TE RUNANGA O TE RARAWA

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**Submission from Te Runanga o Te Rarawa to the Ministerial Review Panel on the Foreshore and Seabed Act 2004**

**To:** Ministerial Review Panel

 Ministerial Review of the Foreshore and Seabed Act

PO Box 180

Wellington 6140

2 April 2009

**From:** Haami Piripi

Chairperson

 Te Runanga o Te Rarawa

PO Box 361

KAITAIA

***Introduction***

1. Te Runanga o Te Rarawa (“the Runanga”) is constituted by twenty three Marae communities situated between north Hokianga and Te Oneroa a Tohe (Ninety Mile Beach). It is also constituted by a population estimated to be thirty thousand people, eighty percent of which live outside the rohe. The Runanga has been engaged in direct negotiations with the Crown on our historical Treaty settlement claims for eight years and signed an Agreement in Principle on 7 September 2007. The Runanga is also a participant in the five iwi forum of Te Hiku o Te Ika which is currently negotiating the return of the Aupouri State Forest and Te Oneroa a Tohe. As you will also be aware Te Rarawa entered into direct negotiations with the Crown under the Foreshore and Seabed Act 2004 (“the Act”) in 2007. Hence the Runanga is very pleased to be able to make this submission in support of the work of the panel.
2. This submission has four aspects. The first describes the basis upon which we make this statement by providing the whakapapa right of Te Rarawa to uphold the manawhenua and manamoana of our rohe. The second section provides an overview of previous assertions made by Te Rarawa in relation to our takutaimoana. We refer to early 19th Century petitions, subsequent court actions and the reiteration of aspects of our submissions already made to the Tiriti o Waitangi Tribunal, the Parliamentary Select Committee on the Foreshore and Seabed Bill and the United Nations Committee on the Elimination of Racial Disrimination (“CERD”). The third element of our submission will discuss our experience and views in relation to the implementation of the current Act focusing upon issues like the Territorial Customary Rights test, the land qualification criteria and the value of the research that has been undertaken to date. We will also discuss for the Panel our approach to the negotiations thus far and the framework that we have developed for retaining manawhenua and manamoana in our rohe. Finally we will outline a number of key observations that we have made in the course of our negotiations culminating in describing the ramifications of the current suspension by the Crown of direct negotiations. We expect that this information will be useful to the Panel and will contribute to a path of continuous improvement of the current legislation and regulations concerning our Takutaimoana.

***Te Mana o Te Rarawa***

*Mana tuku iho.*

*Ko Ranginui e tu atu nei, hei tuanui,*

*ko Papatuanuku e takoto nei hei whaariki*

*ko te reo me nga tikanga hei tahuhu*

*ko te iwi e, he poutokomanawa.*

1. This simple paradigm is an overarching Maori world view which establishes a framework between earth and sky and a ridgepole of knowledge providing for the sustenance of humankind. Like other Maori, this is the entry point of our existence and context within a myriad of genealogical relationships beginning with Atua Maori. Like other iwi, Te Rarawa also has its own unique history, ancestors, waka and tribal features. But perhaps it is appropriate to begin with Tawhaki nui a Hema whose ancient karakia remains in use among our elders of today. Through Tawhaki we have established the canoe trails of Te Moana Tapokapoka a Tawhaki to the many hawaikis; Hawaiki nui, Hawaiki roa, Hawaiki pamamao. Several generations later, Kupe followed the canoe trails and after circumnavigating the North Island (and attempting the South) departed Aotearoa (so named on arrival by his wife) from Hokianga which refers to Te Hokianga nui a Kupe . These names of course have remained with us to this day and are already recognised and used by our fellow pakeha citizens as markers of our own history and mana imbibed about sixteen hundred years ago.
2. There are many more Kupe names and stories throughout our rohe and these pertain to features and events ki uta (landward) and ki tai (seaward). Upon his return to Hawaiki Kupe’s waka was readzed and brought back to Hokianga by his grandson Nukutawhiti who was accompanied by his sister and her husband Ruanui on the waka Mamari. The journey of these waka is rich with stories and descriptions about sea phenomena and events that have locked the Te Rarawa psyche into a seafaring and ocean going iwi. This signature of our iwi was also strengthened by our descent from the Kurahaupo waka which arrived via the Kermadec Islands having been damaged there. However the waka that is utterly unique to the Te Rarawa iwi is the Tinana, captained by Tumoana who is the eponymous ancestor of our iwi. Tumoana, after some years as an accomplished iwi leader and sailor along the western seaboard, also returned to Hawaiki establishing further the canoe trails of our forebears and our adherence to them. Hekenukumai Puhipi of Te Rarawa followed Tumoana’s canoe trail and sailed the traditional Aurere Waka to Rarotonga using only traditional star navigation knowledge. For us in Te Rarawa this was a fulfillment of our history passed down by our ancestors and confirms our manamoana between here and Hawaiki.
3. The mana of Te Rarawa is derived from these ancestors and is ongoing in the contemporary re-emergence of sailing waka, which are rediscovering the lore and ancient knowledge of star navigation. The paradigm within which we define mana has been described by Maori Marsden as having three elements; Mana tupuna, Mana whenua and Mana tangata. Mana tupuna refers to the ira atua of the person which originated with Tane and has been passed down via the whare Tangata to all his descendants. The value and currency of this mana is determined by whakapapa. Mana Tangata refers to the individual traits and competencies of an individual and their ability to generate industry. It also refers to the leadership of a community and the ability of Rangatira to rally and organise their constituency. Mana whenua refers to the ability of mana holders to exercise a right and ability to utilise natural resources through reciprocal kinship relationships. The exercise of this mana is predicated upon mana Tupuna and mana Tangata usually expressed as Rangatiratanga over areas and resources.
4. It follows that the manawhenua of Te Rarawa is inextricably bound within our extensive ancestry and long history and survives today through new generations of descendants supported by centuries of nomenclature, rites and practices which define the Iwi of Te Rarawa who are signatories to Te Tiriti O Waitangi and represented today by Te Runanga o Te Rarawa. The bounds of our mana lie between space who we know as Ranginui and the centre of mother Earth who we know as Papatuanuku. Its breadth lies landward and seaward to the pathways of our ancestors who have traversed the entire Pacific ocean and sown the seed and interred the remains of our forebears among the isles, islands, bays coves and harbours of Tawhaki and Kiwa. This is the mana that provides us with the authority to make this submission

***Mana Whakahaere***

1. Numerous Rangatira of Te Rarawa have asserted this mana over generations, however the first time it was expressed in pakeha terms was our signing of the 1835 Declaration of Independence. It was next expressed in the tuku of whenua and takutaimoana rights to pakeha who came to reside among us. It was further confirmed and guaranteed in the Tiriti o Waitangi which is a national legacy that we have all been educated in. It was recognised every time there was a written transaction concerning land or sea rights indicating from whom the mana of this area or practice was derived. But within five years the understanding which had been reached became lost in the milieu of the colonial culture. This gave rise to letters, petitions, and submissions and while these generated inquiries they were inevitably flawed by a monocultural process.
2. Moreover the interference by pakeha with our mahinga kai and mahinga mataitai deprived our communities further of adequate sustenance and nutrition. The rape of the grey mullet and the Toheroa on Te Oneroa a Tohe, for example, was one factor that gave rise to the claims in the 1950’s by Te Rarawa and Te Aupouri for land ownership rights over the Beach. That court action was a community effort consolidating the history and information about the beach into one arguable case and set a benchmark in the expression of our mana.
3. Te Rarawa was also a principal participant in the Muriwhenua Fisheries and Land claims and signed the infamous Sealords Agreement. In this respect we consider that any manamoana in relation to commercial fisheries has been encapsulated within the currently established framework for Maori commercial fisheries, including the legitimacy of Te Ohu Kaimoana and its subsidiaries. However, the Crown has failed to fulfill its obligation to provide us with any opportunity to establish a new and improved customary fishing regime falling back instead upon the old archaic section 27 of the Fisheries (Amateur Fishing) Regulations 1986 where they retain legislative authority. This failure by the Crown has resulted in dysfunctional relationships and inefficient management. This was an important feature of our submissions on the Foreshore and Seabed Bill claiming that our customary interests were being undermined by the Ministry of Fisheries. We argued that the Bill would result in the effective confiscation of our customary interest given our long and deep association with the Takutaimoana. We also indicated to the select committee that because of our special relationship and reliance on the Takutaimoana the Bill had the potential to cause considerable conflict between Maori and other New Zealanders.
4. Te Rarawa also made written and oral submissions to the United Nations CERD Committee which concluded, among other things, that the the legislation appeared to the Committee, on balance, to contain “discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and in its failure to provide a guaranteed right of redress, notwithstanding the State party’s obligations under articles 5 and 6 of the Convention”..
5. Notwithstanding our abhorrence of the Act and its effects Te Rarawa could not abdicate from a responsibility to continue to assert our mana over takutaimoana and our entire rohe. Te Rarawa coastal Hapu communities remain relatively isolated and actively lead any takutaimoana activities within their rohe. As an iwi we also have an added responsibility to champion these interests. The Act offered us the only opportunity to express these interests in contemporary legal terms and would have the effect of ensuring some form of ongoing recognition of our presence by pakeha. This was an extremely controversial issue among the thirty two Hapu of Te Rarawa and proceeding with negotiations under the Act as we decided to do was not supported by a number of Hapu and marae. It was and remains our view that anything we obtained through the course of negotiation would have to amount to more than the Crown asserts we have now. It was a pragmatic decision based on our strategic analysis and an ambition to move beyond grievance-driven activities.

***Squeezing a Square Peg into a Round Hole***

1. Our subsequent experience of the Act and the limitations it places on our ability as applicants to establish the full nature and extent of our customary interests, including proprietary interests, was reminiscent of raupatu legislation which established goals that could never be fully achieved. The Act is clearly intended to enable a minimalistic definition of site specific activities and in doing so, remove any further and ongoing interest in the remaining aspects of takutaimoana. This was utterly inconsistent with the manawhenua and manamoana described earlier. Our response was to take a holistic approach by contextualising each agreed mechanism into an iwi-wide framework which reflected our manawhenua (refer to map attached). This gave us a comprehensive picture of where and how any new rights would be implemented and provided a benchmark for what we would and would not accept. However, we found that the Crown’s interpretation of the Territorial Customary Rights provisions required hurdles that were impossible to meet.
2. When Te Rarawa agreed to enter negotiations a cursory investigation had shown that a significant area of Maori owned land would meet the test of continuous occupation. However as these lands went through the sieve of conditions required for their inclusion under the Act a large number were asserted by the Crown to be disqualified. After a while we were forced to become more innovative in order to combat the impossible task of satisfying the criteria (refer to our mechanisms framework). There is also a fundamental flaw in the Act in relation to its institutional focus. The negotiation process requires all the rigour of iwi mandate which is expected of historical claim negotiations but then concentrates on individual land interests and localised hapu rights as the rationale for instruments of recognition. This has caused confusion among our iwi constituents and dissention between the iwi organisation and some Hapu for whom it is theoretically possible to enter into their own negotiations. Other legislation and regulations within the fisheries sector already identify iwi as the appropriate level of organisational agency with whom they can engage - it is difficult to see why this cannot apply in the arena of foreshore and seabed legislation. In any event the Act should be clear as to whether it will work through mandated iwi-wide authorities or through individual land owners and Hapu.
3. The Act also perpetuates injustice in two ways. The first is the removal of our access to our manawhenua/moana interest in the Takutaimoana and the second is the deliberate exclusion of WAI claimed lands from any possibility of obtaining future territorial customary rights. The exclusion of these lands makes a mockery of the Act and exposes the lack of intent by the Crown to adequately provide for our interests. It also slows our forward momentum and weakens our strategic position. Historical interests within the foreshore and seabed arena can and do inform the nature and extent of our extant or contemporary rights – whether it be under the legislative tests of the current Act, or under the common law doctrine of aboriginal title.
4. It has been our experience also that no cognizance is taken by the negotiation process of the impact of colonisation on the claimant iwi. Socio-ecomomic conditions are irrelevant to meeting the tests under the Act and are not a consideration when determining criteria eligibility. Nor are the historical economic circumstances of any group considered in the examination of land sales. The recognition of these elements is absolutely necessary in analyzing and assessing land transactions and manawhenua/moana.
5. Another issue is the lack of recognition of the impact of the introduction of the Quota Management System upon our communities where small iwi customary/commercial fishers were put out of operation as a result of their inability to produce a documented catch record which would then lead to quota. The notion of a customary commercial right is not new and is quite capable of being recognised and expressed in a contemporary form. The Kaikoura whale watch and the Titi Islands mutton birding are but two examples. The impact of this loss of iwi capacity on our presence on the sea and on the staple diet of our households has been debilitating, and predictably there is no ability in this Act to redress this situation. It is our observation that no other New Zealand citizen would be subjected to such draconian and transparently inequitable measures.
6. It is our view therefore that the Act as it is currently drafted does not have the intent nor capability to completely and appropriately recognise and provide for our manawhenua/moana interests and rights, including our customary proprietary rights. Underlying the practical implementation of the Act, however, is the spiritual fabric of our ancient culture. The Act has completely smothered our history of association with the Takutaimoana and is analogous to the laying of a red blanket over the people smothering our ethnic identity and stifling our spiritual expression. Nowhere is this more apparent than with the Ara Wairua where the Act has provided for its continued exclusion from our influence and control. While we have attempted to become creative about how we could provide for this customary aspect of the takutaimoana, the Act is really incapable of meeting our full demands. This is perhaps exacerbated by a further factor that is a favourite of the Crown and that is the paralysis of negotiation progress on the basis of so-called cross claim issues. In our case, while we are the only Muriwhenua iwi engaged in Foreshore and Seabed negotiations, we have been expected to cater to the assertions of our neighboring iwi by a requirement for their sign off of any agreement we might reach. This extra hurdle is probably the most difficult to get over in an area like ours which has over a thousand years of layered occupation by a number of ancestral groups. It is also an area where the Crown is beginning to abdicate responsibility for contending that this really is not their business. This of course is nonsense - the Muriwhenua Land Report is riddled with examples of Crown interference in manawhenua, either on its own behalf or on behalf of a favoured iwi of the time. It is also ironic that the Crown purports an inability to assist us as claimants with the historical boundaries while it spends mega resources on doing exactly the same work to examine, test and delineate our own mana whenua.
7. But the process has not been all bad - notwithstanding the shortcomings of the Act and the difficulty in achieving an equitable conclusion the machinery that has been put in place by the Ministry of Justice to undertake negotiations has been very good. The caliber of staff and rigour of processes has been useful in facilitating our progress and we have made significant progress on a number of fronts especially in the arena of research, which we have found extremely useful. The pedantic and almost insurmountable nature of the test and criteria within the Act requires an exceptional team of officials and ideas to try to make a silk purse out of a sows ear. What has been most apparent is the decision to utilise highly skilled Maori staff and tikanga Maori processes and this has made an enormous difference to the nature and pace of negotiations. This bureaucratic capital should not be wasted in any future scenario concerning the implementation of the Act.
8. We have engaged our legal counsel, Pacific Law, to provide us with some advice in relation to whether the Act adequately provides for our customary proprietary rights. We have also sought their advice on what would be an ideal approach to take to ensure that hapu/iwi customary proprietary rights and interests are appropriately and effectively recognised and provided for.
9. Pacific Law has prepared an opinion for us on these matters, which is attached for your perusal. We agree with and endorse the proposed approach advanced in the opinion and our recommendations in paragraph [TBA] below reflect this.

***Turning Toward the Future***

1. For over 150 years now Te Rarawa has been in an adversarial relationship with the Crown over aspects of our mana whenua/moana and the dynamics of such a partnership have been both alienating and debilitating. At times in our history we have struggled with the dichotomy of maintaining the quality of a Treaty partnership against a backdrop of the continuous erosion of our manawhenua/moana. In the instance of this Act, it was promulgated and passed while Te Rarawa was fully engaged in direct negotiations over our historical claims and totally exposed a lack of goodwill on the part of the Crown in providing redress for this important arena of customary identity and activity. The resulting dilemma could have justified a valid complaint but there does not seem to be an appropriate mechanism through which such a complaint might be considered that could result in any adequate resolution. In any event we were so far into the negotiations (four years) that we could not turn back and risk slipping to the bottom of the direct negotiations queue.
2. For generations our forebears have been challenged by this dilemma and have erred on the side of reconciliation based on our commitment to Te Tiriti o Waitangi. In this case we were also guided by an established strategic plan and specific objectives which enabled clarity of analysis and benchmarks for success within the domains of our manawhenua/moana. Our strategic vision in the area of Treaty settlements is to complete all negotiations and establish the resultant redress mechanisms providing iwi, hapu and whanau benefits. The Foreshore and Seabed negotiations are the final aspect of our holistic approach to the settlements process and could take us beyond a grievance-type approach and into a more enterprising and developmental mindset focusing upon language and culture, education and achieving asset productivity. This is a hard vision for our people to buy into because it appears so unattainable. We were promised something akin to this at early Tiriti o Waitangi Tribunal hearings in the 1980’s and again many times subsequently however it remains the unfulfilled dream of both the dead and the living generations of Te Rarawa people.
3. We have already referred to the controversy surrounding the Runanga’s decision to enter into negotiations and the strain that it put on our existing mandate and relationship with our coastal communities. This has required us to work harder with individual constituents expending a significant amount of our own resources. The Panel may be interested to learn that during the Historical and Foreshore and Seabed negotiations, Te Rarawa has expended approximately $1.5 million of its own money to support the processes. It was a devastating blow when the Crown decided unilaterally to suspend our foreshore and seabed negotiations and close down our existing contracts that were supporting our negotiations. It undermines our status in the negotiation, our credibility with our stakeholders and any progress we may be making in other negotiations. Once again circumstances have conspired to defeat us in a litany of events where progress comes to mean standing still.

**Conclusion and Recommendations**

1. Te Rarawa holds mana whenua and mana moana rights and interests, including customary proprietary rights and interests, over the land and resources within its rohe moana, including the foreshore and seabed, which Te Rarawa has not relinquished.
2. It is of utmost importance that tangata whenua access, kaitiakiatanga, mana whenua and mana moana of Te Rarawa is recognised and provided for appropriately in our rohe moana, including the foreshore and seabed.
3. The current framework, in our view, does not appropriately provide for and recognise the nature and extent of our customary proprietary rights in the foreshore and seabed within our rohe. Taking into account the legal advice of our legal counsel Pacific Law, we recommend to the Panel that the following broad approach should be taken to appropriately and effectively recognise and provide for the customary proprietary interests of hapu/iwi, including Te Rarawa, in the foreshore and seabed within their rohe in a way that also maintains and allows for the enhancement of mana whenua.
4. Based on the view that had the Act not been passed, the likelihood is that Maori would have been able to establish native title in the coastal marine area. We recommend that the Crown and Maori enter into discussions to effectively give effect to Maori proprietary rights.
5. In this regard, the overarching principle that should guide arrangements between the Crown and iwi should be that where natural resources in the coastal marine area are being privatised or made available for commercial use and benefit, then an appropriate share should be allocated to the relevant iwi who held customary proprietary rights and interests in that area at 1840 – there would be no “test” as such but an appropriate allocation model would need to be agreed between iwi and the Crown. This principle has of course been adhered to in the past with the 20% allocation to iwi of fishing quota and the 20% allocation of aquaculture. Such an allocation should apply across the board, including to minerals and petroleum exploitation, and to any type of space allocation whatsoever.
6. In relation to giving effect to a right to active management/kaitiakitanga of the coastal marine area, we consider that the criteria set out in the TCRs provision including the manner in which continuity is set out, should be used as criteria to ascertain eligibility for groups to enter into co-management regimes with the Crown.
7. We wish to thank the Panel for meeting with us today – we greatly appreciate having this opportunity to speak with you and we look forward to continued participation in the Review process.
8. We also welcome the opportunity to meet with you again within or near our rohe when you undertake your consultation hui around the country later this month.