

**Submission to the United Nations'  
Universal Periodic Review on New Zealand's  
Human Rights Record**

**by**

<b>Te Rūnanga o Ngāti Ruanui Trust</b>	<b>Whakaahurangi Marae</b>
<b>Ahitahi Hapū</b>	<b>Ketemarae (Ngārongo) Marae</b>
<b>Araukūku Hapū</b>	<b>Ngātiki Marae</b>
<b>Hāmua Hapū</b>	<b>Taiporohēnui Marae</b>
<b>Hāpōtiki Hapū</b>	<b>Meremere Marae</b>
<b>Ngā Ariki Hapū</b>	<b>Mokoia Marae</b>
<b>Ngāti Hawe Hapū</b>	<b>Ararātā Marae</b>
<b>Rangitāwhi Hapū</b>	<b>Ngātiki Marae</b>
<b>Tūwhakaehu Hapū</b>	<b>Wai o Turi Marae</b>
<b>Ngāti Tūpaea Hapū</b>	<b>Meremere Marae</b>
<b>Ngāti Hine Hapū</b>	<b>Wharepuni Marae</b>
<b>Ngāti Kōtuku Hapū</b>	<b>Meremere Marae</b>
<b>Ngāti Ringi Hapū</b>	<b>Whenuakura Marae</b>
<b>Ngāti Tūpito Hapū</b>	<b>Pariroa Marae</b>
<b>Tuatahi Hapū</b>	<b>Manutahi Marae</b>
<b>Ngāti Tākou Hapū</b>	<b>Ararātā Marae</b>
<b>Ngāti Tānewai Hapū</b>	<b>Wai o Turi Marae</b>
	<b>Wharepuni Marae</b>

## 1 Introduction

New Zealand (NZ) has one of the largest Exclusive Economic Zone (EEZ) in the world, with an area of ocean over 20 times the size of its land-mass. To date practically all exploration and extraction activities occur in the EEZ, extending from 12 to 200 nautical miles off-shore. The principal piece of legislation is the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) which came into force on 28 June 2013.

Te Runanga o Ngāti Ruanui Trust (Ngāti Ruanui) is the iwi authority of the land which includes the Whenuakura River, south of the Patea River and inland to Whakaahurangi and back to the coast to wahapū o te awa o Waingongoro (mouth of the Waingongoro River). The coastline interests extend from the mouth of the Whenuakura River north to the Waingongoro River and beyond to the Tasman Sea, and in particular includes the EEZ and Continental Shelf.

Within Ngāti Ruanui's rohe are 16 hapū (Māori tribe). Each hapū comprises of up to three maraes (meeting grounds), a tūrangawaewae - a place where Māori communities and whanau (family) belong and engages in a range of cultural activities. Each marae is governed by trustees, committees, sub-committees, and other beneficiaries which oversee any aspect of the management of the marae and reservations, including tikanga (custom) and kawa (ceremony) issues.

In this submission, Ngāti Ruanui, 16 hapū and 18 maraes outline the gaps of the EEZ Act in terms of compliance with standards set out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), United Nations human rights treaty body decisions and best practice. In effect, breaching mana whenua's (indigenous people with territorial rights) human rights, particularly on Consultation and Free Prior and Informed Consent (FPIC); the lack of effective impact assessments (IA) and benefit sharing. We outline the issues on the principles of tino rangatiratanga (self-determination) over offshore waters adjacent to our territories. Our concerns arise from the Trans-Tasman Resources Limited's (TTR) marine consent to extract iron sands from the EEZ (first seabed mining in NZ approved under the EEZ Act).

Through this submission, we seek to inform the States of the human rights infringements inflicted on us by the NZ government. We request the States to incorporate matters raised including recommendations (refer below) in our submission with the States' Report to the United Nations particularly on NZ's human rights situation. This would assist the UN Human Rights Council's Universal Periodic Review (UPR) Working Group in developing actions to improve or progress mana whenua's human rights in NZ.

THAT New Zealand investigates the human rights violations on mana whenua committed by the New Zealand government with respect to matters raised by Ngāti Ruanui 16 hapū and 18 maraes in their submission, and in particular, failures of the EEZ regulatory regime (including other legislations associated with mana whenua and their human rights) in complying with the international human rights standards and practice: consultation, free prior and informed consent, impact assessment, and benefit sharing.

THAT New Zealand temporarily impose a cessation of seabed mining in NZ until human rights violations on mana whenua committed by the NZ government are resolved.

THAT New Zealand reforms the EEZ Act (including other legislations associated with mana whenua and their human rights) in order to conform with international human rights standards and practice.

THAT New Zealand applies co-management or delegation of powers (shift to self-determination or tino rangatiratanga paradigm) to iwi authorities with the EEZ Act and other legislations affecting mana whenua's human rights and interest.

THAT New Zealand requires judicial measures for extractive businesses to adhere and respect the protection of internationally proclaimed human rights; and to comply with the United Nations Guiding Principles on Business and Human Rights.

THAT New Zealand investigates Trans-Tasman Resources Limited's business standards and practice in terms of compliance with international human rights standards and practice.

THAT New Zealand requires Trans-Tasman Resources Limited to provide remedial actions where business practices and standards infringe on mana whenua's human rights.

## **2 Trans-Tasman Resources Limited Marine Consent**

In November 2013, TTR applied to the Environmental Protection Authority (EPA) to undertake iron ore extraction in an area of 65.76 square kilometres, located between 22 and 36 kilometres off the coast of South Taranaki (the South Taranaki Bight). TTR proposed the excavation of up to 50 million tonnes per year of the seabed, containing iron sand for processing on a large vessel. Around 10 per cent of the extracted material would be processed into iron ore concentrate for export, with residual material (approximately 45 million tonnes per year) returned to the seabed.

The EPA decided to establish a Decision-Making Committee (DMC) to hear and determine the marine consent application. The consent application was subsequently refused based on the primary reasons: uncertainties in the scope and significance of the potential adverse environmental effects, absence of a Cultural Impact Assessment, inadequacy of information and failure of TTR to adequately consult with mana whenua.

In August 2016, TTR has re-lodged the marine consent application (similar scale, location and nature). After hearing and considering all the evidence, submissions, reports and information, members of the DMC did not agree in final deliberations: two members voted to grant consent and the other two voted to refuse consent. The reasons for not granting the consent were the same reasons held by the DMC in the 2013 application. Despite of this, the consent was granted, subject to consent conditions, through a casting vote made by the Chair of the DMC.

In August 2017, Ngāti Ruanui lodged a Notice of Appeal to the High Court on errors of law: incomplete application, adequacy of information, adaptive management, and failure to act in accordance with the purpose of the EEZ Act. At this stage, appellants are waiting for the appeal decision.

### **3 Gaps in the EEZ Act and Infringements on Mana Whenua's Human Rights**

The EEZ Act aims to promote the sustainable management of the natural resources of the EEZ and Continental Shelf. Unlike the Crown Minerals Act, the focus is not economics, but the environment. The EEZ Act is similar to the Resource Management Act 1991 (RMA) in the sense that it aims to promote sustainable management through a robust consent process. The EPA is responsible for issuing marine consents and ensuring that permit holders comply with the relevant environmental and safety standards.

In the succeeding sections, we outline identified gaps in the EEZ Act with respect to the EPA's handling of the TTR's marine consent and resulting infringements on mana whenua's human rights.

#### **3.1 Consultation and the Right to Free, Prior and Informed Consent (FPIC)**

Indigenous rights have become a significant field in international law, culminating in the adoption by the UN General Assembly of the UNDRIP in 2007. In particular, article 3 provides for indigenous people's right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. The right to FPIC, as outlined in article 32 of the UNDRIP, specifically addresses the requirement to obtain indigenous peoples' informed consent prior to the approval of any project within their traditional lands and territories.

The United Nation's Expert Mechanism on the Rights of Indigenous People defines FPIC as a State duty that 'entitles indigenous people to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in the process'.

Professor James Anaya, former UN Special Rapporteur on the Rights of Indigenous Peoples, in a series of reports, has stressed the need to focus on establishing a consultation process that will result in indigenous peoples' full engagement, active contribution to prior assessment of all potential impacts (affected substantive rights and interests) of a proposed activity.

Several cases solidify the importance of consultation and FPIC. In the cases of the Kichwa Indigenous People of Sarayaku v Ecuador and the Saramaka Indigenous People v Suriname, the Inter-American Court challenged the government's grant of concessions to a foreign oil and logging/mining companies respectively without first conducting consultation or gaining the consent of indigenous peoples on whose traditional lands the concessions were granted. The Court held that the right could not be justifiably infringed without compliance with several specific 'safeguards'. The safeguards assert that the State to ensure the effective participation of indigenous people, to consult and obtain their FPIC; to guarantee a reasonable benefit; and to perform a prior environmental and social impact assessment.

Under the EEZ Act, the EPA and TTR both have a duty to notify (but not a duty to consult) iwi authorities, customary marine title groups, and protected customary rights groups and others with existing interests who are affected by the application. Beyond this, **although the IA requirement indicates that there ought to be consultation with existing interests (likely to be adversely affected), neither the EPA and TTR has a duty to consult with iwi authorities and hapū on matters relating to applications under the EEZ Act.**

In deciding whether to grant a marine consent, the EPA must 'give effect' to the principles of the Treaty of Waitangi. To give effect to the Treaty, the EEZ Act establishes an independent Māori Advisory Committee, the Ngā Kaihautū Tikanga Taiao, to provide advice and assistance to the EPA on matters relating to policy, process, and decisions of the EPA. The advice and assistance must be given from the Māori perspective and come within the terms of reference of the committee as set by the EPA. However, **the EEZ Act does not require the EPA to take Ngā Kaihautū's advice into account or follow it.**

Unlike the RMA, the EEZ Act has no national or regional policy statements, nor are there plans such as an Iwi Management Plans (IMP) to guide how the EEZ Act is to be applied. The IMP have been a key initiative under the RMA and have been especially critical to ensuring that mana whenua's interests (traditional relationship with specific rivers, lakes, mountains and waahi tapu) are recorded during any consent application. Furthermore, IMPs would allow mana whenua to determine the process by which they wish consultations to occur. Through this, iwi authorities could tailor the consultation process in accordance with their own customs, traditions, priorities and decision-making process. However, IMP under the RMA covers only activities on land or within 12 nautical miles of the coastline (excludes EEZ).

**We confirm the importance of IMP (including national or regional policy statements) in creating an effective consultation process and to enable mana whenua to give consent in a manner that is free, prior and informed. We believe that the lack of linkage between legislations (RMA, EEZ Act, Crown Minerals Act, etc) associated with adjoining and overlapping areas of jurisdiction and particularly on mana whenua's human rights matters need to be resolved.**

Iwi authorities have raised concerns over the effects of the seabed mining consent on its foreshore and seabed claims under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA). Iwi authorities made it clear that there were to be no negotiations until those matters had been resolved. The EPA did not think that they were sufficient to call for a halt to the processing and subsequent approval of TTR's marine consent.

While iwi authorities have not received formal recognition of ownership (grant of customary marine title under MACA), provided there are rights grounded in customary ownership, use and occupation then, international law will recognise the right to FPIC. In the Report on the Crown's Foreshore and Seabed Policy (Foreshore Report), the Waitangi Tribunal noted, *"It has been Crown policy from 1848 to the present day to recognise that Māori, according to their own customs and usages, had rights equating to ownership of the entire land surface of New Zealand."*

**Overall, we believe that our Human Rights have been infringed due to the EPA's neglect in acquiring mana whenua's FPIC, poor planning and consultation processes. Furthermore, some information was withheld by the EPA and TTR to mana whenua and the public which further infringes on our ability to provide a well-informed consent.**

### **3.2 Impact Assessment (IA)**

The Akwe: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities is a useful guide for determining what should be included with the IA. The Akwe also sets out a list of core recommendations for states and businesses to follow when engaging with indigenous peoples. It recognises the role of indigenous people in the conservation and management of biodiversity through the application of indigenous knowledge.

**Compared to the Akwe, there are several important gaps in the IA required by the EEZ Act. There is no requirement to consider mana whenua's human rights' impacts of proposed projects as set out in the UNDRIP. In addition, there is no requirement to consult (in an appropriate manner) with affected mana whenua and no reference to the right to FPIC.**

When applying for a marine consent, companies must submit an IA, prepared in accordance with section 39 of the EEZ Act. The purpose of an IA is to identify the effects of proposed activities on the environment and on persons with an 'existing interest' (includes an interest in a Treaty settlement; the Sealords' Fisheries Settlement; and Protected Customary Right, or Customary Marine Title recognised under the MACA). Moreover, the IA must include steps to avoid, remedy and mitigate any adverse effects identified by the applicant, and to look for alternative solutions, if necessary. The IA must describe any consultation (but not a duty to consult) undertaken with persons whose existing interests are likely to be adversely affected by the proposal and specify those who have given written approval to the activity. Besides this, the EPA has the ability to commission an independent review of the IA.

**Section 39 of the EEZ Act has no requirement for the IA to include an assessment of potential human rights implications on mana whenua arising from the proposal. Furthermore, there is no requirement for IA's to include clear assessment of the full range of mana whenua's human rights potentially affected, measures that will be taken to prevent violations, and how affected mana whenua will receive culturally appropriate social and economic benefits.** As noted in the *Saramaka* decision, the Court ruled that no concession will be issued within *Saramaka* territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social IAs.

A Cultural Impact Assessment (CIA) is of major importance in any proposal, in this case extractive projects, that will significantly impact cultural areas and interest within mana whenua's territories. Most of the information about the project and its potential implications on cultural areas and interests, taonga, hapu, marae and whanau are gathered and disclosed through the CIA. However, TTR's marine consent was granted in the absence of a CIA, therefore infringing on our human rights.

### 3.3 Benefit Sharing

In the Saramaka case, the Inter-American Court referred to the need for the Saramaka's indigenous people to obtain a reasonable benefit from any projects planned within their territory. There is growing recognition of the need for indigenous people to share in the benefits made from extractive projects in their territories. This flows from the recognition of the rights indigenous people possess in their lands, territories and resources as outlined in article 26 of UNDRIP.

The UN Special Rapporteur on the Rights of Indigenous People has stressed the need to develop new business models for natural resource extraction that are led by indigenous people or involve indigenous peoples partnering up with business enterprises.

The Special Rapporteur (one of a series of reports prepared by Professor Anaya) has expressed concern on the extraction model being promoted by States and corporations where *"an outside company, with backing by the State, controls and profits from the extractive operation, with the affected indigenous peoples at best being offered benefits in the form of jobs or community development projects that typically pale in economic value in comparison to profits gained by the corporation."*

**The EEZ Act does not make any reference to benefit sharing with affected mana whenua. As consultation under the EEZ Act is not required, there is little incentive for applicants to engage with mana whenua, let alone to discuss how they will share the economic and social benefits of their activities. Consequently, the seabed mining consent was granted in the absence of any benefit sharing with affected mana whenua.**

### 3.4 Paradigm Shift to Tino Rangatiratanga

The EEZ regulatory regime relating to extractive industries in the EEZ in short are about environmental 'best practice' and economic sustainability; mana whenua's interests and human rights are secondary. As a result, there has been much emphasis on kaitiakitanga and Treaty principles, but not on tino rangatiratanga.

**We recommend various ways in which tino rangatiratanga issues can be addressed: First, there needs to be discussions between iwi authorities and the NZ government over mana whenua's interests in lands and resources in the EEZ. Secondly, in terms of management and regulation, there needs to be consideration of whether management can be either shared with iwi or delegated to iwi authorities.**

**Although the RMA recognises the possibility of iwi authorities to acquire some of the powers exercised by local governments, that power has not been used to date principally because it requires local governments to initiate the process and the process is subject to broad public consultation. Nevertheless, we believe that co-management or delegation of powers to iwi authorities provides a potential model for application in the EEZ Act and other legislations affecting mana whenua's human rights and interest. This model, if applied with the EEZ Act (and other mana whenua associated legislations) would help assist in resolving human rights violations on mana whenua of NZ.**

#### **4 Business and Human Rights**

While international human rights law primarily imposes duties on States, an increasing number of international legal norms are being imposed on individuals and corporations, including those in extractive industries whose business affects cultural significant/sacred sites. Corporations may be sued in civil lawsuits for violation of indigenous rights, and face barriers to doing business, including licence or contract revocations, as well as reputation-based challenges, when they do not ensure compliance with indigenous rights.

In June 2011, the Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) as the first global standards for preventing and addressing the adverse human rights impacts of business activities. The UN Guiding Principles set out a three-pronged "Protect, Respect and Remedy" Framework. The Guiding Principles recommend a corporation to have a corporate policy commitment, conduct due diligence regarding human rights and develop a process to address and remediate any adverse human rights impacts. They also recommend that corporations should conduct 'meaningful consultation with potentially affected groups and other relevant stakeholders' as part of due diligence.

However, the UN Guiding Principles were never intended to create new binding international law or impose additional obligations on companies. According to Professor John Ruggie, Special Representative for the Secretary General for Business and Human Rights Presentation of Report to United Nations Human Rights Council (Geneva, 30 May 2011), *"its normative contribution lies in elaborating on existing standards and practices of States and businesses; integrating them within a single framework; and identifying where the current regime falls short and how it could be improved."*

**We believe that extractive businesses must adhere to and respect the protection of internationally proclaimed human rights; and make sure that they are not complicit in human rights abuses. We request that the UN Human Rights Council endorses judicial measures which will require extractive businesses to comply with the UN Guiding Principles on Business and Human Rights. This action will ensure that extractive businesses respect the human rights of indigenous people, not only the State's responsibility.**

## **5 Conclusions**

The current legislative regime governing extractive industries in New Zealand contains a raft of measures that seek to promote the Treaty of Waitangi, good environmental performance and the effective allocation of Crown owned minerals. Yet, the TTR's marine consent demonstrates the current regulatory framework's failings on mana whenua's human rights. In addition, it falls short of internationally recognised standards relating to indigenous rights and business and human rights.

While we have outlined the types of reforms (gaps) needed in the regulation of extractive industries in the EEZ – relating to consultation, FPIC, impact assessments and benefit sharing – the underlying issues relate to control over the management and ownership of resources in the EEZ (paradigm shift to tino rangatiratanga). This is largely due to the effects of extractive industries on mana whenua's human rights, interests and their territories. Therefore, what is needed is to reform the EEZ regulatory regime (including other mana whenua associated legislations) to ensure it conforms to international human rights standards and practice. Business practices and standards also needs to change.

We seek the support of the States to incorporate matters raised including recommendations in our submission with the States' Report to the United Nations particularly on NZ's human rights situation. This would help assist the UN Human Rights Council's Universal Periodic Review Working Group in developing actions to improve or progress mana whenua's human rights in NZ.