IN THE WAITANGI TRIBUNAL
KEI MUA I TE RŌPU WHAKAMANA I TE TIRITI O WAITANGI

WAI 2521

IN THE MATTER OF	**The Treaty of Waitangi Act 1975**
AND	
IN THE MATTER OF	**Te Moutere o Motiti Inquiry**
AND	
IN THE MATTER OF	**A claim filed by Graham Hoete, Umuhuri Matehaere, Kataraina Keepa, Jacqueline Taro Haimona and Te Atarangi Sayers on behalf of NGĀ HAPŪ O TE MOUTERE O MOTITI**

EVIDENCE OF MOANA JACKSON
Dated 24th April 2018

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Introduction

1. My name is Moana Jackson, I am Ngāti Kahungunu and Ngāti Porou.

2. I acknowledge all my whakapapa but was raised in Ngāti Kahungunu and it is that experience which most underpins this Brief. Indeed the Brief is based on work I have done over many years both within my own Iwi and others. This work was acknowledged in 2016 when I was selected to be a member of Te Taumata o Kahungunu, a long-standing body which meets and advises on matters of tikanga, history and general well-being. It also advises the Iwi on matters relating to Te Tiriti o Waitangi. I am honoured to be part of the Taumata and to work with its other members Sir Pita Sharples, Dr Rangimarie Rose Pere, Professor Sir Timoti Karetu, Mana Elizabeth Hunkin, and Professor Piri Sciascia.

3. I was originally approached by the Wai 2521 claimants to give evidence in their Customary Marine Title application to the High Court. I was then asked to prepare a brief of evidence in relation to the Waitangi Tribunal's Te Moutere o Motiti Inquiry (Wai 2521). This Brief has been adapted from my High Court evidence. However, given this inquiry is about the identity of an island people, my evidence about mana moana is relevant to the Tribunal inquiry as well. In preparing this evidence, I have read the evidence of Nepia Ranapia (dated 13 April 2018), and referred to relevant parts of Dr Vincent O'Malley's historical report ("Motiti Island: Customary Interests and Crown Engagement", #A16).

4. Prior to accepting instructions, I travelled to Tauranga for a half day meeting with kaumātua and kuia of Motiti on 22 March 2017, to ensure that I had their support to give evidence and to hear from them firsthand about their claims. We met at kuia Kataraina (Bunty) Keepa's house, and Umuhuri Matehaere, Graham Hoete, Nepia Ranapia, Maraea Brown, Hugh Sayers and Karen Feint were in attendance as well. My considered views have been sought on tikanga in the context of the pūkenga evidence provided by Nepia Ranapia. I wish to be clear that I do not have any direct knowledge of the whakapapa or traditional history of the tāngata whenua.

5. I am mindful that in this matter I have been asked to give my considered views on the nature and meaning of tikanga, especially as it relates to the moana, and thus necessarily to water in general. I am also of course mindful that the matters under consideration in this case involve Iwi other than my own and I am humbled that my views have been sought. I am mindful too that others will give evidence on similar matters, especially as they apply to Motiti and I acknowledge and respect their contributions.

6. As a preface to the substantive matters in this Brief I give some background information which provides the papa or base for this Brief and my particular understandings of tikanga. I graduated from Victoria University with an LLB and recently received an Honorary Doctorate of Law from the same University.

7. After my graduation I spent a period in private practice before teaching at Wainuiomata College for a number of years. I then returned to law and was commissioned by the then Justice Department to undertake research on the relationship between Māori and the Criminal Justice System. The research was partly a response by the Department to the ongoing and widespread concern among Māori about the relationship with the justice system, and in particular the high rate of incarceration of young Māori. It was based on a wide-reaching research project over three years and involved 5000 Māori participants. The report of that research, He Whaipaanga Hou, was published in 1988, and for the last three years I have been involved in research to update that Report.

8. That research and the subsequent work I have done on criminal justice issues inevitably involved questions of tikanga and its particular application in instances of personal or collective wrongdoing. Indeed one important recommendation made in the Report was the need to begin a conversation about the application of a "Māori legal system" which of course is the institutionalised expression of tikanga as law. It is that concept of tikanga as law which underlies this Brief.

9. In 1988 I was also able to specifically compare the situation of Maori and other Indigenous Peoples as part of the first Maori delegation to the United Nations Working Group drafting the Declaration on the

Rights of Indigenous Peoples. In 1990 I was elected Chairperson of the Indigenous Peoples Caucus of that Working Group and in that capacity was involved in the many discussions with other Indigenous Peoples about their relationships with fresh and seawater and the land. Much of those discussions were eventually drafted into Articles 25 and 26 of the Declaration.

10. In my view that experience, along with much of my subsequent work on international indigenous rights, is particularly relevant to this Brief as Indigenous Peoples, including Māori, have clear and consistent philosophies and systems of law. They also source that law, as Iwi and hapū do, in the land and waters where they live and in which they exercise political authority.

11. In 1988 I also co-founded with now Judge Caren Fox Nga Kaiwhakamārama i Nga Ture, the first Māori Community Law Centre. Over several years our work included drafting the original Flora and Fauna Claim (Wai 262) which necessarily included the flora and fauna associated with the fresh and sea waters of the six Iwi claimants. We also undertook research on the relationship between water and rangatiratanga in relation to a number of the early fisheries cases, and in particular the nexus between tikanga and the nature of mana moana and te mana i te moana.

12. Through my work at the United Nations and Ngā Kaiwhakamārama i Ngā Ture I also participated in international indigenous conferences on land and water rights as well as indigenous constitutionalism and general human rights. In 1990 for example I was invited to contribute to the first international conference on the sea which included active participation by Indigenous Peoples as well as international jurists. This International Conference on Freedom for the Seas was held in Honolulu and involved a considered review of the 1982 United Nations Convention on the Law of the Sea. It also offered the chance to further refine the nature of indigenous law, including tikanga, in relation to the sea.

13. In 1990 I also became a part-time tutor in Te Ahunga Tikanga, the degree in Māori Laws and Philosophy at Te Wānanga o Raukawa. A core part of that degree programme is the Law of Tangaroa and

Hinemoana which covers the jurisprudence and practice of tikanga and tino rangatiratanga in relation to sea water.

14. In 1993 I was appointed as a judge on the International Peoples' Tribunal in Hawaii and later in Canada. The Tribunals were established following the Russell Tribunal which heard claims of Indigenous Peoples in North and South America in 1972. They consisted of international jurists and considered the matters placed before the Tribunal not according to the extant domestic law of the colonisers but rather by international law and the pre-existing indigenous law of the lands involved.

15. I refer to those hearings because in each case the rights to, and responsibility for both fresh and sea water were important parts of the evidence presented to the Tribunals. I was struck in those instances, as I was during the drafting of the United Nations Declaration, by the similarities between the views of Iwi and Hapū and other Indigenous Peoples. In particular I was struck by the inseparability of the land, the waters, and the notion of self-determination.

16. In subsequent years I have worked extensively with many Iwi and hapū on a number of matters and have been privileged to learn of their histories and tikanga, often in relation to the sea and the authority exercised by them in relation to it. Those experiences have reinforced my understanding that the tikanga of Kahungunu and other Iwi share many commonalities based on its seminal values or kaupapa, as well as its political and cultural significance. There are differences of course in the way tikanga may be explained in different Iwi and in the performance of its associated rituals such as karakia, but it is my considered view that the ideal of tikanga as a law is constant.

17. One example of the commonalities was evidenced in 2004 when I was asked to help represent the Treaty Tribes Coalition, including Ngāti Kahungunu, before the United Nations Committee on the Elimination of Racial Discrimination, (the CERD Committee) in Geneva. The Committee was established pursuant to the Convention on the Elimination of All Forms of Racial Discrimination and exercised its jurisdiction under the Optional Protocol of the

Convention to hear the Coalition claim re the then intended passage of the Foreshore and Seabed legislation. Much of the preparatory work for that submission involved detailed discussion and study of the tikanga surrounding both fresh and sea water with the many Iwi that were members of the Coalition at that time. In each instance there was no difficulty in identifying the tikanga which each Iwi shared.

18. Since that time I have also been called as an expert witness by Iwi in a number of claims to the Waitangi Tribunal. Five of the more recent claims have been the Urewera Claim on behalf of the Hapū of Ngāi Tūhoe, the Paparahi o te Raki Claim on behalf of the Hapū of Te Tai Tokerau, the Rohe Potae Claim on behalf of the Hapū of Ngāti Maniapoto/Tainui, the claim in relation to the Department of Corrections, and the current claim relating to freshwater.

19. In each hearing I was asked to discuss the tikanga and constitutionality of mana and tino rangatiratanga and the relationship between those ideals and Te Tiriti o Waitangi. While only the latter claim related directly to water many of the others necessarily required consideration of the waterways or coastal and sea areas that make up the iwi kāinga. They also involved consideration of what may be called the whakapapa of tikanga and the tikanga of whakapapa.

20. I have also been called as an expert witness before the Courts. In a criminal matter *R v Mason* I was specifically asked to discuss tikanga as a jural construct in matters of serious personal wrongdoing. My evidence naturally considered the nature of tikanga in general as well as its specific theories or ideas pertaining to the commission of a hara or wrong and the tikanga consequences of that wrong.

21. Between 2011 and 2015 I co-chaired with Professor Margaret Mutu the Independent Māori Working Group on Constitutional Transformation. The Working Group was established by the Iwi Chairs' Forum and other lead Māori organisations.

22. Our Brief was to discuss with Māori and others a new constitutional arrangement for Aotearoa/New Zealand based on tikanga, Te Tiriti o

Waitangi, He Whakaputanga o te Rangatiratanga o Nu Tireni, and relevant international Human Rights Conventions. The Working Group held 252 hui throughout the country as well as 70 rangatahi wānanga and received numerous written submissions. The Working Group's Report, *He Whakaaro Here Whakaumu Mō Aotearoa*, was released on Waitangi Day 2016.

23. I believe that the deliberations of the Working Group are relevant in this instance because the kōrero of the hui participants constantly sought a constitution based on the well-being and primacy of Papatuanuku. In those discussions both fresh and sea water were seen as interrelated parts of the life-blood of Papatuanuku and thus intrinsically part of tikanga and the very idea of law and tino rangatiratanga.

24. In 2012 I was asked by the eight Iwi of the Central North Island to be part of an Adjudication Panel convened in accordance with the terms of the adjudication process set out in Schedule Two of the Central North Island Forests Land Collective Settlement Act, 2008. In a general sense the adjudication was part of a broader "tikanga based resolution process for CNI forests land". With the other Panel Members, Tahu Potiki (Ngai Tahu) and Wayne Ngata (Ngati Porou), we received and were asked to adjudicate upon detailed written and oral submissions not just about the lands in issue but the tikanga pertaining to them as well as the nature of tikanga itself.

25. In September 2016 I was approached by the Human Rights Observers and Attorneys working with the Indigenous Peoples of Standing Rock, North Dakota to protect their waterways from oil exploration and contamination. As a result I assisted in the Drafting of the Ocheti Statement on Human Rights which stated the concerns of the People involved about the risks to their waterways from the proposed pipeline. It also reflected the importance of water in indigenous legal and cultural terms, as summed up in the statement from Standing Rock that "Water Is Life". Although the Statement related to freshwater I was struck again by the inseparability of fresh and seawater in indigenous law and philosophy and thus the parallels with tikanga.

26. It is that work and history which provides the context for the ideas outlined in this Brief. In general terms the Brief considers a number of interrelated issues –

26.1. The characteristics and meaning of tikanga as a construct at law;

26.2. The basic elements of that construct as they relate to communally vested taonga such as land, water, (especially seawater) and the notion of discrete areas often known as rohe moana;

26.3. The particular ways in which tikanga at law is developed in relation to the sea and the ways in which that tikanga then shapes the authority and obligations a polity has towards the sea as expressed in the notion of mana moana;

26.4. The ways in which those relationships have been redefined in colonisation since 1840 and the ways in which that redefinition has distorted traditional relationships among Māori and thus the broader historical, constitutional and legal meaning of both Te Tiriti o Waitangi and the interconnections between the exercise of tino rangatiratanga and mana moana;

26.5. The application of those general considerations to the specific case of Motiti Island and the authority and obligations of its people in relation to the moana and thus the retention of their tino rangatiratanga and their mana moana.

27. The Brief has six main Parts:

Part One – Tikanga as Law:

That is, the place and meaning of tikanga as a legal and jural construct regulating relationships according to well-defined social, moral, cultural, and political norms and values.

Part Two – The Relationship Between Tikanga and the Authority of Mana and Tino Rangatiratanga:

That is, the ideas of a Māori constitutionalism and the underpinnings of Iwi and hapū authority in relation to the lands and waters.

Part Three – The Establishment of Mana Moana:

That is, the conceptualisation of mana moana and the relationships Iwi or Hapū needed to have with a particular seascape in order to legitimately claim and exercise both the authority and responsibility of care in regard to it.

Part Four – The Exercise of Mana on Motiti:

That is, the history and traditions on Motiti as viable and valid expressions of mana and tino rangatiratanga in relation to the whenua and the moana, and thus the concomitant exercise of mana whenua and mana moana.

Part Five – The Effects of Colonisation and Crown Policy On the Mana Moana of Motiti:

That is, the acts and omissions of the Crown which have resulted in the dispossession and denial of the rights and authority of the tangata whenua of Motiti.

Part Six – Conclusions.

Part One – Tikanga as Law

28. As explained later in this Part of the Brief, tikanga is a comprehensive and vast body of knowledge which permeates every part of the Māori world view. It is a distillation of knowledge about place and people acquired by Iwi and Hapū over centuries, and it is a seminal determinant of what it means to be a mokopuna with the comfort and right to stand and claim tūrangawaewae in relation to ancestral whenua and moana.

29. Because of its complexity it is appropriate in my considered view to describe tikanga as “law” with all of the philosophies, customary concepts and ethical characteristics which the word “law” implies. It

is of course culturally and philosophically different from the English common law (and indeed every other system of law) but it is also necessary as well as appropriate to define it as such if only to reclaim it from the many dismissive redefinitions it has been subjected to since 1840.

30. In the context of this hearing that reclaiming is especially important because the relationship of people to the lands and waters around Motiti is not just based in political, territorial, or historical assertions. It is also derived from a legal papa or base that is shaped, as all law is, by the lands and waters from which it is drawn and the people who are tangata whenua of those lands.

31. It is of course extremely difficult to discuss basic questions about the nature and meaning of tikanga without acknowledging the impact of colonisation and the associated history of dispossession suffered by all Iwi and hapū since 1840. Indeed the very basic question "What is tikanga?" requires some consideration of that dispossession because colonisation has never just been about the now acknowledged confiscations of land or the depredations of war waged against Iwi and hapū. It has also inevitably involved the redefining and misrepresentation of Māori knowledge, law, and philosophy.

32. As part of that process tikanga has been trapped in a reductive misinterpretation which has tended to limit it to a narrowly focussed and easily quantified set of customary values and practices – a kind of exotica of beliefs that too easily collapses into simplistic generalisations or an 1840 fossilisation of inflexibility and exclusivity. Yet tikanga always was, and in my respectful submission still remains, an open and complex intellectual and cultural discourse that at its heart is a jural construct.

33. In the recent Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 this complexity was recognised in a definition of tikanga as the "customary law, values, and practices" of the people of the Whanganui. It is a philosophy which draws together the values and spiritual relationships which people have with their lands and waters and which find expression both in the law and the political authority which the people have held since time immemorial.

34. Yet in the ideologies of colonisation it was assumed for centuries that Indigenous Peoples and other "savages" did not possess "real" law. It was often vehemently argued in fact that somehow law was only developed by, and reserved for, the so-called "civilised" races who assumed the right to colonise.

35. Because Indigenous Peoples were deemed to be uncivilised it was assumed that they either had no law or possessed only some form of custom that lacked both the efficacy and worth of "real" law. It was thus characterised as an artifact of caprice rather than reason or an acting out of impulsive vengeance rather than considered intellect. In the so-called "chain of being" which was invented in Europe to classify Indigenous Peoples as an inferior "other" it was at best a "pre-law" trapped in the brutality of primitivism.

36. Although Māori were sometimes characterised as "noble savages" or as peoples somewhat higher on the Pacific chain of being than say the Melanesians or Micronesians it was assumed that we too did not have "real" law. Rather like the Colonial Office assumption that the polities of Iwi and hapū in 1840 were "petty tribes" with a consequent "petty sovereignty," so any idea of Māori law was dismissed as something "petty" too.

37. As a result tikanga has too often been mischaracterised as an anthropological "other" of sometimes quaint and deeply spiritual (if heathen) notions of hierarchical order. It was a lesser "lore" that might need to be respected in limited circumstances but was by its nature "repugnant" to the alleged universal standards of civilised law.

38. It is pleasing that this country is slowly abandoning that misconception although it still permeates most of the discussions and current views about tikanga. In this Part of the Brief I therefore endeavour to address the misconception and limitations by outlining something of the nature and philosophies of law in general and of tikanga as law in particular.

39. History shows that every society realises very early on that it cannot survive in a lawless state bereft of guidelines or rules about how people should live and interact with each other and the world they

inhabit. All societies therefore develop ways of ensuring social cohesion and harmony by developing a philosophy or jurisprudence of law and a discrete legal system to give effect to it. Both are shaped by the land, history and values of the people concerned – the ideas and ideals of law are unique cultural creations.

40. Indigenous Nations have their own unique philosophies and it is helpful in my view to briefly refer to some of them as they often have similar characteristics to those developed by Iwi and Hapū. For example, Professor John Borrows has described the law of his Ojibwe/Anishinabe people as a jural system derived from five main sources and values. These are:

40.1. The sacred, that is law derived from the norms and precedents outlined in the poetry of creation and other stories of the cosmogony;

40.2. The land, that is law derived from the land of its origins and the normative lessons found in the interrelationships between all beings and phenomena in the universe;

40.3. The deterministic precedents, that is law derived from decisions made in the past;

40.4. The positivistic lessons, that is law derived from culturally specific ideas about ethics and how people ought to behave; and

40.5. The customs, that is law derived from the settled practices of the people mediated by their inherent right and capacity to change those practices in an appropriate way over time.

41. In Anishinabe jurisprudence water and the people's relationship with it are clearly one of the sources and expressions of the law derived from the land. Professor Borrows has thus noted that the mouth of the river which they call the Zaagiin is not only *"a place of great life...carrying organic and other life-giving matter"* its name is similar to the Ojibwe word Zaagii'aa which means "love". The waters therefore provide analogies and law standards about how life should be lived to nurture and extend love to others. They are the

source of a moral compass about law as the guardian of relationships.

42. In a quite different indigenous context the Kombumerri/Munaljahal people in Australia have what they call a "full law" which the Kombumerri academic Christine Morris has described as a genealogical template linking people with the lands, the (often scarce) waters, and all other realities, both spiritual and non-spiritual. It recognises all of the relationships that impact upon human existence.

43. Dr Morris contrasts that "full law" with the "half law" of the Western legal tradition which struggles to acknowledge the non-tangible or spiritual. The Kombumerri/Munaljahal on the other hand have a reality and a law that not only *"recognised the life in the water but in the flow of the water, not only in the land but in the song lines in the land…it is a law which thereby reaffirms the paramountcy of all relationships as matters of social and legal import".*

44. Iwi and Hapū have of course also created a law derived from our own unique histories and cultural values. Tikanga in fact derives from a unique social and intellectual tradition that recognised the interdependence of all entities. Like the jurisprudence of the Kombumerri it is a "full law" because the recognition of the spiritual and intangible is inherent within it, and like that of the Anishinabe it also has a number of shared sources and characteristics.

45. As Ani Mikaere has aptly said it is the *"first law"* of this land. It developed from philosophies to do with the sacred and the interrelatedness of whakapapa between humans and between people and their lands and waters. It also draws upon the rituals, precedents and customs that have been handed down through the generations. It recognised the need for sanctions when a hara or wrong was committed but stressed ethics and reconciliation rather than mere punishment.

46. The development of tikanga is very real proof that like all societies our tīpuna also saw the need for guidelines to ensure that people could live in harmony with each other and the world. It too is a

culturally-specific construct reflecting the fact that we were never a law-less people.

47. Like all law tikanga was about the "ought to be" of human existence. It recognised the fallibilities of ordinary people caught up in the stresses of life and sought to reconcile any differences that might arise. Most importantly it recognised the immutability of relationships and the obligations and entitlements implicit within them.

48. The normative guidelines it contained formed part of a values-based jurisprudence which in Ngāti Kahungunu we call "whakamārama tōtika" or that which "explains or illuminates what is proper". It provided the principles and ethical framework for tikanga, the reasons why certain things "ought to be". It also set out the principles for settling disputes, regulating trade, making treaties, ensuring peace after conflict, and reconciling all of the competing interests that arise in any human society.

49. Justice Sir Edward Durie has stressed the importance of those values and has noted that law depended upon *"whether there were values to which the community generally subscribed. Whether those values were regularly upheld is not the point but whether they had regular influence. Māori operated not by finite rules alone…but by reference to principles"*. Sir Edward also coined the phrase "custom law" which nicely illustrates its difference from other jurisprudence and legal systems.

50. Ngāti Kahungunu scholar Dr. Carwyn Jones has drawn on the work of many experts to identify five foundational values within the jurisprudence of tikanga –

    50.1. Whanaungatanga – the centrality of relationships to Māori life;

    50.2. Manaakitanga – nurturing relationships, looking after people, and being very careful how others are treated;

    50.3. Mana – the importance of spiritually sanctioned authority and the limits on Māori leadership;

50.4. Tapu – respect for the spiritual character of all things;

50.5. Utu – the principle of balance and reciprocity.

51. In the *Report on the Crown's Foreshore and Seabed Policy* (2004) the Waitangi Tribunal sought to "come to terms with…the intellectual and spiritual flavour" of tikanga and concluded, based on the extensive evidence it heard, that it possessed or incorporated a number of interconnected themes –

51.1. The indivisibility of the natural world, so that all its elements flow together and are seen as one;

51.2. The oneness of the spiritual world and the physical world;

51.3. The mutuality in the relationship between people and the land;

51.4. The connection of the people with the land through whakapapa, kōrero, and the process of naming; and

51.5. The endless cycle of reciprocity, particularly seen in the example of mana and manaakitanga.

52. Based on these values, tikanga necessarily developed as a distinctive relationship-based law in which its prescriptive and proscriptive guidelines for what was legal or illegal (tika or non-tika) behaviour reflected why and how people could and should interact with the world. It was a relational ethos, a jurisprudence devised to maintain balance in te ao tōtika, the world which is right and proper.

53. As such, it sought to maintain the whakapapa relationships between all people and all the constituent parts of the world within which they lived – the land, the trees, the waters, the sky, and indeed the universe. It was flexible and adaptable because life, like whakapapa, is a series of never-ending beginnings. For just as a whakapapa is never-ending because for each death a child will be born and usher in a new beginning, so life itself changes through constant renewal and adaptation which tikanga was devised to mediate and explain.

54. In a sense tikanga reflects the change while also providing certainty through the core values of its whakamārama tōtika. It too was seen as never-ending yet it provided the surety of accepted principles which had "regular influence".

55. Within those principles individuals were vested with certain entitlements which might now be termed "rights" although they are more accurately conceptualised in the Ngāti Kahungunu whakamārama tōtika as precedents for the "right-ness" expected of all mokopuna. The entitlements were conditional upon the "ought to be" of how people should behave and the "ought to be" of relationships with their lands and waters.

56. The entitlements were in turn predicated upon clearly defined sets of collective responsibilities. Each responsibility or obligation was reciprocal in that it was owed by the individual to the whānau, Hapū and Iwi, and by the collective to the individual as an uri. Individuals thus had "rights" within collective responsibilities because that best ensured "right-ness".

57. This whakapapa and relational base meant that law was something which people lived with, just as they lived with the whakapapa into which they were born. The idea that someone lived under the law was as culturally foreign as the notion that one might be above it. In a very real sense tikanga was thus the law for the land (and for the sea as well) rather than the law of the land because it was shaped by and for the relationships people have with their lands and waters.

58. In that sense tikanga as law was never some discrete or esoteric knowledge system that existed in isolation from everyday life. Rather it was adhered to and known through the precedents recorded in moteatea and kōrero that were handed down through the generations as well as through the knowledge of all the markers in the land which indicated the presence of particular political, spiritual, or social spheres of influence.

59. It was a lived reality in which for example the idea of right-ness in the relationship between a community and the river or lake or sea with which it lived was the sure knowledge that the water was part

of that community's whakapapa. Water had its own unique history and characteristics (its own whakapapa) but it was a tīpuna, and tikanga required that it ought to be treated in a just and tika way for that reason.

60. The Waitangi Tribunal cogently explained this need to treat and care for water in a tika way in the Whanganui River Claim - *"Based on their (Māori) conception of the creation, all things in the universe, animate or inanimate, have their own genealogy…these each go back to Papatuanuku…Accordingly for Māori the works of nature - the animals, plants, rivers, mountains and lakes – are either kin, ancestors or primal parents…with each requiring the same respect as one would afford a fellow human being".*

61. Yet alongside the cultural learning of tikanga and the consequences which might follow from a breach Iwi and Hapū also developed distinctive institutions to refine, interpret, and apply it in certain circumstances. As in all cultures we developed a legal system within which tikanga as law could be actioned, understood, and enforced in case of dispute. To live with the law was to know it as part of one's whakapapa and to accept its deliberative interpretation whenever the need arose.

62. That "legal system" serves in my respectful view as evidence of another way that tikanga may be conceptualised as law. It ensured that rightness could be restored after a wrong was committed, whether against an individual, a collective, or even some other part of the whakapapa such as a particular tree or stretch of water. It existed to help ensure a good legal outcome through an accepted institutional process.

63. Most often the outcome was achieved simply by the community living with the law as part of its cultural "learning" reinforced by the fact that it was always backed by the exercise of political power. Indeed there is truth in the old adage that law and political authority are symbiotic since the legitimacy of those who exercise authority is granted through law and law is only effectively applied with the sanction of that authority. The efficacy of the tikanga relating to the lands and waters is therefore unavoidably linked to questions of mana and tino rangatiratanga.

64. For that reason this Brief now considers the relationship between law and constitutional authority and does so by first of all contextualising it within a general history of constitutionalism. In my respectful submission such a contextual discussion is necessary for four main reasons –

64.1. It gives some insight into the underpinnings of the authority and responsibility that our people have always accepted in regards to water and discrete areas known as rohe moana by positioning tikanga and its associated values within the political framework which determined the actual governance and care for the waters within any particular polity;

64.2. Secondly it helps contextualise the fact that the ability of an Iwi or Hapū to know and practically protect any water is dependent upon the relationship between the constitutionality of mana and tino rangatiratanga (the capacity to fulfil one's legal responsibilities and exercise one's authority) and the holistic thinking which underpins the whakapapa linking people to Papatuanuku and all her waters;

64.3. Thirdly it provides a framework to conceptualise the interrelationship between tikanga and tino rangatiratanga and the consequent existence and recognition of mana whenua and mana moana;

64.4. Fourthly, and in a more specific sense, it establishes a framework for understanding a law for the sea as well as the land in tikanga terms. It helps set the base upon which people might define and claim particular legal interests and authority in the land and the contiguous seas of a rohe moana.

Part Two – The Links between Tikanga and Mana

65. In the same way that societies learn that they cannot exist in a lawless state they also learn early in their history that law and social order cannot be maintained in a power vacuum. They therefore simultaneously develop political and constitutional ideas and practices to govern themselves.

66. In this context government is the process or system that people choose to regulate their affairs. A constitution may be understood as the code upon which government will proceed, akin to the kawa of the marae which outlines the way the marae will be governed.

67. Each is based on what may be called a "concept of power" and a corresponding "site of power". A concept of power is the idea of political and constitutional power. It is the philosophical base that a people develop about what government should be, as well as the values upon which the will of the people should be manifest. A ***site*** of power is the governing institution through which the concept of power is given effect. It is also the social, cultural and whakapapa place where that institution operates.

68. Like law the concept and site of power within a particular polity are also unique cultural creations. Indeed the universal desire to be free and independent has led to numerous culturally distinctive ideas about constitutionalism and government. They have also led to correspondingly complex and often confusingly esoteric arguments about what they mean. However like most political and constitutional theories their papa or base are quite clear, as evidenced even in the history of Western, and in particular English constitutionalism.

69. For like every other European polity England also developed its own concept of power which it called "sovereignty". After the consolidation of Catholic and then Protestant Christianity it reflected in particular the centralised hierarchy of the Church and its monist beliefs in a single all-powerful god.

70. Like so much of English constitutional thought the idea of sovereignty had its origins in France where it was first defined by a courtier Jean Bodin in response to populist dangers to the monarchy which he served. It was thus a very politically motivated definition based on past cultural experience and contemporary threat.

71. It was also a definition which was needed at the time simply because in Europe it was a concept which "neither lawyer nor political philosopher hath yet defined." In the subsequent colonisation of Indigenous Peoples the definition became important

for another reason – it was based in the racist duality of superior/inferior peoples which in turn framed the presumption that Indigenous Peoples had neither "real" authority nor "real" law.

72. Thus Bodin argued that proper power could only arise once "man…purged himself of troubling passions" and moved up "the great chain of being…and its hierarchical order. By such a progression (he) reaches the concept of the one infinite God' and with it the reason to develop a concept of power vesting in 'a single ruler on whom the effectiveness of all the rest depend"'.

73. In that context sovereignty became the "most high…and perpetual power over the citizens and subjects". It separated civilised States from the state-less savages and was most legitimate when exercised in the mono-site of a monarchy because *"A sovereign prince is…indispensable to maintain civilised order…it is his power which informs all the members and…to which after immortal God we owe all things".*

74. English jurists subsequently added their refinements to that idea of a "sovereign prince" from the Lockean view that it depended upon a social contract to John Austin's positioning of it within the particular and "positive" acts of certain institutional structures. Yet the English retained the essentials promoted by Bodin that sovereignty as a concept of power was absolute and "indispensable to maintain civilised order".

75. Sovereignty could therefore only be exercised within a site of power based upon a single sovereign - a King, Queen, or Emperor whose power was ordained by god. Over time that site of power was modified in England in particular within a constitutional monarchy framework as "The King (or Queen) in Parliament". However the inalienability and the singularity of its absolute power remained an essential component of what became known as the Westminster Constitutional System.

76. Under that system the various constituent parts of sovereignty were inalienable and could not be voluntarily ceded to another polity. In the proto-racism of sovereignty's definitional origins they also could not be fully possessed by "inferior peoples" as they were part of a

political and constitutional order which "others" such as Indigenous Peoples (including Māori) did not have the capacity or intelligence to exercise.

77. Yet in every polity the relationship between law and political or constitutional power is clear and unequivocal. Cultures express that relationship in different ways but what some call the "rule of law" is always connected to the power of those who "rule". This is clearly illustrated in the unique ways that Indigenous Peoples have defined and used their concepts and sites of power.

78. The Mohawk scholar Professor Taiaiake Alfred has described the Mohawk concept of power as the ideal of decision-making sourced within a *"cohesive universe"* predicated on the relationship between the collective and the *"conscious co-ordination of individual powers of self-determination"*. The site of power was the leadership institution of "Clan Mothers" and "Clan Fathers," as well as those holding special positions such as the "Faith Keepers".

79. In the 15th century the Mohawk treated with its neighbouring Nations the Onondaga, the Seneca, the Oneida and the Cayuga to form the Haudenosaunee Confederation. The Confederation still exists today and within it each Nation retains its own authority (its own version of the concept of power) but joins together in a different site of power to make decisions of common interest.

80. The current Faith Keeper of the Onondaga, Oren Lyons, has stated that the concept of each Nation's power is based upon the relationships which the people have with their Father Sky, their Mother Earth and all her lands and waters, as well as "our elder brother the sun, our grandmother the moon and grandfather the trees". Like the law the authority is relational and embraces the totality of all people and things, both animate and inanimate.

81. In Hawaii the Kanaka Maoli define their concept of power as "mana" which is the absolute independent authority to "malama aina, malama moana" – to care for the land and water and thus the people who belong there. Professor Kekuni Blaisdell once likened "mana" to the idea of "ea" or "the force that can move heaven and earth". The site of power was the institution of "A'liki" which

consisted of hereditary leaders or those chosen for their special skills by the elders or “kupuna”.

82. Iwi and hapū also developed what may properly be called a Māori constitutionalism. Within this constitutionalism tikanga as law and the ideas of political and constitutional authority have always existed in symbiosis.

83. Unfortunately the very idea of a Māori constitutionalism, like that of tikanga as law, has been misunderstood, redefined, and often rejected. It did not fit the ideology of the inferior “other” or the presumption that we existed in “petty tribes” which were placed on the lowest rung of the colonisers’ constitutional chain of being.

84. Yet as Iwi and hapū were established as distinct polities in Aotearoa so too did a concept of power emerge that was known generically as mana. There are of course many different types of mana which are manifest in all entities in the same way that tapu inheres in them. Perhaps the main manifestations may be described as follows –

84.1. Mana atua is the discrete and sacred power possessed by the originary tīpuna or gods which may sometimes be devolved to or transmitted by persons who have been trained in the appropriate rituals and mātauranga;

84.2. Mana tīpuna is the power and authority handed down through certain whakapapa;

84.3. Mana tangata is the power which inheres in all people simply by virtue of their humanity;

84.4. Mana whenua is the power within Papatuanuku and the Iwi or hapū with recognised authority within a particular territory – in this case they are said to be or to hold the mana whenua.;

84.5. Mana moana is the power within the domain of Tangaroa and Hinemoana and the Iwi or hapū with recognised authority in relation to a particular area of the sea.

85. Not all Iwi and Hapū used those terms but wherever and however mana has been manifest it denotes both power and authority. In the quite specific sense of a Māori constitutionalism it is the absolute right of a polity to make decisions and determine its own destiny within a recognised territory. The idea of that absoluteness of authority was shared across all Iwi, although it is described in some as mana motuhake, mana taketake or mana torangapu.

86. Since the 19th century, and especially in Te Tiriti o Waitangi, the concept of power has also been called tino rangatiratanga. I am mindful of course of the considerable thought that the courts and the Waitangi Tribunal in particular have given over the years to the meaning and impact of the term in Te Tiriti. However I am particularly reminded of the definition submitted to the Tribunal by Dame Mira Szazy who equated it with independence and *"the self determination" implicit in "the very essence of being, of law, of the eternal right to be, to live, to exist, to occupy the land."*

87. Because of the relational nature of Māori culture any mana or tino rangatiratanga exercised by Iwi or Hapū could only be legitimised in concert with what may be termed the "essence of being" or spirituality that resides in the mana in the land, the waters and the atua. If tikanga as law was designed to meet all exigencies of human existence, mana and tino rangatiratanga emerged to meet all the possible relationships our people might have with others, with the world, and the universe.

88. The concept of mana as a political and constitutional power thus denotes an absolute authority that touched upon all areas of life. It was absolute because it was absolutely the prerogative of Iwi and Hapū, but it was also absolute in the sense that it was commensurate with independence and an exercise of authority that could not be interfered with by any other polity.

89. All of the constituent parts of mana were exercised within a site of power that resided in the institutions of ariki and rangatira operating most directly within a particular Hapū, and sometimes through huihuinga or whakaminenga involving a collective of Iwi and Hapū. Indeed just as the word "hapū" is derivative of being pregnant or swelling with life, so the Hapū was the place where often the most

important life and death decisions were made. Treaties for example were most often Hapū business, as evidenced in Article Two of Te Tiriti o Waitangi.

90. The actual tenure of ariki and rangatira within a site of power was always subject to how well they preserved and defended the wellbeing of the people and the whenua, and how well they ensured their protection. Their ability to act within the site of power was in the end subject to the will of the people and for that reason it was ultimately exercised for and by them. Māori constitutionalism was an inherently democratic process in the sense of being people bestowed.

91. The absolute nature of the mana which rangatira exercised included a number of different components which may be called the specifics of power such as:

91.1. The power to define – that is the power to define the rights, interests and place of both the collective and of individuals as mokopuna and as citizens;

91.2. The power to protect – that is power to be kaitiaki, to manaaki and maintain the peace, and to protect and care for the land and waters within the rohe;

91.3. The power to assign for use – that is the power to grant or withhold entitlements to the land and waters subject to tikanga and the reciprocal obligations between individuals and the collective;

91.4. The power to decide – that is the power to make decisions about everything affecting the wellbeing of the people;

91.5. The power to reconcile – that is the power to restore, enhance and advance whakapapa relationships in peace and most especially after conflict through processes such as hohou rongo or rongo taketake; and

91.6. The power to develop – that is the power to change in ways that are consistent with tikanga and conducive to the advancement of the people.

92. A number of quite specific but interrelated norms developed over time to ensure the proper and legitimate exercise of mana and tino rangatiratanga. They became the constitutional conventions of every Iwi and hapū and may be conceptualised in the following ways:

92.1. The first convention, intimated above, was that every constituent power was tempered by tikanga and could only be exercised in ways consistent with it. In that regard political power and law were like the maihi and amo of a whare tipuna – they supported each other and held the house of the people together;

92.2. Secondly the exercise of political power was always in a sense governed by its own whakapapa through precedents set over time. New circumstances of course often required new political responses, but just as the Māori intellectual and cultural tradition saw the past as ahead of oneself so politics adapted and moved ahead with history in mind;

92.3. Thirdly, politics was always mediated through the complex certainties inherent in the many facets of mana itself. Whether it was the mana of rangatira ensuring compliance through consensus decision-making or the mana atua ensuring compliance through the seemingly inexplicable precedents and power of tapu, the very notion of mana as a unique power and authority prescribed and proscribed its political exercise;

92.4. Fourthly, the power necessarily entailed an obligation to promote and protect the wellbeing of the people through the constant mediation of relationships within the land and waters recognised by the Iwi or Hapū. It was therefore inseparable from the mana of the land and the water and its exercise was both dependent upon and evidence of the relationships people had with them;

92.5. Fifthly the power was defined and claimed through the intimate associations the people had with a particular whenua and moana. In that sense mana whenua and mana

moana were not determined solely by the exercise of military power of territorial claim but profound associations with, and knowledge of, the very lands and waters themselves – where did those rocks fit in a people's whakapapa, what tipuna resided in that reef, and so on;

92.6. Finally, the power was handed down by the tīpuna in trust for the living to exercise for future generations. It was a taonga to be protected as much as it was an authority to be exercised.

93. Because of those conventions, as well as the fundamental importance of political independence and authority in any polity, mana and tino rangatiratanga were absolutely inalienable. No matter how powerful rangatira might presume to be, they never possessed the authority nor had the right to give it away or subordinate it to some other entity. The fact that there is no word in Te Reo Māori for 'cede' is not a linguistic shortcoming but an indication that to even contemplate giving away mana would have been legally impossible, politically untenable, and culturally incomprehensible.

94. And just as mana as a totalising authority could never be ceded, so its constituent parts were inalienable. Thus the power to protect and the power to grant or withhold entitlements were as jealously guarded as the power to decide and the power to reconcile.

95. Neither could it be ceded or delegated to another polity to exercise on one's behalf. It would have been impossible for example for Ngāti Kere to delegate or cede its authority to make decisions about say the waters off Te Paremahu to Ngāti Porou. It might choose to grant use rights based on whakapapa or as part of some specific agreement, but it could not and would not give away the power to grant those rights.

96. That inalienable authority, as well as the relationships which it encapsulated through whakapapa, stretched from the lands and the rivers to the underground aquifers, and from the mountains to the sea. It is to the particular relationship between tikanga, mana, and te rohe moana that this Brief now turns.

Part Three – The Establishment of Mana Moana

97. The links between tikanga, mana and the rohe moana in a particular Iwi or hapū have been forged through the ever-present presumptions of whakapapa in the Māori world view. Questions about what tikanga applied in a rohe moana (what values shaped the law for the sea), how mana might be legitimately exercised in relation to it, and the very definition of a rohe moana itself were all framed by the knowledge of Iwi and Hapū whakapapa as well as the particular relationships established over time enabling a particular polity to assert and effectively exercise mana moana.

98. Fundamental to that framing is the inseparability of land and water. Unlike the common law compartmentalisation of land and water into separate components like the foreshore and seabed or the river, the riverbed, and the riverbank, the Māori legal and intellectual tradition has always seen fresh and sea waters as part of the land. Every body of water has its own unique characteristics and life cycles but they are all part of the life blood and the sustaining, purifying body fluids of Papatuanuku.

99. It is a truism in all Iwi that riverbeds and lakebeds and the seabed are simply "land with water flowing over them". Within that intellectual construct a rohe moana is the area of sea-covered land recognised by a particular Iwi or hapū as part of its cultural, legal and political territory. It extends to recognised paepaeroa or markers of jurisdiction within which an Iwi or hapū has authority and responsibility for all of its geographic and marine features as well as all of the species which inhabit it.

100. That authority is part of the overarching mana or tino rangatiratanga asserted by the Iwi or hapū and the concomitant duties to care for and protect the area of a rohe moana. The duty of care is most directly exercised through the obligations of kaitiakitanga which are in turn sanctioned through and by the authority of mana or tino rangatiratanga.

101. In that regard the care and protection of a rohe moana was always part of the same law and authority exercised in relation to land. It included the same specifics of power from the power to define its

extent to the power to assign use rights or rights of access in appropriate circumstances.

102. The origins of that authority and responsibility in regard to a rohe moana lie in the metaphors of birth and creation and the poetry that links human growth with the lands and the seas. Thus the fluids which nurture the whenua of a child in the womb, the wai-ahuru, are likened to the gentle waves on the shore washing over the places where the land slips underwater, while te ngutu o te awa breathes life from the mouths of the rivers into the depths of the sea. A rohe moana holds that congruence of birth and life and links the land and sea in a relationship that reaches back to the very source of life.

103. For the Iwi or hapū who live with a rohe moana it is a multi-layered relationship that is deeply spiritual, physical, and of course whakapapa-based. On one level it is expressed in the practical need to ensure that its waters remain clean and its fish stocks viable so that the people may continue to enjoy its bounty. At another level it involves the less tangible but nevertheless real sense that the mauri and mana of the sea need to be protected so that the people might stay well too.

104. Inherent at both levels is the understanding that the authority and legal responsibility to look after the sea, to be kaitiaki, is part of a reciprocal relationship because the sea, like the land, is also the kaitiaki of the people who live with the rohe moana. To have mana moana meant acknowledging and honouring that reciprocity, to exercise one's authority and responsibility in a tika way.

105. Not all Iwi or hapū have traditionally used the term mana moana although each one has a clear understanding of both the absolute authority vested in them to protect and care for the moana as well as the ways in which that protection and defence could be assured through tikanga. As such the mana moana, like the tino rangatiratanga of each Iwi and Hapū vested as what may be termed a whakapapa entitlement regardless of the size or population of the Iwi or Hapū concerned.

106. Analogies are not always an apt means of comparison but mana and the notions of mana whenua and mana moana vested in the same way that for example the international right of self-determination vests in indigenous nations by virtue of their indigeneity, no matter how large or small they may be. Size may have some relevance in the ability of an Iwi or hapū to actually exercise their mana whenua or mana moana, as history shows. However in conceptual terms (that is whether they exist as part of an Iwi or hapū intellectual and political tradition – whether they are legal) size does not really matter.

107. Rather to have mana moana depended more upon the relationship a people established over time with the mana of a particular seascape, as well as the ways in which that relationship was marked through history and tradition. It was the intimate knowledge and respect for place and sea which established the whakapapa entitlement and which most ensured that it was held and exercised according to tikanga as law.

108. How it was first claimed and then developed over time is always a complex amalgam of tradition and adaptability as well as politics and shifting degrees of involvement through periods of war or other disruption. But even in times of stress the evidence of mana moana could remain in all sorts of tangible and intangible ways, such as in the place names (and the knowledge of who gave them and why), in the recorded histories, and in quiet ongoing practice.

109. And just as the names and stories remained even when some members of the Iwi or Hapū concerned may have been forced by circumstance to temporarily leave, so the authority of mana moana would be retained by those who stayed and continued to exercise it.

110. From those long-established practices and history a number of principles developed within tikanga about how mana moana might be acquired and retained. Together they illustrate the comprehensiveness of mana moana as well as the sophistication of mana as a concept of power. Some of them are well known in relation to mana whenua but it is my considered view that they also apply to mana moana, if only because of the inseparability of the land and sea.

111. Some of those indicative principles are –

111.1. ***The Principle of Place*** – a recognised moana, or particular identified stretch of moana with known and named boundaries that can provide the physical and spiritual base for a polity's mana moana;

111.2. ***The Principle of Ancestral Connection*** – an established and proven whakapapa connection to the identified place, often derived from te hikinga tapu or the lifting of tapu in relation to that place – either of the land contiguous to the sea or the area of sea itself;

111.3. ***The Principle of Intimate Association*** – a long-established history of naming markers in the sea and land which link the whenua and people to the rohe moana (and even the universe) through historical events, spiritual association, or geographic and marine knowledge.;

111.4. ***The Principle of Tūrangawaewae*** – a long-established tradition of regarding a particular place as home coupled with a proven intergenerational occupation of that place, especially of lands or islands contiguous to the sea which result in the consequent exercise of authority in relation to the moana as determined by tikanga as law;

111.5. ***The Principle of Connective Use*** – proven use over time of identified and named areas of the sea for food gathering or other purposes that arises from an intimate connection with the land and sea as indicated by named marine features, species, and tidal movements etc.

112. The actual acquisition of mana moana and its subsequent holding according to tikanga depends upon a complex of these principles rather than just one in isolation. Thus while unbroken or regular use is important it has traditionally had to be augmented in other ways. As in all things to do with tikanga and tino rangatiratanga, context is important in defining mana moana.

113. Fundamental to that context and thus the intersection between tino rangatiratanga and tikanga as law is the intellectual and

constitutional space within which the tīpuna addressed particular questions about the nature and extent of authority in regard to water and the consequent obligations that it imposed.

114. Because that space was inevitably shaped by association with, and knowledge about, the land and waters, mana moana in a sense gives expression to the markers in the land and seascape that people have observed and recorded over time. It is an iteration of belonging, of home, that only living with a place can give substance to.

115. Thus if the nature of mana moana depended ultimately upon the nature of the moana, it was also necessarily framed by the nature of the long-term acquaintance, use, and knowledge that made it home. For that reason, seasonal use or transit across a particular seascape does not in itself establish mana moana.

116. Just as shared or agreed pathways across the land did not equate with mana whenua or disturb the authority of the people whose land was being crossed, so navigation or access to fishing grounds by others did not disturb the authority of those holding mana moana. Mana moana is among other things a recognition of the permanent rather than the transitory.

117. Another analogy may hopefully prove illustrative. In the long tradition of Māori visiting and gaining access to marae or sharing food resources in another rohe the journey to and access to the marae or resource never amounted to an exercise of mana whenua by the manuhiri. Occasional or even frequent visits and use may have been proof of a whakapapa relationship or a negotiated treaty (mahi tūhono) but they were never sufficient to allow the users to claim mana moana.

118. Like the very notion of mana as an absolute and inalienable authority in relation to all things in the Māori world, so mana moana evolved as a particular but equally absolute and inalienable authority in relation to a particular seascape. Derived from a sense of home and the accretion of knowledge and interests over time it was expressed as a political, cultural and historical sense of belonging that necessarily carried its own entitlements and

obligations. It is the development and ongoing possession of that authority and those concomitant entitlements and obligations on Motiti that this Brief now turns.

Part Four – The Exercise of Mana on Motiti

119. In many ways Motiti Island and its peoples provide an archetypal example of how mana moana is acquired, nurtured and exercised over time. For although the Hapū involved are linked by whakapapa to other Hapū and Iwi on the mainland, the island is nevertheless where they have long made their home and where they have long claimed mana moana.

120. Motiti Island is in fact the physical base for their site of power and the place which through history and intimate association defines and legitimises their mana moana. It is the land and seascape where tikanga as law reaffirms both their authority in terms of tino rangatiratanga and their obligations in terms of kaitiakitanga. In my submission its history, and the history of its people, clearly illustrate how time and place are interlinked with the parameters of tikanga and the exercise of mana.

121. Mokopuna of the island provide detailed evidence of not just their deep attachment to the land and waters of their rohe but also the traditional practices which they have followed to utilise, to protect, and often to generously share the bounty of their home. Perhaps more importantly they have long known and named the whenua and the moana and the links between them – the knowledge of whakapapa and the whakapapa of knowledge which underpins their identity and their entitlements.

122. In this Part of the Brief I do not presume to canvass the depth of that knowledge. Rather I endeavour to show how that knowledge contains all of the "intellectual and spiritual flavour" of tikanga identified by the Waitangi Tribunal in the Foreshore Report referenced above. Indeed the mātauranga of Motiti is clearly illustrative of the interconnected themes which the Tribunal concluded were inherent in tikanga.

123. It shows for example the indivisibility of the natural world and the oneness of all its elements, including the harmony between the spiritual world and the physical world. In my view it certainly shows the mutuality of relationships between the people and the land as evidenced through whakapapa and kōrero as well as the process of naming. Perhaps most importantly it illustrates the obvious cycles of reciprocity inherent in the exercise of mana and the generous expressions of manaakitanga.

124. The "intellectual and spiritual flavour" may most helpfully be expressed within the characteristic mana moana Principles characteristics, specifically the Principles of Place, Ancestral Connection, Intimate Association, Tūrangawaewae, and Unbroken or Regular Use. Indeed in every act of naming and every telling of whakapapa the mātauranga of Motiti is an expression of those characteristics. In a very real way they pass what may be called a "mana moana test".

125. Each Principle is found in the stories in the land and the sea, and the whakapapa that links the people with them. They have each been defined and refined through time as part of the island's tikanga as law, and they have been guaranteed through the long exercise of tino rangatiratanga. They are the palimpsest upon which mana whenua and mana moana has been prescribed.

126. ***The Principle of Place –***

126.1. In all the traditions on the island there is no distinction drawn between the land and the sea nor the entitlements inherent within them. The rohe moana really is land covered by water and its boundaries as well as its bounty are well-known.

126.2. Like every rohe the island has a creation story depicting how it was formed after a natural disaster which severed it from the mainland. The name Motiti actually derives from Motu-iti or small surviving piece that is linked to other motu or fragments that were also left after the cataclysm or te umu o kahakaha.

126.3. The sea surrounding the island is bordered by Te Paepaeroa which connects all the adjacent motu and toka and encircles Motiti like an anchor holding it in position – ngā Tauranga tai kukume o te Hukarere o ngā Aturere. Te Paepaeroa itself follows the tidal patterns and fishing grounds in the moana and thus represents a living boundary which connects the whenua to all the tangible and intangible markers in the seascape, including wāhi tapu and species-specific mahinga kai.

126.4. It is a discrete and easily-traceable border that not only defines geographic limits but also the meaning and sense of being tangata whenua. It connected the people to the sea and land, to their tūrangawaewae, and as such it defined their home and their place.

127. ***The Principle of Ancestral Connection –***

127.1. Together the land and sea make up the rohe of the Hapū of Motiti - Ngāti Pau, Ngāti Tutonu, Ngāti Kauaewera, Ngāti Makerewai, and Ngāti Takahanga. Each has whakapapa to the eponymous ancestor Te Hapū who was responsible for te hikinga tapu on the island.

127.2. Each Hapū established its own kāinga and over time exercised authority in relation to different parts of the whenua and the moana. Thus for example the mana on Te Moutere o Motu Nau was vested in Ngāti Pau and manuhiri could only access its resources with the permission of the Hapū.

127.3. This was also the case at Moto Haku where Ngāti Pau accumulated extensive knowledge about the reefs and currents and fish stocks. It carefully regulated the harvest of Hapuku and only allowed access to mainland Iwi on strict terms and for limited periods.

127.4. Throughout the rohe moana each Hapū established its mana and similarly shared the resources as an expression of both mana and manaakitanga. The authority and willingness to

do so grew out of the long-standing ancestral connection with the land and sea. It was mana tempered by time and by the people's whakapapa to the whenua and the moana.

128. ***The Principle of Intimate Association -***

128.1. Many of the names on the island were given by Te Hapū during his initial exploration and settlement. Just one example is the hill now known as Motukorapa which on first sight he likened to an island "Te motu ko rapa i te whenua."

128.2. Such naming is not just a metaphorical description of markers in the land or sea. It is also an affirmation and reaffirmation of belonging, authority, and obligation. It establishes and gives life to the reality of ancestral connection that is then passed on through whakapapa and the exercise of mana whenua and mana moana.

128.3. It also constantly reaffirms the links between the land and the sea in a detailed geographical nexus where various wāhi tūpuna, wāhi taonga and wāhi tapu represent what in Ngāti Kahungunu we call a whakapapa tūhono. Thus for example in the middle of the island Te Kopu Whakāiri and To Pito o te Ao represent the connection between the reefs and rocks of Te Paepaeroa, the womb of the island, and the umbilical cord of the heavens.

128.4. They also illustrate how the act of naming can give poetic expression to the type of interconnectedness and awareness which only arises through an intimate knowledge of, and association with, a particular whenua and moana. And because they are names sourced in ancient history which still resonates today they give meaning in a very real sense to the Māori understanding of "i ngā rā o mua" as a past that is always before us.

128.5. As the expert evidence of rangatira attests, there are literally hundreds of such named places and features within Te Paepaeroa. They establish a long and meaningful relationship with the land and sea that has been calmly and

consistently maintained as proof of their tūrangawaewae and their tino rangatiratanga.

129. ***The Principle of Tūrangawaewae –***

129.1. Every Māori concept has a whakapapa in the sense that it is built up of layers from a particular base (hence whaka-papa). The notion of tūrangawaewae is no different. Its literal meaning of "a place to stand" draws upon a complex of values and philosophies about occupation, belonging, and the ultimate security of being at home.

129.2. It therefore means more than just a physical place and encompasses the meaning that a people have given to, and taken from, the place over time. In many Iwi and Hapū those perceptions are encapsulated in pepehā about mountains and rivers.

129.3. Sometimes they are expressed in quite specific stories in the land or in the deeds of the ancestors who first arrived there. For island peoples such as the Hapū of Motiti they are drawn from the inviolable conjunction between the land and sea.

129.4. Within that conjunction tūrangawaewae therefore implies both a knowledge of and an authority for the island and its surrounding seas. If the land is "a place to stand," then for the people of Motiti the sea is a "place to be". One does not exist without the other, and te exercise of mana moana and tino rangatiratanga were similarly inseparable.

130. ***The Principle of Connective Use –***

130.1. Tūrangawaewae naturally implies patterns of use, and a long-established intimate association with a particular whenua and moana establishes the patterns of connective use which legitimise mana moana.

130.2. Again because more detailed evidence will be given by Motiti rangatira this Brief considers just two instances of regular and controlled use which indicate both the intimate association with the land and moana and the connectivity

between that use and a sense of belonging. In a very real sense they indicate the regular and kaitiaki use involved in harvesting the resources of home as an expression of mana moana.

130.3. Perhaps the most striking example is the use of the fishing grounds around Motu Haku which has always been a rich source of Hapuku and Moeone. There is clear evidence of consistent use of the area by Ngāti Pau, evidenced by deep knowledge of the species as well as the construction of a matai pouhere to safeguard them.

130.4. There are also instances where specific permission was given to mainland Iwi to access the fishing grounds. The granting of that permission was an intrinsic part of the Hapū exercising its tino rangatiratanga and its mana moana. It was also part of its obligation to manaaki those with whom they shared whakapapa.

130.5. A similar example of the connective use which is a necessary correlate of mana moana is found the harvesting of kaimoana at Te Māmangi/Ōtāiti. Through intimate association Ōtāiti is regarded as a wāhi tapu because it is one of the anchors holding the mauri of the area and thus the protection of its kaitiaki.

130.6. Because of the reef's tapu nature any fishing for such species as the Karutataka was prescribed and proscribed by various rituals. Indeed fishing could only occur if the tapu was appropriately lifted and then re-imposed afterwards. The regulation of use in this manner was a conservation measure ensuring the well-being of the reef and its species – it was also an exercise of tino rangatiratanga and mana moana that limited access by other Iwi or Hapū.

131. In my considered view it is clear that the people of Motiti established and exercised mana moana in the seas surrounding the island. The in-depth knowledge of the land and sea environs coupled with a knowledge of whakapapa that reaches back to the tīpuna Te Hapū and even further to the Maioriori provided the

cultural and political context within which the unique and relational authority of mana moana could evolve and be sustained.

132. Even when the people were under threat from other Iwi and more recently from the policies of the Crown, that sense of belonging and tūrangawaewae has never diminished. It has remained deeply embedded in their tikanga as law and jealously guarded as part of their independence and mana.

133. It is perhaps apposite and helpful at this point to frame the unique and relational nature of mana moana as not just a political and constitutional authority – an exercise of mana as a concept of power according to tikanga as law – but also as an absolute interest that might usefully be conceptualised in English by adapting the word "ownership". The use of that term does not of course imply it is ownership as understood in the language of capitalist property and common law but rather a culturally distinct appreciation of the totality of Iwi and Hapū interest in, and relationship with, the water.

134. In that regard it is similar to the Old English derivation of the word "ownership" as the acknowledgement of possession, or something flowing from it - something in itself valid and true. It is therefore something more than ownership as an individuated interest because it reflects a possession recognised in tikanga as being sourced in the collective throughout a particular history and whakapapa.

135. It also necessarily implies something more than a mere guardianship interest because, as stated earlier, the tikanga obligation to be kaitiaki is itself dependent upon the effective exercise of mana and tino rangatiratanga. It is an "ownership" that implies a duty of care.

136. In that sense "ownership" in relation to a rohe moana is both a legal and a political construct that is absolute in the same sense that mana and tino rangatiratanga are. It absolutely vested in those whose whakapapa related to them over time and it could not be voluntarily nor permanently alienated or given away.

137. In that context the argument that no-one owns the water is a Māori contradiction in terms. In the contemporary context it is also a

disingenuous contradiction, especially as the Crown and local government authorities assume to exercise all the powers of an owner in everything from the granting of use rights over water to the regulation of access.

138. The interests of an Iwi or Hapū in their "very own" waters were thus exclusive and undisturbed. It was that exclusivity which enabled the Hapū of Motiti to protect and conserve the resources of the moana while also allowing them to assign or share the use of the waters at appropriate times. Sharing the use did not of course lessen the ownership or the political authority in relation to it. Rather it was instead evidence of it.

139. Yet in spite of that clear evidence the people of Motiti have continually seen their rightful place ignored or trampled upon. This Brief therefore turns now to the acts and omissions of the Crown since 1840 which have especially misinterpreted and redefined not just the mana and mana moana of the Hapū of Motiti but the very notions of mana and mana moana in general.

Part Five – The Effects of Colonisation and Crown Policy On the Mana Moana of Motiti

140. It is regrettable that in spite of all the clear history and tradition establishing the entitlements and authority of the Hapū of Motiti to their land and seas the people have had to constantly struggle to be recognised. The matters under consideration in this Brief are sadly no different.

141. For in the end they are the result of acts and omissions by the Crown which have led to a marginalisation of the Island peoples and their entitlements, and often their complete silencing in matters which have affected their future and often indeed their survival. It is especially regrettable that their invisible-isation has become more painful and intense in recent years.

142. Yet the current situation has a whakapapa too, a history shaped by colonisation and the persistent attempts by the Crown to redefine and ultimately subordinate the interests of Māori, including in this case those of the Hapū of Motiti. In my respectful view that

redefining and ultimate silencing of the Hapū may best be conceptualised in the discourse around the Treaty of Waitangi and the gradual emphasis placed by the Crown upon a notion of "Iwi" instead of the "Hapū" actually referred to in Article Two.

143. It is of course indisputable that the certainties of tikanga and mana were beset by a new set of challenges with the arrival of the first Pākehā. However it is also clear that the increasing numbers of strangers arriving on our shores after 1769 did not alter the fundamental legal and political perceptions which Māori brought to the new and rapidly changing situation. Our people continued to engage with and perceive the newcomers according to a view of the world determined by tikanga as law and the absolute certainty of mana, including mana moana.

144. In its most basic sense the strangers were manuhiri whom Iwi and Hapū were obligated to welcome according to tikanga – the rule of our law continued to run. The newcomers simply represented new relationships as well as possible benefits and threats to the established order. Their presence therefore needed to be carefully measured according to how and where they might best be accommodated and what entitlements (if any) they might be granted, especially in relation to land and water.

145. They were in a sense entering the marae atea of Iwi and Hapū who clearly had the legal competence and political and constitutional power to determine the rules of engagement. Like every manuhiri arriving in the rohe of another, they were expected to abide by the kawa and jurisdiction of the hosts, just as other roopu seeking to access the resources of Motiti had long been expected to do.

146. That simple reality, drawn from culture as well as law and power did not change even during the 1820's and 1830's. It has long been argued by the Crown and others that disease and the so-called Musket Wars had reduced Iwi and Hapū to almost helpless and hapless victims begging for the protection and salvation of a greater power. While those consequences of encounter should not be discounted it is simply contrary to any Māori reality to presume that the initiatives taken at the time, including Te Tiriti, were in any way

a retreat from or a diminishing of the law and authority implicit in history and whakapapa.

147. Indeed by its very nature Te Tiriti is derivative of Māori law and mana. For while Māori were always ready to treat and establish new relationships, that readiness depended upon the ability to preserve the existing legal and constitutional order, particularly as they related to the whenua and the moana.

148. And because the idea of treating did not fall unexpectedly out of the sky in 1840 but was known in all inter-Hapū and inter-Iwi histories, the portent and processes around Te Tiriti would have been instantly recognisable. As a result its key context in Māori terms was that its meaning and legitimacy were dependent upon the realities of tikanga as law and mana as a concept of power, especially as they related to the authority and entitlements of "ngā Hapū katoa" as stated in Article Two.

149. It is thus my considered view that the guarantee of tino rangatiratanga in Article Two of Te Tiriti and the English text of the Treaty reaffirms the tikanga and mana of Hapū in relation to water simply because of its whakapapa and inseparability from the whenua. The Article's reference to "taonga" would also necessarily include the moana, as indicated for example by the innate "preciousness" which the Hapū of Motiti accord it in their naming and their practices.

150. Yet not only did the Crown ultimately assume authority over all of the lands and waters it also chose to redefine the nature of the Māori polities which might have an "interest" in them. As the historian Angela Ballara has noted in her book *Iwi: The Dynamics of Maori tribal organisation from c1769 to c 1945* (Victoria University Press, Wellington, 1998), this redefining resulted in a hierarchical re-presentation of Māori polities that is historically and factually incorrect.

151. It resulted in a perverse privileging of Iwi as a pre-eminent and dominant force in Māori political, cultural and economic life. Over time what had been a complex and functional set of relations which maintained both the independence and interdependence of Iwi and

Hapū became a "top down" structure which actually subordinated the authority and entitlements of Hapū. As the detailed historical evidence in this hearing shows, the Hapū of Motiti were particularly affected by this redefinition.

152. This redefining often seemed to have occurred for little more than administrative ease on the part of the Crown, as evidenced in attempts to include offshore islands within the ambit of a mainland Iwi, even though the island's geographic separation in itself illustrated a distinct and uniquely independent Hapū reality, and its history has been forged not only by the peoples of the Mataatua waka but also those of Waitaha of the Te Arawa waka. The Crown has mistakenly equated whakapapa relationships with subordination to the authority of a wider polity.

153. Other witnesses will cover this matter in more detail but it does seem clear that such redefinitions are breaches of the Treaty and a fundamental reconceptualization of the place of Hapū in the treaty relationship. Equally important in my view, they are also contrary to tikanga as law and the very nature of mana and mana moana.

Kinship report

154. I have read the draft report of the Office of Treaty Settlements (**"OTS"**) dated 2 May 2016 regarding the nature of the relationship between Ngāi Te Hapū and Patuwai of Ngāti Awa (the "kinship report"). I have also read Dr O'Malley's assessment of the kinship report in his evidence.

155. It is deeply disturbing that OTS acknowledges at paragraphs 17 and 19 that OTS staff are not experts in the interpretation of whakapapa and therefore cannot make a judgement as to whether Te Hapū is a Ngāti Awa ancestor, but then proceeds throughout the report to consider the 'evidence' on that question. The concept of 'hapū' and 'iwi' are Maori cultural and legal constructs, and it follows that they must be determined by tikanga. From a tikanga standpoint, expertise in whakapapa is essential prerequisite knowledge to even begin considering the question of whether Te Hapū is a Ngāti Awa ancestor. It follows that any 'findings' OTS has reached are methodologically flawed.

156. It is also disturbing that OTS started its analysis with the Crown's definition of Ngāti Awa in the Ngāti Awa Claims Settlement Act 2005. The statutory definition is unhelpfully broad, and in the context where the name Patuwai refers to an historical event rather than an ancestor, particular care is required because descent is not traced from an eponymous ancestor. That underscores the need for expertise in whakapapa.

157. I have also read the letter from the former Minister for Treaty of Waitangi Negotiations dated 28 July 2016. It is difficult to understand from the point of view of justice or logic how the Crown can draw "no conclusion" about whether any historic Treaty claim based on whakapapa from Te Hapū are settled, or whether Ngāi Te Hapū and Patuwai are distinct groups with distinct claims, but then assert that the Crown is not prepared to enter into negotiations because Ngāi Te Hapū has not met its Treaty settlement policies. This conclusion compounds the prejudice of invisible-isation for the Hapū of Motiti. In my considered view, it is also a breach of the Crown's Treaty obligations to conclude that there *may* be unsettled historic Treaty claims on Motiti, but then decide it has no duty to resolve them or to better understand who the Hapū of Motiti are.

Part Six – Conclusions

158. The entitlements and authority which are consequent upon the possession of tino rangatiratanga and thus mana moana are derived from tradition, practice, and effective application. In particular they are derived from and pertain to a particular place, or sense of place.

159. They are thus expressions of tūrangawaewae and the ineffable longings of home. They are not fleeting or temporary use rights but deep-seated and intimate expressions derived from stories in the land and seascape that only time can evince. Their existence, and therefore their legitimacy, can be traced through those stories and the values and practices which they incorporate.

160. In a way that is both quantifiable and qualitative mana moana can therefore be established by positioning a particular sea and the land it borders or surrounds within the history and accuracy of those

stories and practices. Together they can illustrate the extent as well as the legitimacy of any mana moana as well as the authority of tino rangatiratanga which underpins it.

161. It is my considered view, based on the traditional history evidence that I have read, that through long and intimate association the Hapū of Motiti have established and continue to hold the authority and entitlements of mana moana within the island and the seas that are bordered by Te Paepaeroa. They continue to be a distinct people with a distinct authority – they are not, and never have been, part of some amorphous and Crown-defined "large natural grouping" or "Post Settlement Governance Entity".

162. Tikanga as law and history as a still living reality reinforces that distinctiveness. It has been both painful and unjust that the Hapū of Motiti have for so long had that reality denied and their very existence invisibilised.

163. In my respectful view the Crown should resile from its continued denial of the rightful place of the Hapū of Motiti and instead recognise the authority and obligations they have long exercised and fulfilled on the island and its surrounding waters.

Moana Jackson
24th April 2018