# Ōraka Aparima Rūnaka

# Marine and Coastal Area (Takutai Moana) Bill 2010

To: Māori Affairs Select Committee Date: 19th November 2010

From: Ōraka Aparima Rūnaka

## 1. Purpose

This document sets out in outline form a number of the matters of concern within the proposed Marine and Coastal Area (Takutai Moana) Bill (MACA), the proposed alternative to the Foreshore and Seabed Act 2004 and registers our strong objections to the passage of this Bill unless it is substantially amended.

## 2. Ōraka Aparima Rūnaka

The Rūnaka is one of the 18 members of Te Rūnanga o Ngāi Tahu (Te Rūnanga), a body corporate established by statute to, amongst other things, act as the representative body of Ngāi Tahu Whānui. The Rūnaka has its own legal identity; the Ōraka Aparima Rūnaka Incorporated Society.

The Rūnaka is committed supporting Te Rūnanga to protect the rights and interests of all Ngāi Tahu within the Ngāi Tahu Takiwā, and has a particular role to play in protecting the rights and interests of Ngāi Tahu within the takiwā of Ōraka Aparima Rūnaka (as described in schedule 1 of the Te Rūnanga o Ngāi Tahu Act 1996). Our takiwā means that we have an extensive and remote coastline and, given that it extends southwards "until the land turns white" and extensive area of seabed over which we hold mana whenua mana moana. We share some of this responsibility with other Papatipu Rūnanga as set out in the Te Rūnanga Act.

Ōraka Aparima Rūnaka opposed the 2004 Act when it was a Bill by marching on Parliament and by making submissions to the Select Committee. We participated in the Ministerial Review with the hope that that process would lead to a repeal of the 2004 legislation and to justice for all iwi.

We attended hui held by the Attorney General as this Bill was being developed and had our say there. We are deeply disappointed that we now find ourselves opposed to the very legislation which is intended to cure the evils of the 2004 Act.

## 3. Status of this response

This is the formal response of Ōraka Aparima Rūnaka which we respectfully put forward as means of better informing the Māori Affairs Select Committee as it considers the substance of the MACA Bill.

This response is to be read alongside all of the responses of the members of Ngāi Tahu Whānui who may have provided responses to the Māori Affairs Select Committee including the response which will be presented by Te Rūnanga o Ngāi Tahu.

We have read the responses of the Treaty Tribes Coalition and of Te Rūnanga o Ngāi Tahu and we fully endorse and support those responses.

## 4. Basis of our objections to the 2004 Act

**Ōraka Aparima Rūnaka** –

1. **strongly objected** to the 2004 Act on the basis that the legislation; —
   i. by vesting ownership of the foreshore and seabed in the Crown purported to extinguish all of the rights Māori held in the foreshore and seabed without agreement or compensation;
   ii. removed, for Māori only, existing rights of access to the Courts;
   iii. treated Māori differently to non-Māori by deliberately targeting the rights of Māori whilst proactively protecting the private property rights of non-Māori;
   iv. arbitrarily assigned Māori a whole new set of 'pseudo rights' the efficacy of which are entirely at the whim of, and at the grace and favour of, future Governments;
   v. was unnecessary to achieve the stated aims of the legislation and the promoters of the Act; and
   vi. contravened, inter alia, Articles II and III of Te Tiriti o Waitangi, the Bill of Rights Act 1990, the Human Rights Act 1993 and International Conventions on Human Rights and the Civil and Political Rights.

2. **totally rejected** the notion that the Act was of any real benefit to Māori or that the Act either protected or enhanced Māori rights in its current form and that it was capable of redemption by minor tweaking.

3. **rejected outright** the provisions in the Act which would draw Māori into protracted legal processes which, far

from protecting Māori rights, are callously designed to make any remaining rights or newly created 'rights' meaningless.

4. **rejected outright** the provisions in the Act which required Ngāi Tahu Whānui to once again enter into a judicial process to establish the rights which have already been recognised by the Māori Land Court, the Waitangi Tribunal and the Crown via the Ngāi Tahu Deed of Settlement and Te Rūnanga o Ngāi Tahu Act 1996 and more latterly under the Fisheries Settlement Legislation.

5. **made a clear statement** to this Review Panel that Ōraka Aparima Rūnaka did understand the effect of this Act and has not been misled or misinformed as to the effect of the Ngāti Apa judgment and / or the state of the law prior to the passage of the Act. The members of Ōraka Aparima Rūnaka along with other members of Ngāi Tahu Whānui pursued Te Kerëme for generations through petitions, Commissions of Inquiry, Waitangi Tribunal hearings, negotiations and, ultimately, the Ngāi Tahu Deed of Settlement. We have experienced the perfidy of the Crown for over many generations.

6. **wished it to be known that in our opinion** the Act was just one further example of the Crown's repeated failure to act towards Ngāi Tahu "reasonably and with the utmost good faith in a manner consistent with the honour of the Crown".

**Accordingly, Ōraka Aparima Rūnaka recommended that the Act be repealed in such a manner as to restore the legal situation to that which existed prior to the passage of the Act "as if the Act had never been enacted" and that the Crown enters into good faith negotiations with iwi to reach an honourable settlement of the issues of concern to Māori and non-Māori alike.**

**Conclusion**

We are therefore profoundly disappointed that the MACA Bill does not address our concerns in respect of the 2004 Act in any meaningful way and that there will be no material benefit to Ōraka Aparima Rūnaka, to Ngāi Tahu Whānui or to iwi katoa if this Bill passes in its current form.

## 5. Overview of the Response

It has not been possible for Ōraka Aparima Rūnaka to provide a full response to the issues under consideration by the Select Committee. The two major reasons are our limited resources and the comparatively limited time available to prepare the response.

We have therefore devoted our time to recording that our expectations of the proposed legislation have not been met. In our view there is very little substantive difference between the 2004 Act and the proposed Bill.

We have also attempted to include one or two examples of how the Bill will continue to affect the members of Ōraka Aparima Rūnaka. The shortness of this response or the fact it does not refer to all of the detail in the Bill should not be taken as meaning that we support any aspect of this Bill or the way in which it is expected to operate.

In our view, it would be preferable to leave the 2004 Act in place as the intent to remove Māori rights under that legislation was a more honest and open approach. There was no veneer of integrity under that legislation- the Act set out to remove Māori rights and interests and access to courts on the same basis as is enjoyed by non Māori in Aotearoa / New Zealand and it achieved that objective.

We acknowledge that for a small number of iwi, the 2004 Act and this Bill allowed for outcomes that those iwi appear to be satisfied with. However, unless all iwi are able to achieve equitable outcomes based on the legal rights and interests of iwi katoa which existed prior to the 2004 Act then the grievances will remain unresolved.

This Bill in its current form will not undo the harm of the 2004 Act in any material way, it will simply pretend to do so. This Bill may be compared to the manner in which the South Island Landless Natives Act 1906 purported to alleviate the plight of Ngāi Tahu and other iwi in Te Waipounamu who were left without lands and an economic base. This was described by the Waitangi Tribunal hearing the Ngāi Tahu claims as one of the "cruellest hoaxes perpetrated on Māori". We therefore urge the Members of this Select Committee to avoid repeating the mistakes of the past and to either make the necessary changes to this Bill or to let it lapse.

## 6. Observations on some of the specific provisions in the Bill

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**Ōraka Aparima Rūnaka would like the Select Committee to be aware that it is our strong position that –**

(a) The claim that the removal of the Crown's ownership of the foreshore and seabed while retaining full management of the same area is a repeal of the Crown ownership under the 2004 Act is pure sophistry.

(b) The Bill will not have the effect of restoring the full incidences of customary rights for iwi as existed prior to the 2004 Act when in fact only a selective and limited range of rights and interests will be recognised by the Bill. All other customary rights and interests in foreshore and seabed – including the vast majority of Ngāi Tahu rights and interests – will remain as extinguished into the future as they were under the 2004 Act.

(c) While the Bill contains a mechanism, which purports to recognise the "customary authority" of iwi and hapū in relation to foreshore and seabed under the Conservation Act, this mechanism is 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 as the obligations appear to read down the existing provision in the s.4 Conservation .

(d) The provisions of the Bill in relation to customary rights contain only cosmetic changes from the equivalent provisions in the 2004 Act.

(e) The Bill's provisions in respect of customary rights provisions exclude most significant customary practices in the Ngāi Tahu Takiwā: fishing, activities affecting wildlife and marine mammals and spiritual/cultural associations *not* manifested in a physical activity in relation to a physical resource. For that reason alone these provisions will be of as little relevance to Ngāi Tahu – and other iwi/hapū – as their predecessors in the 2004 Act.

(f) The test for establishing whatever residual customary rights are not excluded 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 presents a threshold which is all but impossible to meet.

(g) If we were able to establish rights under the Bill, 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.

(h) The power given to the Minister of Conservation to impose controls on protected customary rights 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.

(i) 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 foreshore and seabed. Therefore, in our view, the Bill does not provide a material improvement on outcomes that could be negotiated under the 2004 Act in respect of customary title. Moreover, the provisions equate to less than the full package of instruments provided for in that Deed.

(j) As with the 2004 Act the tests in relation to customary marine title are so stringent that 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 largely irrelevant to Ōraka Aparima Rūnaka.

(k) However, as a matter of principle, the legal consequences of customary title should be not less than those that would have attached to a freehold title.

(l) The introduction of a six-year time limit on lodging applications for recognition of customary rights/title is will have the effect of to extinguishing any extant rights in the common marine and coastal area for which applications are not lodged in time for no apparent reason other than administrative (or political) convenience.

(m) In conclusion, 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.

## 7. Effect of the Bill on the members of Ōraka Aparima Rūnaka

Ōraka Aparima Rūnaka maintains that the ownership of the majority of the foreshore and seabed within our takiwā remained in iwi ownership prior to the passage of the Act. Te Rūnanga o Ngāi Tahu had previously entered into an agreement not to seek compensation in respect of Crown misdeeds prior to 1992 in the Ngāi Tahu Deed of Settlement 1997. However, the Select Committee should be aware that the Deed specifically preserved our rights to assert claims based on the continued existence of our customary rights including those based on the doctrine of aboriginal title. Not surprisingly the Crown reserved the right to contest that such rights exist.

The effect of the 2004 Act was to remove all meaningful judicial avenues for Ngāi Tahu Whānui to have our existing

rights in the foreshore and seabed properly investigated and recognised. It purports to go past the agreements reached in the Ngāi Tahu Deed of Settlement as if they were never made and to once again arbitrarily impose the power of the Crown over Ngāi Tahu in an effort to extinguish our rights.

The Bill does not restore that opportunity for Ōraka Aparima Rūnaka.

What we require as the kaitiaki of our area is the ability to strongly influence the access and use of the areas in which our kaimoana is being plundered and the pingao dunes and other fragile areas are being destroyed by thoughtless members of the public who believe it is their 'right' to have unlimited access those areas, whether on foot or by 4-wheel drive vehicles, notwithstanding the damage they cause. The Bill does not deliver us the tools that we require to manage these areas.

As the Select Committee will be aware, the tïtï (or muttonbird) islands are within the Murihiku area. The harvesting of tïtï is the sole right of Rakiura Māori. Those rights have existed and been exercised on an annual basis since well before they were known as customary rights in the western legal system. The public has never had access to those islands and it is vital for the protection of the tïtï and for the integrity of the ecosystem of the islands that Rakiura Māori can exercise their rangatiratanga in respect of those islands including the foreshore and seabed associated with those islands. Under the Bill the harm created by the 2004 Act has not been addressed.

This example graphically demonstrates that the Bill is fundamentally flawed and any pretence that Māori will benefit from the Act as it is currently framed is not credible.

## 8. Conclusion

Ōraka Aparima Rūnaka acknowledges that in accordance with the doctrine of Parliamentary Sovereignty the Crown may have the power to legislate to extinguish the rights of Māori (or any other group for that matter), to prevent them from having meaningful access to the Courts, and to arbitrarily define the scope of the remaining 'rights'. Māori have suffered from a litany of such unjust Acts of Parliament since 1840.

The question for this Select Committee is whether the exercise of such draconian powers in 2004 is to be remedied by this Bill. In other words will this Bill be amended to

actually restore the legal rights and interests of Māori and the honour and integrity of the Crown or will this Bill simply perpetuate past mistakes.

Ōraka Aparima Rūnaka respectfully asks the members of the Select Committeee to give these matters raised serious consideration during their deliberations.

## 9. Contact Details

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Signed


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