NOTES FOR AUSTRALIAN – NEW ZEALAND INTERNATIONAL LAW CONFERENCE

CROWN LAW OFFICE – JUNE 2004

A. Introduction

1. This paper addresses international law issues which have arisen in the work of the Crown Law Office over the past year.

2. A brief written report has been prepared which summarises aspects of the work, **attached**.

3. This paper focuses only on the influence of international law on indigenous rights as recognized by the common law.

4. The point is a short one. It is that New Zealand is likely to soon commence a period of examination of the common law's recognition of aboriginal rights / title. This has occurred only sparingly in the past. This examination will in turn prompt consideration of the impact of international law on the articulation of the common law.

5. In New Zealand, the development of common law recognition of aboriginal rights and title has been slow, much slower than in Australia and Canada. There are a cluster of reasons for this. Amongst them, the early sale to the Crown of large tracts of land and conversion, through the 19th century, of customary title on dry land to fee simple title through the Native Land Court and then the Maori Land Court (first established in the 1860s). In addition, and more recently, there has been the recommendatory jurisdiction of the Waitangi Tribunal linked to a Crown / Maori negotiation process which has led to legislated agreements between Maori and the Crown.

6. The foreshore and seabed area in New Zealand now raises the prospect, whether within a statutory regime as proposed by government or without, of development of this jurisprudence. One can predict that treaties, both the Treaty of Waitangi and international treaties and norms will be influential in the development of New Zealand's approach.

B. Background

7. Shortly before last year's conference in Wellington, the New Zealand Court of Appeal delivered its judgment on claims relating to customary rights of Maori to foreshore and seabed (June 2003), *Ngati Apa & Ors v Attorney-General & Ors* [2003] 3NZLR643 (CA).

8. The case and the decisions were comparatively narrowly focused. The primary question before the Court of Appeal was whether the Maori Land Act, Te Ture Whenua Maori Act 1993, under which the Maori Land Court is empowered to identify the customary status of land, and grant fee simple title in appropriate circumstances, enabled the Court to consider applications for customary title to foreshore and seabed.

9. The Court of Appeal held that the Maori Land Court did have jurisdiction. Some of the judges ventured that they considered the jurisdiction might allow the Court to identify customary rights and interests less than exclusive ownership in foreshore and seabed.

10. Since delivery of that judgment one of the parties has appealed to the Privy Council, set down for November this year.

11. The government responded to the decisions by deciding to introduce legislation to address the issues of Crown ownership of foreshore and seabed and to elaborate the jurisdictions of the Maori Land Court and ordinary Courts to examine Maori customary rights.

12. The Bill was introduced in April. The Bill is shortly to be considered by Select Committee.

13. In simplified terms the Bill provides:

    13.1 Foreshore and seabed is vested beneficially in the Crown so as to preclude customary title equivalent to a fee simple.

    13.2 Customary rights can be recognised through a process before the Maori Land Court.

    13.3 The High Court can consider claims to customary title (fee simple equivalent) which would have existed but for the foreshore and seabed legislation, i.e. essentially applying common law tests. If a fee simple equivalent is found, government is to consider compensation.

14. A prelude to the introduction of the Bill was the preparation by government of an outline of its policy proposals for discussions with Maori and others. This, in turn, was challenged by Maori in the forum of the Waitangi Tribunal. The Waitangi Tribunal is a Commission of Inquiry established under the Treaty of Waitangi Act 1975. Its statutory mandate is to investigate complaints about Crown actions said to be in breach of principles of the Treaty of Waitangi. The Treaty of Waitangi is, of course, the short (three clause) agreement between the Crown and many of the chiefs of Maori signed in 1840.

C. The Court of Appeal Ngati Apa decision

15. There were four judgments issued. Most did not deal with arguments relating to international law. But the joint decision of Justices Keith and Anderson did.

16. That judgment considers the English law, consistent with international practice, as recognising two different Crown interests in land, including land below the sea, sometimes referred to as *imperium* and *dominium*. The Treaty of Waitangi reflects this with Article one dealing with *imperium* and Article two *dominium*.

17. The judgment noted that it was clearly established, but without prejudice to public or common rights, especially of navigation (including anchoring) that the Crown could grant, and did grant, to subjects the soil below low water mark, including areas outside ports and harbours (paragraph 133). Their Honours noted:

> "It might be mentioned here that the public or common rights limiting the rights of ownership could arise not just from national law but from international law such as the customary international law relating to innocent passage by foreign vessels through the territorial sea or treaties such as those of 1884 and later regulating the laying of submarine cables." (paragraph 133)

18. The concept of the survival of indigenous property rights on the passing of sovereignty to another was recognised by the laws and usages of nations (paragraph 138). That was the starting point before considering the New Zealand situation.

19. In short, the judges supported their findings by reference to international context. They found that international law of the sea was compatible with claims to private property in foreshore and seabed.

D. Yamirr

20. Australian case law had addressed related claims, the *Yarmirr*[1] decision in particular. The New Zealand Court of Appeal did not refer to *Yarmirr*. In *Yarmirr* an application for determination of native title was made on behalf of a number of Aboriginal clan groups to an area of sea and seabed surrounding Croker Island in the Northern Territory. The native title rights and interests claimed included the right to qualified exclusive possession. The decision of the High Court of Australia was that common law public rights of navigation and fishing and the international right of innocent passage were necessarily inconsistent with recognition by a native title right amounting to exclusive possession. The two sets of rights could not stand together and it was not sufficient to reconcile them by providing that native title rights are subject to public and international rights. Bundles of "lesser" customary rights would be compatible, however.

21. In his minority decision, Justice Kirby took a different view. His Honour refers to Brennan J's reasons in *Mabo* [No. 2].

> "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. The common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule."

22. For Justice Kirby the context of international law raised the importance of preserving and protecting the traditional society and culture of indigenous people as recognised by several international bodies. His Honour considered a "qualified" exclusive title could be found.

23. In the minority decision of Justice Callanan, the international law context of rights of innocent passage meant that the common law of Australia could not recognise anything close to exclusive property rights in foreshore and seabed.

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[1] 208CLR1.

24. Justice Callanan refers to decisions of Canadian and American courts rejecting claims of native title in the sea. Those conclusions are informed, his Honour says, by:

> "A recognition of the reality of the difference between the land mass and the sea; the over-arching importance, for a multiplicity of reasons, such as national defence, foreign relations, strategy, diplomacy and related treaty, trade and commercial considerations, of unrestricted control by the national sovereign of the territorial sea; and, an acknowledgment of the relevance and influence of international law and the history of international relations on the development of the concept of sovereignty over the territorial sea as part of the municipal law."
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> (*Yarmirr,* para 382)

25. In his decision, Justice McHugh is emphatic that the common law in Australia has no reach below the low water mark. The doctrine of tenures and estates does not apply. Even where it did, the Crown had beneficial title. Because of this the Crown does not possess radical title to the seabed or super-adjacent waters. Accordingly no native title rights can be recognised by the common law (p 91). The essential difference with the majority is that the majority did not think radical title was essential for recognition of aboriginal title by the common law. Justice McHugh saw it as the jurisprudential foundation. The extension of the territory of Australia beyond low watermark did not persuade His Honour that the application of the common law mirrored that expansion. Moreover, in Justice McHugh's view, the establishment of native title rights requires that the rights and interests be held when sovereignty was acquired and continuously maintained to the time of enforcement in the common law courts (p 105). In short, no claim of native title (exclusive or otherwise) could succeed over land or water unless the common law would have recognised native title rights and interests at the time of acquisition of sovereignty over the area. Sovereignty over the Northern Territory was acquired in 1824. The common law applied from that date. The common law did not then, and under its own force does not now, operate over the territorial sea (p 107). The only possible recognition then is via statute.

26. As noted above, the majority in *Yarmirr* sits in the middle of the dissents. Without reference to *Yarmirr* the New Zealand Court of Appeal's decision seems closest to the Kirby dissent. It must be remembered, however, that the New Zealand Court of Appeal was presented only with a preliminary jurisdictional issue.

E. Waitangi Tribunal

27. The Waitangi Tribunal reported its findings in February this year (Wai 1071, 2004). It found that the Crown policy behind the proposed legislation is in breach of principles of the Treaty of Waitangi and recommended a rethink.

28. Maori claimants argued that the policy is unfair to Maori extinguishing property rights in breach of common law, international law and Treaty of Waitangi norms.

29. The Tribunal Report records Dr Paul McHugh's[2] comment that it would be wholly appropriate for the Courts to use the Treaty of Waitangi to inform the path of common law development in the aboriginal title sphere. Also human rights norms. (The Tribunal accepted Dr McHugh's prediction of the likelihood of New Zealand High Court Judges following the approach of the majority in *Yarmirr.*)

30. Page 81, Tribunal Report:

> "There is a fairness that can be distilled independently of the Crown's commitments under the Treaty, and we think that wider fairness has relevance in the present situation."

31. In this the Tribunal is likely thinking along the same lines as Justice Kirby in *Yarmirr* about international standards relating to unjust discrimination.

32. As in several of the Tribunal's earlier decisions (e.g. on Crown ownership of petroleum), the Treaty of Waitangi is, by the Tribunal, used as a vehicle for considering human rights norms flowing from principles of international law.

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[2] Dr McHugh, Faculty of Law, University of Cambridge, gave expert evidence to the Tribunal. The evidence included a best prediction of the approach the New Zealand Courts might take to testing the existence of aboriginal or customary title (i.e. fee simple equivalent) to foreshore and seabed.

F. Conclusion

33. It is early days, but the topic of Maori claims to customary interests in foreshore and seabed will be a likely fertile area of litigation over the next few years. It seems safe to predict that in inquiries, particularly in the proposed New Zealand High Court jurisdiction should that come to pass, argument relating to principles of international law will be made to develop and accelerate the specification of the common law, albeit in a statutory context.

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