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# Page 4. Challenge and controversy

The growing appreciation of the potential resources of the seabed in the late 20th century, through new technologies making it increasingly possible to exploit mineral deposits, and through bio-prospecting and aquaculture, for instance, made the legal issue of ownership more urgent. The granting of consents to occupy the seabed for aquaculture occurred on the premise that the submerged land belonged to the Crown. It was conflict over shellfish farming that sparked fierce debate in the early 2000s.

## Ngāti Apa decision

In 1997, eight iwi (tribes) of the northern South Island, spurred on by their failure to be awarded rights for mussel farming, applied to the Māori Land Court to have a determination of the foreshore and seabed of the Marlborough Sounds as Māori customary land. While the Māori Land Court decided that it could consider the issue, the High Court ruled amongst other things that once the adjoining dry land had been purchased by the Crown, the Māori customary interest in the foreshore was lost, while the seabed below the low water mark was owned by the Crown in common law.

In 2003 the Court of Appeal overturned this and unanimously decided that the Māori Land Court did have jurisdiction under the Te Ture Whenua Māori Act 1993 to determine whether the foreshore and seabed had the status of Māori customary land.

While it affirmed the Māori Land Court's jurisdiction, the court noted that this decision did not actually constitute a ruling on the Ngāti Apa claim. Māori customary land was statutorily defined as 'land held in accordance with tikanga Māori' (customary values and practices). The Crown argued unsuccessfully that the Māori Land Court's jurisdiction did not extend to the seabed.

### The Chief Justice speaks

In 2003 Chief Justice Sian Elias stated: 'It may well be that any customary property will be insufficient to permit a vesting order with the consequence of fee simple title. But that does not seem to me to be a reason to prevent the applicants proceeding to establish whether any foreshore or seabed has the status of customary land. I consider that the Māori Land Court has jurisdiction to entertain the application.' [1]

Some commentators claimed they were not surprised by the Court of Appeal's decision. Customary land status under the Te Ture Whenua Māori Act 1993 was not equivalent to fee simple title (permanent and absolute ownership) – ownership of the land could not be freely transferred, for example. However, Māori customary land status on dry or submerged land (whether in lakes or in the sea) could amount to a potent right of property, including the possibility of allocating space to third parties and controlling access. Presumably, the status would have been subject to public rights of navigation and fishing where relevant.

## Foreshore and Seabed Act 2004

The passing of the Foreshore and Seabed Act precluded any detailed examination of particular facts about the issues raised by the 'Ngāti Apa' case.

Widespread public concern about the Court of Appeal's ruling led the government to propose new legislation. There was general acceptance of the need for a clear understanding about public access to the foreshore. The ensuing Foreshore and Seabed Act 2004:

- vested the full legal and beneficial ownership of the public foreshore and seabed in the Crown as its absolute property. Public foreshore included areas owned by local authorities, but excluded an estimated 256 parcels of the foreshore and seabed in private title.
- provided for public rights of access in and over the public foreshore, including recreational activities such as swimming
- provided for public rights of navigation within the whole foreshore and seabed
- allowed for the protection by an order of the Māori Land or High Court of non-territorial customary rights that have been exercised continuously since 1840. Such customary rights are activity-, use- or practice-specific and can be recognised in spite of the fact that the public foreshore and seabed has been vested in the Crown as absolute property.
- allowed any group to claim territorial customary rights if they (or any of their members) had occupied and used an area of the public foreshore and seabed exclusively since 1840, and had held continuous title to the contiguous land. If such rights are established either by the High Court or recognised via a negotiated agreement with the Crown that is subsequently confirmed by the High Court, then the group may establish a foreshore and seabed reserve or apply to the Crown for discussions on redress.

**Footnotes:**

1. Attorney-general v. 'Ngāti Apa'. *New Zealand Law Reports* 3, 2003, p. 643. ›

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