



Ngāti Kahungunu Iwi
INCORPORATED

**A STATEMENT BY NGĀTI KAHUNGUNU TO THE
MINISTERIAL REVIEW PANEL ON THE FORESHORE
AND SEABED ACT, 2004**

Omahu Marae, April 29, 2009

‘He manako te koura e kore ai’

INTRODUCTION:

This Statement is presented on behalf of Ngāti Kahungunu. It has five main sections.

1. A prefatory explanation of the context within which Ngāti Kahungunu first registered its opposition to the then proposed Foreshore and Seabed Bill in 2003.
2. The role and relevance of the United Nations Committee on the Elimination of all Forms of Racial Discrimination.
3. A brief analysis of some overseas policies related to the foreshore and seabed.
4. A kaupapa-based proposal for a foreshore and seabed regime that is based upon tikanga and in particular the obligation of manaakitanga.
5. A brief discussion of the need to realign the current constitutional order so that the problems created by the passage of the Foreshore and Seabed Act 2004 do not happen again.

The Statement does not re-visit the many arguments raised by Māori on the matter since 2003, arguments which others will no doubt traverse with you. Instead we simply submit –

- 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 That the Act should be repealed.**
- 4. That the Crown engage in a good faith and ‘longer conversation’ with Māori as recommended by the Waitangi Tribunal to develop and refine a new foreshore and seabed regime following the deliberations of this Panel.**

On September 12, 2003 the people of Ngāti Kahungunu met with the Crown on this marae to outline its opposition to the then proposed Foreshore and Seabed Bill. In the statement presented at that Hui it was stated that –

‘There is a certain inevitable and disturbing prescience in the lessons of history. One hundred and thirty years ago Ngāti Kahungunu was at the forefront of what became known as the Land Repudiation Movement which was set up (because) the whenua was being so rapidly taken...Ngāti Kahungunu was becoming the most land-less of Iwi...At a hui in August 1873 (also on this marae) Te Ataria noted that ‘the plains and mountains are being removed from under our feet, the hundred pathways of Heretaunga are being trampled by angry greedy people. Soon all we may have left will be the sea and the beaches although even now Pākehā covet our fish, drain the waters that feed the sea, and take away the rocks and sand...the ocean is in danger of being taken like the rest of the whenua’.

The eventual passage of the foreshore legislation was yet another sad affirmation of the fears held by the tīpuna.

THE CONTEXT -

Ngāti Kahungunu is aware of the need for context and our Statement requires some explanation. It is our hope that such an explanation may clarify the arguments we wish to propose (or re-propose) in support of a different approach to the issue.

We also hope that this context may encourage the Panel to be innovative in its reading of its Terms of Reference and willing to conduct its deliberations with insight and imagination as well as abstraction and detachment.

Perhaps most importantly we hope that some contextualisation will help convey a little of the dismay and frustration felt by Ngāti Kahungunu since the first announcement by the Crown that it would legislate to overturn the decision in the Ngāti Apa case. We appreciate the need for the Panel to find practical and reasonable solutions but we would be doing our people a disservice if we did not at least note that for us the issue has never just been a sterile debate about rights or politics but a question that goes to the essence of our integrity and our place as tangata whenua.

The consternation has resonated as a deep sense of hurt because our views were not only dismissed but abused in the dishonest advocacy of the Crown, most other political Parties, and the media. The kuia Hana Cotter perhaps summed up our people's response best. In her kōrero to the first foreshore Hui-a-Iwi that we held in Kahungunu she asked 'Why do they continue to treat us so unjustly...when they have already taken so much, why do they want more...when they talk so much about being honourable people why don't they respect our tikanga?'

In a series of waiata composed during that period Andrea Robin expressed similar sentiments and described the eventual hikoi to Wellington as a lament

'Titiro, titiro, te hīkoi o nga Iwi katoa
Whakarongo ki te tangi o te whenua...'

Kuia do not often openly speak of disrespect, and waiata only sing of sadness when the issue is particularly unjust. It is a cause of profound regret that not just Kahungunu, but all of our people, have had to endure so much because of the hasty, ill-considered and essentially colonising actions of the Crown.

In spite of that hurt the Iwi has always tried to look for a resolution that will guarantee the relationship we have with the foreshore and seabed in a way that is consistent with our tikanga and Te Tiriti. Indeed over the last six years many of our people have worked hard to research, investigate and develop innovative responses that the Crown has chosen to ignore.

We welcome this opportunity to contextualise some of that work, and indeed some of the hurt and commitment that motivated it. We would stress that because the issue has been such a deeply felt one the proposals we originally made in 2003, and which we make again now, are a refinement of our tikanga and rangatiratanga rather than an interrogation of the common law. They are a search for justice in its fullest sense rather an acceptance of what others may see as political 'reality'.

The base of that search was laid during the first Kahungunu foreshore and seabed hui held at Matahiwi Marae on August 17, 2003. It was formulated around part of our history and became known as the ‘Seven Waves of Takitimu’ strategy. The steps in the strategy were -

1. To hold a series of Hui-a-Iwi and Hui-a-Hapū to wānanga on the tikanga of Tangaroa and Hinemoana and to develop appropriate policies to counter the Crown proposals. It was at the first hui at Matahiwi that a decision was made to organise a hikoi throughout Kahungunu.
2. To prepare and present Statements to the Crown at the consultation hui at Omahu Marae.
3. To participate in the three National Foreshore Hui at Ngahutoitoi Marae in Hauraki, Omaka Marae in Te Tau o te Ihu, and Waipapa Marae in Tamaki Makaurau. It was at the last hui that we sought support for a national hikoi to complement our own.
4. To prepare and participate in an urgent Waitangi Tribunal claim.
5. To organise and participate in the Hikoi, culminating in the presentation of a memorandum at Parliament.
6. To wānanga at an international level which involved research and participation in two different arenas. The first was to seek international adjudication by inviting and making submissions to the United Nations Special Rapporteur on the Rights of Indigenous peoples and appearing before the Committee on the Elimination of Racial Discrimination (the CERD Committee) in Geneva, Switzerland. The second was to investigate other indigenous relationships with the foreshore and seabed to inform our own response.
7. To participate in active political lobbying.

It is fair to say that no issue has mobilised and antagonised so many people in Kahungunu since the land frauds of the 19th century. The strategy tried to co-ordinate that concern and promotes a reaffirmation of our mana, our tino rangatiratanga, and the tikanga upon which they are based.

We have an ancient tradition of living with the sea on one of the longest coastlines in the country and we have never erected any artificial boundaries between the whenua and the moana, between the foreshore and shore, or the seabed and the seawaters. They are part of our whakapapa, and when we use the term ‘tangata whenua’ we refer to ourselves as people who live with the whenua in its fullest sense.

For in our tikanga the whenua has never just been what others may call the ‘land’. Rather we conceptualise it as everything that nurtures, flows through and is interwoven with it. The seabed is merely land surging with water and the ‘foreshore’ is just the step between where the water may rest and rise. Every Hapū, indeed the Iwi itself, exercised its mana from our mountains to the depths of our seas. The law we

lived within was a law from and for the land, and it included entitlements and obligations that we learned from the moment our mothers took the whenua that had sustained us in their wombs and buried it in the rich soil or the watery depths of the whenua that would feed us in life.

When Rongokako took his giant stride across the sea from Te Matau-a-Māui to Mahia he was walking the talk of our whenua. When we rejected the legislation and travelled to Geneva or to Wellington we were walking the same talk. We walk it still today, and it is the conceptual foundation from which we make this Statement, animated only by our sense of right and our sense of betrayal at what the Crown has done.

As intimated earlier our Statement focuses on three parts of the Strategy.

1. International Adjudication –

The Panel will no doubt be familiar with the CERD Committee Report Decision 1 (66) 2005 and the mandate of the United Nations Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples. However because of our involvement in both processes we wish to briefly address them as they are pertinent to our view of the innovation needed to properly resolve the issues before the Panel.

As part of the Treaty Tribes Coalition Ngāti Kahungunu originally made written submissions to the CERD Committee and representatives also subsequently travelled to Geneva to appear in person before the Committee.

In relation to the Foreshore and Seabed Act the Committee found that ‘the legislation appears...on balance to contain discriminatory aspects against the Māori, in particular in its extinguishment of the possibility of establishing Māori title to the foreshore and seabed and in its failure to provide a guaranteed right of redress’.

The Crown response, apart from the sound-bite dismissal of the Committee as somewhere ‘on the fringes of the UN system,’ was to suggest that although the Committee found certain ‘discriminatory aspects’ the Act itself was not in breach. However in our view that response was at best illogical and at worst fatuous because any statute that has ‘discriminatory aspects’ is by its nature an act of racial discrimination under the Convention and therefore a breach.

We further suggest that such a breach necessarily means that the legislation is also in breach of Te Tiriti. There are of course a number of other grounds upon which the Act is in breach of Te Tiriti, as the Waitangi Tribunal found, but the fact that it also breaches international human rights standards by extinguishing even the ‘possibility’ of establishing title is especially troubling and egregious.

The findings of the Special Rapporteur were similarly troubling. It concluded that the Act was a ‘backward step for Māori’ (Para 55) because it extinguished ‘all Māori extant rights to the foreshore and seabed’ (Para 79). It also recommended that ‘the Act should be repealed or amended...and the Crown should engage in treaty settlement negotiations...that would recognise the inherent rights of Māori...and establish regulatory mechanisms allowing for the full and free access by the general public’. (Para 92).

The Report also recommended constitutional change to ‘regulate the relationship between the government and Māori people on the basis of the Treaty’. (Para 84).

The major Parties rejected the Report, the Government because it was ‘unbalanced’ and the National Party because the UN had no business telling New Zealand what to do. Yet the Report was produced by one of the most senior UN Human Rights institutions and the fact that the major Parties saw fit to publicly belittle it was not just indicative of the climate they were fostering over the foreshore issue but a hypocritical belittling of the whole human rights framework.

However for our people both UN Reports reaffirmed the rightness of the stand we were taking. The broader issues they raised such as those to do with the constitution remain pertinent in our discussions with the Panel today.

2. International Precedents –

As the Panel will know, many Māori people in the last two or three decades have worked and even signed treaties with other indigenous nations. We suggest that such networks offer illustrative precedents that are relevant to the work of the Panel.

At the level of philosophy and cosmogony they indicate in many cases an understanding of the relationship between people and their lands and seas that has a remarkable symmetry with that of our people. For example in the Kumulipo, the great cosmogony of the Kanaka Maoli of Hawaii, the land and sea moved and slipped into each other from the moment of creation -

‘Hanau kane ia Wai ‘ololi
O ka wahine ia wai ‘olola
Born male for the narrow waters
Born female for the broad waters...’

Alongside the philosophical symmetries there are a number of international attempts currently being made to reposition the legal understanding of the foreshore and seabed, many of which have been proposed in nations where the Indigenous Peoples have regained their independence. It is our view that they are pertinent to the Panel’s Brief to ‘consider the approaches in other Commonwealth jurisdictions’.

Thus in Samoa and the Maldives the artificial distinction between the foreshore and seabed is broken down and the ‘coast’ and sea are regarded as integrated parts of the land. In the former case over 80% of the land use is determined by traditional rules rather than strictly defined common law property requirements, while in the Maldives the beaches, coral reefs and lagoons are all the ‘common wealth’ of the people with community-based rather than individual use rights and title.

The new constitution of Bolivia promulgated earlier this year vests a set of discrete rights in Pachamama or the Mother Earth. They are ‘natural rights’ and any other rights can only be exercised consistently with them. The country is landlocked but its ‘inland sea’ Lake Titicaca is part of the lifeblood of Pachamama and thus the land itself. Of course Bolivia is not a Commonwealth jurisdiction but it has instituted what

its President Evo Morales has termed ‘a constitution steeped in the indigenous world view’ which in our submission makes it relevant to the Panel’s deliberations.

3. A Kaupapa-based Foreshore And Seabed Regime –

In suggesting a repeal of the current legislation Ngāti Kahungunu is mindful of the need to suggest a replacement regime. Indeed in our Statement at the Crown Consultation hui in 2003 we indicated the work being done in that regard.

However we were (and still are) mindful that a legislative framework that merely restores a notion of customary rights defined within the common law doctrine of aboriginal title is neither an appropriate nor just solution. Indeed it is our view it would only be marginally less restrictive than the current process under the Act because it would retain a presumptive Crown authority to define the nature and extent of our rights, something it is neither capable nor entitled to do.

It is our view that Te Tiriti did not grant the power to the Crown to displace tikanga Māori nor the Māori systems of tenure. Even if lawyers argue to the contrary we suggest that such a presumption so clearly sourced in a colonising right to dispossess has no place in a polity seeking a meaningful relationship based upon Te Tiriti.

We therefore suggest the ‘longer conversation’ between Māori and the Crown to negotiate a different framework and also suggest that a possible starting point for the framework could be a concept of tikanga title.

The notion of a tikanga title would reaffirm the relationship between Māori and the foreshore while hopefully addressing two of the main but unsubstantiated Crown reasons for taking the foreshore from us.

The first was its persistent allegation that if Māori had ‘freehold title’ and ‘owned’ the foreshore and seabed we would sell it to the highest bidder. Iwi took great pains of course to make it clear that we had no intention of doing so, a point that is actually reaffirmed in the notion of tipuna title.

Indeed although a tipuna title is the title in and for the whenua from which all other use rights developed it would be wrong to interpret it as ‘equivalent to’ or even ‘greater or lesser than’ a Pākehā freehold title. The title quite clearly derives from a different jurisprudential base where ownership in a Pākehā sense was unknown and the stricture of inalienability was sourced in what Te Rarawa Kohere has called our ‘tūrangawaewae of thought’. It anticipates prescriptions and proscriptions that are only comprehensible within tikanga.

We wish to point that it has been of particular concern to us that since the passage of the Act the Crown has alienated large sections of the foreshore and seabed to various private enterprises, thus actually doing what it had alleged we might do. The hypocrisy in those actions belies any notion of Crown honour.

The second argument the Crown used to justify taking the foreshore was the need to guarantee public access. In a cynical campaign of fear mongering it implied that Māori could not be trusted and that it would hold the foreshore for what it called the ‘benefit of all New Zealanders’. The National Party ran a similarly destructive

campaign with billboards proclaiming that the ‘beaches belong to all New Zealanders’ and that the issue was ‘Kiwi not Iwi’. As we had done with the question of alienation we tried to reassure people we had no intention of denying access but were ignored.

A tipuna title however prohibits the withholding of access subject to the obligation to respect the mokopuna of Tangaroa and Hinemoana. Indeed our people have many stories of establishing kauhanga or passageways to allow other people to use a fishing ground or enjoy a beach. The kauhanga were in effect a right of access.

We would stress however that our willingness to grant access in this way necessarily requires reciprocity. Indeed one of the most grievous injustices perpetrated by the Crown has been its demand that Maori must allow unfettered access while pakeha landowners adjoining the beach do not. This has always seemed a particularly gross act of discrimination which we hope will not continue. If one hapu granted kauhanga to another it was expected that the grantee would reciprocate. We expect the same from our pakeha neighbours.

In summary tipuna title are consistent with the obligation to manaaki manuhiri while protecting the whenua. The passage of the years and the taking of the whenua have not altered that obligation or the means by which it should be protected. They are part of who we are and part of our tino rangatiratanga.

We would be willing to engage in a ‘longer conversation’ with the Crown and other Iwi to refine and further research the idea of tipuna title and to negotiate how it might be recognised in legislation. There are precedents for such discussions in the Joint Working Parties established during the fisheries negotiations.

We therefore request the Panel

- a) To give consideration to the idea of tipuna title as a base for resolution and
- b) Suggest a further forum to negotiate its parameters prior to legislative recognition.

A Constitutional Realignment –

We would be remiss if we did not express to the Panel our fear that our people might have to endure yet again the hurt caused by the foreshore and seabed legislation.

Less than twenty years after Te Ataria expressed the fear that we might lose the beaches Kahungunu hosted the first sitting of the Māori Parliament at Waipatu Marae. The aim of the Parliament, like other initiatives of the time, was to find a new institutional expression of mana that would enable our people to once again be constitutionally self determining and thus protected from the perfidy of the Crown.

The Māori Parliament was unable to survive the opposition mounted by the Crown but the idea has never faded. It was a constant theme in the hui held during the internal constitutional review conducted throughout Kahungunu in 1998 and during the Hui-a-Iwi associated with the foreshore.

We do not envisage that the necessary realigning of the current constitutional order will be easy. However we are convinced that the discussion is necessary. We are also convinced that the necessary change requires not just a tinkering with the existing

Parliamentary system or even the establishment of a republic. Rather it requires in our view a more fundamental re-constituting that results in a new system with a new legitimacy taken from this land and the ineffable hope of its people.

If that should come to pass then perhaps the injustice of the foreshore and seabed may finally be laid to rest.

- Presented by Moana Jackson.