Ngāti Kahungunu Iwi
INCORPORATED

A SUBMISSION TO THE MĀORI AFFAIRS SELECT COMMITTEE ON THE MARINE AND COASTAL AREA (TAKUTAI MOANA) BILL.

PRESENTED ON BEHALF OF NGATI KAHUNGUNU IWI INCORPORATED.

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This Statement is presented on behalf of Ngāti Kahungunu Iwi Incorporated.

Ngāti Kahungunu Iwi Incorporated wishes to appear before and present this Statement to the Committee in person.

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Ngahiwi Tomoana
CHAIRMAN

INTRODUCTION:

In preparing this Statement Ngāti Kahungunu Iwi Incorporated have borne in mind what we said to the 2009 Ministerial Review Panel on the Foreshore and Seabed, namely

1.That the Foreshore and Seabed Act 2004 is a fundamental breach of Te Tiriti o Waitangi.

2. That the Act is also a fundamental breach of human rights as outlined in numerous Human Rights Conventions, including the International Convention on the Elimination of all Forms of Racial Discrimination.

3.That the Act should be repealed.

In preparing this Statement Ngāti Kahungunu Iwi Incorporated have also borne in mind what we said to the Attorney General during the hui on the Marine and Coastal Area (Takutai Moana) Crown Consultation Document, namely

1. That we welcomed the proposed repeal of the 2004 Foreshore and Seabed Act.

2. That we acknowledged the proposed restoration of rights which that Act tried to remove, especially due process.

3. That we were nevertheless concerned that the proposed Bill essentially proceeded from the same political and philosophical standpoint as the 2004 Act and that while it promoted some changes it ultimately defined Iwi and Hapū rights and title in a way that was as inimical to a fair and just resolution as that Act.

We are pleased that the proposals to repeal the 2004 Act and restore due process have now found their way into the Marine and Coastal Area (Takutai Moana) Bill.

However we do have grave concerns about the Bill in its entirety and find it unacceptable.

Indeed it is our submission that the new Bill maintains the same discriminatory, unjust and legally untenable approach to the rights of Iwi and Hapū that made the 2004 Act so objectionable. We regret that in substantive terms nothing has really changed.

This submission has two Parts.

Part One identifies some specific provisions in the Bill which are of special concern.

Part Two suggests an alternative way forward that will resolve the matter in a more just manner consistent with both Te Tiriti o Waitangi and international human rights obligations.

PART ONE:

The provisions considered in this Part of the Submission are indicative of the broader conceptual flaws that make the proposed Bill so problematic and unacceptable.

There are many others but these examples are sufficient in our considered view to illustrate the Bill's basic and continued injustice. They may be categorised under three broad headings.

1. Confiscation –

   It is timely to remember that one of the most voiced concerns of our people in relation to the 2004 Act was that it effectively confiscated relevant areas of the foreshore and seabed from Iwi and Hapū and vested them in the Crown.

   The proposed Bill simply replaces one confiscation with another. It still takes the foreshore and seabed from Iwi and Hapū but instead of vesting it in the Crown as in the 2004 Act it places it in a Crown-controlled legal fiction of a no ownership marine and coastal area.

2. Inequality at Law –

   Opposition to the 2004 Act was also predicated on the fact that it only confiscated and imposed restrictions upon the very small area of foreshore and seabed previously vested in Māori – it discriminated between Māori and non-Māori foreshore interests in ways that were found to be in breach of Te Tiriti by the Waitangi Tribunal and in contravention of international human rights law by the United Nations Committee on the Elimination of Racial Discrimination.

   The proposed Bill maintains that discrimination, for example in requiring Māori to allow public access while not requiring Pākehā with similar contiguous interests to do the same.

   It also maintains a fundamental discrimination in the establishment of tests for establishing customary interests in court that the Prime Minister has admitted are so high Māori will not meet them. No Pākehā are ever subjected to such an improbable test.

Among the many grounds our people raised in opposition to the 2004 Act was that it created a sub-set of Māori rights that was fundamentally different and indeed subordinate to those of Pākehā. It is regrettable that the proposed Bill maintains that fundamental prejudice.

The fact that the Attorney General has defined the proposed Māori 'customary title' as being a 'constrained property right' is also regrettable as it clearly positions it as a lesser right in contrast to the 'unconstrained' freehold title Pākehā are able to hold in the foreshore and seabed.

3. The Legal Fiction –

   The proposed concept of a 'no owner common marine coastal area' is both problematic and discriminatory in legal terms because it again only applies to those areas in which Māori may have an interest.

   It is especially problematic because the very idea of 'no ownership' is contradicted by a number of provisions which actually make it clear that ownership really vests in the Crown. For example in the so-called 'no ownership' area the Crown reserves to itself a number of prerogatives relating to minerals which are a clear statement of ownership.

Some Specific Problematic Provisions

Section 7 Interpretation

The definition of Mana Tuku Iho is both inadequate and restrictive. The notion that it is only an inherited right or authority and limited in its application to conservation provisions is unacceptable in both tikanga and legislative terms.

It is also difficult to see how Māori can reputedly have Mana Tuku Iho when the Crown to all intents and purposes still owns the 'no ownership' area.

Section 10 Special Status of common Marine and Coastal area

Members of the Committee are no doubt aware that there are already provisions in place recognising Iwi and Hapū interests in certain fishery areas as part of the fisheries settlement regime. The creation of a 'no ownership' area appears to clearly conflict with those provisions.

Section 14 Continued Crown ownership of Minerals

As referred to earlier the 'continued Crown ownership of minerals' simply makes a mockery of the whole 'no ownership' construct.

It is also based on a presumption that Iwi and Hapū continue to challenge as being in breacjh of te Tiriti.

Sections 49-51 Customary interests –

The term 'customary interest' is unacceptable because it suggests a lesser status at law for whatever Iwi and Hapū may seek to claim in the 'no ownership' area.

If Iwi and Hapū are to have due process it must be in pursuit of 'rights' not interests.

These few provisions are examples of the broader problems with the proposed legislation and it is our submission that another way forward must be found.

PART TWO: AN ALTERNATIVE –

Ngāti Kahungunu is well aware of the distress and injustice that has been caused by the foreshore and seabed issue, and by the 2004 Act in particular.

That some Iwi have negotiated arrangements under the 2004 regime is worthy of note but does not remove the inherent discriminatory nature of that Act nor the distress it has caused to others.

Our views on the issue have been consistent and we acknowledge the efforts that have been made to date to repeal the 2004 Act. However we remain committed to a resolution beyond repeal that is based upon a search for justice in its fullest sense rather than an acceptance of what others may see as political 'reality'.

We are certainly committed to a resolution that finally resolves the issue and removes the possibility of further discrimination and hurt. It is our considered submission that the proposed Marine and Coastal Area (Takutai Moana) Bill does neither.

Since 2003 we have been engaged in trying to seek a resolution that is consistent with the mana and rangatiratanga of every Iwi and Hapū as well as the relationship envisaged in Te Tiriti. It has led us to develop an approach that has naturally been shaped by our own history as a people inhabiting a long coastline where Hapū with whakapapa to Kahungunu have always exercised their authority in relation to the foreshore.

Like the Prime Minister we seek an 'elegant' solution but we are clear that 'elegance' cannot exist divorced from context. Nor can it exist if the legislative solution itself continues to be discriminatory and unjust.

We are equally clear that 'elegance' is not necessarily the same as fairness and justice and it is our submission that the Crown Proposals are neither.

We therefore propose a three step proposal towards resolution.

1.Withdrawal of the Proposed Marine and Coastal Area (Takutai Moana) Bill –

It is our submission that the proposed Bill is so flawed it should be withdrawn.

Legislation that is discriminatory should have no place in law and the Crown is obligated under Te Tiriti and in terms of a number of international human rights conventions to do better.

If the Bill is to proceed with its current conceptual flaws it is our submission the Crown will be open to further domestic and international claims and complaint.

The claim by some that non-acceptance of the proposed Bill would mean the continuance of the 2004 Act is a political threat that is unwarranted and in our respectful view inimical to the possibility of resolution.

It is also in our submission contrary to the terms of Coalition Arrangement with the Māori Party in which the Parties only agreed to the repeal of the 2004 Act. The detail of a replacement regime was not part of the Arrangement.

2. Repeal of the 2004 Foreshore and Seabed Act –

It is our submission that the proposed repeal of the 2004 Act should proceed.

Repeal could be achieved through separate empowering legislation.

The effect of the repeal would be to simply restore the status quo prior to 2004. Due process would be available for those who wish to pursue that option and certainty of title over the great majority of the foreshore and seabed would not be affected.

3.A Considered Resolution

The Waitangi Tribunal Report on this issue recommended that there be a 'longer conversation' to find a resolution.

It is our view that such a 'conversation' has not been properly facilitated.

The Ministerial Review Panel convened under Justice Durie offered an opportunity for the conversation to begin but the severe time constraints and terms of reference placed upon it by government made the task difficult.

The Panel nevertheless recommended a number of positive options and it is cause for further regret that the government has chosen to largely ignore them.

We therefore suggest that upon repeal of the 2004 Act an Expert Working Group made up of equal numbers of Māori and Pākehā be established to facilitate the 'longer conversation'.

We further suggest that the Group be required to report back within one year with proposals, legislative or otherwise, to resolve the issue in a way that is consistent with Te Tiriti and the interests of all New Zealanders.