

# The Foreshore and Seabed

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Richard A Epstein

NEW ZEALAND BUSINESS ROUNDTABLE

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# Richard A Epstein

RICHARD A EPSTEIN is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago, where he has taught since 1972. He has also been the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution since 2000. Previously, he taught law at the University of Southern California from 1968 to 1972.

He has been a member of the American Academy of Arts and Sciences since 1985 and a Senior Fellow of the Center for Clinical Medical Ethics at the University of Chicago Medical School. He served as editor of the *Journal of Legal Studies* from 1981 to 1991, and as editor of the *Journal of Law and Economics* from 1991 to 2001.

His books include *Skepticism and Freedom: A Modern Case for Classical Liberalism* (University of Chicago, 2003), *Cases and Materials on Torts* (Aspen Law and Business, 8th edition 2000), *Torts* (Aspen Law and Business, 1999), *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (Perseus Books, 1998), *Mortal Peril: Our Inalienable Right to Health Care* (Addison Wesley, 1997), *Simple Rules for a Complex World* (Harvard, 1995), *Bargaining with the State* (Princeton, 1993), *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard, 1992), *Takings: Private Property and the Power of Eminent Domain* (Harvard, 1985) and *Modern Products Liability Law* (Greenwood Press, 1980).

Professor Epstein has written numerous articles on a wide range of legal and interdisciplinary subjects. He has taught courses in civil procedure, communications, constitutional law, contracts, corporations, patents, individual, estate and corporate taxation, Roman law, criminal law, health law and policy, legal history, labour law, property, real estate development and finance, jurisprudence, land use planning, torts and workers' compensation.



# The Foreshore and Seabed

## Natural law and property

On my last visit to New Zealand in 1999 I spoke as an outsider to a sceptical audience on how best to interpret the Treaty of Waitangi.<sup>1</sup> I said that one of the great challenges facing a country formed by successive waves of immigrants is to put together disparate norms from rival cultures, each of which has its own distinctive legal understandings as to how the world does or should work.

On that occasion I said that I would like to start from a neutral corner, and then proceeded to address several Roman law analogues to the question of prescriptive rights, largely on the basis that the great Roman authors were not influenced by the future events that unfolded in New Zealand. On this occasion, I plan to do likewise in discussing the foreshore and seabed. Rather than trying to deal with this topic from the point of view of English law on the one hand or Maori customary law on the other, I want to locate some kind of *tertium quid* – a third point – from which to begin the analysis. So for yet another time I find an unexpected use of my training as a Roman property lawyer, which has long augmented the English property law that I learned as a student at Oxford many years ago. I also begin with the confession that, even after the advent of law and economics, I remain much influenced by the writings of Gaius and Justinian on the creation and organisation of property rights.

Most people who think about the Roman law of property start with a strong sense that its central conception is one of *dominium*, of absolute ownership –

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<sup>1</sup> Richard A Epstein, *The Treaty of Waitangi: A Plain Meaning Interpretation*, New Zealand Business Roundtable, Wellington, 1999.



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good against the entire world. However, Justinian's *Institutes* begin not with an account of private property, nor of publicly owned property, but with a brief yet critical discussion of common property. It bears stressing that there is a sharp difference between what is public and what is common. Public property consists of those things that are owned and operated by the state, for example walls, fortifications and public buildings, while common property is property to which everybody has access but of which nobody has ownership. The key feature of a regime of common property is that it emphatically rejects the rule that allows a private person to obtain title of a particular thing (good against the world) by occupation, that is, by taking initial possession of it. Whereas it is permissible to capture a wild animal and make it your own, those resources – one hesitates to call them things – that fall within the class of common property cannot be reduced to private ownership. The interests that people are said to have in common resources have been called, somewhat inaccurately, usufructory interests, meaning that they are of short duration and are non-exclusive.

From the earliest days of human societies, the two most important forms of common property, apart from the air we breathe, have been bodies of water and beaches. How does one explain this sharp disjunction between private ownership with respect to some kinds of property and common ownership of a non-exclusive, open-access character with respect to others? Because the Romans had not yet developed any understanding of institutional economics, they took refuge in the idea that these things were common property by 'virtue of nature' or under a system of natural law. The word 'nature' in this context evokes several elements, which crop up again in discussions of Maori rights.

The first point about natural law as the Romans understood it is that these rules held good throughout the entire universe. They were common to all mankind. Roman lawmakers had observed enough cultures around the Mediterranean to see elements of commonality about them and were prepared to say that even in places and in parts unknown – including aboriginal societies – much the same kinds of legal rules would be found. This prediction turns out to be remarkably accurate.

The second feature of natural law is that it was regarded as immutable. The only way that natural law could be varied was through some form of public

enactment, which would be contrary to its spirit. Taking something that was private and making it common, or taking something that was common and making it private, was thought to be a fundamental step. Local legislation with procedures for making contracts or deeds did not amount to a repudiation of the natural law principles of voluntary transfer. Rather, it counted as the adoption of a formal mechanism to realise the underlying social processes. On these devices, the Roman jurists tolerated a wide range of methods to secure that single end: mancipation was a Roman method of transfer, and deeds an English and more modern one. Both are consistent with the Roman conception of natural law.

It is convenient to say that natural law is immutable on the one hand, which is not quite right, and universal on the other hand, which turns out to be not quite right either, although it is perhaps closer to the truth. However, if these bald assertions are not compelling, is there any functional explanation that can be offered as to why the particular distribution of rights that the Romans championed operates as the norm in a wide range of societies? I think there is.

### **A modern view of property rights**

To answer this question, let us fast forward to modern times and look at how property rights are generally explained. A point to note at the outset is that any configuration of rights will have benefits and costs. No one has been able to devise a system of property rights that is pure gain and no pain. The task, then, is to maximise the advantages relative to the disadvantages of alternative systems.

With any system of property rights there are two kinds of costs that have to be taken into account. Unfortunately they vary inversely with each other, which means they cannot both be reduced simultaneously. The first are the costs of exclusion. Proudhon said that the first man who puts a flag in the ground and excludes everybody else is a thief against the rest of mankind. This is a rather melodramatic way of saying that exclusive property rights in a particular parcel of land mean that other individuals will be deprived of the use of that resource. Those exclusion costs have to be treated seriously if a system is to be justified on systematic grounds. The egoistic assertion of the successful party is not a

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sufficient warrant for keeping the system, just as the disappointment of any subsequent taker is not a sufficient warrant for jettisoning it.

Why then tolerate the costs of exclusion, especially if we can eliminate the exclusion problem simply by letting everybody in? Unfortunately, that step merely replaces one problem with another. The new problem is coordination and its costs. When large numbers of individuals are entitled to access to a particular resource, how do we – some collective we, no less – decide who gets to use it, and in what way, at what time, and for what purpose? If, for example, we had an open-access system for raw land, where anyone could do anything they wanted on any parcel of land, then we would, as Blackstone pointed out, be in a situation where nobody was prepared to clear the rocks or plant any grain because everybody would know that the seeds would never be allowed to turn into crops for anyone to harvest. I will not plant if you can trample on what I have planted, or swoop down and collect the gains before they are ripe. And even if any two people could coordinate their activities, the possibility of new entrants – normally liked in competitive situations – would render that bilateral agreement useless. Exclusion, which creates rights good against the world, avoids the problem of having to make an endless set of futile agreements.

So why not use exclusion across the board? Largely because that strategy will sometimes fail as well. The key point to understand about property rights is that the ratio of exclusion costs to coordination costs varies from one type of resource to another. In some cases we can be confident that the coordination costs will be enormous and the exclusion costs relatively small, whereas in other situations it will be the converse. So resources are classified, sometimes quite intuitively and often by customary means, in one system or another in response to the perceived ratio of the two sets of costs. The system is, moreover, capable of some incremental adjustment so that some limited private rights can be created in a common, like the right to remove fish, and some common rights, like limited rights of way among neighbours, can be created over private property. This complex process of defining rights does not require people to be deeply rational or cognitive. All they have to do is experience the frustration of using a set of property rights that embodies an inefficient regime and slowly,

haltingly and imperfectly they will move to something that works better. In looking back at former times we do not see systematic movements based on a conscious adoption of some kind of optimisation theory but rather marginal adjustments in response to feedback as people gravitate to those regimes that work better than the ones they displace.

### **Property rights for the foreshore and seabed**

The basic framework helps explain the property rights regime for the foreshore and seabed. The key empirical judgments about resource use are clear in the twinkling of an eye. These forbidding locales are not good places to engage in agriculture or to plant most crops, so the problem of being able to reap what you have sowed does not arise. On the other hand, limiting access to the foreshore creates its fair share of dislocations.

First, to the extent that a beach or a waterway is a natural highway, granting exclusive rights could lead to the erection of toll barriers at frequent intervals, which would completely destroy the value of the beach or water for transportation. When we read the classic writers like Grotius on the topic of the open seas, we find that they wanted water traffic to be able to go continuously from one end of the Rhine to the other, and to advance free trade by preventing local governments following exclusionary practices at each segment of the river. In ancient times, to say that something was by nature common so that nobody could be excluded from using it was a powerful way to overcome those holdout problems.

Second, the beach is a haven from the perils of the seas. If there were strong exclusion rights, somebody who had to come ashore in time of peril might be excluded.

As a first approximation, the ancient ideas seem to be valid across the globe, just as the Romans claimed. Everywhere, one finds that beaches are subject to a strong regime of common property. This conclusion is perfectly consistent with the parallel judgment that farmland should be under private ownership.

Can these arrangements be modified in socially useful ways? Starting with a system of pure common property or pure private property, it turns out that in the real world improvements are possible. While rivers may be common

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property in the sense that anyone may travel along them, limited extraction of water for use on land may be beneficial. The flow of water in the river might not be greatly affected and the gains for agriculture or animal husbandry might be considerable. Similarly, Roman law texts made it clear that huts could be constructed on beaches to provide temporary refuge against bad weather, but they had to be removed the next day when the weather cleared so that a dense array of huts did not constitute a permanent obstacle to free passage.

So these early systems make sense. However, two further problems have to be dealt with.

First, there is the technical problem that beaches and rivers do not maintain themselves. They are subject to erosion, decay, silting or blockage. Investments therefore have to be made in order to maintain common resources, which can only take place if someone has the authority to raise the necessary funds. Should this fundraising be done by a tax or by a toll? Every system has an imperfection so the question is how to strike the balance between public support and user charges. There is no perfect solution although there can be better and worse ones. With pressure on resources such as water in New Zealand, this issue will become very important.

The second question is who is included in the statement that common property is open by nature to all? This is an important issue in the United States and in any federal system involving a union of states. When it is said in the United States that the beaches are open to everybody, does that mean every citizen of New Jersey (or whichever state the beach happens to be in), everybody in the United States, or even everybody in the world? This question was left unexplored by ancient lawyers who were unaware of the way in which jurisdictional matters might limit general principles. The US experience, and I dare say the New Zealand experience, illustrate that it can be difficult to solve these problems.

This leaves us, at least from the natural law standpoint, with a strong presumption in favour of common property with respect to the foreshore and seabed. This conclusion, however, is complicated by the possibility that in some situations, including fisheries, some form of exclusivity of rights may make perfect sense. How should we think about these mixed regimes in

relation to the current New Zealand situation? The two points we have to consider are, first, the mixture of private and common rights that can be attributed to Maori institutions and practices, both before and after the 1840 Treaty of Waitangi, and the extent to which these prior practices ought to be recognised; and, second, if these rights were created and continue to subsist, what is the appropriate public law response? Obviously in everybody's mind is the Marlborough Sounds decision, *Attorney-General v Ngati Apa* [2003] 3 NZLR 643, and the resolute way it reversed *Re the Ninety-Mile Beach* [1963] NZLR 461, decided 40 years earlier.

I had mixed emotions when I looked in some detail at the report of the Waitangi Tribunal on the foreshore and seabed and considered the government's response to the possibility of customary rights being established in the Marlborough Sounds case. It was comforting to note that the tribunal essentially said that the apparatus of the modern administrative state is unsatisfactory in dealing with Treaty of Waitangi obligations and customary rights claims. What I liked most about its report was that it manifests a resurgence of a Lockean theory of property rights as it applies to the controversies over aboriginal title. At the same time, and although I am generally a passionate defender of much of what Locke has written about property rights, I think his position, with its relentless preference for privatisation, has limitations in this case. So let us examine the traditional Lockean response and then go on to explain the shortcomings of the standard administrative law response before considering customary rights.

### **Surrendering property rights**

A Lockean would start with the proposition that once anyone has a property right over some resource there are only three ways in which it might be lost. One, which is not relevant in this case, is through committing a wrong that leads to a requirement to surrender one's property in satisfaction of a judgment.

The second way is by consent. Consent simply refers to the voluntary transfer of rights to somebody else, either by way of gift or for consideration. If property rights were not tradable, it would mean that society could not take advantage of specialisation and gains from trade. If I hold a set of fishery rights,

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for example, but do not know how to fish, then a transfer of my fishing rights to a good fisherman will, generally speaking, produce a social improvement. An exception applies in cases where the assignment of rights creates systematic environmental externalities against third persons. Interestingly, this is most important in cases concerned with waters and beaches. If we separate water rights from the riparian land to which they are appurtenant and allow them to be sold, there will be systematic overconsumption of water. The solution is a tied alienation system: the water rights cannot be sold or exploited separately from the riparian land. Overall, however, gains from trade turn out to be positive and a Lockean would say that if people are not allowed to transfer things by consent, or are given some broad right to reverse the transaction after it takes place, then all gainful exchanges will be either blocked or hampered. Nobody is going to buy something if they know that a future rise in its value will oblige them to return it to the former owner, while a drop in value will see them stuck with it. 'Heads you win, tails I lose' is not an attractive business prospect. The way to introduce various repurchase options into the mix is through a set of option contracts. It is not through reliance on the law.

The third and most problematic way of losing a property right is through a forced taking. This was referred to in the Waitangi Tribunal report as a situation where the property right is taken upon payment of just compensation. Is this alternative needed when voluntary solutions are available? One can envision at least some cases in which it might be appropriate, particularly with complex networks where any given element that is acquired will be of no value unless other elements can be secured. Thus if it is a question of building a highway, or a railroad or canal, a single hold-out can doom the scheme. Against that risk, the law of eminent domain prevents an individual from holding out against the common good. In this case, particular property rights can be taken at a price that they would have been able to fetch in a voluntary market, taking into account all elements of value except those new components created by the project itself. The property owner is then not harmed, and everybody in the society, including the former property owner, will be able to share in the gains generated by the transaction. That example of eminent domain – a forced exchange that leaves the individual property

holder no worse off than before and leaves everybody else better off – counts as a Pareto improvement.

Criticisms are often made of the way an eminent domain rule has been applied in practice. Some of these criticisms are quite pro-Maori in their implications. If rights are defined narrowly, if the dislocations associated with takings are ignored, and if it is assumed that market values are the same thing as subjective values, there will be a systematic pattern of undercompensation. Twenty years ago, I argued for a robust system of compensation to make sure that the question, ‘Did you leave the party who is the target of state power indifferent between the compensation received and their former position?’, was answered in the affirmative.<sup>2</sup>

### **The administrative law alternative**

How are the New Zealand authorities approaching the foreshore and seabed issue? The answer is: in the same manner as governments approach many other administrative programmes in the modern age. A modern administrative law system operates on the basis that in dealing with a given collective enterprise, individuals have to swap their property rights not for compensation in cash or, occasionally, kind, but solely for a right to participate in the political process, along with consultations and hearings. If, for example, the question is whether or not Mr Jones is able to build a supermarket on a parcel of land, he can sit down with everybody else before a planning board and deliberate about it. If the members of that board, even over his dissent or objection, decide a supermarket is not appropriate for this plot of land, and single family homes are preferred, he will be bound by that decision by virtue of the fact that he exercised a participation right.

The first of the US cases on this issue showed exactly what a participation right is worth relative to the previous set of entitlements. I refer here to the famous zoning decision in *Euclid v Ambler Realty Company* (272 US 375 (1926)). The answer in that case was that the owner got use rights worth about 25 cents in the dollar. The property owner starts with a 68-acre (27.5-hectare) plot of

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<sup>2</sup> See Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain*, Harvard, 1985.



land that is perfectly suitable for an industrial facility, and perhaps worth \$10,000 per acre, and comes out with a right to build a few family homes which makes the plot of land worth \$2,500. From both a private and a social point of view I think we should have deep misgivings about the way the administrative state works in these cases. Deliberation under a different set of rules would eliminate a lot of the difficulties. If local people really do not want an industrial facility, they should put their money where their mouth is and pay the owner \$10,000 per acre. They would raise this sum from a general real estate tax on all citizens, given that all citizens benefit equally from the decision. They could then resell the land for some other kind of development that will be worth less, and refund those who had paid the taxes an amount equal to the sale value. In that way the law develops a system in which incentives on public actors are properly aligned. People will honestly disclose their preferences and, if they really think that getting rid of the proposed industrial facility is worth \$10,000 per acre to the neighbourhood, they will be willing to tax themselves to do so. By contrast, under a political and administrative process, the property owner in effect bears the whole burden of an implicit tax imposed by fellow citizens to achieve their desired outcome.

The Maori claim to the foreshore is an exact analogy. Maori realise that they are minority participants in a political debate about their property rights. This is a raw deal because of the uncertainty associated with politics. Accordingly, I count myself on the side of Maori in opposing it. The right response is in effect to strike out the word 'Maori' before the words 'property rights' and adopt a principled approach to property rights in general, regardless of who holds them. This would create pressure for a compensation system to go with the complex schemes of land use regulation – a scheme that would produce benefits for the community overall. People tend not to see the dangers of a customary practice – in this case, that of the modern administrative state – until there are coherent and cohesive interest groups on both sides of the debate and it is clear where the gains and losses lie. This breakdown in institutions happens in the United States as well. Whereas the protection of individual property owners from local governments there is weak, in US contexts that are akin to the Maori situation here the result is different. States have much less freedom of manoeuvre with

citizens of other states than with their own citizens. The predominance of the Lockean model with strong property rights and narrow justifications for takings is stronger in a federalist context, that is in the case of regulation by one state of business activities of citizens from other states. That protection against partial confiscation through differential regulation has led to the creation of a national common market that has been of immense benefit to all Americans, regardless of where they live.

### Understanding customary rights

The question we are now confronted with is whether or not there are any customary rights to which this argument in favour of compensation for Maori rights would apply. As an outsider, I approach an issue that has generated such heat and tension with great diffidence. But let me indicate why I am somewhat sceptical of these claims in general and somewhat troubled by the Treaty of Waitangi framework used to evaluate them.

First, there is too much romanticism in the Waitangi Tribunal report about the state of affairs prior to British intervention. We know that before 1840 there was considerable intertribal warfare. Whatever the ruling political philosophies, there was a breakdown in Maori institutions on the ground because of factional rivalries of the kind that have plagued every divided community from the city states of Greece on. The Treaty of Waitangi makes perfect sense in this context. One reason why the Maori tribes were happy to accept the British claim of sovereignty is that it gave them a neutral arbiter – a role that the Roman common law had played in the Mediterranean. This arbiter also had enforcement powers, which allowed it to separate warring tribes and preserve peace and stability. All Maori tribes would benefit from a durable arrangement that they could not achieve by agreement amongst themselves. The rapidity with which the agreement seems to have been signed, and the clear grant of sovereignty to the British that is created at least in the English version, are consistent with this analysis.

Secondly, it is clear from the preamble to the treaty that commercial and other interchanges had been taking place between the settlers and Maori. The British authorities were “desirous to establish a settled form of Civil

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Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to [British] subjects ...” So clearly Captain Hobson, the Crown’s negotiator, was not starting from a Hobbesian or Lockean or Rawlsian state of nature but was dealing with a messy transition. The status of customary rights has to be viewed in that setting.

These two elements – unrest and trade – should enrich our understanding of customary rights. Take the question of unrest. The standard account of customary rights, both analytical and historical, is usually of a slow process of incremental adjustment over time as people slowly grope toward an optimal social solution. Violence of any kind leads to forcible displacement of rights, which often leaves a customary system in tatters. This unhappy outcome certainly happened in territories that were governed under Roman law after conquest; it happened in Eastern Europe with the convulsions of Nazi and Soviet rule; and it happens everywhere there is major violence. In all these cases, we have to weigh up after the event the claims of breach of customary rights on the one hand and the doctrine of prescription on the other. The doctrine of prescription says that we are willing to allow the status quo to be unravelled for a limited time so true owners can get their property back. Nonetheless, after a given period we judge that there will be more dislocation from actions for rectification (of which a larger fraction will become unfounded) than the process is worth, so we allow existing title to be asserted not only against the world (which happens from initial occupation) but also against the original owner. Customary rights issues were dealt with at length in the Waitangi Tribunal report but the balancing consideration in favour of prescription was not fully addressed.

### **The notion of prescription**

A comprehensive discussion of prescription in relation to the foreshore and seabed would comprise at least two elements. One would be Maori customary law on prescription involving Maori parties to disputes. There seems to be no discussion of this issue in the Waitangi Tribunal report. In addition, it would be helpful to add some discussion of the way prescription rules might apply

with respect to non-Maori who at that time interacted with Maori through the tangled web of transactions.

It is important to articulate a clear view on this issue because the basic impulse behind prescription is, I think, driving government policy. Thus if the Ninety Mile Beach case set out a judicial determination of rights that had stood for 40 years, it is entitled to a presumption in its favour. The Marlborough Sounds case then turns everything upside down and upsets the expectations of those who had relied on what they understood to be settled law. Suppose the Marlborough Sounds decision had reaffirmed the Ninety Mile Beach decision. What would the tribunal have said then? Would it have concluded that, because the Court of Appeal had confirmed there are no extant customary rights, there is nothing to worry about? Or would it have insisted that in the face of clear evidence of Maori custom the Court scandalously decided to adhere to the earlier decision, which should now be changed by legislation? If the latter, all the vested rights of common law would be at risk of being overturned.

There is an important lesson here. Within a single coherent system, judicial decisions can be regarded as extra-political but as soon as tensions arise across racial or cultural lines and indigenous elements are present, everything becomes contentious. People will look with deep suspicion at judicial decisions on the grounds that judges cannot, or will not, apply neutral principles of law but rather are inescapably operating as part of the political process. The Marlborough Sounds case illustrates this point because it reverses the Ninety Mile Beach decision and results in a potentially immense transfer of property rights. Hence, it is not treated as a traditional judicial decision but as a political act. This emboldens the government to say that one political act through the courts justifies another through the legislature if it chooses to get involved. There is no easy way around that problem of legitimacy and impartiality. No matter which way this case had come out, there would always have been a charge of politicisation by people who had lost in one arena and thought they could win in the other.

The lack of proper attention to prescription turns out to be one major problem in the foreshore and seabed debate. A second problem relates to

transfer. We need to know how voluntary transactions with respect to water and beach rights occurred both before and after the Treaty of Waitangi, and both between Maori and Maori and between Maori and settlers. If we were dealing with a system in which there were open non-exclusive rights of access, to take the easier case, what we would expect to find is that transactions affecting private land that abutted the foreshore would make no reference to access rights. They existed independently of the particular title in question for transferor and transferee alike. The transfer would neither add to nor subtract from these rights. Because there were always public access rights, you would expect deeds to be silent on them. One therefore has to take with a grain of salt the claim that none of the deeds in question includes an explicit transfer of foreshore rights. My instinct is that Maori-to-Maori transactions would *not* have included such transfer of foreshore rights either, which is consistent with these rights being held in common. Silence on the matter does not support a claim that there were exclusive customary rights owned by select (Maori) individuals.

One form of potent evidence that customary rights were appurtenant rights to the nearby land would be deeds that purported to reserve these rights to the transferor, say, in connection with some retained lands. I am told there is little evidence for this practice in the known deeds. That is perfectly consistent with the traditional Roman law position, which treated access rights as inherent rights of the public. If so, then they could never have been the subject of exclusive tribal or individual rights.

A second point is that the Treaty of Waitangi talks of full, exclusive and undisturbed possession, *inter alia* of fisheries. There is no particular advantage to linking a specific fishery to any specific piece of foreshore. Anyone with access to the foreshore has all the access they need to fish. If in fact there were exclusive rights there would presumably have been both customary and formal transactions in which someone with rights to a particular fishery would transfer them to somebody else. In order to know whether or not this form of transfer is plausible, I would want to know more about the behaviour of the various species of fish. Generally speaking, if fishes are migratory, like birds, exclusive rights to fish in a given fishery do not make any sense because somebody will be able to harvest them without objection somewhere else. Fish

have to be relatively territorial, like animals, for territories to make sense as a mode of acquisition.

Thirdly, in order to create a prescriptive right in both Roman and Anglo-American law, the claimant must show a continuous and active use of a claimed customary right. This requirement reflects the fear that in the absence of written title to the custom, people will make grandiose claims about customs that have never been exercised until a case like the Marlborough Sounds one erupts.

Putting all this together, the conclusion about the legal position seems to be this: at least as a presumptive matter, for resources that, under the law of nature, were generally regarded as non-exclusive, it would be difficult to find any coherent system of exclusive property rights. So far as exclusivity was appropriate in the case of resources like fisheries, exclusive rights might apply.

A further difficulty concerning this matter is practical rather than legal. In addressing any claims of exclusive rights, do we know how much of pre-1840 New Zealand was actually appropriated to individual owners? The claim that all of New Zealand was Maori territory (see, for example, *Attorney-General v Ngati Apa*, para [37] per Elias CJ) seems to me to confuse the notion of *imperium*, or sovereignty, with ownership which requires actual reduction to possession (a matter discussed in relation to Crown ownership by Elias CJ at para [26]). The problem, which I shall raise but not solve, is that the English version of the Treaty of Waitangi talks about undisturbed possession of rights that Maori had established, whereas I understand the Maori version talks about *tino rangatiratanga* or chieftainship, which looks to be an intermediate state between sovereignty on the one hand and ownership on the other. In my view, the sensible reading of both the English and the Maori versions of the treaty is that both offered this critical guarantee: the Crown would not interfere on matters of internal governance of each tribe, even as it asserted sovereignty over the nation as a whole. But clearly this is a matter that raises the possibility that the two versions of the same treaty are somewhat inconsistent on the grand question of the division of authority. The challenge here goes beyond the seabed and foreshore debate, and beyond the scope of this talk, for getting that question right is critical to establishing stable and sound relations that work for the peace and harmony of all concerned.