A STATEMENT BY NGĀTI KAHUNGUNU ON THE GOVERNMENT CONSULTATION DOCUMENT ‘REVIEWING THE FORESHORE AND SEABED ACT 2004’.

- Presented by Moana Jackson.

INTRODUCTION:

This Statement analyses the Crown Consultation Document on the Foreshore and Seabed and offers a proposal for resolution of the issue.

In preparing the Statement we have borne in mind what we said to the 2009 Ministerial Review Panel on the foreshore and seabed, namely

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 That the Act should be repealed.

Our views have not changed, and we acknowledge the efforts that have been made to date to repeal the legislation and address some of our concerns. However we also remain committed to a resolution beyond repeal that is based upon a search for justice in its fullest sense rather than an acceptance of what others may see as political 'reality'. It was a pursuit of that 'political reality' by the last government that created the inequities in the 2004 Act.

Since 2003 we have therefore tried to seek a resolution that is consistent with the mana of every Iwi and Hapū as well as the relationship envisaged in Te Tiriti. It has led us to develop an approach that has naturally been shaped by our own history living on a long coastline where Hapū have always exercised their authority in relation to the foreshore.

That history, like that of other Iwi and Hapū, has also of course been shaped by a struggle to preserve our mana in the face of constant attempts by the Crown to dismiss or constrain what it means. We referred to that reality in our statement to the previous government on this issue in 2003 when we noted that "There is a certain...disturbing prescience in the lessons of history …At a hui in August 1873 (one of our tīpuna) Te Ataria complained that 'the plains and mountains are being removed from under our feet... trampled by greedy people. Soon all we may have left will be the sea and the beaches although even now Pākehā covet our fish and take away the rocks and sand…the ocean is in danger of being taken like the rest of the whenua".

The concern and grievance of that history has been made worse by the injustices caused by the 2004 Act. In our submission last year to the Ministerial Panel we referred to that sense of grievance and quoted one of our kuia Hana Cotter who asked at our first Hui-a-Iwi on the issue "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 the long debate over the rights and perceived wrongs of this issue it has been too easy to forget that deep sense of bafflement and hurt. We do not wish to forget today, but rather argue that if any resolution is to be equitable it must be aware of that history as well as the hurt that has too often accompanied it.

Like the Prime Minister we seek an 'elegant' solution but we are clear that 'elegance' cannot exist divorced from context. We are equally clear that 'elegance' is not necessarily the same as fairness and justice.

In the brief time available to us since the release of the Crown Consultation document we have tried to measure its proposals against that simple criterion of whether they are fair or just, whether they assuage the sense of grievance. It is with regret and disappointment that we have concluded that they do not.

We acknowledge that there are positive aspects in the proposals. However it is an acknowledgement tempered by the realisation that they could have done more, a view expressed best by one of our Ngāti Kahungunu lawyers, Carwyn Jones. In a Brief from Canada where he is currently completing his Doctorate he commented "The proposals are certainly an improvement on the (2004 Act). But then, almost anything would be".

This Statement analyses what we believe are the shortcomings in the Proposals and offers a different resolution based on research and discussions we have been having since the issue first surfaced six years ago.

The Statement has three Parts –

Part One is an overview of the Consultation Document.

Part Two considers some specific proposals outlined in the Document.

Part Three outlines a possible resolution that we believe is more just both in terms of the mana of Iwi and Hapū and the relationship envisaged in Te Tiriti.

PART ONE – AN OVERVIEW OF THE PROPOSALS:

Ngāti Kahungunu do acknowledge four main positives relating to the Consultation Document.

1. The proposed repeal of the 2004 Foreshore and Seabed Act.
2. The proposed restoration of rights which that Act tried to remove.
3. The proposed restoration of due process.
4. The acknowledgement that agreements entered into by Iwi under the 2004 Act will be honoured.

However it is of concern to us that the Proposals essentially proceed from the same political and philosophical standpoint as the 2004 Act. While it does promote some changes it ultimately defines Iwi and Hapū rights and title in a way that is as inimical to a fair and just resolution as the existing legislation. It may in the Crown's view be realistic but it does not substantively address many of the issues that made the legislation so problematic for our people.

Among the many grounds our people raised in opposition to the 2004 Act was that it created a sub-set of Māori rights that was fundamentally different and indeed subordinate to those of Pākehā. The current proposals maintain that fundamental prejudice, a point which has been reaffirmed in the description of the proposed Māori 'customary title' as being only a 'constrained property right,' in contrast one presumes to the 'unconstrained' freehold title Pākehā are able to hold in the foreshore and seabed.

That acceptance of a lesser or differential Māori status underscores the Proposals as a whole and no consequent discussion about Iwi veto powers or any other examples proffered by the Crown as apparent proof of its elegance can disguise the prejudice. The Hawaiian writer Kawaipuna Prejean once wrote that "The test of whether any rights regime for Indigenous Peoples is just or unjust is quite simple – does it recognise an equality of rights and restore what has been taken, or does it assert something else?'

It is our considered opinion that the basic kaupapa of the Proposals fail that test.

PART TWO – SPECIFIC ISSUES IN THE CONSULTATION DOCUMENT:

1. THE CROWN PREFERRED OPTION:

The Crown preferred option of "no ownership" or "public domain/ takiwā iwi whānui" does not include any clear definition of what "public domain" would entail. However it is our submission that the overarching idea of nobody owning the foreshore is conceptually flawed.

In tikanga terms whenua has to belong to somebody just as tangata whenua have to belong to the whenua. The idea of the whenua not belonging to an Iwi or Hapū (or not being 'owned' in the Proposal's language) is a diminishment of the relationship our people have with it as well as a denial of the whakapapa and the tikanga through which our mana and rangatiratanga have always been exercised.

Indeed the reality of mana whenua depends upon a relationship with the mana of a particular whenua, and if there is no "ownership" there is no relationship and thus no ability to fulfil the obligations that go with it. Throughout our history whenua has always belonged to someone just as surely as we have sung waiata or recited pēpeha about our belonging to the earth.

The obvious corollary of that reality is that Ngāti Kahungunu has never been able (and would not seek) to claim rangatiratanga in regard to land that belonged for example to Tuhoe. It would have been impossible conceptually, politically, and in terms of tikanga - as impossible in fact as asserting that it belonged to no-one.

In terms of Pākehā law the idea of "no ownership" is a legal fiction that is worrying not only in its reliance on old discredited doctrines but also in its detailed deceit.

The most obvious precedent for the "no ownership" idea is the doctrine of terra nullius or 'the empty land' which once allowed colonisers to take indigenous lands simply by saying there were no people there or that those who were present did not meet certain civilised criteria such as 'the superior genius of the Europeans,' to quote one leading jurist of the time.

It is our view that at the very least the Treaty relationship requires something more substantive and honest than a Crown presumption of nothingness which it will then "fill" with rights it can proscribe and determine.

The notion of "no ownership" is even more problematic however because while the Crown suggests there will be no owner it actually retains for itself a right to control the Foreshore and Seabed – it behaves like an owner while saying there isn't one.

The Proposals make no reference for example to repealing the many statutes which have already been passed to vest ownership in the Crown. The government has in fact made it clear that it will continue to own whatever 'nationalised minerals' might exist in the Foreshore and Seabed. In that context the possibility it may permit Māori access to other 'non-nationalised' minerals is simply further evidence that it will in fact remain the owner in the allegedly new regime of no ownership. In our view that is an unworthy deceit that is also contrary to the good faith relationship envisaged in Te Tiriti.

2. CUSTOMARY TITLE AND RIGHTS:

The Document describes in some detail the "customary rights or customary title" Māori may be entitled to in the public domain. They appear at first glance to be extensive as they include the protection of certain 'customary activities,' the ability to prepare a 'Planning document' to be considered by local bodies in their District Plans and applications under the Resource Management Act, and the right to grant or withhold permission for activities requiring a resource consent from a local body.

However in many ways they are no different to the rights which could have been negotiated under the 2004 Act. Their actual nature and extent continues to be determined by the Crown and while they may now be applied for through Court proceedings the final determination of their practical application still rests with the Crown. Negotiation is in fact the Crown's favoured option for determining the "custom" which reaffirms its position as an "owner" granting or approving rights in the supposedly "no ownership" regime.

The origins of this notion of custom lie in the same colonising law that produced terra nullius. In the doctrine of aboriginal rights or title the customary rights that Indigenous Peoples had exercised since "time immemorial" were a 'burden' on whatever authority the Crown assumed to have but they were also able to be extinguished or removed if the Crown decided to do so through legislation or some other means.

Any 'customary rights or title" envisaged in the Consultation Document are therefore not just "constrained" but actually subordinate. As one court case has famously found they are 'necessarily diminished' and 'to a considerable extent impaired' by their very nature. They are what may be called "Animal Farm" rights reminiscent of the chant of the pigs in George Orwell's novel that while all animals are equal, some are more equal than others.

Iwi and Hapū also have to prove the rights and title through a test that is remarkably similar to that involved in the 2004 Act. It requires proof that the claimant Iwi or Hapū has continuously exercised them without interruption since 1840, and that they apply to a piece of foreshore the claimants have continuously occupied without interruption since 1840. As well, the Iwi and Hapū have to prove they have not been extinguished in some way by the Crown – although the Crown is considering whether it should have to prove it has not actually extinguished them.

Those are tests that no-one else has to meet and they will be difficult to prove simply because most Iwi and Hapū have been prevented from exercising them because of Crown actions.

More importantly the discriminatory concept of subordinate rights upon which they are based is also a breach of all that Te Tiriti represents.

3. ACCESS:

One of the most distressing aspects of the issue during 2003 and 2004 was the deliberate misinformation peddled by the government (aided and abetted by the then National Party Opposition) that Māori claims to the foreshore would deny access to the beaches for "ordinary Kiwis" and open the floodgates to widespread sale and alienation.

Iwi and Hapū consistently denied this charge and maintained that we would allow access to the foreshore. We also tried to explain that any control we might exercise would be tikanga-based and thus prevent alienation. In the submissions Ngāti Kahungunu made to the Crown and the Waitangi Tribunal we even offered to enter into solemn covenants with the Crown and appropriate local government bodies to ensure access and non-alienation.

It was frustrating and disheartening that few people seemed to listen at the time and that even fewer seemed prepared to trust our word.

The Consultation Document appears to have addressed the issue by committing to guarantee access and non-sale as part of any "customary title". Our people would be comfortable with such a guarantee although it is unfortunate that the Crown does not offer any real acknowledgement of the principled stand we have always taken on this matter, or even considered that a joint announcement of the guarantee might have been a better Treaty-based way of achieving it.

It is always regrettable when the Crown acts as if the Treaty relationship allows it to make unilateral decisions by fiat.

It is even more regrettable that in its determination to ensure that we grant access the Crown has actually created another injustice by refusing to require a similar undertaking from others who hold freehold title to land contiguous to the foreshore.

The United Nations Committee on the Elimination of Racial Discrimination was forthright in its findings on the 2004 Act that it contained differential and therefore discriminatory provisions. It is our view that the requirement that only Māori allow access is a similarly discriminatory provision that entrenches inequality.

It is especially irksome as well as discriminatory because it applies only to the tiny piece of the foreshore our people might gain "customary title" to and not to the more than 80% controlled by others. Indeed the prejudice (or the privileging of other titles) is so blatant it has a bewildering inelegance.

It has been suggested that this particular issue be "parked up" for later consideration but in our view any such move would merely inhibit consideration of the broader discriminatory nature of the Crown Proposals as a whole.

A POSSIBLE RESOLUTION:

It is our considered view that the Crown's general approach in the Consultation Document, and its specific "preferred option," are so flawed and discriminatory that another way must be found to resolve the issue. We can only reiterate that the Treaty as well as the interests of justice require that we do better.

They also require something other than the threat that if our people do not accept the Crown preferred option the 2004 Act will remain in place. We offer a different possibility.

Our preferred option for resolution is to recognise that the foreshore and seabed belongs to Iwi and Hapū, and we wish to take some time to explain what that means.

In Ngāti Kahungunu we have long debated the idea of belonging within the concept of tīpuna title. It is a concept sourced within tikanga and has no exact equivalent in Pākehā common law although in recent years it has in effect been recognised by the Crown and the Courts. We will address that recognition shortly and the ways that it has resolved the frequently raised concerns that it would be too difficult to determine who held the title in a particular area or what process could be followed to exercise any entitlements that flow from the title.

In this section of our Statement the concept of tipuna title is therefore briefly explained and the possible mechanics for implementation (and thus resolution of the broader issue) are outlined.

1. The Concept of Tipuna Title –

Tipuna title may be described as the physical and spiritual interests that collectively vested in Iwi or Hapū as part of their mana or rangatiratanga in regard to the whenua.

It is a title that exists within what may be termed "relational interests," that is the interests that inhered in the relationships of a particular whakapapa and the willingness of our people to develop existing or potential relationships with others.

It is an absolute title in the sense that rangatiratanga and whakapapa create inalienable ties to the land. Being tangata whenua implies having whenua to be tangata upon, and "tipuna title" presupposes a continuing authority in relation to it. In that context a mokopuna was born into the collective title through his or her whakapapa.

Tipuna title did ***not*** depend upon a "radical title" as understood in Pākehā law nor on what the last government called an "ancestral connection" based upon "continuous occupation". Instead it depends upon the fact of birth and the presumed permanence of whakapapa.

Because the title inhered through whakapapa in this way it was defined through an understanding of whakapapa as a concept and a reality. For example if an Iwi or Hapū was defeated in battle or a mokopuna with an interest moved away the ability to practically enforce the title would slip into abeyance but the notional title would remain as long as the whakapapa endured.

An analogy may be drawn with the pēpeha of the people of Whanganui, "E rere kau mai te awa nui mai te kahui maunga ki Tangaroa ko au te awa, ko te awa ko au". In that case the people are part of the river because of their whakapapa and they have "tipuna title" because of their relationship with it. If they move away they may not be able to fully participate in everything that that means in a practical sense but their notional title remains because moving does not extinguish their whakapapa.

In a very real sense the people can never give up or give away their river, and so an Iwi or Hapū cannot give away or alienate its tipuna title. Indeed wherever we live we keep the title alive in our waiata and more obviously in our place names. Thus this area Te Whanganui a Orutu or the area further north Te Whanga o Ruawharo indicate places where mokopuna could claim entitlements based on whakapapa with the tīpuna concerned. We will illustrate this in more detail later.

The Entitlements And Obligations That Flow from Tipuna Title –

The rights or entitlements that flow from tipuna title are naturally sourced in the same whakapapa as the title itself. Thus the burial of a new born baby's whenua in the rites of birth affirmed the rights that mokopuna derived from the tipuna title he or she was born with.

The actual exercise of the entitlements might then include such things as an individual use right within the collective interests held by the Iwi or Hapū.

They also included a recognition that the whenua might be used in different ways in different circumstances, provided the new use was not contrary to tikanga or the interests of others. There was in effect a right to development.

With every entitlement there were associated obligations. One of the most obvious is that the title could not be permanently alienated. To do so would be to give away one's whakapapa which would have been culturally incomprehensible.

Another obligation is that the title holders were required to allow access by others in appropriate circumstances. In Ngāti Kahungunu a notion of kauhanga or "passageways" developed as one means of facilitating access, subject to necessary restrictions if for example a rahui had to be imposed.

Each entitlement and obligation was of course to be exercised or fulfilled in ways that were consistent with manaakitanga and kaitiakitanga, as well as the political interests of mana and rangatiratanga. Tipuna title did not and could not exist in isolation from whakapapa and tikanga.

It is important to stress that the entitlements are akin to but not the same as "property rights" simply because they are derived from a quite different cultural and legal paradigm.

In certain circumstances access or use rights might therefore be granted to others with whom Iwi sought a relationship, while in other cases they might be developed in new ways without diminishing the mana or integrity of the tipuna title itself.

2. Tipuna Title As A Mechanism For Resolution -

It is our view that the concept of tipuna title and the consequent clarification of entitlements and obligations would provide a truly elegant solution because it is just and fair.

It would provide certainty to Iwi and Hapū that their tikanga and mana would be secured for the benefit of mokopuna and that the specific entitlements they had in specific locations would be protected. It would remove the grievance and the hurt.

It would also provide Iwi and Hapū with the ability to develop if they so chose provided the exercise of that right did not damage the whenua, the whakapapa, or the interests of others.

It would also hopefully reassure Pākehā that access to a favourite beach could not be unreasonably restricted and that the foreshore would be safe from alienation.

We do not underestimate the challenges that such an approach would entail but are also mindful that because the Crown has already in effect recognised tipuna title in a number of instances it would be less fraught than people might imagine. The most obvious example is fisheries where the Crown has effectively recognised tipuna title to both the moana and certain associated fisheries. Indeed it was only when Iwi and Hapū were left to discuss fisheries entitlements in tikanga terms that the long and difficult debate on the subject was resolved. Detailed examples of this process will also be illustrated shortly.

We simply suggest that what has been recognised in other instances should now be recognised in regard to the foreshore and seabed.

We have had neither the time nor resource to scope the practical steps needed to introduce a tipuna title regime but a phased implementation process could begin with three steps –

1. Acceptance and legislative recognition by the Crown of the concept of tipuna title.

2. Hui-a-Iwi and Hui-a-Hapū to identify the appropriate tipuna from whom title has been derived and to clarify the entitlements involved.

3. The convening of an Expert Working Group consisting of equal numbers of Māori and Pākehā to develop guidelines for (among other things) –

(a) The implementation of the title and its interface with local and central government as well as its impact on relations among Iwi and Hapū.

(b) The implementation of the title and its relationship to the interests of others.

Whatever practical steps are needed it is our firm belief that it will enhance the Treaty relationship and ensure that the foreshore and seabed remains a taonga for everyone. Perhaps it might even be a prompt for a proper debate about the constitutional relationship between Māori and the Crown that will prevent issues of this kind arising in the future.

We do not believe we are unrealistic or presumptuous in our proposal. Rather we are simply hopeful that the Crown will be brave enough to meet this Treaty challenge.