IN THE WAITANGI TRIBUNAL

Wai 2180, Wai 1705, Wai 647, Wai 588, Wai 385, Wai 581, Wai 1888

IN THE MATTER OF the Treaty of Waitangi Act 1975 and the Taihape: Rangitikei ki Rangipo Inquiry (Wai 2180)

IN THE MATTER OF a claim by Isaac Hunter, Utiku Potaka, Maria Taiuru, Hari Benevides, Moira Raukawa-Haskell, Te Rangianganoa Hawira, Kelly Thompson, Barbara Ball and Richard Steedman on behalf of themselves, the Iwi organisations who have authorised them to make this claim and the Mōkai Pātea Waitangi Claims Trust (**Wai 1705**)

AND a claim by Maria Taiuru and others for and on behalf of Wai 647 Claimants (**Wai 647**)

AND a claim by Isaac Hunter and Maria Taiuru and others for and on behalf of the Wai 588 Claimants (**Wai 588**)

AND a claim by Neville Franze Te Ngahoa Lomax and others for and behalf of the Potaka Whanau Trust and Nga Hapu o Ngati Hauiti (**Wai 385**)

AND a claim by Neville Franze Te Ngahoa Lomax and others for and behalf of Te Runanga o Ngati Hauiti (**Wai 581**)

AND a claim by Iria Te Rangi Halbert and others for and behalf of the Wai 1888 Claimants (**Wai 1888**)

Claimant Specific Closing Submissions
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E te Rōpū Whakamana i te Tiriti o Waitangi

1. Introduction and Acknowledgements

1.1 These Claimant Specific Closing Submissions are made on behalf of the "Mōkai Pātea claimants" listed above.

1.2 I acknowledge the claimants and their whānau who are the descendants of those tūpuna of Ngāi Te Ohuake, Ngāti Hauiti, Ngāti Whitikaupeka and Ngāti Tamakōpiri who have carried the grievances on their shoulders and are being heard in this inquiry. The claimant whanau have all experienced the passing of loved ones during the course of this inquiry. I acknowledge their contributions and sacrifices. A special mention of Winston Halbert who passed away this week, and who had supported the paepae throughout the Tribunal's visits to Moawhango Marae in this inquiry.

1.3 These submissions support and affirm generic closing submissions on the issues raised by the Statement of Issues. These submissions seek to place the Mōkai Pātea narrative within a holistic assessment of what the guarantees of Te Tiriti o Waitangi required of the Crown, and what the failures by the Crown have meant for Mōkai Pātea. Importantly, the claimants also are constantly looking to the future, seeking opportunities for how this process of understanding the history can lead to better outcomes for Mōkai Pātea and a better relationship with its Treaty partner.

1.4 Counsel acknowledges the claimants in this inquiry who affiliate to Ngāti Hinemanu and Ngāti Paki. Their evidence has contributed significantly to the process. The Tribunal has heard different perspectives on whakapapa and on the nature of the connection between whanau, hapū and iwi within the Mōkai Pātea rohe. As these submissions will be presented orally at Winiata Marae, it is important to acknowledge the hau kāinga and their hospitality.

1.5 Counsel takes this opportunity to acknowledge those other counsel who have been involved in the Wai 2180 inquiry over many years,

who have all contributed to the important task of addressing the pain, loss and grievance that the whanau, hapū and iwi of this rohe have suffered.

1.6 Crown counsel and Crown witnesses have provided substantial input into this inquiry hearing. While the claimants will await the extent of Crown concessions before replying, nevertheless the involvement of Crown officials (in particular from the Ministry of Defence) towards understanding the deep pain and loss of the claimants is appreciated.

1.7 I also acknowledge the Presiding Officer, the Tribunal members, and hard-working Tribunal staff. We wish Sir Doug Kidd recovery to full health. Tēnā koutou katoa.

2. Update on mandate process

2.1 As previously noted, the Mōkai Pātea claimants have sought a mandate to represent those within the claimant community of Mōkai Pātea in the negotiation of their historical Treaty of Waitangi claims. The claimant community has been referred to as "Mōkai Pātea Nui Tonu" to represent the broad confederation of whanau, hapū and iwi in the Mōkai Pātea rohe.

2.2 A draft deed of mandate has been the subject of a mandate voting process, and a subsequent public submission process. The submissions are being considered before a final deed of mandate is presented to the Crown.

3. Mōkai Pātea claimants

3.1 The phrase "Mōkai Pātea claimants" has been used throughout this inquiry to refer to a consolidation of six claims. The claimants are all descendants of one or more of the founding ancestors of Ngā Iwi o Mōkai Pātea: Te Ohuake, Hauiti, Whitikaupeka and Tamakōpiri.

Wai 1705 – the comprehensive Mōkai Pātea claim

3.2 The Wai 1705 Claim is filed on behalf of Isaac Hunter, Utiku Pōtaka, Maria Taiuru, Hari Benevides, Moira Raukawa-Haskell, Te Rangianganoa Hawira, Kelly Thompson, Barbara Ball and Richard Steedman on behalf of themselves, Ngā Iwi o Mōkai Pātea, and the Mōkai Pātea Waitangi Claims Trust.

Wai 385 – Pōtaka Whanau claim

3.3 Wai 385 is a claim by Neville Franze Te Ngahoa Lomax and others for and behalf of the Pōtaka Whanau Trust and Ngā Hapū o Ngāti Hauiti. The claim relates primarily to the sections of land contained within the Township of Pōtaka (now referred to as "Utiku") acquired by the Crown for public purposes and railways, and the buildings and improvements thereon.

Wai 581 – Te Rūnanga o Ngāti Hauiti

3.4 Wai 581 is a claim by Neville Franze Te Ngahoa Lomax and others for and behalf of Te Rūnanga o Ngāti Hauiti. The claim relates to the broad claims of Ngāti Hauiti including:

3.4.1 The maintenance and enhancement of the physical and spiritual sustenance of Ngāti Hauiti and their customs and rights to their land, fisheries, resources and waterways;

3.4.2 The impacts on Ngāti Hauiti of Crown actions on Te Awa o Rangitīkei and its resources including the loss of authority, loss of taonga, gravel extraction;

3.4.3 The impacts of the Native Land Court on Ngāti Hauiti causing fragmentation, individualisation and loss of land;

3.4.4 The taking of land for roading and railway purposes;

3.4.5 The dispossession of tribal lands, forests and taonga, leading to economic and social loss;

3.4.6 The compulsory acquisition of Taraketī 5 block;

3.4.7 The compulsory acquisition of Otumore block.

Wai 588 – Ngāti Tamakōpiri and Ngāti Whitikaupeka Claim

3.5 Wai 588 is a claim by Isaac Hunter and Maria Taiuru and others for and on behalf of Ngāti Tamakōpiri and Ngāti Whitikaupeka. The claim relates primarily to:

3.5.1 The impacts of Crown acts and omissions on the designation of land for defence purposes;

3.5.2 The impacts of the construction of the Moawhango Dam;

3.5.3 The impacts of Crown acts and omissions in relation to the Kaimanawa Horses;

3.5.4 The environmental consequences on Ōruamātua-Kaimanawa blocks and the Rangipō Waiū blocks.

Wai 647 – Awarua 4A1 and Railway claims

3.6 Wai 647 is a claim by Maria Taiuru and others for and on behalf of Ngāti Tamakōpiri and Ngāti Whitikaupeka. The claim relates primarily to the acquisition of Awarua 4A1 and other properties taken for the purposes of the railway line.

4. Kōrero Tuku Iho narrative

4.1 The booklet of whakapapa and images that has been prepared with these submissions sets out the whakapapa in summary form, building on the evidence given by Mōkai Pātea witnesses in the Kōrero Tuku Iho hearings in this inquiry. A particular note of thanks to Gloria Toheriri for facilitating the production of the booklet.

4.2 The Mōkai Pātea claimants commenced their narrative with Tamatea Pōkai Whenua, who in their tradition is a mokopuna of Tato. Tamatea Pōkai Whenua was of the "Hono-i-Wairua" people and came to Aotearoa on the Tākitimu waka. The narrative explains the whakapapa connections of the people, and highlights the sites of

significance including the prominence of the inland waterways within the Taihape: Rangipō ki Rangitīkei district.

4.3 Tamatea Pōkai Whenua had three wives with whom he begat the recognised tūpuna of Mōkai Pātea Nui Tonu, namely:

4.3.1 Iwipupu, from whom was born Kahungunu;

4.3.2 Kahukare, from whom was born Ruaehu; and

4.3.3 Tanewhare, from whom was born Tamakōpiri.

4.4 Tamatea Pōkai Whenua travelled from Tūranga through Ahuriri (Whanganui a Orotu) and into the Mōkai (Inland) Pātea rohe, meeting with his son Kahungunu at the Waitutaki Stream. Tamatea carried with him a number of pets (mōkai) which were released from time to time during his hīkoi.

4.5 Tamatea travelled to Rakautaonga, and to Te Koau. Kahungunu went up the Ngaruroro River, and the Tāruarau River, and met with his father again at Ikaawetea stream. This is marked by the significant wahi tapu rock edifice known as Te Upoko o Kahungunu. It is from here that Pohokura, one of the mōkai of Tamatea Pōkai Whenua, escaped while he slept on the rock. Pohokura is now understood to reside on the sacred mountain of Aorangi, which overlooks the Rangitīkei River.

4.6 Tamatea and Kahungunu travelled up the Ikaawetea stream and towards Rangitīkei awa below Aorangi and met Tarinuku who offered Tamatea a calabash of preserved birds. This place was named Te Papa a Tarinuku. From here Kahungunu returned back to the Tairāwhiti area.

4.7 Tamatea then travelled up the Moawhango awa, staying the night and then in the morning extinguishing the firebrands from his fire at the waterfall known as Te Pounga o ngā Motumotu o te ahi a Tamatea Pōkai Whenua. At Tikirere, Tamatea left his Koura (crayfish) mōkai, (Te Koura a Tamatea). At Whakatara he left another mōkai. At

Waiouru, Tamatea's third son Tamakōpiri cried for his father, at the place named Te Hiwi a Tamakōpiri, and the Waitangi Stream denotes this event.

4.8 Tamatea travelled south to the juncture of the Hautapu awa with the Rangitīkei awa, and he left his pātiki (flounder) mōkai there. He climbed the high ridgeline to the west, which became known as Te Whakauae a Tamatea. He sought shelter from a storm at Te Harakeke a Tamatea, and then headed south towards the Whanganui awa.

4.9 By these three hekenga into Inland Pātea, the rohe became populated with the ancestors of Mōkai Pātea. The first hekenga by Tamakōpiri and his descendant Tumakaurangi led to the many whānau and hapū of **Ngāti Tamakōpiri**. The second hekenga by Te Aitanga o Rongomaitara led to the many whānau and hapū of **Ngāi Te Ohuake**. The third hekenga of Te Hika a Kahukare led to the many whānau and hapū of **Ngāti Hauiti** and **Ngāti Whitikaupeka**.

4.10 In the Kōrero Tuku Iho presentation from Ngāti Hauiti, witnesses also described their significant tradition of Matangi, who journeyed from the Wairarapa following Whirikōkō, and naming places from the Tararua to the Rangitīkei. His two children Horouta and Hine-te-Iwaiwa remained to occupy the area.

4.11 There has been evidence presented of the tradition of Whatumamoa (also referred to as Hotumamoe/Ngāti Hotu), from Mahutapoanui through Ōrotu and to Tupakihi and his sister Nukuteaio, (who would marry Te Ohuake), and his brother Tuwharaukiekie (grandfather of Hauiti).

4.12 From this basis of mana whenua, there followed generations of inter-hapū and inter-iwi relationships, through marriage, through war and the making of peace, through the conquering of territory and the tenure of occupation and use of the land and its resources. Key battles which shaped the people and the identification of their rohe over which they exercised rights included: Otara (at Rōhotupapa), Otara II

(at Omanono), Te Tohi a Te Rehu, Orongotama at Rangipō Waiū, Hawera Roa at Rotoaira, Te Whiti at Tararei, Otihau at Whangaehu, Whakatapere and Mangawhero, and the battles at Pōtaka, Mangatoetoe, Otaparoto, Motuopuhi and Kai-Inanga, to name a few. Whānau and hapū developed their areas of customary use and occupation.

4.13 As such, the evidence to this Tribunal has provided clear analysis of how the whanau, hapū and Iwi of Mōkai Pātea exercised their mana and tino rangatiratanga over their ancestral lands. Collectively, they are referred to in these submissions as Mōkai Pātea Nui Tonu.

4.14 Mōkai Pātea Nui Tonu exercised their customary rights and practices to their traditional rohe and in relation to their taonga, including by way of:

4.14.1 tribal, collective decision-making structures;

4.14.2 cultural identity and cultural preferences for organisation and decision-making;

4.14.3 matauranga/tribal knowledge including processes for dissemination of knowledge and all manifestations of matauranga and cultural expression;

4.14.4 Mōkai Pātea language and customary practices;

4.14.5 Lands, forests and ngāhere;

4.14.6 freshwater catchments, wetlands, streams, rivers and lakes, including aquifiers and puna-wai and their fisheries;

4.14.7 kāinga, including ūrupa, marae, wānanga, sites of significance and waahi tapu;

4.14.8 natural resources, including flora and fauna and pataka kai;

4.14.9 eco-systems, and biological and genetic resources of flora and fauna.

5. Overview of Treaty of Waitangi analysis

5.1 Whakapapa and tino rangatiratanga are at the heart of this claim. Whakapapa creates the relationships that connect the claimants to their whenua, their taonga, and to each other. Tino rangatiratanga (embracing rights and obligations) is what enables the claimants to give full expression to those relationships. Whakapapa and tino rangatiratanga are essential to the claimants' identity and wellbeing.

5.2 From whakapapa comes the rights and responsibilities of being *tangata whenua – people of the land*. Those rights and responsibilities are encompassed in a world view, a way of existing according to tikanga, matauranga, customs and laws, which include the following key concepts: kaitiakitanga, tapu, manaakitanga, mana, aroha, whanaungatanga, wairua and mauri.

5.3 The authority to live according to that world view is tino rangatiratanga, which was guaranteed under Te Tiriti o Waitangi/Treaty of Waitangi 1840. Te Tiriti was a constitutional guarantee that tangata whenua would be able to live in accordance with their world view for as long as they wished to do so, and that the Crown would actively protect those rights and responsibilities. As such, the guarantees in Te Tiriti o Waitangi are not ends in themselves, but rather are guarantees that cultural identity will be given full authority in order to reach wellbeing or mauri-ora.

5.4 This guarantee in Te Tiriti o Waitangi is central to the mauri (the life essence, survival, growth and well-being) of tikanga, te reo, matauranga and the identity of whanau, hapū and iwi. Enhancing the well-being and mauri of tāngata whenua has significant consequences for the well-being of all of the peoples of Aotearoa, and indeed for the well-being of the environment. The Mōkai Pātea claim is about restoring and enhancing *Te Ao Mauri.*

5.5 The Mōkai Pātea claim has focused on the ways in which the Crown system of laws, policies, procedures and delegated authority to

agencies, has consistently failed to give effect to that central guarantee of tino rangatiratanga.

5.6 By Te Tiriti o Waitangi / Treaty of Waitangi and its terms, and its principles, the Crown:

5.6.1 Guaranteed to Mōkai Pātea Nui Tonu their tino rangatiratanga including the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries, other properties, rivers, waterways and taonga;

5.6.2 Promised to protect their rights guaranteed by the Treaty and perform their obligations arising out of the Treaty; and

5.6.3 Extended to Mōkai Pātea Nui Tonu all the rights and privileges of British subjects.

5.7 The Crown had and continues to have duties to recognise and actively protect the rights and interests of Mōkai Pātea Nui Tonu under the Treaty and its principles, including:

5.7.1 Recognising and protecting their tino rangatiratanga;

5.7.2 Ensuring they retain their lands, estates, forests, fisheries, other properties and taonga so long as it is their desire to do so;

5.7.3 Recognising and protecting their language, customs, cultural and spiritual heritage;

5.7.4 Ensuring they exercise tino rangatiratanga, including the right to possess, manage and control all of their property and resources in accordance with their cultural preferences and customs;

5.7.5 Ensuring they are provided with the means to develop, exploit and manage their resources in a manner consistent with their cultural preferences.

5.8 These principles, obligations and duties are affirmed by the United Nations Declaration on the Rights of Indigenous Peoples.

5.9 Mōkai Pātea claimants have been, and continue to be, prejudicially affected by acts and omissions of the Crown that are inconsistent with the principles of Te Tiriti o Waitangi / the Treaty of Waitangi.

6. Relevant Principles of Te Tiriti o Waitangi

6.1 It is submitted that the following principles of Te Tiriti o Waitangi are particularly relevant to the Mōkai Pātea claim:

6.1.1 Autonomy / Tino Rangatiratanga

6.1.2 Partnership

6.1.3 Active Protection of Taonga

6.1.4 Development/Options

6.1.5 Redress.

Principle of Autonomy[1]/Tino Rangatiratanga

6.2 Article II of the Treaty guarantees to Maori their rangatiratanga over all they possess for as long as they wish to retain it.[2] The *Report on the Muriwhenua Fishing Claim*,[3] cited with approval in the *Wananga Capital Establishment Report*, explained the phrase "te tino rangatiratanga o o ratou taonga" in this way:

> "'Te tino rangatiratanga o o ratou taonga' tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and yet to be born. There are three main elements embodied in the guarantee of rangatiratanga.

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[1] Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui Preliminary Report* (Legislation Direct, Wellington, 2007), p 5: "Inherent in Māori autonomy and tino rangatiratanga is their own customary law and institutions, and the right to determine their own decision-makers and land entitlements."

[2] Ibid, p 138. Waitangi Tribunal *Wananga Capital Establishment Report* (Legislation Direct, Wellington, 1999) section 5.5.

[3] Waitangi Tribunal *Report on the Muriwhenua Fishing Claim* (Legislation Direct, Wellington, 1989) section 10.3.2.

> The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually.
>
> The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations.
>
> Thirdly, the exercise of authority was not only over property, but [over] persons within the kinship group and their access to tribal resources."

6.3 This highlights the following key aspects:

6.3.1 The crucial element of *authority or control* over tribal taonga;

6.3.2 The *tapu* or spiritual nature of authority must be recognised, being the cultural context in which tino rangatiratanga is exercised;

6.3.3 Stewardship or *kaitiakitanga*; and

6.3.4 The authority over *access* to tribal resources.

6.4 In the context of the reform of the law of succession, Dr Pat Hohepa describes the movement towards alternative dispute resolution processes incorporating marae based justice. For Dr Hohepa:

> "… the deep issue is the substantive law; merely changing the rules of dispute resolution *to take account of Maori processes* doesn't deal with that deeper issue. **The central issue is for an autonomous Maori succession law with tikanga as its core.**" [4]

6.5 The same principle applies across the whole interface between tikanga Maori and Crown legislation and policy. It is insufficient to merely 'take account of' Maori processes and tikanga when the legislation and policy continues to be based in a core of Western legal traditions.

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[4] P Hohepa and D Williams; *The Taking Into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (Working Paper for the Law Commission, July 1996) p 37 (emphasis added).

6.6 Professor David Williams, in that same working paper discusses the 'interface' between tikanga Maori and the general law:

> "An important part of the consultation process for this Project ought to be, therefore, a consideration of the extent that tikanga Maori may be allowed to act on its own terms within its own frameworks and without being imposed upon by the general law. When, on the other hand, is it appropriate for Maori to be able to opt to pursue remedies in ordinary courts over matters which are intrinsically Maori? Should Maori have a choice of law/tikanga on such matters? If so, what choice of law or conflict of laws rules might emerge or might be developed? When, if at all, is it appropriate that the general law should impose constraints for the operation of tikanga Maori?"[5]

6.7 These questions remain pertinent some 25 years later. They are not questions which can be addressed by Crown proposals which seek simply to "incorporate" or "take into account" or "be informed by" tikanga Māori, within the existing parameters of power. Rather, the questions speak to the deeper issue of the substantive nature of the law itself, namely: where does the decision-making authority lie, and whose cultural values underpin that authority?

6.8 Ani Mikaere argued from the context of the signing of the Treaty itself for tikanga as the first law in Aotearoa, and Crown law as subject to tikanga Māori:

> "Both the clear words used in Te Tiriti o Waitangi and the context in which it was signed, therefore, reveal a clear Māori intention to create space for the Crown to regulate the conduct of its own subjects, subject to the overriding authority of the rangatira. This reaffirmation of Māori authority meant that the highly developed and successful system of tikanga that had prevailed within iwi and hapū here in Aotearoa for a thousand years would retain its status as first law in Aotearoa: the development of Crown law, as contemplated by the granting of kāwanatanga to the Crown, was to remain firmly subject to tikanga Māori."[6]

6.9 Mikaere likens the subjugation of tikanga to the law of the coloniser, as akin to the suffocation of the Māori language in the twentieth century, and like the revival of te reo Māori, she exhorts Māori to reclaim their tikanga in order that it may regain its rightful place according to the intentions of the Treaty pact:

> "As we all know, the Crown perception of the legal position in Aotearoa is rather different: the Crown insists that the law emanating from Parliament is supreme law and that tikanga exists at the whim of that law. This assertion of the supremacy of the coloniser's law has become so dominant, so all-encompassing, that it is easy to fall into the psychological trap of accepting it as unchallengeable or, at very least, as somehow inevitable. Yet clearly this is not the case. While our experience of colonisation has been devastating, its impact should not blind us to the fact that it has occupied a mere moment in time on the continuum of our history. When viewed in this way, it is apparent that while tikanga operated as an effective system of law for our ancestors (both here in Aotearoa and before that) for thousands of years, the imposition of Crown law represents no more than a temporary aberration[7] from that state of affairs." [8]

6.10 The Māori version of Article II of Te Tiriti guarantees "*te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa*". The English version of Article II provides for full and undisturbed possession of lands, estates, forests, fisheries and other properties. The Treaty (both Māori and English versions) guaranteed the continued recognition and protection of Māori existing customary laws, interests and property rights. The Waitangi Tribunal in *Te Tau Ihu* (2007) found:

> "the principle of active protection applied to those things, tangible and intangible, over which Maori exercised tino rangatiratanga according to their own law….There is no evidence that the guarantee of customary property rights was intended to be short-term in this way."[9]

6.11 It is well-established Treaty jurisprudence that Te Tiriti o Waitangi is a "living document", "always speaking" and an "evolving compact". Thus, the claimants rely on their right of development which arises from both Article II and Article III of Te Tiriti.[10] The indigenous right of development is recognised in international documents such as

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[5] Ibid, p 45.
[6] Ibid, pp 3-4.
[7] This term is borrowed from Whatarangi Winiata, who has used it to describe the process of colonisation in Aotearoa.
[8] Ani Mikaere "How will future generations judge us? Some thoughts on the relationship between Crown law and tikanga Maori", paper presented to the hui on *Waka Umanga: A Proposed Law for Maori Governance Entities* (2006), p 7.
[9] Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui* (Legislation Direct, Wellington, 2007), p 115-116
[10] Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fisheries Claim: Wai 22* (Legislation Direct, Wellington, 1988). *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).

the Rio Declaration, Agenda 21, the Declaration on the Rights of Indigenous Peoples, and the Mataatua Declaration. These international instruments build on the principle of self-determination which is firmly entrenched as part of international human rights law.[11]

6.12 The New Zealand Court of Appeal in the 1987 *Lands case* made the direct link between the rights guaranteed under the Treaty and international human rights:

> "[The Treaty of Waitangi] ... is a document relating to fundamental rights: that it should be interpreted widely and effectively and as a living instrument taking account of subsequent developments of human rights norms."[12]

6.13 The Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities has noted that:

> "To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right and duty of indigenous peoples to develop their own cultures and knowledge systems, and forms of social organisation."[13]

6.14 As was noted by the Tribunal in the *Motunui Waiatara Report*:

> ""Rangatiratanga" and "mana" are inextricably related words. "Rangatiratanga" denotes the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences."[14]

6.15 Rangatiratanga is central to the claimants' case, and to Māori customary law. As McHugh has said:

> "Rangatiratanga, the tribal basis of Maori society, arises from Maori customary law, indeed the two (tribalism and customary law) are

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[11] See for example, Erica-Irene A Daes *Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations to the Commission on Human Rights* (E/CN.4/sub.2/1993/29).

[12] *New Zealand Maori Council v. Attorney-General* [1987] 2 NZLR 656.

[13] Report of the Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/sub.2/1994/26) Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples (Annex 1, 21 June 1995) [see also E/CN.4/sub.2/2000/26, 19 June 2000 which updates the 1995 version with some minor changes]

[14] Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui Waitara Claim: Wai 6* (Legislation Direct, Wellington, 1983).

> inseparable. It is not a consequence of Pakeha permission or acquiescence, but an inherent attribute of Maori society."[15]

6.16 Tino rangatiratanga can be framed in a constructive manner that works towards a more balanced relationship between Māori and the Crown. As Mason Durie has stated:

> "Essentially Maori self-determination is about the advancement of Maori people, as Maori, and the protection of the environment for future generations."[16]

6.17 In the Wai 262 *Ko Aotearoa Tenei report*, the Tribunal endorsed the notion of a sliding scale relating to appropriate Crown engagement with Maori, depending on the nature of the Maori interest. Negotiation between the Treaty partners required consent where the Maori Treaty interest is so central.[17]

6.18 This has culminated in the Stage One report of the *Paparahi ki te Raki* claim (Wai 1040)[18] which concluded that Ngāpuhi had not ceded sovereignty to the Crown, and that each Treaty partner operated within their own "sphere of influence".

Principle of Partnership

6.19 The Treaty of Waitangi created a reciprocal relationship between Maori and the Crown, in the nature of a partnership, with the partners required to act towards each other reasonably and with the utmost good faith.[19]

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[15] P G McHugh "Constitutional Theory and Māori Claims" in I H Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 25.

[16] Mason Durie *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) 4.

[17] Waitangi Tribunal, *Wai 262, Ko Aotearoa Tenei*, at page 237.

[18] Waitangi Tribunal, *He Whakaputanga me te Tiriti: The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi ki Te Raki Inquiry* (Wai 1040, 2014).

[19] *New Zealand Maori Council v Attorney-General* [1987] NZLR 641 (CA). In the *Broadcasting Assets* case (*New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)) the Privy Council stated that the Treaty relationship should be founded on reasonableness, mutual cooperation and trust. Other references include the *Waitangi Tribunal Report on the Muriwhenua Fishing Claim* (section 10.5.2); the *Motunui-Waitara Claim*, section 10.2(b); and *Te Whanau o Waipareira Report*, section 1.5.5(1). Adopted by the Tribunal in the *Preliminary*

6.20 In the interim decision of the *Radio Spectrum* Tribunal, the majority finding endorsed the *Radio Frequencies* Tribunal analysis of the principle of partnership that:

> "The ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources. Neither Treaty partner can have monopoly rights in terms of the resource."[20]

6.21 The Waitangi Tribunal in the *Te Reo Maori* report summarised the partnership principle, by observing that "*in its widest sense the Treaty promotes a partnership and the development of a country and a sharing of all resources*."[21]

6.22 This analysis has been adopted by the Tribunal in the *Kahui Maunga* report.

6.23 This creates the opportunity for an interface between two cultures, two worldviews. Moana Jackson gave important testimony to this concept in his evidence at Winiata Marae. One aspect of that constitutional relationship has marred progress has been the assumption that English law will apply and it is for tikanga Māori to fit into that model. However, an interface necessarily first involves a reappraisal of the underpinnings of the assumptions that we make about the 'constitutional priority' which is given to one worldview over another.

6.24 The Waitangi Tribunal is well-placed to reassess that constitutional priority, given the jurisdiction that it has under the Treaty of Waitangi Act 1975:

> "… shall have regard to the 2 texts of the Treaty set out in Schedule 1 and, for the purposes of this Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them."[22]

Report on the Te Arawa Representative Geothermal Resource Claims (Legislation Direct, Wellington, 1993) p 33.

[20] Waitangi Tribunal *Report on Radio Spectrum Management* (Wellington, 1999)..

[21] Waitangi Tribunal *Report of the Waitangi Tribunal of the Te Reo Maori Claim: Wai 11* (Legislation Direct, Wellington, 1986) para 7.2.5.

[22] Treaty of Waitangi Act 1975, s 6(a).

6.25 The fact that such a task might lead the Tribunal to make recommendations which challenge the constitutional framework within which it, and the legal system operates, does not take the inquiry out of the Tribunal's jurisdiction. This can be contrasted with the line of authority illustrated by the *Berkett v Tauranga District Council* case,[23] where courts have refused to countenance argument from tangata whenua that the specific laws (including laws relating to unlawful taking of a tractor, drink driving, cannabis prohibition and electoral laws) do not apply because such arguments constitute a challenge to the existing constitutional framework.[24] The jurisdiction of the Waitangi Tribunal is concerned directly with an analysis and interpretation of that constitutional framework, based as it must be on the Treaty of Waitangi. It is submitted that this Mōkai Pātea claim rests on a challenge to be transformational: that is, a transforming of the way in which two world views interact with each other, for the betterment and advancement of both worldviews.

Principle of Active Protection of Taonga

6.26 Te Tiriti o Waitangi Treaty guarantees to the claimants their "*te tino rangatiratanga o o ratou… taonga katoa*".

6.27 The Crown has a duty of active protection in relation to those treasures, tangible and intangible, which are taonga of Maori. Counsel anticipates that the Crown submissions will focus on the constraints of active protection, based on an observation by the Privy Council that obligations to protect taonga must be reasonable in the circumstances.[25]

6.28 The phrase "o ratou taonga katoa" was considered by Professor Mead in his submission before both the *Radio Frequencies* and *Te Reo Maori* Waitangi Tribunals. In the *Te Reo Report,* the Tribunal found:

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[23] *Berkett v Tauranga District Council* [1992] 3 NZLR 206.

[25] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517.

> "[Professor Hirini Mead]…produced for us a carefully prepared submission…The general thrust of his view…is that the phrase "O ratou taonga katoa" covers both tangible and intangible things and can best be translated by the expression "all their valued customs and possessions." This is in accordance with the conclusion we have already reached in the Kaituna River Finding (para. 4.7) where we accepted the phrase to mean "all things highly prized", and the Motunui Finding to the same effect."[26]

6.29 The *Report of the Waitangi Tribunal on the Manukau Claim* concluded that taonga meant more than objects of tangible value. Importantly in the context of this claim, the 'mauri' or 'life-force' of a river was deemed a taonga.[27] The Tribunal in the *Report of the Waitangi Tribunal on the Orakei Claim*, found that taonga '*may even include thoughts*'.[28]

6.30 In the *Wananga Capital Establishment Report* the Tribunal has found that matauranga Maori is a taonga of high and irreplaceable value to Maori. That Tribunal relied on the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993* to establish the link between the taonga status and the Crown's obligations of active protection:

> "Article 2 of the Treaty requires the Crown actively to protect the claimants' respective interests in both the benefit and enjoyment of their taonga and the mana or authority to exercise control over them. Failure to afford such protection constitutes a breach of Treaty principles.
>
> The degree of protection given to the claimants' taonga will depend on the nature and value of the resource. The value to be attached to their taonga is essentially a matter for the claimants to determine. Such value is not confined to, or restricted by, traditional uses of the taonga. It will include present day usage and such potential usage as may be though appropriate by those having rangatiratanga over the taonga. In the case of a highly valued, rare and irreplaceable taonga of great spiritual and physical importance … the Crown is under an obligation to

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[26] Waitangi Tribunal *Report of the Waitangi Tribunal on the Te Reo Maori Claim: Wai 11* (Legislation Direct, Wellington, 1986)

[27] Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim: Wai 8*(Legislation Direct, Wellington, 1985) para 8.3.3.

[28] Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: Wai 9* (Legislation Direct, Wellington, 1987) para 11.5.20.

> ensure its protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected."[29]

The "Fourth Article" and Related Promises

6.31 Governor Hobson promised at Waitangi in 1840 that "*the Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Maori custom, shall be alike protected by him*".

6.32 Willoughby Shortland conveyed to Māori gathered in Kaitaia to sign the Treaty, on behalf of the Governor his explicit message that "the Queen will not interfere with your native laws or customs".

6.33 This is sometimes referred to as the "fourth article" of Te Tiriti, which envisaged a dual system of governance for Aotearoa/New Zealand, including the full recognition and authority of the claimants' laws, customs and values, which has never been honoured by the Crown." The importance of the Fourth Article and related promises at the time of the signing of the Treaty has been confirmed in the Tribunal's *Te Tau Ihu o Te Waka a Maui Report*.

> "The historical evidence of Dr Williams addressed the latter point. He noted the so-called fourth article read out at Waitangi and Hobson's promise to protect Maori custom (ritenga). Other oral and written promises were made to the effect that the Government would recognise Maori customary rights. ….
>
> **In Williams' view, therefore, the recorded promises in the Treaty debates clarified the meaning of article 2, and the Crown's intention to recognise Maori property rights [something it wanted to obtain] as defined and regulated by Maori law. We agree**, and consider the evidence very clear that the principle of active protection applied to those things, tangible and intangible, over which Maori tangible and intangible, over which Maori exercised tino rangatiratanga according to their own law."[30] (emphasis added)

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[29] Waitangi Tribunal *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993: Wai 153* (Legislation Direct, Wellington, 1993) p 49.

[30] Waitangi Tribunal, report *Te Tau Ihu o Te Waka a Maui: Report on the Customary Rights in the Northern South Island: Wai 785* (Legislation Direct, Wellington, 2007) p 115. See also Waitangi Tribunal *Radio Spectrum Management and Development Final Report: Wai 776* (Legislation Direct, Wellington, 1999), p 47.

6.34 In the 1996 Otago Law Review article, Chief Judge Durie (as he then was), in discussing Shortland's assurance that "the Queen will not interfere with your native laws or customs", observed that:

> "American precedent is undoubtedly correct in asserting that in treaties with indigenous peoples of oral tradition, verbal promises are as much a part of the Treaty as that subscribed to in the documentation. It cannot be said, as a matter of fact, that the Treaty introduced the law of England if the corollary is that Maori laws then cease to be applicable. The Treaty is rather authority for the proposition that the law of the country would have its source in two streams."[31]

6.35 This has been endorsed in the work of Professor Allan Ward,[32] and by the Law Commission in its detailed discussion of the Fourth Article in *Maori Custom and Values in New Zealand Law*:

> "Chief Judge Durie, in extra-judicial remarks, in the Waitangi Tribunal in a 1997 report, has now clearly come down in favour of the view that the Crown representations in 1840 on respect for Maori custom are indeed important to Treaty jurisprudence." [33]

6.36 The Law Commission concludes:

> "As a consequence of reviewing all of the above matters and of splicing elements of trust, equity, public/private law, administrative law and custom law, it may be that an indigenous form of public law is developed which draws on the best of English legal traditions and Maori values. Ultimately the purpose of this law will be to provide a set of values of principles to guide the exercise of powers both by and within Maori socio-political kin groups."[34]

6.37 As such, it is submitted that there is a historical and evidential basis for the claimants' contention that the guarantee of tino rangatiratanga includes the right of kaitiaki to make and enforce laws and customs in relation to their taonga.

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[31] E T Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8:4 *Otago University Law Review.*

[32] Allan Ward *A Show of Justice: Racial Amalgamation in 19th Century New Zealand* (2nd ed, Auckland University Press, Auckland, 1995), p 45.

[33] Law Commission *Maori Custom and Values in New Zealand Law* (Study Paper 9, Wellington, March 2001) pp 73-75.

[34] Law Commission *Maori Custom and Values in New Zealand Law* (Study Paper 9, Wellington, March 2001) p 401.

Principle of Development/Options

6.38 The Waitangi Tribunal has consistently acknowledged a Maori right of development of resources as a Treaty right arising from Article II.[35] The right of development is also recognised under International Law. For example, the United Nations Declaration on the Right to Development was adopted by the General Assembly on 4 December 1986 (resolution 41/128), and was supported by New Zealand:

> "Article 1 (1) The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.
>
> Article 3(1) States have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development.
>
> Article 10 Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels."[36]

6.39 It is submitted that Mōkai Pātea have a right to develop their culture in both customary and modern ways. Their rights cannot be fossilised as at 1840 and limited only to resources known or used back then. To do so would unfairly constrain their social, cultural and economic development as a people.

Principle of Redress

6.40 In the *New Zealand Maori Council* case (the Lands case), Justice Casey addressed the question of redress for past breaches and saw it as obligation on the Crown. President of the Court, Cooke P (as he then was) noted that it would only be in "special circumstances" that the Crown could justify the withholding of redress:

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[35] Waitangi Tribunal *Ngai Tahu Sea Fisheries Report: Wai 27* (Legislation Direct, Wellington, 1992) chap 10; Waitangi Tribunal *Ika Whenua Rivers Report: Wai 212* (Legislation Direct,

> "A duty to remedy past breaches was spoken of. I would accept that suggestion, in the sense that if the Waitangi Tribunal finds merit in the claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would only be in very special circumstances, if ever. As mentioned earlier, I prefer to keep open the question whether the Crown ought ordinarily to grant any precise form of redress that may be indicated by the Tribunal."[37]

6.41 In the hearings in this Wai 2180 claim, the Tribunal has before it extensive historical material from Tribunal commissioned witnesses indicating prejudice to tangata whenua in relation to their relationship with their environment, and loss of matauranga. Redress is addressed in the concluding section of these submissions. The invitation from the claimants is for the Crown to revisit, and respond to, the 1892 letter from the Mōkai Pātea Rangatira who had proposed a series of steps which would see them benefit from the Treaty partnership.

6.42 A helpful exposition of what due process might mean in practice can be found in *New Zealand Maori Council v Attorney-General*.[38] That case concerned the transfer of radio and television assets from the Crown to the Radio New Zealand Limited and Television New Zealand Limited, under section 23 State Owned Enterprises Act 1986. The plaintiffs argued that the proposed transfer made no provision for the protection of te reo Māori and Māori culture, and sought a declaration that the transfer of the assets without inquiry as to the extent of the Treaty obligation and without establishing a protective process to ensure that the transfer was not inconsistent with the Treaty was unlawful. McGechan J discussed the issue of *"*[*o*]*n the facts of this case, are proposed asset transfers to RNZ and TVNZ inconsistent with Treaty principles?*"[39] He said:

Wellington 1998) p 120; Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fisheries Claim: Wai 22* (Legislation Direct, Wellington, 1988) 10.2.1.

[36] United Nations Declaration on the Right to Development (4 December 1986) Res 41/128.

[37] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664.

[38] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 as per McGechan J.

[39] Ibid, p 66 and following.

> "I approach this crucial issue by inquiring into sufficiency of required prior Treaty processes, identified as:
>
> - Good faith;
> - Self-instruction and consultation;
> - Planning and safeguards;
> - Discussion and negotiation towards agreement.
>
> Second, I examine the consistency with Treaty principles of results arising.
>
> This method of analysis must not, however, be allowed to drown the ultimate aim. The question at end to be answered is one of overall principles – at heart, very much a matter of spirit."[40]

6.43 The Crown obligation to be "properly informed" is not sufficient for a fulfilment of Treaty principles in relation to making an ultimate decision on a Treaty issue. McGechan J states that "*having properly informed itself, the Crown was required to devise satisfactory Treaty safeguards*."[41] He continues, stating, "*having informed itself, and devised its BC safeguards, the correct Treaty process was for the Crown in good faith to disclose proposals to Maori, and seek negotiated agreement.*"[42]

6.44 The Crown's view that it need only be `properly informed', derives from the Lands case, where Richardson J (as he then was) stated that an "*absolute open ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty*."[43] His Honour went on to say that:

> "I think the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably toward the other puts the onus on a partner, here the crown, **when acting within its sphere to make an informed decisio**n, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say that it has had proper regard to the impact of the

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[40] Ibid.
[41] Ibid, p 71.
[42] Ibid, p 78.
[43] *New Zealand Maori Council v AG* [1987] 1 NZLR 641, 684 as per Richardson J.

> principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith."[44] (emphasis added)

6.45 What appears to have occurred since that judgment, is that the Crown has interpreted its obligations in a blanket way, requiring only that it be 'properly informed' as to the facts and the law of each case. The requirement noted by Justice Richardson, for "*extensive consultation and co-operation*", appears to have received limited application by the Crown.

6.46 As the Waitangi Tribunal found in the *Radio Spectrum Management and Development Final Report*, consultation is a process of partnership:

> "Consultation between Treaty partners acting reasonably and with the utmost good faith to one another required, in our view, fully fledged discussion, preferably in an atmosphere that respected Maori tikanga, **with every attempt to find an agreed position that was in accord with Treaty principles**." [45]

The Maori Text of Te Tiriti o Waitangi and Tikanga as law

6.47 The principle of *contra proferentum* is directly applicable to the issues of cross cultural communication that arise in the context of the interpretation of the English text and the Maori text of the Treaty of Waitangi. An established principle of the interpretation of treaties with indigenous peoples internationally,[46] which has been endorsed by the Waitangi Tribunal, *contra proferentum* provides that the indigenous language text should prevail where ambiguities in interpretation arise.[47] In the context of the signing of the Treaty of Waitangi, it was the Maori version which was put to the Chiefs and to which they overwhelmingly signed. It contained the phrases which they would interpret according to their cultural constructs.

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[44] Ibid.

[45] Waitangi Tribunal *Radio Spectrum Management and Development Final Report: Wai 776* (Legislation Direct, Wellington,1999), p 39.

[46] *Jones v Meehan* (1899) 175 US 1.

[47] Waitangi Tribunal *Ngai Tahu Report: Wai 27* (Legislation Direct, Wellington, 1991), p 223; *The Mohaka River Report: Wai 119* (Legislation Direct, Wellington, 1992), p 34; *Radio*

6.48 That issue of cross-cultural communication has a long linguistic history. The principles, cultural practices and values of Tangata Whenua, which have developed in Aotearoa for upwards of 1000 years, have their origins in a much older culture, as described by Professor Pat Hohepa in his working paper for the Law Commission:

> "The principles and cultural practices and beliefs have developed in Aotearoa for over 1000 years, and its origins were from an Oceanic cultural life style which existed in the Pacific for over 10,000 years which originated in South-East Asia at least 20,000 years before that. Linguistically Maori belongs to the Austronesian or Malayo-Polynesian family of languages ... neither Maori, nor its related family of languages cultures, have language or culture origins links with the Indo-European family. Aotearoa was the last of the larger inhabited land masses to be reached by European voyagers and the last to be colonised. The errors, misinformation and difficulties in comparing, translating or codifying Maori into English are due partly to that lack of common origin linguistically, culturally and historically."[48]

6.49 This applies not only to the interpretation of the wording of the two language versions of the Treaty, but to an understanding of the two systems of law. Tikanga Maori is not a relic of the past, but has authority in the present. While early colonial administrators saw and interpreted tikanga in a westernised legal terms, and while that interpretation provided some understanding, the reality of tikanga was distorted. Hohepa maintains that tikanga has to be placed in its own cultural context.[49] Western law became known as 'ture', being the introduced law which came with the church, colonial Government and the institutionalised Maori land law:

> "Ture has been in operation for 190 years now. That ture has either replaced, impeded, codified or ignored tikanga Maori in a manner which subverted its power and efficacy for Maori."[50]

> "Like grammatical laws, deep cultural principles have the greatest resistance to change because they are the underpinnings of cultural strength and continuity. While changes and more surface things such as land tenure, social and political structures or

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Spectrum Development and Management Final Report: Wai 776 (Legislation Direct, Wellington, 1999), p 37.

[48] Pat Hohepa and David Williams "The taking into account Te Ao Maori in relation to reform of the law of succession" (Law Commission Working Paper, 1996) pp 11-12.

[49] Ibid, p 16.

[50] Ibid, p16

> religion happens, they did so without sacrificing the deeper principles outlined above. That is why tikanga Maori has persisted."[51]

6.50 Mōkai Pātea tikanga has persisted. That is despite all of the challenges to its survival. The application of their tikanga to solutions must be cognisant of the issues of cross-cultural communication to avoid a 'linguistic colonisation".

7. Post-contact subversion of tino rangatiratanga

7.1 The Crown has eroded, subverted and dismantled the effective exercise by Mōkai Pātea Nui Tonu of their tino rangatiratanga, customary tribal authority and decision-making. The Crown acts and omissions in this regard are fundamentally inconsistent with the principles of Te Tiriti o Waitangi.

7.2 There was an assumption by the Crown of power and of the scope of that power, that it had the right to govern and make laws concerning Mōkai Pātea lands, estates, property and taonga.

7.3 The Crown imposed a political and law-making system of authority which fails to provide for the exercise of, and failing to actively protect, Mōkai Pātea tino rangatiratanga and customary practices, including the right to make, control and enforce laws in relation to their taonga.

7.4 Within the exercise of its unconstitutional power, the Crown introduced laws, ordinances and policies prejudicially affecting Mōkai Pātea environmental management and their exercise of kaitiakitanga in relation to their taonga.

7.5 It is true within this inquiry district that in the immediate post-contact period, those within the rohe of Mōkai Pātea Nui Tonu had relatively little exposure to Europeans through to the 1870s. However, Mōkai Pātea tūpuna were concerned about and engaged with the Crown and settler attempts to acquire tracts of land for settlement. And without

the assent (or even consultation) of Mōkai Pātea, the Crown system of authority was being constructed in the districts around them. This meant that as the system was being honed and crafted in the absence of Mōkai Pātea, it resulted in complete disparity of power once the Crown system did get applied to this inquiry district.

7.6 A theme of this inquiry is that the fact that Mōkai Pātea Nui Tonu were targeted later in the chronology than other hapū and iwi in other areas, increases the Crown's culpability. The Crown was aware of the impacts of large-scale land loss (either through long-term settler leasing or purchasing) and the impacts of the Native Land Court processes (in terms of cost, facilitation of alienation of land, divisiveness within whanau, and the breakdown of collective tribal title). Nevertheless, the Crown continued to impose these systems on Mōkai Pātea despite the knowledge of the prejudicial impacts in other rohe.

7.7 A second important theme is the degree to which Mōkai Pātea took steps to both object to the land alienations, and to posit reasonable alternatives.

7.8 Mōkai Pātea tūpuna organised the Kokako Hui in 1860 and the Turangaarere Hui of 1872, and objected to land acquisition processes through the 1870s and 1880s, and sought to consolidate and respond to the individualisation of land title foisted by the Native Land Court investigations.

7.9 In the 1890s, Utiku Potaka, Wiremu Paraotene, Raumaewa Te Rango, Hiraka Te Rango and Wirihana Hunia on behalf of the rangatira of Mōkai Pātea Nui Tonu proposed a form of collective tribal title to retain control of the key Awarua lands, to administer land and distribute benefits to their people, to apportion land among hapū by way of tribal rūnanga and to access development assistance to promote growth in the new economy.

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[51] Ibid, p17.

7.10 The claimants acknowledge the Crown concessions in relation to the individualisation of title. It is important to place this into the broader context of impacts to the claimants. As the Waitangi Tribunal has noted in the *Kahui Maunga* decision:

> "The absence of a communal title prior to 1894 is the most glaring example of this and has been acknowledged as a Treaty breach….(p270)
>
> In sum, the Crown's various acknowledgements on matters of Native Land law…do not go to the heart of the problem and address the fundamental breach found in all native land legislation – namely the constricting requirement of ownership interests being recorded as tenancies in common. The numbers of owners who might be listed – whether 10, dozens or scores – is rather beside the point. …(p271)
>
> In effect, the imposition of tenancy in common severed each Māori from his or her collective customary ownership or title environment and exposed them individually (and generally unadvised) to the determined and persistent attentions and intentions of purchase agents…" (p272)

7.11 Furthermore, it is reasonable (as the *Kahui Maunga* Tribunal did) to consider what might have been had this individualisation system not been imposed. There, the Tribunal said:

> "Had paramount chief of Ngāti Tūwharetoa, Horonuku Te Heuheu for instance, been able to secure tribal title to Taupōnuiātia, on behalf of all the 141 hapū listed on the application, it might have permitted the maintenance of some sort of tribal control over the retention or disposal of around two million acres or some six thousand square kilometres of land." (p270)

7.12 The evidence in this Taihape inquiry makes plain that the Crown were put on notice by Mōkai Pātea rangatira as to the destructive effects of Crown acts and omissions on the wellbeing of their people, but the Crown failed to take the opportunities to remedy those breaches causing further loss. By way of example only:

7.12.1 The Kokako Hui of 1860 and Turangaarere Hui of 1872;

7.12.2 The 1867 report to Donald McLean that Ngāti Whitikaupeka and Ngāti Tamakōpiri Rūnanga ("Council") would be conducting land dealings;

7.12.3 The communications from Mōkai Pātea representatives in the Repudiation Movement objecting to the Native Land Court processes during 1872-1878;

7.12.4 The telegrams in 1890 from Erueti Arani and Winiata Te Whaaro for Ngāti Whitikaupeka to the Native Land Court imploring that any hearing of the Awarua block occur at Moawhango because of the deleterious effects on the people, and other representations on the same issue from Mōkai Pātea rangatira;

7.12.5 The evidence of Utiku Pōtaka, Winiata Te Whaaro and other rangatira on behalf of the committee of chiefs at the Awarua hearing in 1891 as to the division of land interests based on the rangatiratanga of Mōkai Pātea Nui Tonu;

7.12.6 The evidence of Hiraka Te Rango in 1891 to the Rees-Carroll Commission and subsequent recommendations from the Commission to the Crown concerning the right of tribal councils and committees to adjudicate on land ownership, administer land collectively and distribute benefits.

7.12.7 The letters in 1892 and 1895 from rangatira such as Hiraka Te Rango to the Crown proposing land apportionment to hapū be allocated by the tribal rūnanga, with consolidation of interests to combat the fragmentation of title, and access to development assistance for economic growth.

7.12.8 The Kōtahitanga hui held at Kaiewe in 1893;

7.12.9 Representations made to Premier Seddon at a hui at Moawhango in 1894 as to issues of local governance and control.

7.12.10 The repeated attempts by Winiata Te Whaaro to obtain justice through legal avenues for the errors in the surveying

of the Mangaohane block, and his protestations at his forced eviction from Pokopoko.

7.13 A poignant example of the attempts to maintain collective control by the Rangatira is the following letter from CB Morison in August 1890 to the Native Minister, acting on behalf of Winiata Te Whaaro and Retimana Te Rango, described as "Chiefs of Inland Patea" including the plea:

> "…that they desire all negotiations relating to the purchase of the lands of Ngatiohuake, Ngatihauiti, Ngatiwhiti and Ngatitama be conducted through them as the chiefs representing these hapus – Winiata Te Whaaro the two former and Retimana Te Rango the two latter."

7.14 The Rees Commission (the report of the Commission on Native Land Laws) in 1891 had clearly demonstrated to the House of Representatives and to the Crown the deleterious impacts of the Crown land tenure system. The objectives of the system aided the Crown's overall objectives of facilitating settlement by Europeans. In the case of the prosperous Awarua lands, the "rohe potae" of Mōkai Pātea, the Crown's facilitation of settler avarice caused momentous prejudice to the ability of Māori to participate appropriately in the economic and political life of the district.

7.15 The claimants entirely reject the suggestion that the Crown is not responsible for the Native Land Court workings or the way in which the Court implemented its decisions. The Court was a functionary of the Crown. To rely on a "separation of powers" argument is to semantically distinguish between branches of the same power broker – the Crown. The *Kahui Maunga* Tribunal cited the Rees Commission in this context, where under-secretary Lewis had testified in 1891 that "the whole object of appointing a Court for the ascertainment of native title was to enable alienation for settlement."[52]

7.16 Land was held by way of fragmented interests spread across blocks in the rohe, insufficient to support rational economic units.

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[52] Waitangi Tribunal, *Kahui Maunga* report, p315.

7.17 Title investigations, partitions and re-hearings took place during winter, away from the kainga of Mōkai Pātea and caused hardship, sickness, cost and prejudice.

7.18 Title investigation court costs and survey liens created financial debt and personal hardship.

7.19 Land ownership was further reduced through land-takings for roads, railways, townships, reserves, schools and other public purposes.

7.20 There was a lack of financial and support systems for owners to develop lands, with government initiatives (such as the Advances to Settler Act 1894) being practically unavailable to Māori owners.

7.21 Forced migration of whanau out of their tribal rohe to survive compounded the disadvantages caused by absentee owners. Rates and charges, including rabbit rates, were imposed on Māori land in circumstances where the title held by owners who were fragmented and geographically severed from the land, caused immense difficulties in meeting the rates, and causing rating liability to rise.

7.22 Landowners turned to partitioning of their land interests. There was little Crown support given to attempts by Rangatira to assert a collective control or strategy over the partitioning process. If an individual did not agree, the attempts to reach out-of-court settlements failed. Partition orders resulted in blocks becoming practically or legally landlocked, which itself resulted in loss of economic value for the land, and a severance from the cultural expression of kaitiakitanga.

7.23 Evidence has been presented in this inquiry of examples of these factors having prejudicial impacts on Mōkai Pātea landowners:

7.23.1 Crown investigation of Otamakapua 1 (Takapurau and Mangamoko) in the period 1870-1880;

7.23.2 The purchase by the Crown of Otamakapua 2, Waitapu and Mangoira blocks including the lack of recognition of Ngāti Hauiti interests in Pohangina lands;

7.23.3 The investigations of the Paraekaretu lands, including the Rangatira and Otairi blocks;

7.23.4 The hearings on the Taraketī block, including the creation of "reserves" to Taraketī 3 and 4, and the confiscation of Taraketī 5 by the Crown under the provisions of the Coal Mines Act 1925 relating to navigable river;.

7.23.5 The investigations, re-hearings and partitioning of the Owhāoko, Rangipō Waiū and Ōruamātua-Kaimanawa blocks;

7.23.6 The investigations, re-hearings and partitioning of the Awarua and Motukawa blocks;

7.23.7 The saga involving the Mangaohane title investigations and the persecution of Winiata Te Whaaro and whanau;

7.23.8 The long-running hearing into the Timahanga block;

7.23.9 The investigation of the Otumore block from 1906 with the subsequent survey in 1923 resulting in a significant lien, a charging order and alienation.

7.24 The imposition of a individualised land title system, the breakdown of collective tribal authority, and the subversion of tino rangatiratanga led to loss of land, economic and social impoverishment and cultural alienation. By the 1920s, Mōkai Pātea Nui Tonu were on the social and economic margins in their own traditional rohe. Remaining land held as Māori freehold was in isolated areas, with much of it landlocked. These various factors contributed to an alienation of the community from their hapū roots. As such, the unique identity and tino rangatiratanga of Mōkai Pātea Nui Tonu was almost destroyed.

7.25 In this period, successive governments also sought to impose new structures for tribal decision making, including Māori Councils, land boards, and marae trusts. While Mōkai Pātea Nui Tonu acknowledges the contribution of many who represented these structures, they were

ultimately devoid of the whakapapa basis of hapū rangatiratanga and identity. In the region of Mōkai Pātea Nui Tonu, a situation arose which was particularly corrosive of hapū identity, as the marae took on affiliation to their neighbouring iwi. The individuals working within the marae communities were often tireless advocates for the health, education and language survival of their whānau, but those communities had become separated from the whakapapa connections that bound them to the whenua of Mōkai Pātea Nui Tonu, to their hapū and Iwi of Mōkai Pātea Nui Tonu, and to each other.

Rivers and Inland Waterways

7.26 Mōkai Pātea exercised tino rangatiratanga and kaitiakitanga to the following rivers and their tributaries within the lands of Mōkai Pātea including:

Rangitīkei River;
Moawhango River;
Hautapu River;
Kawhatau River;
Ngaruroro River;
Tāruarau River;
Turakina River;
Mangapapa river;
Oroua River; and,
Pohangina River.

7.27 Tino rangatiratanga and the effective exercise of cultural authority to the Rivers has been subverted in favour of Crown and local government management.

7.28 There has been an assumption of ownership and control of riverbeds and waterways in the Crown (in the case of navigable rivers) or private owners where adjoining land has been alienated. Counsel refers to earlier submissions concerning the lack of authority for this assumption as being contrary to the constitutional underpinnings of the Treaty relationship.

7.29 The construction of the Moawhango Dam as part of the Tongariro Power Development did not include engagement with Mōkai Pātea,

and resulted in significant environmental changes to the Moawhango River and tributaries, water quality and fish species. Within the inquiry district, inland waterways were treated as commodities for water abstraction and gravel extraction. Technical evidence described the programmes of catchment modification, and river engineering works, with channel instability and flooding impacts. Yet there was a parallel failure to protect the freshwater systems from pollution, effluent discharge, diversion, sediment, oxidation, and nutrient run-off.

7.30 Evidence has established that the imperatives for settler economic dominance of the region included widescale and extensive deforestation of the Mōkai Pātea rohe, resulting in habitat loss of taonga (including the huia); erosion, sedimentation and pollution of waterways and aquifers and general water quality degradation. The intensification of agriculture increased the use of pesticides, herbicides and fertilizer.

7.31 As a consequence, witnesses described the loss of health of traditional food sources such as tuna, koura, watercress, pātiki and other taonga;

7.32 The Tribunal received evidence from Mōkai Pātea claimants that the Crown ignored the traditional relationship of Mōkai Pātea with the Kaimanawa Horses in the Oruamātua-Kaimanawa and Rangipō Waiū blocks, and embarked on a systematic policy of removal and destruction of the horses from 1920 to 1970, through the State Forest Department. The Crown's management plans for control of the Kaimanawa Horses from 1970 did not involve Mōkai Pātea in their exercise of kaitiakitanga. The Department of Conservation did not provide for the exercise of kaitiakitanga by Ngā Iwi o Mōkai Pātea in the 1993 cull, nor the 1995 Management Plan, nor the Kaimanawa Wild Horse Advisory Group, and has only included Ngā Iwi o Mōkai Pātea as consultees in its Working Plan in 2012.

7.33 Other environmental evidence has traversed the adverse impacts from the introduction of noxious weeds, pests and vermin, including opposums and rabbits into the Mōkai Pātea rohe.

7.34 When cultural connection to the whenua is undermined, and kaitiakitanga is restricted, Mōkai Pātea had their relationship to their waahi tapu and sites of significance diminished.

7.35 Counsel affirms the submissions filed in this inquiry which address the devolution of environmental control from the Crown to local authorities. The Crown established local government management and control of the environment without providing for the exercise of tino rangatiratanga and kaitiakitanga of Mōkai Pātea.

8. Defence Lands and compulsory acquisition

8.1 Mōkai Pātea claimants acknowledge and rely on the generic submissions relating to public works takings. The introduction and operation of public works and compulsory acquisition legislation is contrary to the exercise by Mōkai Pātea claimants of their tino rangatiratanga to their tribal rohe.

8.2 Particular focus has been given to the defence lands, which form part of the tribal lands of Ngāti Whitikaupeka and Ngāti Tamakōpiri. Of paramount concern is the abject failure by the Crown to consider reasonable alternatives to the compulsory acquisition of land for defence purposes. There is no cogent evidence that long-term lease or licence arrangements were adequately considered by Crown officials.

8.3 Imperatives that relate to national security, or health and safety concerns as to explosion of ordinances could have been satisfactorily addressed in land-use arrangements which did not result in the alienation of the land out of Māori hands. Conversely, such long-term alternative arrangements would have likely resulted in a tangible continuing and visible connection between tāngata whenua and the defence force, allowing for the growth in the partnership relationship, and allowing for cultural and economic kaitiakitanga to find

expression. This did not occur, where Mōkai Pātea mana whenua were effectively locked out from their ancestral lands for decades. Where land might have been returned as being no longer needed for defence purposes, those opportunities were not offered to Mōkai Pātea.

8.4 As set out in generic closings, Mōkai Pātea have been affected by public works takings including the construction of the North Island Main Trunk railway; setting aside of land for roads; the creation of reserves; and the creation of the Taihape township. In particular, the Crown was focused on the opening up of the Mōkai Pātea rohe for economic gain for settlers. The Crown failed to proactively consider or assess alternatives to the taking of Mōkai Pātea land for public purposes including alternative routes, locations or methods, and/or alternatives to taking of land, such as leasing or exchanges of land.

8.5 Mōkai Pātea have been prejudicially affected by the process undertaken by the Crown in relation to the Owhāoko gifted lands. Some 18,000 acres of land was gifted by Ngāti Tamakōpiri and Ngāti Whitikaupeka for the purpose of Māori solider settlement at the time of World War 1. With little or no engagement with mana whenua, the Crown took steps in relation to the gift blocks which resulted in their alienation from Mōkai Pātea. The land was regarded as poor quality and unsuitable for settling discharged soldiers. Richard Steedman traced carefully through the history of Crown conservation and defence agencies utilising gifted lands to further their own strategies. The vesting of the lands to Ngāti Tūwharetoa representatives in the 1970s highlighted the effects of colonisation on Mōkai Pātea tribal authority and structures.

9. Matauranga, Identity, Education, Health

9.1 Nicola Chase gave evidence to the Tribunal at Taihape school about her long journey in fighting for the survival of her reo Māori. As she explained to the Tribunal, the language connects to her values, the motivation for why she does things. “If we don’t get our reo back,

then what motivates our people does not come from our culture." It is a powerful succinct summary of the central place of Te Reo in how the guarantee of tino rangatiratanga was dismantled by the Crown, but how Te Reo is central to the restoration and revitalisation of Mōkai Pātea.

9.2 The Crown has acted inconsistently, and/or omitted to act consistently with the principles of Te Tiriti o Waitangi by failing to ensure that Mōkai Pātea cultural identity, matauranga and reo is protected, affirmed and enhanced.

9.3 The provision of education within the Taihape district did not include provision for matauranga Māori, and inclusion of *te reo me ōna tikanga* in school curricula was minimal with the focus being on learning Western knowledge. Mōkai Pātea matauranga and tribal knowledge, including the processes of dissemination of that knowledge, was not actively protected or promoted by the Crown.

9.4 In the case of Moawhango School, the Crown displayed a pattern of indifference, delay and neglect towards the needs of the Moawhango community in the education of their children whereby facilities were sub-standard and not conducive to educational achievement. In Taihape, whanau have sent their children out of the district in order to learn their reo Māori. Mōkai Pātea cultural preferences for native schools, and then subsequently kura kaupapa, and kōhanga reo and tertiary wānanga have not been adequately supported or funded by the Crown.

9.5 Crown breaches of Te Tiriti guarantees extend to the health services available to Mōkai Pātea. The Crown was obliged to ensure that Mōkai Pātea health, wellbeing and mauri was protected, affirmed and enhanced.

9.6 However, evidence to this inquiry has established that there has been inadequate provision for Māori engagement in the development or implementation of health services for Mōkai Pātea. Crown provision

of health services for Mōkai Pātea was not initiated until the 20th century through the Kurahaupō Māori Council. Health services were "mainstreamed" to apply Western science and knowledge and to disregard traditional medicinal practices. Evidence established sporadic attention from the Native Health Nurse and the Native Health Inspectors in the 1920s-1930s, with maternity, dental and vaccination healthcare not provided on a systematic basis. No Native Medical Officers operated in the Mōkai Pātea rohe.

9.7 The Tribunal heard evidence of the impacts of colonisation on health outcomes generally for Mōkai Pātea, including substance abuse, addiction, suicide, and mental health effects.

10. Prejudice and Loss

10.1 As a result of these breaches of the principles of Te Tiriti o Waitangi, Mōkai Pātea Nui Tonu have suffered prejudice and loss:

10.1.1 Loss of tino rangatiratanga, tribal structures and customary decision making;

10.1.2 Loss of identity, contributing to social alienation, and over-representation in negative housing, health, education, employment and crime statistics;

10.1.3 Loss of whenua;

10.1.4 Economic loss;

10.1.5 Loss and/or significant degradation of natural resources;

10.1.6 Depletion and ruination of the Rivers in the Rohe, their tributaries and catchments, and flora and fauna therein;

10.1.7 Loss of opportunity to fully develop the potential of land, freshwater assets, and taonga;

10.1.8 Direct costs of liens, survey charges, litigation costs, rates, landlocked land restrictions, water charges and infrastructure levies;

10.1.9 Loss of customary fisheries and custodial rights;

10.1.10 Loss of reo me ona tikanga, matauranga and systems of dissemination of matauranga.

11. Relief Sought

11.1 In considering the relief sought from the Tribunal, the claimants return to the principle of "redress" and focus back on the 1892 letter from their Mōkai Pātea tupuna. The claimants continue to wait for a reply to that letter, including a plan from the Crown to implement the tribal proposals contained in the letter. Where certain parts of the letter's proposals are no longer feasible, the claimants require negotiation with the Crown to achieve an equally innovative plan to meet the aspirations of their tupuna. Mōkai Pātea, in the face of extraordinary change in their rohe, put forward a blueprint for partnership, for the benefit of all. They ask this Tribunal to recommend that this blueprint be honoured by the Crown.

11.2 Mōkai Pātea seek findings from the Waitangi Tribunal that the Crown acts and omissions as supported by the evidence were inconsistent with the principles of Te Tiriti o Waitangi and caused prejudice to Mōkai Pātea.

11.3 Mōkai Pātea seek recommendations from the Tribunal that the Crown enter into negotiations with Mōkai Pātea to achieve the following:

11.3.1 The full and meaningful recognition of tino rangatiratanga o Mōkai Pātea Nui Tonu be restored in accordance with their lore and customs, over their lands, estates, forests, fisheries, other properties, lakes, rivers, waterways, other resources and taonga including whether or not such taonga are perceived now as being in their ownership or possession;

11.3.2 The return to Mōkai Pātea Nui Tonu of all ancestral lands, estates, forests, fisheries, other properties, lakes, rivers, waterways and other resources and taonga wrongfully acquired by the Crown, including where applicable, lands held by the Department of Conservation and the Ministry of Defence;

11.3.3 The restoration of the social, cultural, resource and economic base of Mōkai Pātea Nui Tonu in a full and substantial manner;

11.3.4 The making of an appropriate and comprehensive apology to Mōkai Pātea Nui Tonu;

11.3.5 Compensation to Mōkai Pātea Nui Tonu or the loss of customary use, occupation and enjoyment of lands, estates, forests, fisheries, other properties, lakes, rivers, waterways and other resources and taonga as a result of breaches of Te Tiriti o Waitangi.

Dated this 20th day of October 2020

Leo Watson
Counsel for the Mōkai Pātea Claimants