I turn to the section 5 analysis.

### **Is the Prima Facie Infringement Justifiable under section 5?**

80. The basis on which the section 5 analysis is to be conducted has been outlined above (paragraphs 47-52). The approach taken is consistent with that described by Richardson J writing extra-judicially. He stated that section 5 requires:

*"a utilitarian assessment of the public welfare in determining whether setting reasonable limits on a protected right is justified. On its face, that involves a Brandeis brief inquiry where the Court undertakes an extensive empirical examination supported by economic, statistical, and sociological data, makes a cost-benefit analysis of the effects of various policy choices and chooses the solution which best reflects a balancing of the values involved."*<sup>[36]</sup>

81. The first matters for consideration are the government's reasons for introducing the Bill. An assessment must then be made weighing up the advantages and disadvantages that may accrue to those Maori and others who may be affected by the Bill once enacted.

82. The reasons for introducing the Bill are best set out in clause 3 and are as follows:

*to integrate, within existing systems for regulating activities in the public foreshore and seabed, all rights and interests in the public foreshore and seabed by creating a new legal scheme that -*

*(a) vests the full legal and beneficial ownership of the public foreshore and seabed in the Crown to ensure that the public foreshore and seabed of New Zealand is preserved in perpetuity for the people of New Zealand; and*

*(b) provides for general rights of public access, recreation, and navigation in, on, over, and across the public foreshore and seabed; and*

*(c) acknowledges the expression of kaitiakitanga by recognizing the ancestral connection of Maori with the public foreshore and seabed; and*

*(d) provides for the recognition and protection of ongoing customary rights to undertake or engage in particular activities, uses, or practices in area of the public foreshore and seabed; and*

*(e) enables applications to be made to the High Court to investigate the full extent of the rights that may have been held at common law, and provides for formal discussions on redress if those rights cannot be fully expressed as a result of this Act.*

83. The principal reason for introducing the Bill is to clarify the law for both Maori and non-Maori alike. The state of the law on this subject may best be described as radically indeterminate. The Ngati Apa decision created significant uncertainty with regard to the common law status of customary interests in the foreshore and seabed in New Zealand; the range of customary interests that could be recognized; the viability of existing legislative regimes such as the Resource Management Act; and the nature and extent of public rights in relation to New Zealand's foreshore and seabed.

84. The common law of customary interests has been little developed to date in New Zealand because Maori have chosen to obtain redress through the Treaty of Waitangi. Without legislation the Courts would be required to develop the common law of indigenous rights on a case-by-case basis over many years. This jurisprudence would be developed through both the High Court and the Maori Land Court, thus creating the real possibility of conflicting and confusing approaches and decisions. As a result there would be substantial uncertainty as to the legal status of New Zealand's coastline for many years, and governments have the obligation to provide certainty in the law wherever possible.

85. The precise nature and extent of customary interests is not clear because they fall along a spectrum ranging from weaker to stronger interests. Dr McHugh in his evidence to the Waitangi Tribunal noted it was doubtful the common law would have recognized exclusive rights equivalent to fee simple titles. Several judges in Ngati Apa acknowledged that private interests in the foreshore and seabed at common law would be subject to the public rights. A process would need to be devised to enable these rights to be declared and accommodated.

86. Further, it is important to note that Te Ture Whenua Maori Act was never intended to deal with customary interests and therefore does not have the required tools. Finally in this context it is relevant to note the extent of the interests claimed, in some instances to the limit of the Exclusive Economic Zone, a clear illustration of the factual uncertainty resulting from the Ngati Apa decision.

87. It is important to understand that legislation such as the Resource Management Act currently operates on the basis of Crown ownership of the foreshore and seabed, based to some extent on the earlier Court of Appeal decision in the *Ninety Mile*

*Beach* case. It is clear the smooth functioning of the legislative scheme created under the RMA would be impeded during the lengthy and potentially contradictory process of jurisprudential development of common law customary rights and interests in the High Court and Maori Land Court. It is interesting to note the Waitangi Tribunal in its decision confirmed the uncertainty likely to result when it suggested the fisheries settlement may be relevant to the High Court process but not the Maori Land Court process. This position is both illogical and unsatisfactory and therefore requires clarification through legislation.

88. Finally on the issue of the need for the Bill, New Zealand is an island nation, and the coastline has played and continues to play an important part in the economic, social and cultural lives of all New Zealanders, both Maori and non-Maori. The government therefore considers it is important for all New Zealanders that there be no uncertainty about the nature and extent of public rights in relation to the foreshore and seabed.

89. When making an assessment of the Bill's advantages and disadvantages in terms of the interests of Maori and others, the issue of certainty is vital, as is a consideration of the provisions to address the interests and rights of Maori and others in relation to customary interests under common law.

90. The potential for uncertainty referred to above is now a reality. I note for example there have already been instances where the Crown or local authorities have been unable to exercise their regulatory responsibilities. For example, Ngati Manuhiri o Omaha hapu has sought an injunction to prevent the issuing of any new resources consents for sand extraction in the Kaipara Harbour. The basis for the action is that the hapu owns the relevant area. Similarly, Ngati Toa has taken judicial review proceedings designed to prevent the establishment of a marine reserve at Taputeranga off Wellington's South Coast. The basis of their claim is also ownership of the relevant area.

91. It is impossible for the Crown and local authorities to perform their regulatory functions in the face of such ownership claims. It is clear there will be many more such claims, and without legislative intervention these will take many years to be heard and resolved. In the meantime, regulatory decision-making would be stalled, to the long-term detriment of all New Zealanders.

92. The Crown does not regard it as acceptable that appropriate regulatory governance be stalled in the long term - day-to-day management of foreshore and seabed must proceed. The Bill is designed to facilitate decision-making while recognizing and providing for the customary interests of Maori and others.

93. While addressing the issue of certainty is important, equally important to the government is that the Bill ensures the interests of Maori common law customary interests and rights are protected. The Bill recognizes these interests in three vital ways.

94. First, the Bill attempts to give effect to Maori common law customary interests in the foreshore and seabed, through the Ancestral Connection Orders and the

Customary Rights Orders. These Orders are in addition to those currently existing in legislation, for example, the fisheries legislation.

95. Secondly, to the extent that these Orders or proceedings will not address any claim to a bundle of rights equivalent to a fee simple title, the Bill provides for an action to be taken in the High Court for a finding as to such rights. That finding can then be referred to the government for redress. The combination of this trio of remedies is an attempt to deal with the full range of Maori common law customary interests in the foreshore and seabed.

96. Thirdly, the Ancestral Connection Orders and Customary Rights Orders provide an improvement on any other mechanisms currently available for ensuring Maori interests are reflected in any planning processes affecting the foreshore and seabed. Current provisions in the Resource Management Act provide limited guidance on who to consult, whereas the Bill's provisions give explicit recognition to affected Maori groups, and stronger protection for recognized customary rights.

97. The one area in which the Bill may come in for criticism is that it does not guarantee redress if a claim equivalent to a fee simple title is made out in the High Court. There is an argument that a body independent of government should determine the nature and extent of the redress.

98. In my view the process for redress through negotiation with the government is justified. It cannot be assumed the Crown will approach negotiations in bad faith. Section 19 of the Bill of Rights Act and the Treaty of Waitangi require a good faith approach to negotiations, which means the offers must be appropriate and sufficient.

99. It is also important to realize that even the strongest form of common law Maori customary interest in the foreshore and seabed would be inalienable, and likely to be subject to public rights of access and use. Such an interest cannot readily be valued in financial terms, and monetary compensation may not be the best form of redress. This means an analogy cannot be drawn with, for example, compensation regimes for land taken for public works. There is no objective basis on which an independent third party can fix redress. It is an issue best determined in the particular case by discussion and negotiation.

100. A further point to note is that policy work is underway in related areas such as aquaculture. Such work may open new avenues for redress that would be prevented if a closed compulsory redress regime were imposed at this stage.

101. It is relevant to note in this context there is no statutory requirement for the government to negotiate historical land grievances under the Treaty of Waitangi Act, yet governments on all sides of the political spectrum have honoured the commitment to negotiate. In relation to Treaty breaches, the Crown has shown itself willing to consider many different forms of redress. It is undesirable that flexibility be limited, as it would inevitably be if the government were to cede ultimate decision-making power to some other body. The government has already moved to put in place the administrative infrastructure necessary to facilitate such negotiations,

which can take place without a High Court declaration, if that is what the Maori claimant group determines.

102. I accept there is a risk a human rights body may regard this aspect of the Bill as imposing an unjustifiable limitation on a protected right. However, I note the government must be accorded a margin of appreciation in this area and my assessment is that, on balance, to the extent that the Bill involves a *prima facie* infringement of section 19, it is a reasonable limit in terms of section 5 of the Bill of Rights Act.

103. The Bill seeks to achieve a balance that recognizes and protects Maori customary interests, recognizes and protects the interests of the general public (including Maori) and resolves the substantial uncertainties resulting from the Court of Appeal's decision in Ngati Apa. Taken in conjunction with existing mechanisms for the recognition and protection of Maori common law customary interests in the foreshore and seabed (e.g. the fisheries legislation) and in conjunction with the likely future recognition of such interest (e.g. in relation to aquaculture), I consider the Bill meets the section 5 test. Accordingly, it does not involve any breach of the Bill of Rights Act.

Hon Margaret Wilson  
Attorney-General

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#### Footnotes

1. Gault P reserved his position on whether there is a real distinction between common law aboriginal title and Maori customary land under Te Ture Whenua Maori Act (paragraph 103).
2. G Palmer *New Zealand's Constitution in Crisis* (1992) 69; M Taggart "D??vu All Over Again" [1998] NZLJ 234, 235-236; P Joseph *Constitutional and Administrative Law in New Zealand* (2ed 2001) 252.
3. Legislation Advisory Committee "Legislation Overriding Judgments and Pending Proceedings" in *Report No. 9: Recurring Issues* (1996) 42, 56.
4. G Huscroft "The Right to Justice" in P Rishworth et al. *The New Zealand Bill of Rights* (2003) 753, 768; *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR A.6, 111.
5. In *Mahuika v New Zealand* Communication No 547/1993, 15 November 2000, paragraph 9.3, the HRC recorded that it had not been disputed by the New Zealand Government that Maori were, for the purposes of art 27 ICCPR, a "minority". I accept for the purposes of this opinion that Maori are a minority for section 20 BORA purposes.
6. See the specific reference to art 27 ICCPR in the White Paper commentary at p 87, paragraph 10.83.
7. [2000] 2 NZLR 659, 675 (CA).
8. *CCPR General comment 23* (Art. 27) 08/04/94, para. 7.
9. *Lansman v Finland*, Communication 511/92, 8 November 1994 paragraphs. 9.4 - 9.8.
10. *Ominayak v Canada*, Communication 167/84, 10 May 1990, para. 33.

11. *Lansman v Finland*, Communication 511/92, paragraphs. 9.4 - 9.8.
12. Communication 671/95, para. 10.5.
13. *Mahuika v New Zealand*, Communication 547/1993, para. 9.9.
14. See *Mahuika* above at paragraph 9.5.
15. See also, for example, the decisions of the Supreme Court of Canada in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 174 *Eldridge v British Columbia* [1997] 3 SCR 624, paragraph 62.
16. *Simunek v Czech Republic* Communication No 516/1992, 31 July 1995, paragraph 11.7.
17. See also *Mabo v Queensland* (1988) 144 CLR 186, 230 (HCA, per Deane J) (*Mabo (No. 1)*).
18. At p 18.
19. See also, *R v Turpin* [1989] 1 SCR 1296 at p 1331-1332; *Miron v Trudel* [1995] 2 SCR 418 per McLachlin J at p 874; see also *Eldridge v British Columbia* [1997] 3 SCR 624 at paragraph 55.
20. *R v Secretary of State for Employment, ex parte Seymour Smith* [2000] 1 All ER 857 at 871-872.
21. *MoT v Noort* [1992] 3 NZLR 260, 283-284 (CA).
22. See eg *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, at 782 and *RJR MacDonald v Canada* [1995] 3 SCR 199 at paragraph 160. See also *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754, at paragraph 15.
23. *Irwin Toy v Quebec* [1989] 1 SCR 927, at 992-993.
24. *M v H* [1999] 2 SCR 3 at paragraphs 78-93.
25. *Attorney-General for Hong Kong v Lee Kwong-kut* [1993] 3 All ER 939 at 954.
26. *East African Asians v United Kingdom* (1973) 3 EHRR 76; *Korematsu v United States* 223 US 214, 216; *Quilter v Attorney-General* [1998] 1 NZLR 523, 566 (Keith J, noting US approach).
27. For the sake of accuracy it should be noted that the cases span the break-up of the former Czechoslovakia into the Czech Republic and the Republic of Slovakia; references just to the Czech Republic are for convenience.
28. See eg paragraph 31 (Elias CJ).
29. *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 (SCC) and *R v Marshall* [2003] NSCA 105 (especially the valuable discussion between paragraphs 104 to 186), although these cases deal with dry land rather than foreshore and seabed.
30. See, eg, *Delgamuukw* above at 243 (per Lamer CJ).
31. In *Delgamuukw*, the Court suggested that a use of aboriginal land that was inconsistent with the means of its acquisition as aboriginal land (ie its relationship to the practice and enjoyment of custom) falls outside the rights that the title would confer; *ibid* at 246-7.
32. For example, legislation placing minerals in Crown ownership as does the Crown Minerals Act.
33. *Delgamuukw* above at 247-8.
34. *Mabo (No. 1)* was essentially an application strike-out so that the Court did not have any facts, established at trial, before it. In this respect it is very similar to *Ngati Apa*.
35. See eg, in terms of the general principle, *Northern Regional Health Authority* above at 241-2; *Griggs v Duke Power Co* 401 US 424, 431 (1971).
36. Sir I Richardson, "Rights Jurisprudence - Justice for All?" in P Joseph (ed) *Essays on the Constitution*, Brooker's Wellington, 1995, p.82.

