A PRIMER ON THE MARINE AND COASTAL AREA (TAKUTAI MOANA) BILL.

"The land and waters have nearly all been taken now in a raupatu that seems to have no end …they seem determined not to hear what our people say".

- Te Ataria, 1889.

"Perhaps the greatest injustice in the colonisation of Indigenous Peoples is that a wrong is so often excused as reason and any response to indigenous grievance is trumpeted as a step along the way to resolution…yet a wrong can never be reasonable and a response can never be a resolution, or even a step towards resolution, if it perpetuates the core injustice".

- ***John Mohawk, Haudenosaunee jurist at Conference on "Settling the Unsettled" 1996.***

INTRODUCTION.

This Primer has been produced on behalf of Ngati Kahungunu after hui last month reaffirmed the opposition of the Iwi to the Marine and Coastal Area (Takutai Moana) Bill.

That opposition has been consistent and principled since the last Labour government first announced the proposed 2004 Foreshore and Seabed Act. It has been expressed in numerous submissions to government since then and was most recently re-stated in the submission to the Māori Affairs Select Committee on the issue.

Throughout that time the Iwi has also been consistent in offering practical and reasoned suggestions to address the issue and regrets that once again the Crown seems "determined not to hear what our people say"**.**

It was that long opposition which prompted the chair of Ngāti Kahungunu, Ngahiwi Tomoana, to ask the Māori Party at its Annual General Meeting last year to withdraw its support for the Bill. In his view the Party was "swallowing a ngārara" and asking our people to do the same.

The Primer attempts to give context to that concern and highlights the ongoing flaws and injustice in the present Bill that indeed render it a "monstrous" wrong.

In doing it is mindful that other Iwi have been equally consistent and principled in their opposition to the original 2004 Act and the current bill. Indeed all but one of the Iwi submissions to the recent Select Committee hearings expressed opposition to all or substantial parts of the Bill.

- Moana Jackson.

What is the general context for the opposition to the Bill?

Although the Bill does repeal the original Act and purportedly removes Crown title or ownership it is based upon the same inherent injustices.

1. It continues to confiscate Iwi and Hapū rights to the foreshore and seabed by placing any foreshore in which Māori have an interest in a new Crown-controlled construct called a common space in the marine and coastal area.

2. It continues to be discriminatory in several ways, most notably because it only confiscates areas of the foreshore in which Māori have an interest. It does not affect non-Māori interests and thus creates a space where only the rights of Iwi and Hapū will be redefined and controlled by the Crown.

3. It also continues to be discriminatory in specific ways. For example it requires that Māori with interests in the foreshore and seabed must provide public access but does not impose a similar requirement on Pākehā.

Is the "common space" any different from the Crown title of the 2004 Act?

No.

The Bill establishes the common space as an area which no-one is meant to own and within which no-one is allowed to have a new private title.

However the Crown continues to exercise Crown title (continues to act as the "owner") by setting the rules for the space. For example it keeps its "ownership rights" of any nationalised minerals such as petroleum in the common space.

It thus asserts continued Crown ownership and ultimate authority in an area that no-one is supposed to own, just as it did under the "Crown title" of the 2004 Act.

Are Iwi and Hapū granted any interests in the common space?

Not really.

The Bill does define "customary interests (mana tuku iho)" as part of a regime of "Māori customary title" that may be claimed in the common space.

However that "Māori customary title" is not the title exercised by Iwi and Hapū prior to 1840. Neither is it the full and exclusive title guaranteed in the Treaty of Waitangi. Rather it is a limited bundle of rights subject ultimately to the presumed authority of the Crown to define their limit and extent. They are necessarily subordinate rights.

For example they are less than those that might be held by a Pākehā person with land contiguous to the foreshore and seabed. Indeed the Crown has stated several times that while they are a "property interest" they are something less than a freehold title.

That is not only discriminatory but a blatant redefinition of tino rangatiratanga and any accepted understanding of mana tuku iho.

Do Iwi and Hapū have to prove their "customary interests"?

Yes.

If Iwi and Hapū choose to go to Court to claim a "customary interest" they have to prove that it has been exercised through continuous and exclusive use and occupation of the area concerned since 1840.

Unlike those with a freehold title whose interests automatically flow from the title the recognition of "mana tuku iho" essentially conveys nothing unless Iwi and Hapū can pass this "test" and prove continuous use.

Will it be easy to prove continuous use since 1840?

No.

The ability of most Iwi and Hapū to prove continuous use has actually been taken away by actions of the Crown since 1840. For example the raupatu or land confiscations have prevented Iwi and Hapū from having the continuous use needed to establish "mana tuku iho".

While it may be argued that a raupatu of dry land will not necessarily sever the connection of Iwi and Hapū with the foreshore, research prior to the 2004 Act shows that in over 97% of cases it has effectively prevented continuous use.

Perhaps it is for that reason that the Crown has stated several times that the test is so high that most Māori won't meet it.

Isn't this "test" unfair?

Yes.

While the Bill does restore access to the Courts it remains prejudicial to Māori because

(a) the test is so high it may well be a costly exercise with no hope of success
(b) it does not impose any similarly impossible test on others nor require them to prove the extent of their interests.

Can the test be met in any other way?

Yes.

Iwi and Hapū can negotiate with the Crown but any negotiations will still be limited to the nature and extent of any "customary interest".

In effect the Crown will still control the process and Iwi and Hapū may only end up with a "right" to be consulted on conservation and resource management, something which is already required in legislation such as the Resource Management Act.

Does the Crown have to meet any test?

No.

Because it defines the nature of customary interests it only has to satisfy itself that an Iwi or Hapū has had continuous use since 1840 subject to its overriding "ownership".

It has accepted one obligation in relation to its so-called right of "extinguishment" which derives from old colonising law and assumes that a colonising power can "extinguish" indigenous rights provided it follows its own processes.

Normally Iwi and Hapū would have to prove their interests have not been extinguished but the Crown has now agreed to accept that it will have to prove that they have in fact been removed.

While it might be argued that this is an improvement it does not remove what John Mohawk would have regarded as a "core injustice," namely the presumed right of a coloniser to take away any indigenous rights in the first place.

In his recent Report the United Nations Special Rapporteur supported this view and reminded the Crown in particular that "any extinguishment of indigenous rights by unilateral uncompensated acts is inconsistent with the United Nations Declaration on the Rights of Indigenous Peoples".

Have Māori suggested alternative resolutions?

Yes.

However as with the submissions to the Select Committee they have been rejected.

For example one suggested resolution was that the Crown recognise the tipuna title of Iwi and Hapū in the foreshore and seabed and then negotiate appropriate matters of access etc. The Crown rejected that proposal because there are "no precedents," even though there are no exact precedents for its idea of a common space either.

Will Iwi and Hapū continue to seek a more just and non-discriminatory resolution?

Yes.

It is regrettable that the proposed Bill makes this necessary when the potential for a just resolution was possible based on a reasoned dialogue with the Crown that took into serious account the suggestions Iwi and Hapū have made and the recommendations also put forward by the Ministerial Review Committee in 2009.

It is especially regrettable that politicians and media commentators have depicted the current opposition as "politicking" or a mere "jockeying for position" by Māori. That is insulting to the considered views put forward by Iwi and Hapū and singularly ignores the blatant injustice and discrimination within the Bill.

This Primer is available online at http://www.converge.org.nz/pma/moana.htm