A new take on the concept of proprietary rights arising from the Marine and Coastal Areas Act 2011

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"..IN EVERY SOCIETY, RIGHTS IN LAND which afford an enforceable entitlement to exclusive possession are basic to social peace."[1]

The fundamental rule at common law is that the owner of the soil is presumed to be "the owner of everything up to the sky and down to the centre of the earth."[2] This European understanding of property law is the building block of property rights in New Zealand. It underlies the principle of indefeasibility and estates in land, providing owners with individual possession to the exclusion of others.[3]

This eurocentric view can be contrasted with Māori customary property rights. The general understanding of customary rights in land in New Zealand is that land is held in accordance with tikanga.[4] Tikanga is a system of collective rights which guarantees collective access and collective use of resources. [5] Under this system Māori are guardians and caretakers (kaitiaki) of the land rather than owners and conquerors of it. The responsibility of kaitiaki extends beyond allocated blocks of land.

Applying these two contrasting understandings of property rights to water is conceptually challenging, as bodies of water are not confined or divided up in the same way as plots of land. In New Zealand, river beds and lake beds are largely vested in the Crown.[6] Landowners with properties adjacent to bodies of water have ownership up to the maximum flow level. This traditional view of ownership of freshwater was challenged in the 2012 findings by the Waitangi Tribunal in its Freshwater Inquiry.[7] At stage one of the inquiry the Tribunal found that freshwater ownership, prior to 1840, was for Māori analogous to "full-blown ownership in the English sense."[8] The bundle of rights contained in this 'ownership' includes having authority and control over access to and use of the resource and exclusive use over relevant freshwater bodies by local iwi, as well as kaitaiki obligations over the freshwater, and recognition of the taonga relationship Māori have with the waters.[9]

Ownership of non-freshwater is provided for in the Marine and Coastal Areas (Takutai Moana) Act 2011 ('MACA').[10] MACA gives rise to yet another variation to the understanding of "property rights" in New Zealand. The Foreshore and Seabed Act 2004 (controversially) provided a means by which Māori who met very high thresholds could have their rights in coastal areas legally recognised. That Act proved unworkable, and following the *Ngati Apa* case, which recognised the continued existence of Māori customary property rights in marine coastal areas, MACA was introduced.[11] MACA provides a legislative platform for Māori to claim customary marine title and/or protected customary rights within a defined portion of the marine and coastal area.[12] Customary marine title is enforceable in the terms prescribed by Parliament in MACA. It gives iwi, hapū or whānau the right to say yes or no to proposed activities that

need resource consent or permits within the customary marine area (with some exceptions).[13] A consenting authority must not approve consents if a proposed activity would have a more than minor adverse effect on protected customary rights.[14] The purpose behind this Act is to protect traditional uses of the coastal area.[15]

Furthermore, customary marine title gives the group rights in relation to marine mammal watching, coastal policies and protection of wahi tapu (i.e. sacred sites such as burial places). Customary marine title cannot be sold or converted to freehold title, nor does it exempt the group from the need to obtain permits and resource consents for that area.[16]

It is therefore a different type of property right. It permits some attributes of ownership, such as the right of veto over resource consenting, while other attributes are rights of use and enjoyment. But it lacks the full suite of rights normally associated with holding a freehold title over a specified parcel of land.

Protected customary rights, also provided for in MACA, are designed to recognise and allow customary activities, such as collecting hangi stones or launching waka, in the common marine coastal area. This allows iwi to carry out the activity without resource consent.[17]

There are limits to the exercise of rights granted under MACA, just as individual property rights to land are limited by various legislative provisions.[18] For example, property ownership of a fee simple title does not permit landowners to freely engage in certain activities provided for in the Resource Management Act 1991. This is analogous to the restrictions on rights granted under MACA; for example, the recognition of these rights does not affect the public right of access to the common marine and coastal area. Existing recreational fishing rights, navigation rights and other uses of the common marine area remain, alongside any new rights under the Act. Furthermore, the Crown still owns any petroleum, gold, silver and uranium within the common marine area.

The Freshwater Inquiry and MACA recognise property rights in a unique and different way and are working to give effect to these rights in a practical sense. The concept of full, exclusive, uninterrupted possession of title is not a reality in New Zealand. All property rights are a bundle of rights. The application of these is changing. MACA confers new legal Māori property interests with statutory rights which are in themselves based on customary interests, rights and usages. It is an innovative way to recognise the customary importance of the coastal area. It remains unclear whether the thresholds required are practically able to be met and whether the property rights conferred in the resulting title will deliver much benefit to recipients.

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Applications are currently underway for establishing customary marine title and protected customary rights.[19] The main criteria for applications are that iwi or hapū must prove they have used and occupied the specified area without substantial interruption from 1840 until present.[20] There are two pathways by which applications can be progressed, through negotiations with the Office of Treaty Settlements or through the High Court.

1. Kirby J in Fejo v Northern Territory of Australia (1998) 195 CLR 96, 156 ALR 721 at [104].
2. Hinde McMorland and Sim Land Law in New Zealand (online looseleaf ed, LexisNexis) at [6.004].
3. Hinde McMorland and Sim Land Law in New Zealand (online looseleaf ed, LexisNexis) at [6.002]; Land Transfer Act section 64.
4. Te Ture Whenua Māori Act 1993, section 2(a).
5. Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast (ed) *Māori Land Law* (2nd ed, Lexis Nexis, Wellington, 2004) at 41-42.
6. The Resource Management Act, section 354 – If a river is non-navigable the common law presumption of ad meium filium aquade applies. This presumption also applies to small lakes.
7. Waitangi Tribunal, "Stage 1 report on the National Freshwater and Geothermal Resources Claim, Wai 2358" (2012); Resource Management Act 1991, section 2 – freshwater does not include coastal water.
8. Waitangi Tribunal, "Stage 1 report on the National Freshwater and Geothermal Resources Claim, Wai 2358" (2012) at 76. Ronga is translated as properties in the English translation of the Treaty of Waitangi, where continued Māori ownership was guaranteed, but more generally refers to treasured possessions or things of value.
9. Waitangi Tribunal, "Stage 1 report on the National Freshwater and Geothermal Resources Claim, Wai 2358" (2012), at 47, 52, 61 and 75.
10. Marine and Coastal Area (Takutai Moana) Act 2011, section 11 give the "special status" to the marine coastal area. It is not owned by the Crown nor anyone else.
11. *Attorney General v Ngati Apa* 3 NZLR 2003 at [13] and [183].
12. Marine and Coastal Area (Takutai Moana) Act 2011, section 9 "marine coastal area" defined as the portion of the coast and waters between the mean high water springs line and the outer limits of the territorial sea (12 nautical miles from shore)
13. Marine and Coastal Area (Takutai Moana) Act 2011, schedule 1.
14. Marine and Coastal Area (Takutai Moana) Act 2011, section 55.
15. Marine and Coastal Area (Takutai Moana) Act 2011, section 51.
16. Marine and Coastal Area (Takutai Moana) Act 2011, section 62.
17. Marine and Coastal Area (Takutai Moana) Act 2011, section 51.
18. Some Acts interfering with exclusive ownership include, Resource Management Act 1991, Public Works Act 1981 and Crown Minerals Act 1991.
19. For more information on this process, refer to "The Blue Book" available at https://www.justice.govt.nz/assets/Documents/Publications/Blue-Book.pdf. Applications must be submitted by 3 April 2017
20. Marine and Coastal Area (Takutai Moana) Act 2011, section 58.

Editor's Note:

A thoughtful High Court decision was recently made in *Re Tipene* [2016] NZHC 3199 where Justice Mallon issued an order recognising customary marine title in favour of a group known as Rakiura Maori to access two small Titi islands (otherwise known as the Muttonbird Islands). This is the first successful case brought and underpins the considerable effort needed to prove a case going back to 1840 and the need to demonstrate exclusive use without substantial disruption. One can expect very few cases to be brought, given the very high threshold of proof required.

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