CHAPTER 13

FORESHORES

Note: What follows is largely a summary of *The Foreshore*, a report prepared by Dr Richard Boast for the Waitangi Tribunal Rangahaua Whanui Series.

13.1 Definition

The seashore, foreshore, or sea beach (in legal parlance, these are generally synonymous terms) is that portion of the realm of England that lies between the high-water mark of medium high tide and the low-water mark, but it has been said that all that lies landward of the high-water mark and is in apparent continuity with the beach at the high-water mark will normally form part of the beach, and it has been held on special facts that 'foreshore' means the whole of the shore that is from time to time exposed by the receding tide.[1]

13.2 The Importance of the Foreshore

The tidal zone was important to Maori because it was a source of food; not only sea food but also birds. In *In re Ninety Mile Beach*, it was submitted that the beach area was a place of recreation as well.[2] It is certain that the beaches were important as walkways or highways, by which coastal Maori travelled from one part of their domain to another. In some districts, they also served as battlegrounds. For all these reasons, but especially because of their value as food resources, the possession of, and access to, foreshores was a jealously guarded right. Where there were many claimants, these rights could be, as they were with respect to desirable areas of land, complex, overlapping, and contestable.

13.3 Maori Rights

There is no doubt that before 1840 Maori had rights over the foreshore, in the same way that they had rights over the land inland of the foreshore. From time to time since the establishment of the Maori Land Court, Maori customary rights to the

1. *Halsbury's Laws of England*, 4th ed, vol 49, p 187 (cited in Boast, p 6)
2. *In re Ninety Mile Beach* [1963] NZLR 461

foreshore have been conceded or confirmed by the court, although to particular foreshores rather than to the totality of the foreshore as such. This does not necessarily mean, however, that aboriginal title rights do not exist in the foreshore. Maori rights to foreshore fisheries continued after 1840 and were to some extent recognised in statute law, although not as exclusive possession.[3]

As far as the Native Land Court is concerned, Maori claims to sections of the foreshore were, in fact, considered provable on the same basis as claims to land: proof of descent, exclusive or dominant use, customary management or control. If there was a difficulty to be surmounted before a certificate of title could be issued, it arose from two sources: the common law assumption that the foreshore was Crown property and Chief Judge Fenton's view that a tribe had to prove exclusive possession before he would award title.[4]

13.4 The Position of the Crown

For Maori, there was no difference between the ownership of land, the possession of inland fishing sites, and the control of foreshore areas. These were all forms of tribal property, governed by customary practices. It was the Pakeha who drew a distinction between the ownership of land, which was conceded to be Maori property, and the ownership of the foreshore, which eventually came to be considered Crown property.

There is some evidence that initially the Crown considered the foreshore to be Maori property, which had to be bought and paid for like any other property. In 1874, referring to the earliest alienations of Maori land, McLean stated that:

> it had been held that when the lands were ceded, all the rights connected with them were also ceded such as rivers, streams and whatever was on the surface of the land or under the surface. Almost all the deeds of cession contained a clause to that effect.[5]

It is true that many of the early deeds do contain wording that seems to indicate that lakes, rivers, and seashores were part of the property that was being acquired, although, as Boast points out, often the 'the language used is somewhat allusive and imprecise, making it far from clear exactly which water bodies are being referred to'.[6]

An earlier statement by J Mackay, however, supports the opinion that during the first few decades of settlement the foreshore was not automatically considered to be Crown property:

> I believe the general custom with the Native Land Purchase Department, respecting lands between high and low water-mark, has been to consider that when the Native

3. For discussion, see Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, pp 154–183
4. A Ward, 'Overview', report commissioned by the Waitangi Tribunal (Wai 27 rod, doc aa26), p 18
5. NZPD, vol 16, p 853 (cited in Boast, p 30)
6. Boast, p 30

> title is extinguished over the main land, then any rights which the Natives have over the tidal lands have ceased . . . I am not aware of any cases having arisen in which the Government have required to make use of tidal lands previous to the extinguishment of the Native title over the main land.[7]

Moreover, there are instances where the Maori Land Court had indeed granted foreshore titles and the Crown had gone around afterwards to buy them up.[8] In the Kauwaeranga judgment of 1870, however, Fenton came out strongly against foreshore titles: 'evil consequences . . . might ensue from judicially declaring the soil of the foreshore . . . vested absolutely in the natives'.[9] Thereafter, the court seems generally not to have granted titles of this kind, although the question of whether it had the right or the power to do so still remained, as did the question of whether the foreshore was Maori customary land. In 1872, the Crown invoked a section of the Native Lands Act 1867 in order to suspend the operation of the Maori Land Court in the Auckland district in the portion of the province 'situated below high water mark'.[10] This was to prevent any possibility of the court issuing titles to the foreshore around Thames, where gold had been discovered. The implication is that the Government did recognise that the court had the power to investigate foreshore claims and issue titles. If so, this can only have been on the basis that the foreshore may have been found to be customary land. When Crown counsel advised the court of the proclamation suspending its operation with respect to foreshore claims, he said that the claims had been:

> deferred, not refused; and that the Government have not the wish, as they have certainly not the power, to deprive the natives of any just rights they have to the foreshore.[11]

Further research may be needed on this point, but if Mackay and, in particular, McLean were confused as to the nature of the early land alienations vis à vis the foreshore areas, then it is likely that no one did.[12] For the moment, at any rate, the preliminary data suggest that, during the early decades of settlement, up to perhaps as late as the mid-1870s, the Crown did not consider that it owned the foreshore until Maori title to the adjacent land above the high-tide line had been extinguished. It may also have been considered necessary to include in the sale deeds a reference to the fact that the foreshore was part of the alienation. This appears to be the sense of the explanation McLean provided to Parliament in 1874.

---

7. AJHR, 1869, f-7, p 6 (cited in Boast, p 31)
8. Boast, p 33
9. Cited in Boast, p 32
10. *New Zealand Gazette*, 1872, vol 187, p 347 (cited in Boast, p 33)
11. Cited in Boast, p 33
12. For a discussion indicating the confusion surrounding the 'ownership' of the foreshore, see Ward, pp 22–23.

13.5 Statutes Affecting the Foreshore

The Harbours Act 1878 (revised 1950) provided that no part of the foreshore was to be granted or given away other than with the authority of a special Act of Parliament. Boast comments that there was no indication at the time that this legislation was intended to do away with Maori claims to the foreshore and nothing in the Act seemed to prevent an application of this sort to the Maori Land Court.[13] On the other hand, the underlying assumption must surely have been that the foreshore was not Maori land. No reference to compensation for Maori was raised in the Act.

The Native Lands Act 1909 made it clear that customary title did not prevail against the Crown; Maori had to convert customary titles into Crown titles if they wished to obtain the protection of the law. Could the Maori Land Court issue titles to the foreshore? In a series of cases over the next 50 years this point was argued in the courts.

13.6 Twentieth Century

Whatever the position may have been in the nineteenth century, by the early twentieth century the Crown's position on the foreshore was that the Crown had owned the foreshores since 1840, according to common law.

In 1916, a Crown law opinion stated that 'the limits of Native customary titles are high water mark'.[14] In 1917, another opinion attempted to limit customary rights even above the high-water mark:

> Native title is not universal. It is not true that the whole of New Zealand . . . is necessarily the subject of Native title except so far as such title had been extinguished by cession . . . or otherwise . . . There may be areas of land in which no Native title can be shown to exist, No Man's Land . . . If no claimant can prove his title it is not Native land at all.[15]

Government thinking was also based on the assumption that customary titles had no legal standing in themselves; they became enforceable in law only when given statutory recognition, and the standard way for this to occur was via a Crown grant issued under one of the Acts relating to native land and following an investigation of title by the Maori Land Court. The inference is that, if no title to the foreshore had been issued as a result of this process, then no valid title existed. There was also an official belief that Maori custom did not permit the ownership of large bodies of water, essentially because an idea of this kind was beyond Maori conception:

> The larger the water . . . the more probable it is that Native custom did not recognise it as part of the land but as distinct from the land just as the sea is and not the subject of exclusive possession and ownership like the land. . . . Natives on the

13. Boast, p 34
14. Salmond to Under-Secretary of Land, 28 August 1916, copy on l1 29057 (cited in Boast, p 39)
15. cl 174/2, NA Wellington (cited in Boast, pp 39, 83)

> shores of Lake Taupo did not think that they owned the Lake anymore than Natives on the shores of the sea thought they owned the Pacific Ocean.[16]

On the other hand, the Crown submitted, the smaller the area of water, the more likely it was that Maori would have regarded it as incorporated into the adjacent land and so covered by the same customary title.

The Crown also drew a distinction between land (and water) and fishing rights, based, it was claimed, on the distinction made in the Treaty of Waitangi: the right to fish did not involve ownership of the water, or of the land under the water.

In the end, of course, the Crown had to make its case in the courts. By the 1930s, it appeared that the Crown's legal advisers were becoming less and less certain that the courts would uphold the Crown's position. In 1932, the Crown Law Office prepared an opinion on a case involving the Northland foreshore. It was considered that the argument of the claimants – which was that, while the foreshore might be vested in the Crown, it was still customary land – had some merit. It was also considered likely that the claimants could establish a customary title to the satisfaction of the Maori Land Court. In short, 'the Crown had little hope of success in the present case'.[17] That the Crown was in a weak legal position seemed to have been the consensus with respect to other foreshore cases as well.[18]

According to Boast, the Crown kept this assessment to itself and continued to assert in the courts that the foreshore was, by common law, vested in the Crown.[19] In the case of Awapuni Lagoon (1928), the Maori Land Court appeared to accept this argument. In the long drawn out case of the Ngakororo mudflats (1926–41), however, the Maori Land Court decided in favour of the Maori claimants: the area was found to be Maori customary land. This decision was reversed by the Native Appellate Court, but not on the grounds advanced by the Crown. The Maori Land Court could issue title to foreshore land, but it had to be on the basis of a convincing claim. In the case before it, the appellate court concluded that the applicants had not proven their claim to the degree of 'particularity required'.[20] The Herekino case (1941) followed the same course as the Ngakororo case: a decision for the Maori claimants in the Maori Land Court was reversed by the appellate court, but this time on the basis that the area involved was accreted land and, as such, outside the jurisdiction of the Maori Land Court.[21]

13.7 Ninety Mile Beach

In 1957, the Maori Land Court accepted arguments by Maori that Ninety Mile Beach was customary land. The matter was then referred to the Supreme Court to

16. Cited in Boast, p 40
17. Cited in Boast, p 42
18. Boast, pp 41–43
19. Ibid, pp 43–44
20. Cited in Boast, p 60
21. Boast, p 61

determine whether the Maori Land Court had the power to conduct title investigations with respect to the foreshore. The Crown argued that the Maori Land Court had never had jurisdiction: the foreshore had been Crown property since 1840. The Supreme Court thought that this might be an 'acceptable' argument but decided the case on the basis that sections of the Harbours Act 1950 and the Crown Grants Act 1908 effectively prevented the Maori Land Court from issuing foreshore titles. That was the situation at that time; what may have been the case in the past was not the concern of the Supreme Court.

The dispute was then taken to the Court of Appeal. The Maori submission was that the Maori Land Court existed to investigate customary titles. If it were possible to make a case for customary titles to the foreshore, then the Maori Land Court would have jurisdiction. Additionally, while the Harbours Act was a difficulty, it was contended that the legislation was in itself insufficient to deprive Maori of their property rights. The Crown case was the same as before. English common law had applied in New Zealand since 1840, and under common law the foreshore was vested in the Crown.

While the Court of Appeal decided for the Crown, it did not entirely accept the Crown's argument that the Maori Land Court had never had jurisdiction over the foreshore. Nor did it follow the same line that had been taken by the Supreme Court. If Maori were to be deprived of rights over the foreshore by legislation, the legislation would have to state that explicitly; such an outcome could not be simply inferred from legislation, like the Harbours Act, that had been passed for some other purpose entirely. There had to have been an 'express enactment': Maori could not be deprived of their customary rights incidentally, by a 'side wind'.[22] The Court of Appeal, however, held that the Maori Land Court had, since 1865, investigated all the Maori land along the coast. This overlooked the fact that many coastal areas were alienated before the advent of the Maori Land Court. Moreover, if the Maori Land Court, in issuing titles to these blocks, had not stipulated that the foreshore was included in the title, then Maori rights to this area must be treated as having been extinguished. The Court of Appeal accepted that in the past the Maori Land Court had been able to deal with foreshore claims; this can only have been on the basis that the foreshore was, or could be, customary land. But the court also seemed to have a belief that the foreshore was Crown property – unless the Maori Land Court had explicitly decided otherwise.

The Court of Appeal had said that Maori rights could not be done away with in an indirect way, simply by the application of general law. Yet the court held that Maori rights to the foreshore had been extinguished. Boast says that the court's arguments (cited in the previous paragraph) on this point are 'not tenable' and that it is unlikely that a contemporary court would accept that Maori property rights in the foreshore had been abolished in the manner accepted by the Court of Appeal. Lastly, Boast warns not to lose sight of the factual problems of the case. He says, 'The Court of Appeal contructed its analysis on a factual supposition – that is, that

22. The opinion of T A Gresson, *In re the Ninety-mile Beach* , p 477 (cited in Boast, p 68)

all the coastal blocks must have been investigated at some stage by the Native Land Court – which is quite incorrect.'[23]

13.8 Harbours and Lagoons: A Case Study

The Waitangi Tribunal had reason to consider the ownerhship of the Te Whanganui-a-Orotu Lagoon (Hawke's Bay) in 1995. The claimants contended that they had never knowingly or willingly relinquished their tino rangatiratanga over this taonga and that the Crown was in breach of the principles of the Treaty in vesting the lagoon in the Napier Harbour Board by statute. On the other hand, the Crown contended that the lagoon was included in an 1851 purchase or, alternatively, that it was vested in the Crown through the 'arm of the sea' legal rule, whereby areas of water that form part of the sea are the property of the Crown.[24] On these matters, the Tribunal concluded, first, that the sellers had no reason to believe that Te Whanganui-a-Orotu was included in the purchase and that, while the Crown had believed it was included, there was not the necessary 'meeting of minds'. Secondly, on the matter of whether Whanganui-a-Orotu was an 'arm of the sea', the Tribunal concluded that the lagoon contained large quantities of fresh water and a very restricted link to sea water, which distinguished it from harbours like Manukau. It was therefore not possible to accept the Crown's presumption that Te Whanganui-a-Orotu was part of the sea, which meant also that the bed of the lagoon was not, as a matter of common law, vested in the Crown.[25]

13.9 The Current Position

It appears to be the situation that no New Zealand court has ever entirely accepted the Crown's submission that it owns the foreshore by virtue of the common law. In particular, in *In re Ninety-Mile Beach*, the Court of Appeal did not accept that this was the position.

The legislation that currently operates with respect to the foreshore area – the Conservation Act 1987, the Foreshore and Seabed Endowment Revesting Act 1991, and the Resource Management Act 1991 – does not explicitly vest the foreshore in the Crown, and it seems doubtful that the (now repealed) Harbours Act 1950 would be construed by any latter-day court as having extinguished Maori customary title over the foreshore. In short, the Crown's claim to the foreshore seems to have no statutory basis.

The argument advanced by the Court of Appeal in 1963 – that Maori Land Court investigation of titles to the adjacent land extinguished Maori titles to the foreshore unless the foreshore was specifically included in the certificate of title – seems

23. Boast, p 69
24. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995, p 204
25. Ibid, pp 205–206

tenuous if not 'simply wrong'.[26] If it is wrong, then any unmentioned foreshore areas remained customary – that is to say, Maori – land. They did not somehow 'revert' to being Crown land – unless, of course, the Crown's assertions about the application of the common law are in fact correct.

The best claim the Crown has to foreshore land appears to be the one advanced by McLean in 1874: namely, that the Crown purchased the foreshore when it purchased the coastal blocks. In Boast's opinion, 'it makes . . . sense to think of the Crown as owning today those areas of foreshore which it clearly and unambiguously purchased by pre-emption era deed of cession',[27] or where it expressly extinguished customary title by statute. If these areas could be identified, then by implication all the remaining foreshore area could be assumed to be Maori customary land. However, while investigations of titles might be made in the usual way, provided it was accepted that the jurisdiction of the Maori Land Court extended below the high-water mark, any attempt to do so would almost certainly lead to a revisiting of the legal ground covered by the Court of Appeal in 1963. This would be a long, expensive, and probably divisive process. On the other hand, attempts to pursue the matter via the ordinary courts, perhaps on the basis of prescriptive rights, would seem to be blocked by a 1993 amendment to the Limitation Act 1950. This prescribed that action to recover Maori customary land must be begun within 12 years of the date 'on which the cause of action accrued'.[28]

It appears to be the case that, while the validity of the Crown's title to the foreshore is uncertain, no easy avenue of legal redress is available to Maori. The best way forward may be for some kind of negotiated settlement to be reached, to be followed by legislation of some kind.

This legislation would deal with the matter of ownership and with the issues of management. As Boast points out, ownership and management are two different things, and the reality seems to be that, no matter who owns the foreshore, the Crown will manage it. In Boast's view, management laws can reduce the 'rights of ownership to an empty shell'.[29] Given the management regime currently in place, it seems to be Boast's opinion that to return foreshore lands on a piecemeal basis would serve no conceivable purpose and be of very little practical benefit to Maori. Maori views have yet to be ascertained.

In respect of sea fisheries, there is little doubt that inshore fisheries were effectively under the control of the hapu adjacent to them and to their kin. The 200-mile economic zone recently recognised by the law of the sea is attributed to New Zealand as a nation state, rather than as an extension of the development right of adjacent hapu (which could hardly be said to be 'adjacent' to fisheries 200 miles out and several miles deep). Offshore fisheries would seem therefore appropriately to be at the disposal of the Government for the benefit of the whole New Zealand

26. *Te Whanganui-a-Orotu Report 1995*, p 69
27. Ibid, p 31
28. Cited in Boast, p 28
29. Boast, p 71

community or to sections of it, as is exemplified in the grant to New Zealand Maori in the 1992 Sealord settlement.

This report has not had time to encompass seabed issues as distinct from foreshore issues. A preliminary view would be that, where aboriginal title rights existed at 1840, they were protected both under common law and by the Treaty. Their most usual expression was likely to have been fishing over rocks and reefs, well offshore and locatable only by fishing families who knew the bearings. In terms of Fenton's position in the Kauwaeranga judgment, they would have merited recognition as fisheries and an easement would have been granted, possibly exclusively to the user family, but not 'title to the soil'.

It would be the view of this report that, as in offshore fisheries of a more general kind, so also with the general seabed below the low-water mark: rights to it appertain to New Zealand as a nation state by operation of international law. A development right in 'adjacent' hapu, based on improved technology since 1840, might be valid but can scarcely be seen as an exclusive right.