

He tono nā



Te Rūnanga o NGĀI TAHU

ki te
MAORI AFFAIRS SELECT COMMITTEE

19 November 2010

On the
MARINE AND COASTAL AREA (TAKUTAI MOANA) BILL 2010

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contact person

Justine Inns | Acting General Manager Strategy and Influence | **Te Rūnanga o Ngāi Tahu**

justine.inns@ngaitahu.iwi.nz | Phone 03 366 4344 | PO Box 13-046 | Christchurch

request to be heard

Te Rūnanga o Ngāi Tahu wishes to appear before the Select Committee to speak to this submission
and would appreciate the opportunity to be heard

support to other submissions

Te **Rūnanga** wishes to note that we have reviewed and fully support the submissions presented by

EXECUTIVE SUMMARY

1. The Ngāi Tahu Takiwā includes a greater area of foreshore and seabed than any other tribal rohe in the country. As the representative of the whānau, hapū and iwi kaitiaki of that very extensive maritime tribal estate, Te Rūnanga o Ngāi Tahu (Te Rūnanga) carries a heavy burden in presenting its response to the Marine and Coastal Area (Takutai Moana) Bill (the Bill).
2. Te Rūnanga commends the Government and, in particular, the Māori Party, for recognising the injustice of the Foreshore and Seabed Act 2004 (the 2004 Act) and for moving to repeal and replace that Act. It is with tremendous frustration and disappointment, therefore, that Te Rūnanga has been forced to conclude that – while the Bill is different from the Act in a number of notable ways – the Bill will not make a difference to Ngāi Tahu, or most other iwi. Te Rūnanga maintains that the long-standing rights and interests of Ngāi Tahu in relation to foreshore and seabed will be no more capable of recognition under the Bill than they were under the 2004 Act.
3. Foremost among the concerns held by Te Rūnanga in relation to the Bill are the tests for establishing customary title and customary rights. Those tests will not result in materially different outcomes from the 2004 Act and they suffer from the same defects as the tests contained in that Act, which have been almost universally denounced as unjust and unprincipled. The bottom line for Te Rūnanga is that – unless significant amendments are made to the tests in the Bill, so that those tests can encompass the rights and interests of all iwi in respect of the areas of foreshore and seabed of greatest importance to them – Te Rūnanga believes the Bill should not proceed.
4. Even if this bottom line issue was addressed satisfactorily, there are a number of areas in which Te Rūnanga believes that the Bill is deficient, in particular:
 - a. The ‘no ownership’ regime represents only a symbolic, not a substantive, alternative to explicit Crown ownership. Te Rūnanga would strongly prefer to see foreshore and seabed (other than those areas in freehold or customary title) held jointly by the Treaty partners, with both of those partners actively involved in decision-making;
 - b. The awards provided for under the Bill represent something far less than incidents flowing from freehold title and represent a failure of imagination, foresight and creativity, as they merely replicate (generally in a compromised form) instruments that have been developed in Treaty settlements or foreshore and seabed negotiations conducted under the 2004 Act; and
 - c. The processes for seeking recognition of customary rights and interests will, of themselves, exclude most iwi and hapū from obtaining such recognition. High Court applications will involve expensive and adversarial processes which, without modifications to the Legal Aid regime like those provided in respect of Waitangi Tribunal proceedings, will be out of the reach of most iwi and hapū. The option of direct negotiations between iwi or hapū and the Crown will not mitigate the harshness of the regime, as it will be open only to those iwi and hapū which the Crown is satisfied could meet the tests set out in the Bill.
5. Unless the Bill is substantively amended by the Committee to address these concerns, Te Rūnanga’s position is that it should not proceed. While it has been suggested that

Māori should support the Bill on the basis that it is the best option available in the current political climate, Te Rūnanga takes a different view, as articulated by the Kaiwhakahaere in a speech to the Iwi Chairs' Forum on 13th November 2010:

If it takes another generation or more to rectify the injustice of the 2004 Act, we would rather our mokopuna took up the journey following in the million footsteps we all took to Parliament in 2004, rather than shouldering the burden of a history that alleges Māori support for a 2011 Act that is equally as unjust.

6. We urge every member of the Committee to take a stand against this Bill in its current form. Not to do so will mean being named for posterity as being complicit in an injustice just as great as that perpetuated in the 2004 Act.
7. Te Rūnanga recommends that the Bill:
 - a. Modify the test for customary marine title by:
 - i. Reinstating the test for customary title that applied in Te Ture Whenua Māori 1993, i.e. whether the area in question is held in accordance with tikanga Māori; or
 - ii. Replacing the proposed exclusivity-based test in Clause 60(1)(b) with one that focuses on the intensity of the iwi/hapū relationship with an area of foreshore and seabed, such as that proposed in Appendix Two; or
 - iii. Adding a proviso to the test for customary title so that neither a break in continuity of exclusive use, nor extinguishment of rights can be proven by reference to acts inconsistent with the Treaty of Waitangi; and removal of all references to ownership of continuous title to contiguous land; and
 - iv. Removing the requirement in Clause 93(4) that the Crown can only negotiate recognition of customary title/rights in circumstances where it is satisfied that the relevant tests could have been met in Court.
 - b. Make it clear that all customary title, rights and interests extinguished by the 2004 Act are restored to their full legal effect:
 - i. As if the 2004 Act had never happened; and
 - ii. Irrespective of whether or not such title, rights and interests are capable of recognition under the Bill;
 - c. Vest the common marine and coastal area jointly in the Treaty partners, to hold on trust for all New Zealanders;
 - d. Remove the new regulation and bylaw-making powers proposed to be given to the Minister of Conservation under Clause 30 of the Bill;

- e. Amend provisions relating to customary marine title, to ensure that such title is not treated disadvantageously as compared to existing freehold titles;
- f. Remove the power of the Crown under Clause 12 to withdraw land from the common marine and coastal area by deeming or declaring it to have status under conservation related legislation;
- g. Provide that reclaimed lands remain within the definition of the common marine and coastal area, unless the Crown and the iwi or hapū holding mana over the relevant area agree to transfer such lands to a third party;
- h. Make it clear that Clauses 49-52 of the Bill set minimum standards that do not detract from the broader obligations imposed by Section 4 of the Conservation Act or any other processes or arrangements agreed between iwi/hapū and the Department of Conservation from time to time;
- i. Extend the customary rights provisions (Clauses 53-57) to include all customary rights and practices not already expressly provided for in law, including all rights in relation to flora and fauna, including marine mammals;
- j. Provide, in respect of the test for customary rights, that:
 - ii. The fact that such rights and practices are held and exercised in accordance with tikanga should be the sole determinant of their continued existence; and
 - iii. No legislation or other acts or omissions of the Crown in breach of the Treaty of Waitangi can be treated as having extinguished or interrupted the exercise of any customary right or practice;
- k. Impose a positive obligation on local authorities and other relevant agencies to protect the capacity to exercise customary rights practices, by taking steps to actively protect the natural resource(s) to which those rights and practices relate;
- l. Remove the power under Clause 58 for the Minister of Conservation to impose controls on customary rights and practices, and replace it with provisions empowering the relevant iwi or hapū to exercise its kaitiaki responsibilities in respect of such rights and practices, including by imposing limits on their own members where necessary.
- m. Provide for holders of customary marine title to exercise a full suite of rights at least equivalent to freehold title;
- n. Offer holders of customary marine title the option of expressing that title through a range of co-governance mechanism if they so desire;
- o. Remove the six-year time limit for filing applications for recognition of customary marine title and customary rights imposed by Clause 98(2);

- p. Allow applications for recognition of customary marine title and customary rights to be heard in the Māori Land Court, rather than the High Court; and
- q. Modify the application of the Legal Aid regime, so as to make Legal Aid available in respect of applications for recognition of customary marine title and customary rights, in the same way as for Waitangi Tribunal claims.

TE RŪNANGA O NGĀI TAHU

8. This submission is made on behalf of Te Rūnanga. Te Rūnanga is statutorily recognised as the representative tribal body of Ngāi Tahu Whānui and was established as a body corporate on 24th April 1996 under Section 6 of Te Rūnanga o Ngāi Tahu Act 1996 (the Te Runanga Act). We note for the Committee the following relevant provisions of our constitutive documents:

Section 3 of the Te Rūnanga Act States:

This Act binds the Crown and every person (including any body politic or corporate) whose rights are affected by any provisions of this Act.

Section 15(1) of the Te Rūnanga Act states:

Te Rūnanga o Ngāi Tahu shall be recognised for all purposes as the representative of Ngāi Tahu Whānui.

The Charter of Te Rūnanga o Ngāi Tahu (1993) constitutes Te Rūnanga as the kaitiaki of the tribal interest.

9. Te Rūnanga requests that the Select Committee accord this submission the status and weight due to the tribal collective, Ngāi Tahu Whānui, currently comprising over 40,000 members registered in accordance with Section 8 of the Te Rūnanga Act .

TE RŪNANGA INTERESTS IN THE MARINE & COATAL AREA (TAKUTAI MOANA) BILL

10. As kaitiaki of the customary rights and interests of Ngāi Tahu Whānui in respect of the most extensive maritime Takiwā of any iwi in the country, Te Rūnanga has an overwhelming interest in the Bill. The Ngāi Tahu relationship with, and dependence on, the coastal resources of its Takiwā are extensively canvassed in the Waitangi Tribunal's Ngāi Tahu Report (1991) and Ngāi Tahu Sea Fisheries Report (1992).
11. Te Rūnanga also has a specific interest in the Bill by virtue of the Ngāi Tahu Claims Settlement Act 1998, which provides for Ngāi Tahu and the Crown to enter into a new age of co-operation. The relevant part of the Ngāi Tahu Claims Settlement Act is **attached** as Appendix One. Te Rūnanga viewed the 2004 Act as fundamentally at odds with the commitments made by the Crown to Ngāi Tahu in 1998 and views the Bill, in its current form, as no less a breach of that solemn compact.

TE RŪNANGA STATEMENTS OF POSITION ON THE BILL

12. Te Rūnanga's fundamental positions in relation to the Bill are that:

- a. The test for establishing customary title set out in the Bill is discriminatory and will be almost impossible for Ngāi Tahu – and virtually all other iwi – to meet. As accepted by the Crown in the Ngāi Tahu Settlement, acts or omissions of the Crown from 1840 have denied Ngāi Tahu the ability to maintain undisturbed possession of marine and coastal areas. Therefore, in most instances, Ngāi Tahu will be unable to establish exclusive and undisturbed occupation without substantial interference since 1840. Furthermore, the requirement of exclusivity is fundamentally at odds with the Ngāi Tahu tikanga of manaakitanga (hospitality and sharing). We recommend that the test for recognition of customary title be amended to take into account the historic denial of rights in the foreshore and seabed; the dispossession of Ngāi Tahu rights in our lands adjacent to the foreshore and seabed and the tikanga of manaakitanga.
- b. The Bill's "no ownership" regime in respect of the marine and coastal space is fictitious and largely symbolic. The Crown will, in fact, retain and extend its powers over the marine and coastal area. We recommend that the marine and coastal area be held under a Treaty of Waitangi model by the Crown and iwi as partners on trust for all New Zealanders.
- c. Whilst the Bill purports to reinstate rights extinguished by the 2004 Act, it – on the whole – merely perpetuates the same injustices as its predecessor under the guise of new labels. The Bill purports to reinstate those rights of iwi and hapū that are capable of recognition under the Bill. However, our analysis concludes that the Bill's threshold for establishing customary rights and customary title effectively rule out any recognition of Ngāi Tahu rights, meaning the Bill continues the extinguishment of those rights effected in 2004.
- d. The imposition of a six year time limit for lodging applications under the Bill is unfair and will potentially lead to an extinguishment of even those limited iwi/hapū rights capable of recognition under the Bill if the necessary applications have not been lodged within the specified time.

CUSTOMARY MARINE TITLE – TESTS

Introduction

13. Pursuant to the Bill, the essential test for customary title will be the continuous exercise of exclusive use and occupation over the relevant area since 1840, without substantial interruption and in accordance with tikanga (Clause 60(1)(a) and (b)).

Test for establishing customary marine title

14. The Bill's test for establishing customary title will not be able to be met in many parts of the Ngāi Tahu Takiwā, despite those areas being of huge cultural significance to Ngāi Tahu Whānui. Te Rūnanga maintains that customary law, applied consistent with the Treaty, should provide for recognition of those relationships.

15. Our particular issue with the test contained in Clause 60(1)(b) lies in the "exclusive use and occupation" concept. That requirement negates the rights of most iwi based on accidents – or black spots – of history, such as raupatu, and on our own tikanga of

manaakitanga, which would seem in hindsight to have done us great harm. The requirement of exclusivity of use for ourselves at the expense of others is fundamentally at odds with our tikanga and deserves no place in the jurisprudence of customary rights in New Zealand for that reason. The fact that so many iwi and hapū were precluded from exercising exclusivity (even had they wished to) by acts of the Crown carried out in flagrant breach of the Treaty of Waitangi further underlines the inappropriateness of the concept in New Zealand circumstances.

16. In most areas of the Ngāi Tahu Takiwā, the ability to continue to exercise customary uses and practices was interrupted by the operation of the Crown land purchases, in a manner that was acknowledged in the Ngāi Tahu settlement as being in breach of the Treaty of Waitangi. Premising the investigation of customary title on the concept of exclusivity subjects Ngāi Tahu, and other iwi, to effective 'double jeopardy', whereby they are unable to secure future recognition of their rights due to the very fact of the Crown's historical failure to acknowledge those rights.
17. The retention of continuous ownership of contiguous land as a factor relevant to assessing the existence of customary title compounds these issues, given the tiny parcels of land that were reserved to Ngāi Tahu in the land sales. The Court of Appeal, in the 2003 *Ngāti Apa* decision, determined that the adoption of ownership of contiguous land as a fundamental determinant of customary title to foreshore in the 1963 *In re Ninety Mile Beach* decision was incorrect and bad law. The fact that the 2004 Act enshrined that principle in law was one of its most egregious elements, and to see the ghost of *In re Ninety Mile Beach* lingering in the Bill's retention of ownership of contiguous land as a relevant factor is simply offensive.
18. Because of the difficulty that this test will present in respect of the majority of the vast Ngāi Tahu Takiwā, the other differences between the Bill and the 2004 Act, such as the revocation of Crown ownership of foreshore and seabed (Clause 11(3)) and the restoration of customary rights and interests extinguished by the 2004 Act (Clause 15) will be of no more than symbolic value to Ngāi Tahu. Put simply, while there are certainly differences between the Act and the Bill, the Bill will not make a difference.
19. The preference of Te Rūnanga, and the most principled way of dealing with this issue, is to reinstate the test for customary title that applied in Te Ture Whenua Māori 1993, namely, simply asking whether the area in question is held in accordance with tikanga Māori.
20. An alternative, albeit imperfect, approach would be to adopt a test that couples tikanga with an assessment of the intensity of the iwi/hapū relationship with an area of foreshore and seabed. An example of such an approach is **attached** as Appendix Two.
21. The very minimum amendments to the test for customary marine title that Te Rūnanga find acceptable would be the:
 - a. Addition of a proviso to the effect that neither a break in continuity of exclusive use and nor extinguishment of rights can be proven by reference to acts inconsistent with the Treaty of Waitangi; and
 - b. Removal of all reference to ownership of continuous title to contiguous land.

Direct negotiations for customary marine title

22. The Bill provides for recognition of customary marine title (and customary rights) through negotiated agreements between iwi/hapū and the Crown (Clause 93). However, such negotiated agreements are confined to those areas where the Crown is satisfied that the relevant tests could have been met by iwi/hapū in Court. As stated above, it is unlikely that Ngāi Tahu and most other iwi/hapū will satisfy the relevant tests given the impact of the land sales – and raupatu – in the nineteenth century.
23. Consequently, as currently drafted, the Bill’s threshold for customary title would remove direct negotiations as a means of seeking recognition of Ngāi Tahu rights and interests. The negotiations route will therefore not be available to ameliorate the most unfair aspects of the Bill’s operation.

Recommendation

24. Te Rūnanga therefore recommends that the Committee amends the Bill so as to:

- a. Modify the test for customary marine title by:
- i. Reinstating the test for customary title that applied in Te Ture Whenua Māori 1993, i.e. whether the area in question is held in accordance with tikanga Māori; or
 - ii. Replacing the proposed exclusivity-based test in Clause 60(1)(b) with one that focuses on the intensity of the iwi/hapū relationship with an area of foreshore and seabed, such as that proposed in Appendix Two; or
 - iii. Adding a proviso to the test for customary title so that neither a break in continuity of exclusive use, nor extinguishment of rights can be proven by reference to acts inconsistent with the Treaty of Waitangi; and removal of all references to ownership of continuous title to contiguous land; and
 - iv. Removing the requirement in Clause 93(4) that the Crown can only negotiate recognition of customary title/rights in circumstances where it is satisfied that the relevant tests could have been met in Court.

OWNERSHIP

Introduction

25. The Bill will revoke the 2004 Act’s vesting of foreshore and seabed in the Crown (Clause 4) and instead deem that space (to be called the “common marine and coastal area”) is not owned, and is not capable of being owned, by anyone (Clause 11(2)).

Crown powers over common marine and coastal area

26. The shift from Crown ownership to a ‘no ownership’ regime is merely symbolic, as the Crown will retain all of its current powers in relation to the common marine and coastal area and, in fact, proposes to extend those powers in some respects. While Te

Rūnanga understands that there is a difference between Crown ownership and ‘no ownership’, this is – again – a difference that does not make a difference. It is, in practical terms, little more than legal sophistry.

27. While we are aware that there are a range of views on this point held by different iwi, Te Rūnanga’s position is that foreshore and seabed (other than that in freehold or customary title) should be held jointly by the Treaty partners, with both actively involved in decision-making. There are now a number of models and precedents for co-governance of natural resources and we find it disappointing that none of these appear to have been genuinely considered in the development of the Bill.
28. It is also noted that, despite the revocation of Crown ownership, the Minister of Conservation will continue to be the “manager” of the marine and coastal area and will acquire new powers to make regulations and bylaws in respect of such management (Clause 30). It seems ironic that a Bill touted as undoing the injustices of the 2004 Act and repealing Crown ownership will, in fact, be the vehicle by which the Crown acquires new regulatory powers it did not have before. The difference between rhetoric and reality could hardly be more apparent.

Exceptions to the ‘no ownership’ regime

29. There are three major exceptions to the ‘no ownership’ regime, and Te Rūnanga has concerns in relation to each:
 - a. The exclusion of pre-existing freehold titles from the common marine and coastal area, but inclusion of areas subject to customary title, remains just as discriminatory as the same distinction drawn by the 2004 Act. To be clear – Te Rūnanga does not seek any interference with private property rights, but maintains that customary property rights should not receive second-class status as compared to more recently-created rights encapsulated by freehold titles;
 - b. Provision for any area to be removed from the common marine and coastal area by virtue of it ‘acquiring’ (i.e. being deemed or declared by the Crown to have) status under any one of several conservation statutes (Clause 12) makes a mockery of the idea that the common marine and coastal area will be inalienable. The reality is the Crown will unilaterally be able to remove any area of foreshore and seabed from the common area without notice and through a simple administrative process and, by doing so, it would negate both rights of public access and any customary rights and interests; and
 - c. The Bill contains far more extensive provisions in respect of reclamations than the 2004 Act and these provisions not only set up a process for developers to acquire title to reclaimed land (Clause 38), but establish a presumption that such title will always be granted to developers who are port or airport operators (Clause 40). These straight-forward administrative processes for acquiring title to reclaimed land are in stark contrast to the costly, adversarial and constrained processes for acquiring the form of title intended to recognise customary rights and interests of far longer standing. These provisions therefore constitute yet another of the Bill’s double standards.

30. Te Rūnanga therefore recommends that the Committee amends the Bill so as to:

- a. Vest the common marine and coastal area jointly in the Treaty partners, to hold on trust for all New Zealanders;
- b. Remove the new regulation- and bylaw-making powers proposed to be given to the Minister of Conservation under Clause 30 of the Bill;
- c. Amend provisions relating to customary marine title, to ensure that such title is not treated disadvantageously as compared to existing freehold titles;
- d. Remove the power of the Crown under Clause 12 to withdraw land from the common marine and coastal area by deeming or declaring it to have status under conservation related legislation; and
- e. Provide that reclaimed lands remain within the definition of the common marine and coastal area, unless the Crown and the iwi or hapū holding mana over the relevant area agree to transfer such lands to a third party.

CUSTOMARY INTERESTS – RESTORATION OF RIGHTS AND INTERESTS

Introduction

32. Clause 15 of the Bill purports to restore the legal status and effect of customary rights and interests and has been touted as thereby undoing the damage done to those rights and interests by the 2004 Act.

Limitations on rights and interests restored

33. Te Rūnanga does not believe it is accurate to claim that the Bill would reinstate all of the customary rights and interests improperly extinguished by the 2004 Act. Clause 15 makes it clear that the only rights and interests that are to be restored are those which are capable of being recognised under the Bill. For the reasons set out above in respect of the restrictive and constraining approach taken by the tests contained in the Bill, only a very selective and limited range of rights and interests will be capable of recognition under the Bill. It is therefore only that selective and limited range of rights and interests that will be legally restored by the Bill. All other customary rights and interests in the foreshore and seabed – including the vast majority of Ngāi Tahu rights and interests – will remain just as extinguished as they were under the 2004 Act.

Recommendation

34. Te Rūnanga therefore recommends that the Committee amends the Bill so as to:

- a. Make it clear that all customary title, rights and interests extinguished by the 2004 Act are restored to their full legal effect:

- i. As if the 2004 Act had never happened; and
- ii. Irrespective of whether such title, rights and interests are capable of recognition under the Bill.

CUSTOMARY INTERESTS – PARTICIPATION IN CONSERVATION PROCESSES

Introduction

35. This mechanism, ostensibly intended to recognise the “customary authority” of iwi and hapū in relation to foreshore and seabed is unfortunately likely to have the negative effect of undermining that authority, by equating it to a mere opportunity to participate in a limited range of processes under conservation legislation.

Relationship between mechanism and section 4 of the Conservation Act 1996

36. Te Rūnanga is concerned that the provisions of Clauses 49-52 merely replicate what might be regarded as minimum requirements for iwi/hapū participation in conservation processes by virtue of the direction contained in Section 4 of the Conservation Act that:

This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

37. Te Rūnanga believes that Section 4 imposes significantly higher standards on the Minister and Department of Conservation than those proposed in the Bill, and Ngāi Tahu works hard at holding the Department to those high standards in all conservation processes undertaken within its Takiwā. Our fear is that the low standards for participation set out in the Bill will come to be treated by the Department of Conservation as the maximum standard it needs to meet, rather than minimum standard.

Recommendation

38. Te Rūnanga therefore recommends that the Committee amends the Bill so as to:

- a. Make it clear that Clauses 49-52 of the Bill set minimum standards that do not detract from the broader obligations imposed by Section 4 of the Conservation Act or any other processes or arrangements agreed between iwi/hapū and the Department of Conservation from time to time.

CUSTOMARY INTERESTS – CUSTOMARY RIGHTS

Introduction

39. The provisions of the Bill in relation to customary rights contain only cosmetic changes from the equivalent provisions in the 2004 Act. From the point of view of Te Rūnanga, those provisions therefore suffer all of the shortcomings of the Act in this respect.

Limitations and tests for customary rights

40. The Bill's provisions in respect of customary rights exclude most significant customary practices in the Ngāi Tahu Takiwā: fishing, activities relating to wildlife and marine mammals, and spiritual/cultural associations not manifested in a physical activity in relation to a physical resource (Clause 53(2)). For that reason alone these provisions will be of as little relevance to Ngāi Tahu – and other iwi and hapū – as their predecessors in the 2004 Act.
41. The test for establishing whatever residual customary rights are not excluded from consideration also remains effectively unchanged from the 2004 Act, albeit with less explicit provisions in relation to extinguishment. The requirement that such rights must have been exercised more or less continuously since 1840 (Clause 53(1)) presents a threshold which is as inappropriate to New Zealand circumstances as the 'exclusive use and occupation' threshold for customary title, for the reasons canvassed above in relation to that test.

Protected customary rights

42. Again, the provisions for protection of proven customary rights of the narrow type contemplated by the Bill do not differ materially from their predecessors in the 2004 Act. The Bill therefore continues an illogical regime in which only rights which have been exercised lawfully for 170+ years will attract legal protection to continue and will not require resource consents to do so, despite the fact that such rights – by definition – are within the law (i.e. do not require protection) and do not require consents.
43. The power given to the Minister of Conservation to impose controls on protected customary rights (Clause 58) is just as offensive as its predecessor in the Act, in that it ignores the principles of kaitiakitanga and the very tikanga that are constitutive of the rights in question.

Recommendation

44. Te Rūnanga therefore recommends that the Committee amends the Bill so as to:

- a. Extend the customary rights provisions (Clauses 53-57) to include all customary rights and practices not already expressly provided for in law, including all rights in relation to flora and fauna, including marine mammals;
- b. Provide, in respect of the test for customary rights that:
 - i. The fact that such rights and practices are held and exercised in accordance with tikanga should be the sole determinant of their continued existence; and
 - ii. No legislation or other acts or omissions of the Crown in breach of the Treaty of Waitangi can be treated as having extinguished or interrupted the exercise of any customary right or practice;

- c. Impose a positive obligation on local authorities and other relevant agencies to actively protect the capacity to exercise customary rights practices, by taking steps actively to protect the natural resource(s) to which those rights and practices relate;
- d. Remove the power under Clause 58 for the Minister of Conservation to impose controls on customary rights and practices and replace it with provisions empowering the relevant iwi or hapū to exercise its kaitiaki responsibilities in respect of such rights and practices, including by imposing limits on their own members where necessary.

CUSTOMARY INTERESTS – CUSTOMARY MARINE TITLE

Introduction

45. The mechanisms provided for in the Bill in respect to customary rights appear to be based almost entirely on instruments provided for in the Ngāti Porou Deed of Settlement in respect of the foreshore and seabed. Therefore, in our view, the Bill does not provide a material improvement on the outcomes that could be negotiated under the 2004 Act. Moreover, the provisions equate to less than the full complement of instruments provided for in the Ngāti Porou Deed.

Irrelevance of customary marine title mechanisms

46. The tests in relation to customary marine title are addressed above at paragraphs 13 – 23. For the reasons set out there, there will be so few, if any, areas of the Ngāi Tahu foreshore and seabed capable of the meeting the tests as they stand, that the mechanisms provided in the Bill for areas deemed to be subject to customary marine title are effectively a moot point for Te Rūnanga.

47. By way of general comment, however, Te Rūnanga is disappointed that a broader range of mechanisms was not considered, despite a great deal of energy having been devoted to the subject over the years. Simply picking up a selection of the instruments provided for in the only agreement concluded under the 2004 Act represents either a failure of imagination or a triumph of lazy analysis. We refer the Committee to the paper submitted to the Attorney-General in 2009 by the Iwi Leaders Group which provides examples of a range of possible mechanisms.¹

48. As a matter of principle, Te Rūnanga maintains that the legal consequences of customary title should be no less than those that would have attached to a freehold title. This position is based on the fact that, prior to the 2004 Act, any customary title could have been converted to freehold title, with all the normal legal incidents of such title. The 2004 Act removed that right and the Bill ensures that it is not to be reinstated. In these circumstances, it is incumbent on the Crown to provide the holders of a customary marine title with a suite of legal rights and authorities equivalent to freehold title. The package of new statutory rights set out in the Bill falls far short of this standard.

¹ Technical Advisory Group (2009), *Foreshore and Seabed Replacement Framework – Spectrum of Possible Outcomes/Awards* (at: <http://www.iwichairs.maori.nz/Kaupapa/Foreshore-Seabed/Kaupapa-Update-201009/Technical-Advice-on-Awards.pdf>)

Recommendation

49. Te Rūnanga therefore recommends that the Committee amends the Bill so as to:

- a. Provide for holders of customary marine title to exercise a full suite of rights at least equivalent to freehold title; and
- b. Offer holders of customary marine title the option of expressing that title through a range of co-governance mechanisms if they so desire.

TIME LIMITATION

50. The imposition of a six-year time limit on lodging applications for recognition of customary rights/title (Clause 98(2)) is unprecedented and utterly unprincipled. While promoted by the Crown as a continuation of the policy of limiting the timeframe for bringing claims to the Waitangi Tribunal, its effect will be to extinguish any extant rights in the common marine and coastal area for which applications are not lodged in time for no reason other than administrative (or political) convenience.

Recommendation

51. Te Rūnanga therefore recommends that the Committee amends the Bill so as to:

- a. Remove the six-year time limit for filing applications for recognition of customary marine title and customary rights imposed by Clause 98(2).

HIGH COURT JURISDICTION

Introduction

52. The Bill provides that all applications for customary rights and customary marine title are to be dealt with by the High Court (Clauses 7 and 96(2)).

High Court applications for customary marine title

53. Te Rūnanga maintained throughout the development of the Bill that the Māori Land Court should remain the forum in which customary rights are assessed. The Māori Land Court has the necessary experience and expertise and has developed processes that are appropriate for dealing with such issues. The High Court, on the other hand has no experience in such matters and operates far more adversarial and inflexible processes, which will present significant barriers to iwi and hapū. The option of referring matters of tikanga to pukenga will do little to mitigate this.

54. The cost of pursuing customary marine title applications in the High Court will be prohibitive for most iwi and hapū, particularly if – as is to be assumed – the Crown

adopts a stance of vigorously opposing and contesting such applications. Legal Aid will not be available to such iwi and hapū, as the Bill makes none of the modifications to the Legal Aid regime that would be necessary to achieve such a result. Such modifications have a precedent in the Treaty of Waitangi Act 1975 and Te Ture Whenua Māori 1993.

Recommendation

55. Te Rūnanga therefore recommends that the Committee amends the Bill so as to:

- a. Allow applications for recognition of customary marine title and customary rights to be heard in the Māori Land Court, rather than the High Court; and
- b. Modify the application of the Legal Aid regime, so as to make Legal Aid available in respect of applications for recognition of customary marine title and customary rights in the same way as for Waitangi Tribunal claims.

CONCLUSION

56. Earlier this year, New Zealand endorsed the Declaration on the Rights of Indigenous Peoples (the Declaration). With that endorsement before the international community, New Zealand committed to protecting the minimum human rights standards enshrined in the Declaration for the benefit of iwi and hapū. In its current form, the Bill is in complete violation of many of those minimum standards affirmed within the Declaration. Te Rūnanga urges the Committee to assess the Bill, both in light of New Zealand's commitment to the Declaration, and its standing in the international arena as an active advocate of fundamental human rights.
57. Te Rūnanga reiterates its bottom line position that – unless the tests for customary rights and customary title are significantly amended so that they are capable of being met by Ngāi Tahu whānau and hapū in respect of those areas of their foreshore and seabed of greatest significance to them – the Bill will represent no material advance on the 2004 Act and should not be passed.
58. Ngāti Tama Manawhenua Ki Te Tau Ihu Trust (the Trust) has had the opportunity to examine this submission and has requested that it be recorded herein, that the Trust fully supports and endorses Te Rūnanga's submission on the Bill.

Part One – Apology by the Crown to Ngāi Tahu

1. *The Crown recognises the protracted labours of the Ngāi Tahu ancestors in pursuit of their claims for redress and compensation against the Crown for nearly 150 years, as alluded to in the Ngāi Tahu proverb ‘He mahi kai takata, he mahi kai hoaka’ (‘It is work that consumes people, as greenstone consumes sandstone’). The Ngāi Tahu understanding of the Crown’s responsibilities conveyed to Queen Victoria by Matiaha Tiramorehu in a petition in 1857, guided the Ngāi Tahu ancestors. Tiramorehu wrote:*

‘This was the command thy love laid upon these Governors ... that the law be made one, that the commandments be made one, that the nation be made one, that the white skin be made just equal with the dark skin, and to lay down the love of thy graciousness to the Māori that they dwell happily ... and remember the power of thy name.’

The Crown hereby acknowledges the work of the Ngāi Tahu ancestors and makes this apology to them and to their descendants.

2. *The Crown acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngāi Tahu in the purchases of Ngāi Tahu land. The Crown further acknowledges that in relation to the deeds of purchase it has failed in most material respects to honour its obligations to Ngāi Tahu as its Treaty partner, while it also failed to set aside adequate lands for Ngāi Tahu’s use, and to provide adequate economic and social resources for Ngāi Tahu.*
3. *The Crown acknowledges that, in breach of Article Two of the Treaty, it failed to preserve and protect Ngāi Tahu’s use and ownership of such of their land and valued possessions as they wished to retain.*
4. *The Crown recognises that it has failed to act towards Ngāi Tahu reasonably and with the utmost good faith in a manner consistent with the honour of the Crown. That failure is referred to in the Ngāi Tahu saying ‘Te Hapa o Niu Tireni!’ (‘The unfulfilled promise of New Zealand’). The Crown further recognises that its failure always to act in good faith deprived Ngāi Tahu of the opportunity to develop and kept the tribe for several generations in a state of poverty, a state referred to in the proverb ‘Te mate o te iwi’ (‘The malaise of the tribe’).*
5. *The Crown recognises that Ngāi Tahu has been consistently loyal to the Crown, and that the tribe has honoured its obligations and responsibilities under the Treaty of Waitangi and duties as citizens of the nation, especially, but not exclusively, in their active service in all of the major conflicts up to the present time to which New Zealand has sent troops. The Crown pays tribute to Ngāi Tahu’s loyalty and to the contribution made by the tribe to the nation.*
6. *The Crown expresses its profound regret and apologises unreservedly to all members of Ngāi Tahu Whānui for the suffering and hardship caused to Ngāi Tahu,*

and for the harmful effects which resulted to the welfare, economy and development of Ngāi Tahu as a tribe. The Crown acknowledges that such suffering, hardship and harmful effects resulted from its failures to honour its obligations to Ngāi Tahu under the deeds of purchase whereby it acquired Ngāi Tahu lands, to set aside adequate lands for the tribe's use, to allow reasonable access to traditional sources of food, to protect Ngāi Tahu's rights to pounamu and such other valued possessions as the tribe wished to retain, or to remedy effectually Ngāi Tahu's grievances.

- 7. The Crown apologises to Ngāi Tahu for its past failures to acknowledge Ngāi Tahu rangatiratanga and mana over the South Island lands within its boundaries, and, in fulfilment of its Treaty obligations, the Crown recognises Ngāi Tahu as the tangata whenua of, and as holding rangatiratanga within, the Takiwā of Ngāi Tahu Whānui.*
- 8. Accordingly, the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and, with the historical grievances finally settled as to matters set out in the Deed of Settlement signed on 21 November 1997, to begin the process of healing and to enter a new age of co-operation with Ngāi Tahu.*

APPENDIX TWO – AN INTENSITY-BASED TEST FOR CUSTOMARY TITLE

A test of the intensity, rather than exclusivity, of association, with the express proviso that extinguishment cannot be proven by acts inconsistent with the Treaty of Waitangi:

- i. *Constituted by tikanga* – that the area of the foreshore and seabed is held in accordance with the tikanga of the mana whenua iwi/hapū;
- ii. *Exercise of authority* –
 - i. that at 1840, iwi/hapū exercised authority over uses of the foreshore and seabed by tribal members and non-members, amounting to the ability to permit, preclude or make conditional particular uses; and
 - ii. that since 1840, iwi/hapū have exercised authority over uses of the foreshore and seabed by tribal members amounting to the ability to permit, preclude or make conditional particular uses.
- iii. *Presence* – that, at 1840, there was physical presence in the area and –
 - i. that presence has been substantially maintained with the exception that any actions by the Crown or third parties that iwi/hapū objected to will not be sufficient to breach the chain of continuity; and/or
 - ii. that iwi/hapū have, since 1840, evidenced an intention to retain control in the area, for example through litigation or participation in statutory management processes.
- iv. *Criticality* – that the area and associated uses are integral to the retention of iwi/hapū identity; and
- v. *Extinguishment* – that any acts by the Crown or its agents that are inconsistent with the Treaty of Waitangi will not be capable of extinguishing the rights and interests of Iwi/hapū.