Aotearoa Indigenous Rights Charitable Trust

PO Box 3072 Kaiti, Gisborne 4041

Aotearoa/New Zealand

aotearoaindigenousrightstrust@gmail.com

www.airtrust.org.nz

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Submission of Aotearoa Indigenous Rights Trust

for the 6th periodic review of New Zealand before the human rights committee

The Aotearoa Indigenous Rights Trust (AIR Trust) is a non-governmental organisation made up of Māori individuals, all of who are active in their *hapū* (collective of extended families) and *iwi* (tribal nation) and Māori politics more generally. We seek to support the indigenous peoples’ rights movement internationally and domestically. AIR Trust submitted a report to the Human Rights Committee during the 5th periodic review of New Zealand and continues to engage in international indigenous human rights standard setting as well as with UN Treaty monitoring bodies.

AIR Trust makes the following comments.

***Implementation of previous recommendations of the Committee***

*Foreshore and Seabed Act*

The Foreshore and Seabed Act 2004 was repealed and replaced with the Takutai Moana Act 2011. However, criticism has been raised by Māori that the replacement Act does not remove the discriminatory aspects to Māori property rights that existed in the Foreshore and Seabed Act. For example, the statutory ‘customary marine title’ requires that Māori prove exclusive use and occupation of part of the foreshore and seabed but the statutory title does not provide for such exclusive rights. This statutory test to prove customary interests is unrealistic and places a greater burden on Māori while affording them interests with little substance.[[1]](#footnote-1)

*Status of the Treaty of Waitangi*

The government created a constitutional advisory panel who issued their report in December 2013. Analysis of the panel’s recommendations note they are bland and add nothing further to the conversation about constitutional change or the status of the Treaty of Waitangi within New Zealand’s constitutional framework.[[2]](#footnote-2) The independent Māori working group on constitutional matters recently released their report.[[3]](#footnote-3) It addresses the Treaty of Waitangi and more importantly, the right of self-determination as a key component of constitutional transformation. The government has yet to respond to the report.

*Treaty settlement process*

We fully support the submission of the Monitoring Mechanism of the National Iwi Chairs Forum in relation to the ongoing problems experienced by Māori engaged in the Treaty settlement process. In the rush to complete settlements, smaller groupings such as *hapū* - who were signatories to the Treaty of Waitangi - are often ignored and their only option is to make urgent applications to the Waitangi Tribunal to halt processes viewed as exclusive and unrepresentative. For example, in November 2015 Ngā Uri o Whangaruru took an urgent claim to the Waitangi Tribunal challenging the mandate of the Ngātiwai Trust Board to represent them in negotiations with the government. Further, Te Kotahitanga (a collective of *hapū* of the tribal nation Ngāpuhi) has in the last few months begun discussions with the Minister of Treaty Negotiations, Chris Finlayson after the Waitangi Tribunal found that Tuhoronuku with whom the government had been negotiating on behalf of Ngāpuhi did not have sufficient broad support from those it purported to represent.[[4]](#footnote-4)

***Current Issues***

*Te Ture Whenua Māori Act 1993*

The government continues to take a piecemeal approach to engagement with Māori on issues that effect them. In 2011 the government decided to reform Te Ture Whenua Māori Act 1993, the legislation which governs the remaining remnants of land still collectively owned by Māori. Because of the significant changes that were proposed as well as the process by which Māori were informed of the changes, a number of Māori individuals and organisations made urgent applications to the Waitangi Tribunal. The Tribunal recently released its draft findings because the government has continued with their timetable to pass the draft legislation into law before the Tribunal’s final report is released.

The Waitangi Tribunal upheld the concerns of Māori and found that:[[5]](#footnote-5)

the Crown will be in breach of Treaty principles if it does not ensure that there is properly informed, broad-based support for the Te Ture Whenua Maori Bill to proceed. Maori landowners, and Maori whanau, hapu, and iwi generally, will be prejudiced if the 1993 Act is repealed against their wishes, and without ensuring adequate and appropriate arrangements for all the matters governed by that Act.

The Waitangi Tribunal recommended the government engage in meaningful discussions with Māori about the consultation process as well as the proposed changes to Te Ture Whenua Māori Act.[[6]](#footnote-6)

The Minister of Treaty Negotiations, Chris Finlayson rejected the Waitangi Tribunal’s draft findings calling them “bizarre.”[[7]](#footnote-7) Given the high level of consensus that marked the passing of the Te Ture Whenua Māori Act into law, it is difficult to understand why the government is not prepared to engage in meaningful and robust discussion with Māori over their proposed changes to this fundamental piece of legislation.

*Trans Pacific Partnership Agreement*

The Trans-Pacific Partnership Agreement (TPPA) was signed in New Zealand on 4 February 2016. Māori along with other New Zealanders took to the streets to voice their opposition to this agreement concerned with the lack of transparency during its negotiations as well as the absence of engagement with Māori before or during the negotiations.[[8]](#footnote-8)

The TPPA conflicts with Māori rights under the Treaty of the Waitangi and the UN Declaration on the Rights of Indigenous Peoples, particularly in relation to the right of self-determination and governance, the recognition and enforcement of the Treaty of Waitangi as well as the right of free, prior and informed consent in relation to the potential impact on Māori and their resources.

Expert analysis notes that the Treaty of Waitangi exception clause in the TPPA “is limited in scope and relies on the good will of the government to protect Māori rights, which repeated Waitangi Tribunal reports show it has failed to do.”[[9]](#footnote-9) In practical terms, the rights and interests of Māori will be more vulnerable to third parties who are not bound to comply with the Treaty of Waitangi.

The TPPA has already received international scrutiny. The UN Special Rapporteur on the Rights of Indigenous Peoples, in her second report to the General Assembly, focused on investment chapters of agreements like the TPPA and investor-state dispute settlement. She noted they were a risk to indigenous peoples’ rights and a constraint on their ability to gain remedies.[[10]](#footnote-10)

The Waitangi Tribunal will hold an urgent hearing in March 2016 on the TPPA. The Tribunal will focus on the government’s engagement with Māori before and during the negotiation of the TPPA as well as whether the Treaty of Waitangi exception clause fully protects Māori interests and rights. The Crown has refused to defer further action on the TPPA until the Waitangi Tribunal report is issued.

1. <http://ahi-ka-roa.blogspot.co.nz/2010/09/marine-and-coastal-area-takutai-moana.html> and <http://www.radionz.co.nz/news/te-manu-korihi/249375/foreshore-law-still-prompts-debate> [↑](#footnote-ref-1)
2. <https://ahikaroa.wordpress.com/2013/12/> [↑](#footnote-ref-2)
3. <http://www.converge.org.nz/pma/MatikeMaiAotearoaReport.pdf> [↑](#footnote-ref-3)
4. See for example, <http://www.radionz.co.nz/news/national/290890/a-second-northland-treaty-authority-challenged> and [http://www.radionz.co.nz/news/te-manu-korihi/288184/te-kotahitanga-'overjoyed'-at-crown-offer](http://www.radionz.co.nz/news/te-manu-korihi/288184/te-kotahitanga-%27overjoyed%27-at-crown-offer) [↑](#footnote-ref-4)
5. Waitangi Tribunal *Report into Claims concerning Proposed Reforms to Te Ture Whenua Maori Act 1993 Prepublication Version* (WAI 2478, 2016)pages 182-183. [↑](#footnote-ref-5)
6. <http://tvnz.co.nz/te-karere-news/crown-set-breach-treaty-over-its-maori-land-review-process-waitangi-tribunal-6445868> [↑](#footnote-ref-6)
7. <http://www.radionz.co.nz/news/political/295943/waitangi-tribunal%27s-findings-%27bizarre%27-minister> [↑](#footnote-ref-7)
8. <http://www.odt.co.nz/node/371964>, <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11497553> <http://www.msn.com/en-nz/news/national/tpp-protesters-to-descend-on-auckland/ar-BBp4Osc#image=1>, <http://www.aljazeera.com/news/2016/02/controversial-tpp-pact-signed-zealand-protests-160204031601547.html> [↑](#footnote-ref-8)
9. C Jones, C Charters, A Erueti, and J Kelsey *Expert Paper #3 Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement* (New Zealand Law Foundation, 2016) page 5. Found at <https://tpplegal.files.wordpress.com/2015/12/ep3-tiriti-paper.pdf> [↑](#footnote-ref-9)
10. *Report of the Special Rapporteur on the Rights of Indigenous Peoples* 70th session A/70/301 (2015) paras 77 - 79 and <http://unsr.vtaulicorpuz.org/site/index.php/en/statements/95-statement-ga70> [↑](#footnote-ref-10)