

THE
TAKUTAI MOANA ACT 2011
URGENT INQUIRY
STAGE 2 REPORT

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Waitangi Tribunal
Te Rōpū Whakamana i te Tiriti o Waitangi
Kia puta ki te whai ao, ki te mārama

The Honourable Paul Goldsmith
Minister of Justice
Minister for Treaty of Waitangi Negotiations

The Honourable Tama Potaka
Minister for Māori Development
Minister for Māori Crown Relations: Te Arawhiti

The Honourable Nicola Willis
Minister of Finance

Parliament Buildings
WELLINGTON

5 June 2025

*Te tai rā, te tai rā e pari nei,
E pari nei ki whea?
E pari ana ki tawhiti nui, ki tawhiti roa, ki tawhiti pāmamao.
Te tai e pari ki whea?
E pari ana ki Aotearoa,
Ki te nohoanga rā o te tangata Māori – Tihei mauriora!*

E ngā minita, tēnei ngā maioha ki a koutou. Kua oti i a mātou te wāhanga tuarua o te pūrongo mō te Takutai Moana. Koia tēnei ka tukuna atu hei kai mā ō koutou whatu, hei wānanga mā ō koutou hinengaro i ngā whakaaro o te Rōpū Whakamana i te Tiriti o Waitangi mō tēnei take whakahirahira ki ngā iwi huri taiāwhio i ngā motu o Aotearoa.

I enclose our report on stage 2 of the Marine and Coastal Area (Takutai Moana) Act Coalition Changes Urgent Inquiry. This inquiry was granted urgency in the Waitangi Tribunal's inquiry programme, due to the importance of the customary rights at stake; the immediacy and apparent irreversibility of likely prejudice to Māori; and the lack of an alternative remedy.

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In our stage 1 report (released 13 September 2024), we solely considered the Treaty compliance of the policy development process the Government followed in seeking to amend the Takutai Moana Act, and of the proposed amendments themselves. This stage 2 report addresses claims concerning the Government's alleged mismanagement of funding for the 2024/25 financial year for Customary Marine Title (CMT) applications under the Marine and Coastal Area (Takutai Moana) Act 2011. As we stated in stage 1, when developing policy or legislation concerning a taonga as significant as te takutai moana, the principles of the Treaty require the Crown to observe the highest standard of consultation — and, where possible, co-design with Māori.

Despite several early and clear warning signs in 2021 and 2022 that the funding scheme would experience a significant rise in reimbursement costs in following years, it was not until late 2023 that the Crown identified the issue for the 2024/25 financial year. We are unable to say what the outcome would have been if the Crown had identified the growing pressure on the scheme at an earlier stage, but it may have been able to better manage the scheme before it reached the crisis point that it did in late 2023/early 2024. This may well have prevented, or at least alleviated, the impact of the urgent steps taken, and decisions made, concerning the funding scheme in 2024. The Crown has an obligation to act reasonably, in good faith and to actively protect Māori interests. That applies when managing the funding scheme which is fundamental for Māori seeking recognition of their customary rights in the takutai moana under the Act. We find that the Crown failed to meet these obligations and breached these principles.

Officials at Te Tari Whakatau (then Te Arawhiti) projected that an additional \$19 million would be required to cover expected costs for the 2024/25 financial year. However, Cabinet denied this additional funding. We were not presented any evidence that Cabinet carried out a Treaty compliant exercise to balance the rights of Māori and the public when making this decision. In fact, we were not presented with evidence of any reasons at all for the decision Cabinet reached. We find that the Crown's decision to decline the funding for the 2024/25 scheme without any proper balancing exercise breached the principles of partnership, good government, and active protection.

As a result of Cabinet's decision, officials had to administer a demonstrably insufficient fund. To do this, they implemented three

measures: budgeted workplans, aligning lawyers' rates with legal aid rates, and the introduction of funding caps. Due to the Crown's late identification of the issues facing the funding scheme, it implemented these urgent changes via an accelerated process that did not allow for any consultation with Māori — a further breach of the principle of partnership.

We acknowledge that the regime under the Act is expensive. However, it is a regime of the Crown's own making, one in which Māori have participated in good faith. The Crown accepts that the applicants' costs have not been unreasonable, however, it is concerned that its own regime costs more than it would like — a problem not caused by the applicants. This broader context highlights the serious nature of these breaches by the Crown. We find that the Crown has not acted reasonably or in good faith. It has not actively protected Māori interests in relation to this important taonga and has not exercised good government. We find that Māori will, or are likely, to suffer significant prejudice because of these breaches.

We therefore recommend that:

- ▶ the Crown, when revising the funding scheme for the 2025/26 financial year and beyond, adhere to Treaty compliant processes and decision making;
- ▶ the Crown makes a genuine effort for meaningful engagement with Māori; and
- ▶ the statutory deadline for applications be removed from the Act, as this has put financial pressures on the scheme (we reiterate this from our earlier Wai 2660 report).

These recommendations should be implemented to restore a fair and reasonable balance between Māori interests and those of the public in te takutai moana. We caution the Crown that, on the strength of the evidence we have received, to proceed without adequately funding the scheme in coming years will significantly endanger the Māori–Crown relationship.

Nāku noa, nā



Judge Miharo Armstrong
Presiding Officer

ABBREVIATIONS

CA	Court of Appeal
CJ	chief justice
cl	clause
CMT	customary marine title
doc	document
ed	edition, editor
FAS	financial assistance scheme
IP	interested party
IT	information technology
J, JJ	justice, justices (when used after a surname)
KC	King's Counsel
ltd	limited
MACA	marine and coastal area
memo	memorandum
no	number
NZHC	<i>New Zealand High Court</i>
NZSC	<i>New Zealand Supreme Court</i>
p, pp	page, pages
para	paragraph
PCO	prospective costs order
PCR	protected customary rights
pt	part
s, ss	section, sections (of an Act of Parliament)
sch	schedule
SOE	State-owned enterprise
v	and
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, statements of issues, submissions, and transcripts are to the Wai 3400 record of inquiry. A copy of the full index is available on request from the Waitangi Tribunal. All URLs were current at the time of going to print.

CHAPTER 1

INTRODUCTION

1.1 WHAT IS AT ISSUE?

This inquiry determines urgent claims before the Waitangi Tribunal concerning the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). Stage 1 of the urgent inquiry focused on the proposed amendments to section 58 of the Act which sets out the test for customary marine title. The stage 1 report was released in September 2024.

This report considers claimant allegations concerning the Takutai Moana Financial Assistance Scheme that supports applicants under the Act. The claimants alleged changes made to the scheme for the 2024–25 financial year prejudice their ability to progress applications for recognition of their customary interests in the takutai moana.¹ Claimants argued that these changes breach Treaty principles.

The Crown acknowledged that these changes have presented challenges to applicants.² However, the Crown argued that the changes were necessary due to significant pressure on the funding scheme and the need to avoid potential breaches of fiscal appropriations. The Crown submitted that the changes do not breach Treaty principles.³

1.2 INQUIRY BACKGROUND

1.2.1 Previous procedural details

The background to this inquiry, including granting urgency and the decision to hear and report on the claims in two stages, is covered in our stage 1 report (see section 1.2). We do not repeat that full background here.

1.2.2 The Wai 2660 inquiry

In 2017, the Tribunal launched the Wai 2660 inquiry into claims concerning the Act. The inquiry was divided into two stages, with stage 1 (released in 2020) inquiring into whether ‘the procedural arrangements and resources the Crown put in place to support the Act are in breach of Treaty principles and prejudicially affect Māori’.⁴

1. Statement of claim 1.1.1, pp 1, 5–6

2. Submission 3.3.54, p 8

3. Ibid, pp 5–6

4. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Lower Hutt: Legislation Direct, 2020), p 12

In that report, we found that the Crown breached the principles of active protection and partnership by only partially funding Māori applicants who were seeking legal recognition of their customary rights in the takutai moana.⁵ We also found that ‘the funding caps of the milestones and tasks set out in the funding matrices [are] broadly inadequate.’⁶ We made an overarching recommendation that ‘the Crown fund all reasonable costs’ to pursue applications under either pathway.⁷ We also recommended that the Crown incorporate some elements of the legal aid regime into the funding scheme, or that it extend the legal aid regime to include applications under the Act.⁸

1.2.3 Changes to the funding scheme

In March 2023, the Crown implemented revised changes to the funding scheme which incorporated some, but not all, of the recommendations in our 2020 report.⁹

On 1 July 2024, the Crown made further changes to the funding scheme for the 2024–25 financial year. Key features of these changes include:

- ▶ aligning applicant lawyer rates with legal aid rates;
- ▶ requiring applicants to provide a budgeted workplan agreed to by the Crown before funding is provided; and
- ▶ capping the Crown’s contribution to court costs for all scheduled hearings in the 2024–25 financial year at \$140,000 per applicant for substantive hearings, \$25,000 per applicant for follow up hearings and \$30,000 per applicant for appeals.¹⁰

It is these changes for the 2024–25 financial year that are the focus of this report.

1.2.4 Hearings for the stage 2 inquiry

The hearings for stage 2 of this inquiry took place at the Tribunal’s offices in Wellington from 14 to 16 April 2025.¹¹ Closing submissions were heard on 12 May 2025.¹²

1.2.5 The panel

The panel for this inquiry includes Judge Miharo Armstrong (presiding), Tā Pou Temara, Professor Rawinia Higgins, and Ron Crosby.¹³

5. Ibid, p 129

6. Ibid, p 100

7. Ibid

8. Ibid, pp 92, 104

9. Submission 3.3.79, p 1

10. Submission 3.3.49, pp 7–9

11. Memorandum 2.6.3, p 3

12. Memorandum 2.7.3, p 3

13. Due to other commitments, Professor Higgins was unable to attend the hearing on 14–16 April 2025. Professor Higgins attended the hearing on 12 May 2025 (online). Tā Pou Temara attended the hearing on 14–16 April 2025 but was unable to attend the hearing on 12 May 2025. At all times, the panel had a sufficient quorum per clause 5(6)(b) of schedule 2 to the Treaty of Waitangi Act 1975.

1.2.6 Parties to this inquiry

On 23 July 2024, Judge Armstrong finalised the list of claimants and interested parties.¹⁴ The full list of claimants and interested parties is appended to this report.¹⁵

1.2.7 Te Arawhiti/Te Tari Whakatau

On 24 February 2025, the Māori Crown Relations portfolio was transferred from the interdepartmental agency Te Arawhiti to Te Puni Kōkiri. At this time, Cabinet agreed to a new name for the agency to reflect changes in its role. The Māori name ‘Te Tari Whakatau’ means the office ‘te tari’ where things are settled or determined ‘whakatau’.¹⁶ As the claims we received regarding the funding scheme relate to the period when the agency was still named Te Arawhiti, for accuracy and consistency we most frequently use the former name.

1.3 ISSUES FOR INQUIRY

The Tribunal Statement of Issues for stage 2 is as follows:

1. Which principles of the Treaty of Waitangi/Te Tiriti o Waitangi (Te Tiriti) were and are engaged?
2. What were the Scheme settings prior to the 2024/25 financial year?
3. What are the Scheme settings for the 2024/25 financial year?
4. What process did the Crown follow in developing and settling on the Scheme settings for the 2024/25 financial year?
5. In what ways (if any) do, or will, the Scheme settings prejudice applicants seeking to progress their applications under the Marine and Coastal Area (Takutai Moana) Act?
 - 5.1 Will any increased costs that resulted from groups having to revisit/amend their pleadings and evidence in order to meet the new statutory test(s), which are proposed by the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill that is currently in the House of Representatives, be covered under the new Scheme settings?
6. Is the process the Crown followed in developing and settling on the Scheme settings for the 2024/25 financial year consistent with the principles of Te Tiriti?
7. Are the Scheme settings for the 2024/25 financial year and the effects of the Scheme settings consistent with the principles of Te Tiriti?
8. If the answer to Issues 5 to 7 is no, what recommendations are required to address any prejudice caused to claimants by these breaches?¹⁷

14. Memorandum 2.5.3, p 2. This list was updated to include one further interested party on 3 April 2025: see memo 2.6.5, p 4.

15. Memoranda 2.5.13(a), (b)

16. ‘Tēnā Koutou Katoa’, Te Tari Whakatau, <https://whakatau.govt.nz>, accessed 17 May 2025

17. Statement of issues 1.4.4(a); see also statement of issues 1.4.4

1.4 THE TREATY CONTEXT

1.4.1 Adoption of stage 1 principles

Claimants argued that the Treaty principles set out in our stage 1 report (partnership, active protection, tino rangatiratanga, and good government) apply to the issues now before us.¹⁸ We agree and confirm these principles apply to stage 2.

Claimants also argued that the additional principle of equal treatment applies here.¹⁹ We elaborate on this additional Treaty context below.

1.4.2 The principle of equal treatment

We adopt the definition of the principle of equal treatment provided by *The Maniapoto Mandate Inquiry Report* (2020), which summarised its expression in previous jurisprudence:

The principle of equal treatment requires the Crown to act fairly and impartially towards Māori, including by treating Māori hapū and iwi fairly in relation to each other. As the *Te Arawa Mandate Report: Te Wahanga Tuarua* noted, this does not necessarily mean ‘treating all groups exactly the same, where they have different populations, interests, leadership structures, and preferences.’ Just as the Crown has a duty to foster whanaungatanga among hapū and iwi, in treating groups fairly and equally it must do all that it can to avoid creating or exacerbating divisions and damaging relationships.

However, the principle of equal treatment contains two further practical duties that are intrinsically linked: the duty to act fairly and impartially towards Māori and the duty to preserve amicable tribal relations. Regarding the former, the Tribunal commented in the *Maori Development Corporation Report* that the Crown’s guarantee of tino rangatiratanga to all iwi also contains another guarantee – that the Crown will not act in such a way as to allow one iwi an unfair advantage over another. There is ‘continuing vitality of Maori tribal organisation and identification’ and tribal rivalry remains ‘healthy and dynamic’. Should the Crown fail in this duty, it runs the risk of creating or worsening divisions between groups. This is when the Crown’s ‘honest broker’ role comes into play: it should be proactive in ensuring that arriving at settlements does not come at the cost of deteriorating already fragile relationships within and between iwi.²⁰

Claimant counsel argued this applies due to the inconsistent levels of support available in the 2024–25 financial year for groups participating in the High Court and Crown engagement pathways.²¹ We agree this principle is relevant.

18. Submission 3.3.70, pp 3–6; submission 3.3.53, p 3

19. Submission 3.3.70, pp 3–6

20. Waitangi Tribunal, *The Maniapoto Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2020), p 18.

21. Submission 3.3.70, pp 28–30

1.5 THE STRUCTURE OF THIS REPORT

In chapter 2, for context, we first set out the steps taken by the Crown in 2019 to review the funding scheme, and the subsequent changes to the scheme that were implemented in March 2023. We then consider the further review and changes that followed which resulted in the current settings for the 2024–25 financial year. In chapter 3, we analyse the Treaty compliance of the review process for the 2024–25 financial year, as well as the implications of those changes for applicants under the Act. We conclude with our findings and recommendations to the Crown.

CHAPTER 2

WHAT PROCESSES DID THE CROWN FOLLOW TO REVISE THE TAKUTAI MOANA FUNDING ASSISTANCE SCHEME?

2.1 INTRODUCTION

This chapter details the policy process the Crown followed to develop and revise the funding scheme under the Act. We begin by outlining the review of the scheme initiated in 2019 and the resulting changes to the scheme implemented on 1 March 2023. As part of the overall timeline and to inform our Treaty analysis in the upcoming chapter, we include short summaries of the Crown's Takutai Moana Engagement Strategy, as well as the MACA court fixtures scheduled in 2022 by Justice Churchman of the High Court. Finally, we outline the events leading to the changes made to the scheme for the 2024–25 financial year.

2.2 THE 2019 FUNDING SCHEME REVIEW

2.2.1 Background to the review

In 2019, Treaty of Waitangi Negotiations Minister Andrew Little and Finance Minister Grant Robertson authorised Te Arawhiti to review the funding scheme. This review was prompted, in part, by concerns raised during the stage 1 Wai 2660 inquiry.¹

Officials proposed to conduct the review in three stages: first, engaging with the applicants to identify any issues with the current funding scheme; secondly, conducting the review; and, finally, consulting with Māori on the review's findings before finalising the new scheme.²

The December 2019 Cabinet paper noted that the funding scheme 'did not anticipate that the High Court would set down a hearing for 40 days. For highly complex applications, such as the groups involved in the *Edwards* hearing, the scheme only covers the costs of a 15-day hearing.'³ The paper also cited the High Court Rules 2016, which estimated that 'a 40-day hearing could entail 47.5 days of preparation'. The Cabinet paper recognised that 'accessing the High Court is expensive', and without sufficient funding, 'applicant groups may be unable to retain their legal representation or will face financial barriers to accessing justice'.⁴

1. In August 2019, during the presentation of closing submission for stage 1 of Wai 2660, Crown counsel advised the Tribunal that Te Arawhiti had sought approval from the Minister to conduct this review. The Minister agreed, and the Tribunal was advised of this in September 2019.

2. See doc B048, TA.005.0651

3. Document B048, TA.008.0008

4. See doc B048, TA.008.0009

Between September and November 2020, Te Arawhiti undertook the first phase of the review by conducting a consultation process regarding the funding scheme. Te Arawhiti communicated directly with approximately 170 applicants and received 52 submissions from applicants and legal counsel.⁵

On 27 August 2020, Te Arawhiti sent a briefing paper to Ministers Little and Robertson advising that the funding scheme review would be completed in March 2021.⁶ Officials also sought Ministerial agreement to implement interim changes that did not require significant policy amendment.⁷

These interim changes included: allowing Te Arawhiti's Chief Executive to approve discretionary payments of up to \$50,000; lowering the reimbursement threshold to \$1,000; removing the need for Ministerial approval to transfer under-spends to future milestones; and enabling immediate funding access for Crown engagement applicants by establishing a \$50,000 fund for applicants in the first 'two coastlines' (Taranaki and Tairāwhiti) when the final Crown Engagement Strategy is approved by Cabinet.⁸ Both Ministers and Cabinet agreed to the proposed interim changes.⁹

2.2.2 Takutai Moana Crown Engagement Strategy

On 16 March 2021, Minister Little sought Cabinet approval for the Takutai Moana Crown Engagement Strategy, designed to address officials' concerns that the existing engagement approach was too slow, causing uncertainty and damage to the Māori–Crown relationship.¹⁰ The Engagement Strategy outlined how the Crown intended to improve applicant engagement. The Engagement Strategy terms included dividing New Zealand's coastline into 20 coastal areas, working with applicants within these areas to determine timeframes and approaches for the applications, and engaging with all applicants. The strategy would be delivered in three phases: establishment; research and evidence gathering; and determination and recognition.¹¹ Cabinet approved the strategy on 22 March 2021.¹²

2.2.3 2019 review findings and subsequent Ministerial advice

On 8 April 2021, Te Arawhiti sent a briefing paper to Minister Little detailing the outcome of the funding scheme review and findings. The review found that funding for High Court hearings was insufficient and there was little evidence of consideration for overlapping applications. Furthermore, the review noted that, while High Court applicants could access funding immediately, Crown engagement applicants needed to wait for their applications to be accepted before accessing

5. See doc B048, TA.005.0108

6. See doc B048, TA.005.0556

7. Document B048, TA.005.0556

8. See doc B048, TA.005.0557, TA.005.0563

9. See doc B048, TA.005.0680

10. See doc B048, TA.008.0098

11. See doc B048, TA.008.0150

12. See doc B048, TA.008.0115

funding. The review stated that ‘the scheme needs improving’ and commented on Te Arawhiti ‘not necessarily being best placed to administer’ it.¹³

Officials sought the Minister’s approval to consult with applicants to develop changes to the funding scheme. The draft proposals included provision to apply for prospective funding grants as well as reimbursements, fixed hourly rates for professional services, and a schedule of eligible expense categories. Officials also suggested assessing funding for High Court hearings and appeals as individual events, the removal of the 85 per cent ‘contribution rate’, and allowing Crown engagement applicants to access funding immediately.¹⁴ Te Arawhiti justified the removal of the 85 per cent cost contribution by saying: ‘While the cap was introduced to incentivise savings and efficiencies, whānau and hapū groups, or unsettled iwi groups, can be disproportionately disadvantaged as they have fewer alternate resources to self-fund once maximums are reached.’¹⁵

In terms of its consultation process, Te Arawhiti ‘engaged directly with applicant groups to hear their views and understand their experiences with the financial assistance scheme’. The agency also ‘contacted all applicants to seek feedback on their experiences . . . and invited groups and legal counsel to make a submission.’¹⁶ Both applicants and legal counsel made 52 submissions in total.¹⁷ Te Arawhiti also stated that their proposals were ‘informed by the lessons learned through the Whakatōhea Priority High Court Application’; ‘claimant evidence and the Waitangi Tribunal Stage One report’; and ‘the independent Deloitte report on the administration of the scheme.’¹⁸

Following consultation, on 4 November 2021 Te Arawhiti sought Ministerial approval for the following changes to the funding scheme. First, the introduction of ‘activity-based workstreams that fund common activities, court proceedings, and collaborative work’. Secondly, changing the approach to funding court proceedings ‘by assessing each hearing as an individual event including case management and judicial conferences, interlocutory and substantive hearings, and appeals’. Thirdly, introducing grant-based funding alongside reimbursements. Finally, removing the 85 per cent contribution limit to costs incurred. Officials also proposed an increase in activities-based funding from \$442,878 to \$458,000, as well as a funding increase for all court proceedings from \$1.3 million to \$5.5 million per year.¹⁹

In relation to the activities-based funding, officials proposed replacing the milestone framework with six activity workstreams: administration, relationships, research, recognition, court proceedings, and collaboration.²⁰ The first four work-

13. See doc B048, TA.005.0526, TA.005.0527

14. See doc B048, TA.005.0528, TA.005.0529

15. See doc B048, TA.005.0666

16. ‘Review of Takutai Moana Financial Assistance Scheme: Proposed Changes’, briefing to Minister for Treaty of Waitangi Negotiations, 8 April 2021 (see doc B48, TA.005.0551)

17. Ibid

18. Ibid (see doc B48, TA.005.0531)

19. See doc B048, TA.005.0657

20. See doc B048, TA.005.0663

streams would cover general activities, such as project planning and management, legal advice, traditional evidence gathering, and mapping. The fifth workstream would include activities associated with court proceedings, such as costs for court preparation, legal representation at hearings, and costs for expert witnesses.²¹ The sixth workstream would provide funds for collaborative activities between applicants, for example engaging a facilitator (or mediator) to provide guidance in matters involving overlapping interests. The funding for the sixth workstream (collaborative activities) was in addition to the activity and court proceedings funding. Activities funding would be capped at \$458,000; but the funding both for court proceedings and for collaborative activities would not be capped.²²

As part of its advice, Te Arawhiti set out the rationale behind the proposed changes. The agency outlined the need to support the Crown to meet its obligations as a Treaty partner and to facilitate better access to justice for Māori, while also maintaining flexibility, efficiency, and certainty of costs.²³

Moreover, Te Arawhiti acknowledged that

Levels of High Court and appellate court funding are largely based on assumptions made when the scheme was established. Those assumptions include the number, duration and complexity of court hearings, as well as an assumption that applicants will only be involved in one substantive hearing over the course of their application. Those assumptions have proven to be incorrect, with a lack of funding for court proceedings now an established cost pressure.

Hearing duration is longer than anticipated and is subjected to extending, even during the hearing itself. Hearings are also being held in stages, and each stage has to be fully prepared for and participated in, as a separate hearing. The complexity of issues to be determined are far more significant than originally assumed, both because of the novel questions of law being raised and because of the number of applicants with overlapping applications who are participating in each hearing.²⁴

2.2.4 2023 changes to the funding scheme

On 15 February 2022, the Cabinet Māori Crown Relations – Te Arawhiti Committee issued a minute on the funding scheme revisions. The Committee agreed to simplify the funding scheme, with activities being categorised under activity-focused workstreams, to allocate funding for court hearings as individual events, to enable grant-based funding, and to remove the 85 per cent contribution. Cabinet noted that the changes to the funding scheme would ‘increase the maximum financial assistance applicants can receive (other than for court proceedings) from \$442,878 to \$458,000’.²⁵ Cabinet also agreed to further changes: court costs

21. See doc B048, TA.005.0663

22. ‘Vote Te Arawhiti: Addressing Costs Pressures to the Takutai Moana Financial Assistance Scheme’, joint briefing to Minister of Treaty of Waitangi Negotiations and Minister of Finance, 11 March 2024 (see doc B048, TA.005.0017)

23. See doc B048, TA.005.0662

24. Document B048, TA.005.0664

25. Document B048, TA.005.0119

would be funded separately, and there would be no funding cap ‘on the costs of participating in Court hearings’.²⁶

In an internal memorandum dated 19 December 2022, Te Arawhiti senior officials moved to implement the funding scheme changes approved by Cabinet in February 2022. Officials advised that once the changes were approved, applicants would be notified in January 2023.²⁷ These revised changes to the scheme took effect from 1 March 2023.²⁸

2.2.5 Hearings scheduled in the High Court

Meanwhile on 4 August 2022, Justice Churchman of the High Court issued a minute listing applications under the Act which had been set down for fixtures. Eight fixtures had confirmed dates, four of which were between eight to 12 weeks’ long: East Coast Wairarapa Group M Stage 1 (eight weeks, commencing on 4 September 2023); East Coast Wairarapa Group M (10 weeks, commencing 12 February 2024); South West (Whanganui / Kāpiti) Group N (12 weeks, commencing 6 May 2024); Whangārei Harbour Stage 1(a) (10–12 weeks commencing 12 February 2024), and Whangārei Coast Stage 1(b) (10–12 weeks, commencing 22 July 2024).²⁹

2.3 THE FUNDING SCHEME COMES UNDER PRESSURE

2.3.1 Forecasting for the 2023–24 financial year

Frances Dagg (Manager, Takutai Moana at Te Arawhiti) said in her evidence that ‘an unprecedented volume of complex funding requests’ in late 2023 and early 2024 put the funding scheme ‘under significant financial pressure’.³⁰ However, Harry Kent (Principal Advisor, Takutai Moana at Te Arawhiti) gave further evidence that highlighted issues with the original forecasting. He stated that ‘the modelling assumed that applicant groups would only participate in one Court proceeding to have their application under the Act heard and determined’. But this assumption ‘did not account for the fact that some applicants would need to participate in multiple hearings for the determination of their applications, including, for example, staged hearings or wāhi tapu hearings’. On top of this, Mr Kent stated:

the modelling did not account for applicant groups participating as interested parties in substantive hearings other than the hearing, or area, in which their application would be determined, relating to areas of the coastline in which they hold overlapping interests.

26. Frances Dagg, affidavit, 8 July 2024 (doc A74), p 3

27. Document B048, TA.005.0119

28. Dagg, affidavit (doc A74), p 3

29. Churchman J, minute, 4 August 2022, p [4]

30. Frances Dagg, brief of evidence, 20 December 2024 (doc B1), p 14

Mr Kent submitted that ‘the funding team has come to the view that the original modelling did not fully account for the introduction of the Takutai Moana engagement strategy’. The ‘cumulative effect of these factors’, he stated, was that the 2023–24 financial year experienced ‘higher-than-expected costs and demand’.³¹

In March 2024, Te Arawhiti staff undertook financial forecasting on the funding scheme and raised grave concerns about an impending breach of the financial appropriation for the 2023–24 period. In a 6 March briefing paper to Chief Executive Lil Anderson, staff advised that ‘the Takutai Moana funding assistance scheme for 2023–24 is now expected to become fully expended by 22 March and to breach by 30 April 2024. We have previously advised you that a breach would likely occur by 31 March’.³²

Te Arawhiti also sought feedback from Treasury on the proposed advice to Ministers regarding the funding scheme issues. Email correspondence between Te Arawhiti and Treasury indicated Te Arawhiti had ‘first become aware of costs pressures in September 2023, but only raised them with Treasury in February [2024]’.³³ Treasury noted in an email dated 20 March 2024 to Te Arawhiti that ‘the cause of the significant increase in expenditure is primarily driven by applications going through the High Court pathway, but has also been enabled by the widening of policy settings by Cabinet in 2022’.³⁴

2.3.2 Ministerial advice on funding for the 2023–24 financial year

(1) *The first draft Ministerial briefing paper*

On 8 March 2024, Te Arawhiti drafted a joint briefing paper to Ministers Goldsmith and Willis, which was sent to Treasury for review and feedback. The briefing paper advised the \$12.023 million appropriated for the 2023–24 financial year would be fully exhausted by the end of April 2024.³⁵ Financial forecasting estimated total expenditure for the 2023–24 period at \$30.800 million; that is, \$18.777 million in excess of the 2023–24 appropriation.³⁶

The briefing paper confirmed that, in September–October 2023, Te Arawhiti began to notice changes in billing from legal counsel for legal costs for hearings in which some applicants were participating.³⁷ Officials attributed the overspend to several factors, including: the number of court fixtures scheduled; the complexity of the matters being heard; the costs associated with appeals; the level of legal costs being claimed; and the need for Crown engagement pathway applicants to participate in court hearings that impact their interests.³⁸

The briefing paper suggested two possible options to address the issue: to cease reimbursements once the funding appropriation was expended or, alternatively, to

31. Harry Kent, brief of evidence, 17 January 2025 (doc B2), p 12

32. Document B48, TSY.002.0002

33. Ibid, TSY.002.0021

34. Ibid

35. Ibid, TSY.001.0162

36. Ibid

37. See doc B48, TSY.001.0162

38. See doc B48, TSY.001.0162

reallocate funding from within other funding appropriations to cover the shortfall until the end of the 2023–24 financial year (which was the preferred option).³⁹

Te Arawhiti officials sought agreement from Ministers Goldsmith and Willis to seek Cabinet approval for: a transfer of \$1.5 million from unspent Treaty Settlement Claimant funding for the 2023–24 financial year; the transfer of \$17.3 million from future years' appropriations for the 2023–24 year; and the transfer of a further \$18.5 million funding from future years' appropriations to the 2024–25 year on top of the existing appropriation.⁴⁰

(2) *The second draft Ministerial briefing paper*

On 11 March 2024, Te Arawhiti drafted a second briefing paper, which included amended options and recommendations from the 8 March draft.

In this second paper, Te Arawhiti proposed two new options. The first option sought Cabinet approval to transfer \$17.3 million from future years' funding allocations to the 2023–24 financial year, \$19 million for the 2024–25 financial year (also transferred from future years' funding allocations), and changes to the financial scheme. Alternatively, Te Arawhiti also recommended a second and preferred option: a transfer of \$36.3 million from the Between-Budget Contingency to be split across the 2023–24 and 2024–25 financial years, as well as authorising changes to the funding scheme.⁴¹

In feedback provided on the second draft briefing paper, on 6 March 2024, the Treasury noted that 'this paper seeks to address an approx 150% increase over the current appropriation for Takutai Moana expenditure'.⁴² Treasury officials recommended the briefing paper include a clear articulation of the cause of the 2023–24 costs pressures, and what steps Te Arawhiti intended to take in future years to alleviate those pressures.⁴³ Furthermore, Treasury considered that Te Arawhiti's analysis lacked a compelling rationale to 'front load' the \$19 million requested for 2024–25 from future years' funding appropriations.⁴⁴ The preferred option of Treasury officials was for Ministers to 'agree to seek Cabinet approval to fund higher expenditure for 2023–24 only (\$17.3 million) through the Between-Budget contingency' and to 'direct Te Arawhiti to report back on policy settings to reduce costs in future years'.⁴⁵ According to Treasury officials:

this option will provide Te Arawhiti with a stronger incentive to implement policy changes quickly and will provide more certainty around the specific quantum of funding required. If higher forecast expenditure creates another risk of unappropriated

39. Document B48, TSY.001.0170

40. Ibid, TSY.001.0169, TSY.001.0170. We note the figure recorded on the briefing paper recommendations at page 11 is \$18.5 million. This may have been an error, because the title page of the briefing paper has a recommendation seeking \$19 million for the 2024–25 financial year.

41. Document B48, TA.002.0020, see also TA.002.0017

42. Ibid, TSY.001.0237.

43. Ibid

44. Ibid, TSY.002.0022

45. Ibid, TSY.002.0022, TSY.002.0023

expenditure in 2024/25, Te Arawhiti can seek further additional funding or proposed front-loading of spending (as the impact of any policy changes and risks will become clearer at that time.)⁴⁶

Despite this Treasury advice, both Ministers agreed with Te Arawhiti's preferred option, namely to 'seek Cabinet approval for \$36.3 million split across the 2023/24 and 2024/25 periods', and included a handwritten note requesting a report back from Te Arawhiti on the proposed changes to the scheme.⁴⁷

2.3.3 Cabinet decision

On 15 April 2024, the Cabinet Committee noted that the funding appropriation for each of the 2023–24 and 2024–25 financial years was forecast at \$30.8 million.⁴⁸ This comprised an overspend of \$18.777 million for 2023–24, and an overspend of \$19 million for 2024–25.⁴⁹

Cabinet approved the Ministers' joint request for the additional \$17.3 million for the 2023–24 financial year, but declined the Ministers' joint request for an additional \$19 million for the 2024–25 financial year. Cabinet noted that 'further changes would be needed (and will form part of the review) to manage costs to appropriation levels'.⁵⁰ Ms Dagg said that, as a result of Cabinet's decision, \$12.023 million was the total amount available for Te Arawhiti to 'distribute to all applicants seeking funding from the scheme for the [2024–25] financial year to applicants in both the High Court and Crown engagement pathways'. She added that applicants were informed of Cabinet's decision on 22 April 2024.⁵¹

2.4 THE FUNDING SCHEME IN THE 2024–25 FINANCIAL YEAR

2.4.1 Proposed changes to the funding scheme

Te Arawhiti had initially planned to seek Cabinet approval to introduce two changes to the funding scheme criteria, which would be implemented as of 1 January 2025. First, applicants would be required to provide budgeted work plans. Secondly, hourly rates for lawyers would be reduced to align with legal aid rates.⁵²

However, in the wake of the April 2024 Cabinet decision, officials updated their forecasts and realised that at the current rate of spending, the \$12.023 million appropriated for 2024–25 would be fully expended by September 2024.⁵³ Subsequently, on 17 May, officials asked Minister Goldsmith to seek Cabinet approval to expedite the introduction date of the new measures to 1 July 2024.⁵⁴

46. Ibid, TA.002.0022

47. Ibid, TA.002.0020

48. Ibid, TA.002.0205

49. Ibid, TA.002.0205, see also TA.002.0149

50. Ibid, TA.002.0027

51. Dagg, brief of evidence (doc B1), p 19

52. Document B48, TA.002.0130

53. See doc B48, TA.008.0086

54. Document B48, TA.002.0130

Officials also introduced an additional change as a preferred option: to ‘fund all scheduled hearings but cap funding at an affordable level’.⁵⁵ Due to the extremely short timeframes to implement the changes, Te Arawhiti did not engage or consult with applicants on the proposed changes.⁵⁶

2.4.2 Additional changes to the funding scheme for 2024–25

Te Arawhiti officials sent a briefing paper (attaching a draft Cabinet paper) on 30 May 2024 to Ministers Goldsmith and Willis asking them to seek Cabinet approval to introduce the proposed changes to the scheme, effective from 1 July 2024. In their assessment, these measures would be necessary to manage the funding scheme within the existing appropriation. In addition to the budgeted workplan requirements and the change in hourly rates, court costs for all hearings scheduled for 2024–25 would be capped at \$140,000 per applicant for substantive hearings, \$25,000 per applicant for follow-up hearings, and \$30,000 per applicant for appeals.⁵⁷ Officials acknowledged the funding caps were ‘a substantial reduction in the Crown’s contributions to applicants’ court costs’.⁵⁸

Furthermore, Te Arawhiti clarified that it would prioritise working with applicant groups involved in scheduled substantive hearings, follow-up High Court hearings, and appeals in the 2024–25 and 2025–26 financial years. In addition, Te Arawhiti also confirmed they would prioritise applicant groups who were ‘close to seeking Ministerial determination in the 2024–25 and 2025–26 financial years’.⁵⁹

Ministers Goldsmith and Willis agreed to approach Cabinet to approve these urgent changes.⁶⁰ Ms Dagg stated that Te Arawhiti ‘undertook urgent work’ in May and June ‘to ensure the scheme was managed within its appropriation and that applicant funding was available from 1 July 2024’.⁶¹ In a ministerial briefing paper dated 30 May 2024, Minister Goldsmith inscribed a note on the draft Cabinet paper attached to the briefing, which read ‘it is my view that \$12 million is a justifiable budget’.⁶² This note was added as a paragraph to the final Cabinet paper considered by the Cabinet Committee.⁶³

Officials advised they would communicate the changes to applicants once Cabinet approval was confirmed. They added that, while the amendments were rushed, ‘changes being made within the appropriation will not come as a surprise to applicants’. Officials cited a previous pānui that had been sent out on 24 May 2024 to update applicants about the funding constraints.⁶⁴ That pānui confirmed officials were in the process of developing proposals for consultation with

55. Ibid, TA.002.0132

56. See doc B48, TA.002.0130

57. Document B48, TA.002.0129

58. Ibid, TA.002.0141

59. Ibid, TA.001.0180

60. Ibid, TA.002.0124

61. Dagg, brief of evidence (doc B1), p 21

62. Document B48, TA.002.0150

63. Ibid, TA.001.0007

64. Ibid, TA.002.0136

applicants around more permanent changes to the scheme beyond the 2025–26 financial year.⁶⁵

On 26 June 2024, the Cabinet Economic Policy Committee approved the proposed scheme changes, but noted that ‘the proposals are likely to be seen by applicants as inconsistent with Article 2 of the Treaty of Waitangi and the Treaty principles of active participation [*sic*] and partnership’.⁶⁶ Te Arawhiti subsequently developed guidance documents for applicants regarding the changes to the funding scheme effective from 1 July 2024, which included information on the types of costs applicants could seek reimbursement for.⁶⁷ Officials sent out the guidance documents to applicants by email on 5 July 2024.⁶⁸ Ms Dagg stated that from July 2024, the funding team worked ‘under urgency to assist applicants with what they needed to do to ensure the continuation of funding and the development of work-plans, while continuing to process requests for reimbursement’.⁶⁹

2.4.3 Comment from the High Court

On 15 May 2024, Justice Churchman held a case management conference, which included discussions on the status of the funding scheme. In his following minute, Justice Churchman recorded a list of High Court hearings that were either underway or scheduled for 2024 and 2025, as well as a list of applications awaiting firm fixture dates.⁷⁰ The minute also noted the April 2024 Cabinet decision, and that no additional funding had been secured for 2024–25 or future years.⁷¹ The minute stated:

that the appropriation was intended to cover not only litigation before the High Court but the costs of direct Crown engagement applications. The latest information the Court has is that there were 368 direct engagement applicants. None of the claims appear to have been resolved. Some 188 direct engagement applicants also have proceedings under MACA in the Court, that leaves 186 direct-engagement-only applicants, which the Court also understands would need to be funded by the Scheme.

Te Arawhiti’s modelling has indicated that one hearing as large as the Whangārei Coast hearing (due to start on 22 July 2024), would cost more than the entire appropriation for the next financial year.

65. Ibid, TA.002.0136

66. Cabinet Economic Policy Committee, ‘Takutai Moana Financial Assistance Scheme: Interim Changes’, minute of decision, 26 June 2024 (see doc B048, TA.004.0407)

67. Document B48, TA.001.0180–TA.001.0207, see also TA.004.0179–TA.004.0181, TA.016.0019–TA.016.0024

68. Ibid, TA.014.0022

69. Frances Dagg, brief of evidence (see doc B43), p 4

70. Churchman J, minute, 15 May 2024, pp [6]–[7]

71. Ibid, p [7]

The memorandum also acknowledged that the annual appropriation of \$12 million from 1 July 2024 will cause ‘significant disruption to the Senior Court’s scheduling, and to applicants interested parties and counsel.’⁷²

Justice Churchman went on to explain the staged framework of MACA hearings:

The first and largest hearing is to decide which applicants, if any, qualify for CMT or PCR recognition orders. Once the identity of the successful applicants for those orders is known, then further hearings are necessary to address the detail of the order and the complex mapping standards that MACA requires the parties to meet before an order can be issued.⁷³

Justice Churchman acknowledged that ‘it is not appropriate or necessary for the Court to comment on Cabinet decision-making as to the funding of hearings under MACA’, but equally ‘the timetabling of any litigation before the High Court is a matter for the High Court’. Justice Churchman then invited applicant counsel to make submissions regarding which cases were to be heard, and whether certain hearings should continue or be adjourned.⁷⁴

2.5 THE CURRENT STATUS OF APPLICATIONS UNDER BOTH PATHWAYS

2.5.1 What happened to the High Court cases?

In a pānuī dated 5 July 2024, Te Arawhiti listed the scheduled High Court hearings for the 2024–25 financial year, for which applicants would receive funding at the new capped rates. The substantive hearings included: Whangarei 1(b) (Whangarei Coast); Ruapuke Island; South Taranaki; and Central Bay of Plenty.⁷⁵ The follow-up hearings (being stage 2, wāhi tapu and part-heard proceedings) included: Tokomaru Bay 2; Wairarapa 1(a) wāhi tapu; Wairarapa 1(b) wāhi tapu; and Group N1(a) (Kāpiti-Manawatū) continuance.⁷⁶ The pānuī did not list the appeal proceedings.

The record of what happened to each of these hearings is not entirely clear. The Courts of New Zealand website maintains a list of scheduled and completed hearings for applications under the Act. It is not clear whether that list is complete or up to date.

The hearing for Ruapuke Island was due to commence on 24 March 2025 and was to run for three weeks. While it is unclear from the website whether this hearing was completed, in her oral evidence Justine Inns informed the Tribunal that ‘I’ve just completed a MACA hearing for the Ruapuke whānau. That hearing was set

72. Ibid, pp [7]–[8]

73. Ibid, pp [8]–[9]

74. Ibid, p [8]

75. Document B48, TA.001.0181

76. Ibid

down for three weeks. In fact [it was] disposed of in one.⁷⁷ Whangarei Coast 1(b) was heard and is awaiting a reserved decision.⁷⁸

The fixtures for Central Bay of Plenty and South Taranaki were adjourned without a confirmed future date. In relation to Central Bay of Plenty, in his minute dated 26 September 2024, Justice Powell initially granted an enlargement of the court timetable, stating:

the applicants have noted that previously observed issues with funding together with the changes to the Marine and Coastal Area (Takutai Moana) Act 2011 having follow on effects with regard to the ability of the applicants to prepare for the Central Bay of Plenty hearing currently set down for 10 weeks in May 2025.⁷⁹

In a further minute for the same proceeding dated 19 December 2024, the hearing was adjourned altogether. Justice Powell reiterated the funding issues outlined by the applicants, and also noted the impact of the adjournment:

In addition, the Ngāti Awa applicants also identified ongoing issues with funding as a result of the amendment to the Takutai Moana financial assistance scheme and the resulting impact on the ability of applicants to prepare for hearing.⁸⁰

The only remaining issue is when the Court should convene a further case management conference . . . having vacated the May 2025 hearing, the simple fact is it will make little or no difference when in the second half of 2025 a case management conference is held. By that time it will not be possible to accommodate a nine-week hearing in 2026 and on the contrary a hearing in 2028 or 2029 at the earliest will be more likely.⁸¹

On 1 May 2024, for the stage 1 hearing Justice Cull released her decision granting recognition orders for customary marine title (CMT) and a protected custody order for two hapū of Tokomaru Bay.⁸² On 22 February 2025, Justice Cull released a further decision for the Tokomaru Bay stage 2 hearing granting CMT and wāhi tapu orders to two hapū of Tokomaru Bay.⁸³ For the Group N1(a) continuance, the most recent court dates listed are 29 October to 8 November 2024, with a further hearing scheduled for July 2025.⁸⁴ In relation to Wairarapa 1(a), Justice Gwyn issued a decision on 5 February 2025 granting wāhi tapu orders to Ngāti Hinewaka

77. Transcript 4.1.2, p 46

78. Hearing Information — Courts of New Zealand

79. Powell J, minute, 26 September 2024, p [3]

80. Powell J, minute 2, 19 December 2024, p [4]

81. Ibid, p [7]

82. *Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupare ki Tokomaru* [2024] NZHC 682 (1 May 2024)

83. *Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupare ki Tokomaru* [2025] NZHC 250 (21 February 2025) at [51]–[52]

84. Grice J, minute, 24 April 2024, pp [2], [7]

and Ngāti Tumupūhia. A further hearing was set down for 28–30 April 2025 to finalise the CMT orders. For Wairarapa 1(b), a wāhi tapu hearing is scheduled for five days between 21–25 July 2025.⁸⁵

2.5.2 What happened to the Crown engagement cases?

In the stage 2 report of our Wai 2660 inquiry, we noted that, as of 9 July 2021, 387 applications relating to the 20 different coastlines had been filed in the Crown engagement pathway.⁸⁶ In our Wai 2660 stage 1 report, claimant counsel argued then that, since the statutory deadline, the Crown had done ‘little more than acknowledge receipt of these applications.’⁸⁷ Indeed, we noted at that time that ‘only 16 applications had progressed in any measurable way.’⁸⁸ Fourteen applications remained in the pre-engagement phase, where Te Arawhiti conducts preliminary appraisals to ‘consider what priority to give [an application] in its work programme and the circumstances in which terms of engagement could be agreed.’⁸⁹

In her affidavit, Ms Dagg confirmed that ‘while the Crown engagement pathway under the Act has not resulted in a successful determination, several applicant groups have progressed to the point or close to the point of ministerial determination in this pathway.’⁹⁰

At the panel’s request, Te Tari Whakatau provided a redacted copy of a spreadsheet listing the Crown Engagement pathway applications that are ‘close to determination.’⁹¹ There are seven in total: Ngā Hapū o Ngāti Porou Stage III, Ngā Hapū o Ngāti Porou Stage IV, Hauraki (Ngāti Porou ki Hauraki), Rangitoto ki te Tonga, Eastern Bay of Plenty (Te Whānau a Apanui), Southern Hawke’s Bay (Mana Ahuriri), and Ngati Hokopu/Te Wharepaia (PCR).⁹²

At the April 2025 hearing, in their questions to Ms Dagg the Tribunal raised concerns about the Crown Engagement pathway applicants, saying ‘in large measure, they have not been playing much of a role so far in the process.’⁹³ The Tribunal continued, noting that ‘even in your own affidavit at February is telling us that there hasn’t been one completed Crown engagement determination.’ In response, Ms Dagg said ‘No.’⁹⁴ Following on, one of our panel members, Ron Crosby, referred to Ms Dagg’s affidavit and pointed out:

85. Gwyn J, minute, 16 December 2024, p[3]

86. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report*, p 35

87. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, p 63

88. Ibid

89. Ibid, pp 63–64

90. Dagg, affidavit (doc A74), p 13

91. Tribunal questions 2.6.7(a)

92. See doc 3.4.49(b), TA.018.0008

93. Transcript 4.1.2, p 189

94. Ibid, p 191

If we look at 61.1, 'All hearings and applicants would be treated the same.' . . . But the reality varies from that doesn't it because it's, 'fund all scheduled hearings'. So that just cannot be all hearings and applicants being treated the same because it's limited to the scheduled hearings. Am I right on that?⁹⁵

In reply, Ms Dagg said 'Yes'.⁹⁶

Likewise, claimant counsel also raised the Crown engagement pathway applicants with Ms Dagg, asking:

turning to that question of applicants and ministerial determination . . . if funding is prioritised based on progress it does mean that those applicants who are not yet close to a ministerial determination are basically incapable of seeking any funding or receiving and funding to progress their applications, isn't that correct?⁹⁷

In response, Ms Dagg stated 'that's correct for this financial year, yes'.⁹⁸

95. Ibid, p192

96. Ibid

97. Ibid, p143

98. Ibid

CHAPTER 3

TREATY ANALYSIS, FINDINGS, AND RECOMMENDATIONS

3.1 INTRODUCTION

In this chapter, we determine the issues for inquiry concerning the funding scheme. First, we summarise the parties' position on these issues. Secondly, we assess whether the process to review and amend the funding scheme was Treaty compliant. As we noted in chapter 2 of our stage 1 urgency report, the scope of the Crown's proposed changes to the regime governing Māori rights and interests in a taonga as significant as the takutai moana requires us to measure the Treaty compliance of the Crown's actions against the highest possible standards. Third, we assess whether the current funding scheme settings are consistent with Treaty principles. Lastly, we make our recommendations.

3.2 THE PARTIES' POSITIONS

3.2.1 Claimants and interested parties' submissions

The claimants and interested parties argue that both the process followed to change the funding scheme and its settings for the 2024–25 year breached Treaty principles.¹

Claimant counsel described the case against the Crown as 'straightforward' because it established a regime for those seeking recognition of their customary rights, 'compelled participation' in that regime, and 'promised funding support', but then broke its promise 'repeatedly and systemically'.² Counsel stated that the subsequent defunding of the scheme represented a 'betrayal' and a breach of the claimants' 'legitimate expectations'.³ Counsel alleged that the Crown did this 'with full knowledge' of the prejudice this would cause.⁴

Broadly, the claimants submitted that the Crown breached the Treaty principles of partnership, active protection, good government, and redress 'by implementing a funding regime that has chilled the claimants' interest in pursuing rights recognition in the takutai moana'.⁵ Counsel described the process for acquiring CMT (set out in the Act), as 'an exhaustive one, necessitating adversarial litigation and the

1. Submissions 3.3.61, 3.3.62, 3.3.63, 3.3.64, 3.3.65, 3.3.66, 3.3.67, 3.3.68, 3.3.69, 3.3.70, 3.3.71, 3.3.72, 3.3.74, 3.3.75, 3.3.76, 3.3.79

2. Submission 3.3.49, p 1

3. Submission 3.3.56, p 12

4. Submission 3.3.49, p 1

5. Submission 3.3.56, pp 6–7

testing of considerable evidence'. Moreover, the Crown's failure to fund the process adequately, counsel alleged, breached its fiduciary duty to Māori.⁶

Counsel noted the Tribunal's finding in *Ngā Mātāpono* that 'poorly designed and unjustifiable policies are inconsistent with the principle of good government'.⁷ Claimant submissions highlighted that the scheme has led to delayed payments, been communicated poorly, been insufficient, and 'overall made it more difficult for Claimants to progress their application under the Act'.⁸ The claimants submitted that '[t]he Crown knows what a treaty compliant funding scheme looks like and have ignored their obligations to Māori to institute it'. The Crown, it was alleged, has instead prioritised 'fiscal pressures' and left applicants 'severely under resourced to protect their taonga moana', breaching Treaty principles.⁹

(1) Processes to review and amend the scheme

In designing and reviewing the scheme settings, claimant counsel submitted that the Crown 'failed to engage with Māori' or 'give proper consideration to te Tiriti o Waitangi and its principles'. As such, the current scheme has created numerous issues that undermine the rangatiratanga of the claimants.¹⁰

The claimants noted that, instead of consulting meaningfully with Māori, the Crown implemented these changes to the scheme 'unilaterally', despite 'knowing it would impact applicants in a major way'.¹¹ The claimants submitted that, because the Crown is in 'complete control' of the funding scheme, it bears responsibility for its 'deficiencies'.¹² In their general submissions, the claimants asserted:

The 2024/25 appropriation was set without reference to actual expected costs, at a level far below forecasted demand, and with full knowledge that it would be insufficient and inadequate.

The Crown has since treated the appropriation as a fixed external constraint, claiming that Te Tari Whakatau was simply managing within limits set by Cabinet. But the appropriation was not imposed on the Crown – it was a limit the Crown chose for itself.¹³

Claimant counsel submitted that the financial modelling used by officials to inform the appropriations for the 2024–25 financial year was 'highly flawed', causing 'significant underestimation of the funding required'.¹⁴ 'Systemic issues'

6. Ibid, pp 20–21

7. Submission 3.3.52, p 5; Waitangi Tribunal, *Ngā Mātāpono/The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and Treaty Clause Review Policies – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 74

8. Submission 3.3.52, p 6

9. Ibid, p 10

10. Submission 3.3.53, pp 4–5

11. Submission 3.3.52, pp 4–5

12. Submission 3.3.47, p [2]

13. Submission 3.3.79, p 3

14. Submission 3.3.56, p 9

with the Crown's fiscal management and record-keeping systems were raised in claimant submissions, including 'a low-technology approach to tracking reimbursement requests', despite warnings this was insufficient. The Crown also failed 'to adequately monitor the financial modelling once it was implemented'. These issues, counsel alleged, 'contributed to an inability to accurately forecast cost pressures' on the funding scheme.¹⁵ They claimed that had the Crown's forecasting, processes, and consultation with applicants been 'sufficient', the funding scheme 'debacle' would have been avoided.¹⁶

(2) Current scheme settings

The claimants submitted that, in the Wai 2660 inquiry, 'the Tribunal reported on what a Treaty compliant MACA funding scheme should look like', but the Crown has 'essentially ignored' those findings and recommendations.¹⁷ Not only did the Crown ignore the Tribunal, the claimants alleged, but the funding scheme it put in place was 'disabling . . . by design'.¹⁸

Counsel detailed the many negative consequences of the current scheme settings. These included the reduction in the funding available, the inability for claimants to progress their applications, the power for the Crown to determine what are 'reasonable' costs, and significant delays in payments that have put 'unnecessary pressure' on claimants and their counsel.¹⁹ Counsel submitted that the claimants have been 'stymied on several fronts', such as 'not being included in decision-making', 'having their funding reduced without good faith dialogue', and 'by the delays caused to the progression of their applications'.²⁰ They alleged that due to applications proceeding 'very, very slowly . . . the realisation of Treaty obligations have been slowed or become non-existent'. They maintained that '[t]he funding scheme lies at the heart of it'.²¹ While noting that 'previous financial schemes have been far from perfect', claimant counsel described the 2024–25 scheme as 'practically unworkable'.²²

For applicants pursuing the High Court pathway, the claimants submitted that 'funding for court proceedings is inadequate . . . to the point where proper and effective legal representation has been compromised'.²³ Counsel stated that the reduction of available funding from \$484,000 in 2023 to \$140,000 in 2024 was 'dramatic' and 'has impacted the quality of legal representation' for applicants.²⁴ Additionally, the limitation of \$30,000 for applicants to lodge appeals 'gives rise to issues of access to justice', as it hinders their ability to engage in the appeals process

15. Ibid

16. Ibid, p 10

17. Submission 3.3.52, p 3

18. Submission 3.3.56, p 11

19. Submission 3.3.52, pp 3–4

20. Submission 3.3.53, p 7

21. Submission 3.3.47, p [2]

22. Submission 3.3.52, p 3

23. Submission 3.3.56, p 7

24. Submission 3.3.52, p 7

unless they ‘absorb significant costs themselves’.²⁵ Because legal representation ‘is being hobbled’, claimants argued that customary rights in the takutai moana have also been ‘compromised’.²⁶ Despite officials seeking more funding, the claimants submitted that ‘Cabinet gave insufficient weight to factors that warranted an increase’ and ‘failed to rationalise its decision’.²⁷

Delays in processing payments have been ‘particularly problematic’ in the lead-up to hearings. Counsel noted that the processing time of 45 working days (initially 10 to 20 working days) had caused applicants ‘stress and concern’ as ‘they must cover the shortfall themselves’ until funding is approved.²⁸ Disputed payments and communication issues with officials then place further burdens on applicants to the point that it becomes no longer ‘financially feasible’ for some to continue to represent their iwi or hapū.²⁹ The claimants alleged that the Crown has created ‘unfair and inadequate processes’ and is therefore ‘in breach of [its] obligations of good government and active protection’.³⁰ Counsel accepted the Crown’s requirement for applicants to produce budgeted workplans is ‘a sensible measure’, but noted related policy and practice were ‘plagued with issues and concerns’. They cited as an example the fact that, if a workplan needs amending, rather than being paused, the 45-working day timeframe for workplan approvals would restart from the very beginning.³¹

Claimants submitted that ‘the removal of funding for Interested Parties (“IPs”) and the imposition of a fixed fee regime hinder their ability to present a fair and comprehensive case, access legal representation, and secure expert evidence’.³² Claimants viewed the changes to the funding scheme ‘as breaches of their Tiriti rights, further marginalising and disadvantaging Māori communities’.³³ Meanwhile, Crown engagement-only applicants alleged the Crown has treated them ‘as an afterthought in the funding process’, and the lack of clarity surrounding how the funding scheme settings impacts them breaches the principle of active protection.³⁴

The claimants sought a Tribunal finding that the scheme’s development and current settings breach Treaty principles, and that the Tribunal recommend the Crown increase funding to cover all reasonable costs and consult with Māori in all future changes to the scheme.³⁵ In their closing submissions, some claimant counsel referred to the funding caps as the Crown’s attempt at creating ‘a one-size-fits-all model for funding allocation, disregarding the varying demands and

25. Ibid, p 8

26. Submission 3.3.56, p 7

27. Ibid, pp 10–11

28. Submission 3.3.52, p 9

29. Ibid, p 10

30. Ibid, pp 8–9

31. Submission 3.3.56, p 23

32. Submission 3.3.50, p 3

33. Ibid

34. Submission 3.3.55, p 3–5

35. Submission 3.3.52, pp 11–12

complexities of individual cases.’³⁶ Other claimant counsel described the funding caps as ‘grossly inadequate’ and requested a Tribunal recommendation that they be removed.³⁷ In addition, claimants asked for a statutory amendment transferring court related funding to Legal Aid Services with provisions protecting applicants from any liability, and improvements to information management systems at Te Tari Whakatau.³⁸

3.2.2 Crown submissions

Crown counsel submitted that ‘when the Crown’s actions and policies are assessed in all the circumstances, the case has not been made out to establish that the Crown has acted inconsistently with Treaty principles.’³⁹ Counsel noted that this position did ‘not seek to minimise the experiences of applicants and their teams’ regarding the funding scheme changes in July 2024, which it accepted were ‘unexpected and challenging.’⁴⁰ The Crown acknowledged the central importance of the funding scheme in allowing applicants to progress applications for CMT under the Act. Counsel stated that this was ‘the reason that the Crown has established this bespoke funding regime and committed substantial resources to it.’⁴¹ The Crown also noted the ‘strongly worded allegations’ concerning the administration of the scheme, and that the ‘seriousness’ of these allegations underscored the need for the Tribunal to make findings that ‘have a proper evidential basis that clearly establishes the Crown act, omission, policy or practice at issue and the related actual or likely prejudicial effect.’⁴²

The Crown accepted the Wai 2660 inquiry’s finding that the principle of active protection requires the Crown to ensure Māori have ‘access to the courts in appropriate cases.’⁴³ However, counsel maintained that the principle of partnership allows the Crown to ‘choose between a range of possible policy options provided that, in pursuing a particular course of action, it is acting reasonably and in good faith’ — how the Crown does this ‘will necessarily depend on the circumstances’. The Crown submitted that ‘[c]onsultation is not an automatic requirement’ as ‘the method and degree of consultation, will depend on the facts of each case.’⁴⁴

(1) *The process to review and amend the funding scheme*

In the Crown’s submission, officials reviewed and amended the funding settings ‘to address urgent and significant cost pressures on the scheme that arose in the previous financial year from several compounding factors’. These compounding factors included:

36. Submission 3.3.64, p 8.

37. Submission 3.3.56, pp 7, 8, 24

38. Ibid, pp 24–25

39. Submission 3.3.73, p 1

40. Ibid

41. Submission 3.3.54, p 1

42. Ibid, pp 1–2

43. Ibid, p 4

44. Ibid, p 3

- ▶ an unprecedented volume of complex reimbursement requests
- ▶ a significant increase in legal costs billed by applicants' legal counsel
- ▶ the need for Te Tari Whakatau to process reimbursement requests carefully as it is not uncommon for applicants to seek reimbursement for costs clearly outside the Scheme
- ▶ late requests relating to services from earlier years that increased the demand on the Scheme and impacted the Funding Team's ability to forecast costs, and
- ▶ the absence of any mechanism in the nature of the current budgeted workplans also impacted on the ability of Te Tari Whakatau to forecast and manage costs.⁴⁵

Crown counsel defended the decisions and processes while amending the scheme, arguing that its broad course of action was reasonable under the circumstances:

Te Tari Whakatau's process to develop the current Scheme settings has its origins in the steps taken by officials in late 2023 to track, monitor, and assess the cost pressures developing on the Scheme. Responsibly, officials took these steps promptly and as soon as reasonably practicable.⁴⁶

The Crown submitted that, in early March 2024 'officials were forecasting a breach of the 2023/24 financial year appropriation by 30 April 2024'. The Crown needed to address the risk of this appropriation breach, 'because it is constitutionally axiomatic that any public expenditure of this kind . . . be authorised by Parliament'.⁴⁷ In response to the possible appropriation breach, 'officials proposed a phased approach'. The first step was to seek Cabinet approval for the Ministers' joint request for additional funding for the 2023–24 financial year and Cabinet subsequently approved that request. Officials also sought additional funding for the 2024–25 financial year 'and changes to the Scheme settings'.⁴⁸ However, Cabinet did not authorise additional funding for the 2024–25 financial year, requiring the scheme to be managed 'so as to bring it back within the level of the original appropriation'.⁴⁹ Counsel submitted that 'once Cabinet had made those decisions, Te Tari Whakatau had to devise policy changes to manage the Scheme within its existing appropriation'.⁵⁰

To enable the agency 'to better forecast and manage' the scheme, counsel said, Te Arawhiti introduced the requirement of budgeted workplans. To 'mitigate cost pressures', Te Arawhiti also introduced lawyers' hourly rates 'that aligned with legal aid rates'. Counsel noted that 'Cabinet's approval of these measures was subject to consultation with applicants'.⁵¹ Counsel stated that, as it was 'cognisant

45. Ibid, p 6

46. Submission 3.3.73, p 27

47. Submission 3.3.54, p 6

48. Ibid, pp 6–7

49. Ibid, p 7

50. Submission 3.3.73, p 3

51. Submission 3.3.54, p 7

of the Crown's Treaty obligations, Te Tari Whakatau had intended to consult with applicants on these proposed changes,⁵² but the urgent prospect of the funds running out 'did not allow for consultation with applicants.'⁵³

The Crown addressed the allegations raised by claimant counsel surrounding consultation, explaining:

Te Tari Whakatau needed to take urgent steps to address significant issues with the Scheme. Consultation with applicants had been intended but ultimately this was not possible. The current Scheme settings implemented from 1 July 2024 were reasonable and necessary to address the issues with the Scheme and are not inconsistent with Treaty principles.⁵⁴

Furthermore, Crown counsel submitted that '[a]pplicants were informed of these changes shortly after they were approved by Cabinet, in early July 2024', and that officials 'endeavoured to proactively manage the impacts of these changes on applicants, including through assisting drafting workplans with applicant groups'.⁵⁵ The Crown submitted that 'given the circumstances outlined above, the process by which the current Scheme settings were developed and implemented was not inconsistent with Treaty principles'.⁵⁶ Counsel submitted that relevant to the question of Treaty consistency 'is that the Crown needs to strike a balance between ensuring access to justice for applicants and the prudent management of public funds'. The Crown maintained that it 'has struck a reasonable balance in this context' and that the claimants' allegations of Treaty breach 'do not acknowledge this balance'.⁵⁷ Counsel submitted that 'Treaty principles do not give rise to an absolute, open-ended duty to consult' and, instead,

the Crown's duty in this regard necessarily depends on the circumstances of each case, but it would generally be required to consult on 'truly major' issues affecting Māori. Factors such as urgency or the availability of resources, may influence what is reasonable in particular circumstances.⁵⁸

(2) Current scheme settings

In respect of the Treaty consistency of the current funding scheme settings, Crown counsel stated:

the Crown does not accept that Treaty principles obligate it to provide nothing short of full funding to applicant groups . . . Under the Treaty principles, the Crown is able to choose between a range of possible policy options provided that, in pursuing a

52. Submission 3.3.73, p 4

53. Submission 3.3.54, p 7

54. Submission 3.3.73, p 4

55. Ibid

56. Ibid

57. Ibid

58. Ibid, p17

particular course of action, it is acting reasonably in good faith. In other words, a particular funding arrangement or the provision (or absence) of a resource will not be inconsistent with Treaty principles simply because there are other viable options.⁵⁹

In their conclusion, Crown counsel addressed resulting difficulties faced by applicants due to the current settings, noting:

The Crown acknowledges that the events in the first half of 2024 and the introduction of the Scheme settings have presented challenges for many applicants, as expressed in claimant submissions and evidence.

However, the Crown commented further:

While seeking to acknowledge this . . . the Crown's position is that the case has not been made out to establish that the Crown has acted inconsistently with Treaty principles. In the first half of 2024, the Crown was responding to urgent and significant stressors facing the Scheme. The reality is that the Crown has been required to manage the Scheme within the constraints of the appropriation for 2024/25. This has required the Crown to balance the need to ensure applicants' access to justice with its responsibility to manage public funds.⁶⁰

3.3 TREATY ANALYSIS AND FINDINGS

3.3.1 Was the process to review and amend the funding scheme for the 2024–25 year Treaty compliant?

The Crown's closing submissions and the evidence of Crown witness Harry Kent focused on the underspend in previous years as reasons why the pressure on the scheme in late 2023 caught Te Arawhiti off guard.⁶¹ But this focus overlooked the realities of what was taking place during those years in the lifecycle of the application process. The early stages of the proceedings in the High Court were naturally dominated by interlocutory steps. It is understandable that overall costs would be lower at that point as most applications had not been heard at that time. However, there were several key factors that led to an increase in momentum.

The first was the decision by Justice Churchman to group applications into regions to be heard at the same time similar to Waitangi Tribunal district inquiries.⁶² This established that related and overlapping applications would be heard and determined together. The second was the release of the *Edwards* judgment in 2021. This set out the broad approach the High Court took when determining these applications (which was subsequently refined on appeal). The *Edwards* hearing,

59. Ibid, p 37

60. Ibid, p 44

61. Ibid, p 3; Harry Kent, brief of evidence, 17 January 2025 (doc B2), pp 4–5

62. 'Takutai Moana Financial Assistance Scheme: Proposed Changes', joint briefing to Minister for Treaty of Waitangi Negotiations Minister and Minister of Finance, 4 November 2021 (see doc B48), TA.005.0664

and the resulting judgment, also demonstrated the complexity and duration of the hearings required to determine such applications using the regional approach. The third was the minute of Justice Churchman dated 4 August 2022 which listed the applications scheduled for upcoming hearings and the length of those hearings (see section 2.2.3).

In our assessment, the Crown should have been on notice from this point that the High Court pathway was gathering momentum which would likely result in a significant increase in demand on the funding scheme. However, according to Mr Kent, it was not until over a year later, in September and October 2023, that 'Te Arawhiti began to identify that the scheme appropriation was coming under financial pressure as a result of higher-than-expected court-related costs for applicants'.⁶³

In addition to this, there were significant flaws in the modelling used to calculate the annual appropriation required to fund the scheme. According to Mr Kent, 'the modelling assumed that applicant groups would only participate in one Court proceeding to have their application under the Act heard and determined'. But this assumption 'did not account for the fact that some applicants would need to participate in multiple hearings' such as staged hearings or wāhi tapu hearings. Mr Kent also stated that 'the modelling did not account for applicant groups participating as interested parties in substantive hearings other than the hearing, or area, in which their application would be determined'.⁶⁴

We are surprised that these flawed assumptions continued to form the basis of the modelling throughout 2022 and 2023, when the Crown had already identified that these assumptions were wrong in late 2021. The advice from Te Arawhiti to Ministers on 4 November 2021 acknowledged that:

Levels of High Court and appellate court funding are largely based on assumptions made when the scheme was established. Those assumptions include the number, duration and complexity of court hearings, as well as an assumption that applicants will only be involved in one substantive hearing over the course of their application. Those assumptions have proven to be incorrect, with a lack of funding for court proceedings now an established cost pressure.

Hearing duration is longer than anticipated and is subjected to extending, even during the hearing itself. Hearings are also being held in stages, and each stage has to be fully prepared for and participated in, as a separate hearing. The complexity of issues to be determined are far more significant than originally assumed, both because of the novel questions of law being raised and because of the number of applicants with overlapping applications who are participating in each hearing.⁶⁵

63. Kent, brief of evidence (doc B2), p16

64. Ibid, p12

65. Document B48, TA.005.0664

Despite that, the modelling continued to use these flawed assumptions and the pressure on the scheme, and potential overspend, were not identified until almost two years later in late 2023.

In his brief of evidence, Mr Kent said that, in October 2023, Te Arawhiti started to manually track the pre-hearing and hearing costs for individual applicant groups. As a result, Te Arawhiti identified a noticeable increase in pre-hearing costs and weekly hearings costs incurred by applicant groups, which exceeded Te Arawhiti's forecasted costs.⁶⁶ Despite that, when giving evidence before us, Mr Kent clarified that 'there is no suggestion from Te Arawhiti that the costs incurred weren't actual or reasonable in the context in which the work was completed'.⁶⁷

We acknowledge that Te Arawhiti officials faced limitations by only having access to Excel to manage and forecast spending concerning the fund. As Mr Kent stated:

you're not going to have a \$20 million IT system to manage a \$12 million appropriation . . . So, is it fit for purpose or is it fit for the purpose they assumed it would be used for? I would say yes. Does it provide all the information that would be useful for a person like me with my sort of skillset to be able to interrogate data? I would prefer more.⁶⁸

We accept that using a basic system like Excel to manage and accurately forecast spend on this scale would be difficult. However, the evidence does not demonstrate that using Excel was the issue. Rather, Te Arawhiti was surprised in late 2023 that Court related costs were higher than expected when:

- ▶ it should have been obvious at least one year earlier that the High Court pathway was gathering momentum; and
- ▶ Te Arawhiti continued to use flawed assumptions in its modelling when it knew those assumptions were wrong two years earlier.

The late identification of the growing pressure on the funding scheme had a significant impact. Te Arawhiti had to seek emergency funding from Cabinet to cover the projected shortfall for the 2023–24 year and the 2024–25 year. The additional funding for the 2023–24 year was approved, the additional funding for the 2024–25 year was not. Yet, there is no difference in principle between the two differing years as to the nature of the cost. The resulting urgency of these steps also meant that the Crown could not consult or engage with applicant groups before the changes to the scheme for the 2024–25 year were implemented.

While we do not know what the exact outcome would have been, if Te Arawhiti had have identified the growing pressure on the scheme at an earlier stage, it may have been able to better manage the scheme before it reached the crisis point that it did in late 2023 to early 2024. This may well have prevented, or at least alleviated,

66. Kent, brief of evidence (doc B2), pp 18–19

67. Transcript 4.1.2, p 211. Te Arawhiti did refer to some reimbursement requests that did not fit within the funding criteria, such as purchases of alcohol. Those requests were rejected.

68. Ibid, pp 228–229

the impact of the urgent steps taken and decisions made concerning the funding scheme in 2024.

The Crown has an obligation to act reasonably and in good faith and to actively protect Māori interests. That applies when managing the funding scheme which is fundamental for Māori seeking recognition of their customary rights in the takutai moana under the Act. We find that the Crown failed to meet these obligations and breached these principles.

The Crown submitted that changing the funding scheme urgently was a ‘necessity’ and this ‘did not allow for consultation with applicants.’⁶⁹ As the Tribunal has found in many inquiries, the principle of partnership requires the Crown to consult with Māori on decisions and changes that significantly impact their Treaty rights and interests. While this duty is not absolute or open-ended, where significant Treaty rights are engaged, such consultation is necessary to ensure that: the Crown is acting in good faith; the Crown is properly informed; and so Māori as a Treaty partner can engage in the decision-making process.⁷⁰

Here, the Act provides for the recognition of customary rights in a significant taonga. The funding scheme is essential to ensure that Māori can properly engage under the Act. The Crown was proposing to introduce drastic changes to the funding scheme that would significantly impact the ability of Māori applicants to engage under the Act. While the Crown was under time pressure when it was seeking to introduce these changes in 2024, as we set out above, that pressure was created by the Crown failing to properly identify earlier the growing pressure on the funding scheme. The Crown then moved at pace, without consultation or engagement, because of the urgency it created. This is not a reasonable basis to refuse engagement with Māori on such an important issue. The Crown breached the principles of partnership and good faith.

Accordingly, we find that, in abruptly changing the funding scheme without the input of applicants, the Crown breached the principle of partnership and the associated duty of consultation.

3.3.2 Are the current funding scheme settings Treaty compliant?

We now turn to the Treaty compliance of the 2024–25 funding scheme settings. We first consider Cabinet’s decision to decline additional funding for the 2024–25 year. We then consider the changes made to the scheme for that year, namely: introducing budgeted workplans; aligning lawyer’s rates with legal aid rates; and capping the funding available for Court costs.

(1) Declining additional funding

In stage 1 of the Wai 2660 inquiry, we made an overarching recommendation that the Crown fund all reasonable costs to pursue applications under the High

69. Submission 3.3.54, p 7

70. Waitangi Tribunal, *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness* (Lower Hutt: Legislation Direct, 2024), p 93

Court or Crown engagement pathway.⁷¹ Initially, the Crown appeared to accept this recommendation. The revised settings implemented in March 2023 increased funding for the activity workstream to \$458,000 per applicant group. Court costs were funded separately and the 2023 scheme set no overall cap on the costs of participating in Court hearings.

However, in this inquiry the Crown submitted that it ‘does not accept that Treaty principles obligate it to provide nothing short of full funding to applicant groups’. It added that it ‘respectfully, has not accepted [the Wai 2660] recommendation.’⁷² This submission appeared to be contrary to the approach the Crown took when implementing the above changes to the scheme in March 2023. When questioned about this, Mr Stephens KC, for the Crown, clarified that the Crown does not accept that Treaty principles require it to provide full funding to applicant groups in all circumstances. Rather, the Crown is ‘required to strike a reasonable balance between ensuring access to justice for applicants and the prudent management of public funds.’⁷³

Mr Stephens relied on the decision in *New Zealand Maori Council v Attorney-General*, where the Privy Council held:

Both the 1975 Act and the SOE Act refer to the ‘principles’ of the Treaty. In their Lordships’ opinion the ‘principles’ are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty.

Foremost among those ‘principles’ are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown’s obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown’s other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori

71. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Lower Hutt: Legislation Direct, 2020), p 100

72. Submission 3.3.73, p 37

73. Ibid, p 39

language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.⁷⁴

While the Crown owes obligations to Māori as its Treaty partner, we accept that it also owes obligations to the general public as the government of New Zealand. We also accept that where those obligations do not align, the Crown may have to balance the interests of both sides.

This is consistent with the findings in *New Zealand Maori Council*. The Privy Council, by way of example, referred to relevant factors for the Crown to consider when actively protecting Māori interests. This included the state of the economy, whether in recession or buoyant, and the state of the taonga requiring protection. The Privy Council also found that the Crown may be required to take vigorous action to protect a vulnerable taonga where that vulnerability can be attributed to past Crown Treaty breaches.

In other words, the Privy Council directed the Crown to consider Māori interests, and the public interest, and then to take the protective steps that are reasonable in those circumstances. This requires considering, and then balancing, the interests on both sides. This is not something new. In the stage 2 Wai 2660 report, we said:

Balancing the interests of Māori and non-Māori in a fair and reasonable manner is particularly relevant to this inquiry. Importantly, in addition to being fair and reasonable, any such balancing exercise must also be principled. It cannot be arbitrary, particularly where the balancing exercise has the effect of restricting or impacting Māori rights.⁷⁵

In stage 1 of the Wai 2660 inquiry, we found that 'on the basis of the evidence we heard, we consider that the Crown decided to partially fund applications primarily on the basis of fiscal concerns, with insufficient regard for Treaty considerations'.⁷⁶ Our overarching recommendation that the Crown fund all reasonable costs, was based on this finding that the Crown had not carried out a proper balancing exercise when making the decision to partially fund applicants.

In the present case, Cabinet had previously agreed to an annual appropriation of \$12.023 million for the funding scheme. Te Arawhiti projected that an additional

74. Ibid, p17

75. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report – Pre-Publication Version* (Wellington: Waitangi Tribunal, 2023), p 10

76. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, p 86

\$19 million was required to cover expected costs for the 2024–25 financial year. In these circumstances, we expect that a Treaty-compliant balancing exercise would require the Crown to:

- consider the impact on the public fund of approving the additional \$19 million;
- consider the impact on Māori applicants of declining the additional \$19 million; and
- weigh the obligations it owes to both interests and strike a fair and reasonable balance between these interests.

We do not have any evidence that Cabinet carried out this balancing exercise when declining this additional funding. In fact, we do not have evidence of any reasons at all for this decision. Moreover, as we observed above there is no underlying difference in principle between the nature of the costs in one year as compared to the other.

During questioning, the Tribunal put it to Crown counsel that the only reason ‘why the Cabinet might have reached a different conclusion than that recommended to it by the two responsible Ministers presumably was a fiscal one.’ Counsel replied, ‘Yes.’⁷⁷

However, there was nothing in Treasury’s 20 March 2024 email addressing cost pressures on the funding scheme that explicitly suggested the Crown could not afford the \$19 million.⁷⁸ If the Government could not afford the extra funding, we would have expected evidence from the Minister’s Cabinet paper about the fiscal effect (there was none). Instead, there was a recommendation to fund what was an existing Treaty obligation.

We also note that Te Arawhiti had projected total actual costs for the 2024–25 year of \$31 million (being the existing appropriation of \$12 million, and the additional funding requested of \$19 million). By declining the additional funding, in effect the existing appropriation represented a contribution of 38 per cent of total projected actual costs. This is significantly less than the 85 per cent contribution the Crown provided at the time of our stage 1 Wai 2660 report. Once again, there is no evidence that Cabinet considered the impact of this on Māori applicants when making their decision.

From the evidence available to us, and Crown counsel’s answers to our questions at the hearing, the only inference we can draw is that this was a purely fiscal decision, but one made without any evidence that the additional funding would affect the economy, nor any apparent consideration of how it would impact Māori rights and interests. This is not a Treaty-compliant balancing exercise.

We find that the Crown’s decision to decline the funding for the 2024–25 scheme without any proper balancing exercise breached the principles of partnership, good government, and active protection.

77. Ron Crosby to Tim Stephens, livestream, 7:46:08–7:46:20

78. Matt Curzon to Elinor Bendell, 20 March 2024, pp [1]–[5] (TSY.002.0020–4, doc B48, pp 306–311)

Finally, we note that a number of claimants and their counsel argued that the decision to decline additional funding was part of a deliberate strategy by the Crown to try and delay proceedings in the High Court until the proposed legislative amendments to the CMT test take effect. We do not agree. All the evidence we have received indicates this was not a strategic move but a purely fiscal decision on behalf of the Crown due to escalating costs. We consider this was not connected to the proposed amendments to the Act. This is supported by the fact that Ministers Goldsmith and Willis did not adopt Treasury advice and instead took a proposal to Cabinet to seek the additional funding.

(2) *The impacts of declining emergency funding*

Now we turn to consider the impacts of Cabinet's decision to decline the emergency \$19 million in additional funding for the 2024–25 year. We agree with the Crown argument that Te Arawhiti could not breach the appropriation set by Cabinet.⁷⁹ As a result of Cabinet's decision, Te Arawhiti officials had to administer a demonstrably insufficient fund. To do this, they implemented three measures: budgeted workplans, aligning lawyers' rates with legal aid rates, and the introduction of funding caps. We consider these measures in turn.

(a) Budgeted workplans

We take no issue with the concept of budgeted workplans where costs are estimated and approved in advance. This has similarities with the legal aid scheme for civil and Waitangi Tribunal proceedings. In fact, in stage 1 of the Wai 2660 inquiry, we suggested that the Crown should adopt this type of approach to provide certainty to both the Crown and the claimants.⁸⁰

Although we recommended this approach five years ago, the Crown chose not to do so until last year and then it implemented the workplans under urgency. Implementing any new system is going to cause teething problems, as has been demonstrated throughout the various changes made to this funding regime since it was introduced. But what is particularly concerning here is the timing around the budgeted workplans being introduced.

Cabinet approved the requirement to provide budgeted workplans on 26 June 2024.⁸¹ These changes were due to take effect from 1 July 2024. Te Arawhiti worked to prepare guidance on these new changes. This guidance was sent to applicants on 5 July 2024, five days after the changes took effect. This means that by the time the applicants learnt of this requirement, they could no longer access funding until they had prepared a budgeted workplan, and that plan had been approved by Te Arawhiti. It is also clear that there was a great deal of confusion amongst applicants and their counsel over what funding was available under the changes to the

79. We have already found that Cabinet's decision not to increase additional funding was a Treaty breach.

80. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, pp 93–94

81. Cabinet Economic Policy Committee, 'Takutai Moana Financial Assistance Scheme: Interim Changes' (see doc B48, TA.004.0407)

2024–25 scheme. Such confusion is not surprising given that these changes were rushed through urgently, with no consultation or engagement with the applicants.

These changes were also introduced at a time when some applicants were preparing for scheduled fixtures. In her oral evidence during the April 2025 hearing, Jocelyn Naden told of the difficulties with the budgeted workplans:

At the time when this came out in July, we had received a template we were advised was just guidelines . . . It had also asked us to do from July, August, September, October, November, December six-monthly. By that time we were about to go into hearing and we were also had a major hearing in August that we had already prepped for. So in order for us to try and do these budgets, it was quite difficult for us to try and work out where we were at as far as working out these budgeted work plans. It's not that we didn't know what we were doing. It was the budgeted work plans that weren't as straightforward as what we had anticipated.⁸²

As such, while we agree that budgeted workplans should provide certainty to both sides, the way in which they were implemented here, under urgency and without any prior engagement or consultation, caused confusion and disruption to the scheduled hearings. This links directly back to Te Arawhiti's failure to identify the growing pressure on the funding scheme at an earlier stage, and Cabinet's decision to decline additional funding for the 2024–25 year.

(b) Lawyer rates

The MACA regime established by the Crown requires complex proceedings to be heard in the higher courts. In their advice to Ministers on 4 November 2021, Te Arawhiti acknowledged that the proceedings are far more complex than originally assumed (see section 3.3.1). Such complex proceedings require the services of senior legal counsel. Barrister Monique van Alphen Fyfe, who represented a number of applicants in the High Court, detailed the demands placed on lawyers in these proceedings:

It is worth emphasising here how unique MACA Act litigation is. It involves a highly specialist area of law, requiring counsel with a depth of understanding of tikanga Māori and depth of experience in both Te Tiriti o Waitangi work as well as High Court civil litigation. It is factually and procedurally complex, with detailed evidence from applicants and experts addressing well over 180 years of whānau, hapū and iwi whakapapa, and detailed histories of the whenua and the moana. All of this is made more procedurally and factually complex due to the multi-party nature of proceedings, including involvement of additional interested parties (sometimes at the last minute). And, of course, the importance of MACA Act proceedings to the applicants involved – which applicants themselves will be best placed to attest to, but I personally find difficult to overstate – adds weight to the need for counsel to be adequately

82. Transcript, 4.1.2, p71

equipped to spend the time necessary to manage such complex proceedings, commensurate with that importance.⁸³

As noted above, in its efforts to manage the inadequate 2024–25 appropriation, officials reduced hourly rates for applicant lawyers to align with civil legal aid rates.⁸⁴ For a senior associate, senior solicitor or a barrister, these rates are \$167 per hour to appear in the High Court, and \$178 per hour to appear in the Court of Appeal or Supreme Court.⁸⁵

In our stage 1 report in the Wai 2660 inquiry, we suggested that the Crown could improve the funding scheme ‘by transplanting into it some specific aspects of the legal aid funding scheme – or indeed extending the legal aid scheme to cover marine and coastal area applications’.⁸⁶ We made this suggestion as we considered that the approach under the legal aid scheme of approving an estimate of costs in advance was superior to the milestone approach under the funding scheme in place at the time of that report. We also suggested extending the legal aid scheme to cover applications under the Act given that the Legal Services Agency had established systems and expertise in administering legal assistance funding whereas Te Arawhiti did not. These suggestions did not consider, or approve, civil legal aid hourly rates as appropriate rates for High Court proceedings under the Act. They were addressing the issue of how the mechanics of the scheme could be better managed.

Claimants argue that civil legal aid rates do not reflect market rates and will compromise their ability to retain senior and suitable counsel to properly represent them in these complex proceedings. The legal aid rate of \$167 per hour for a senior associate, senior solicitor or a barrister to appear in the High Court is certainly significantly less than the earlier rate of \$250 to \$350 per hour which applied under the 2023 settings.

Barrister and solicitor Justine Inns, who has been representing the Ngātiwai Trust Board, submitted in her evidence that, under the 2024–25 rates her firm has had to adopt ‘a policy of heavily discounting rates or acting pro bono’. However, she added that, while they ‘may be able to sustain heavily discounted rates for mahi of a limited scale, such as hearings over a few days, we will not be able to do so for hearings that extend over weeks or months’. Ultimately, she stated that it was ‘simply uneconomic’ and ‘not financially feasible for my firm to continue to undertake substantial work in the MACA jurisdiction on the basis of the current funding policy’.⁸⁷

83. Monique van Alphen Fyfe, affidavit, 27 February 2025 (doc B33), p 3

84. Te Arawhiti intended to introduce this alignment with legal aid rates anyway, but the introduction was brought forward given the 2024–25 appropriation issue.

85. *Takutai Moana Financial Assistance Scheme – Update to Applicants – JULY 2024*, pānui (see doc B48, TA.001.0180)

86. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, p 92

87. Justine Inns, affidavit, 27 February 2025 (doc B34), p 3

The Crown argued there is no evidence to demonstrate that counsel stopped acting for applicants once the new hourly rates were introduced. However, we accept the argument from claimant counsel that they continued to act for their clients at the reduced rate out of their duty to act in the best interests of their client, not because they accept that the rate is suitable. We agree with Ms Inns' evidence. Given the lack of notice with which these rates were imposed counsel in ongoing proceedings would have let their clients down badly had they sought to withdraw. We consider there is a genuine risk that suitable senior counsel may not accept instructions to act for applicants in future High Court proceedings under the Act if this hourly rate is continued beyond the 2024–25 financial year. This could prejudice applicants if they are unable to retain suitable counsel to represent them in such complex proceedings.

We also note that applying civil legal aid rates cannot be viewed in isolation, as these reduced rates were applied alongside the capped contribution to court costs. We consider the funding caps in more detail below. However, we observe here that the funding caps imposed in this scheme do not apply under the civil legal aid scheme.

In the stage 1 Wai 2660 inquiry, barrister Leo Watson gave expert evidence on the civil legal aid scheme. We referred to his evidence in our stage 1 report:

In his expert brief of evidence, Mr Watson notes that the legal aid scheme for Waitangi Tribunal claimants 'sets its maximum grant based on the applicant's own estimate of costs, not a pre-determined quantum cap, although the Legal Aid Service retains full discretion in terms of its decision on the Amendment to Grant'. In the High Court and appellate jurisdiction for civil legal aid, 'while the activities are set maximum hours per task', he submits that there is 'no limit on hearing time, which is paid based on actual hours'. He contrasts this with the marine and coastal area High Court funding regime, where 'hearing time is subject to a cap for lawyer's time ranging from \$15,000 to \$30,000 depending on the Crown's assessment of complexity'.⁸⁸

The changes to the funding scheme for the 2024–25 year did not seek to align the funding scheme as a whole with the civil legal aid scheme. It only adopted the lower hourly rate for lawyers.

We appreciate that the Crown is seeking to reduce costs by aligning lawyer's rates with the legal aid scheme. However, it has done so by cherry picking that part of the legal aid scheme it agrees with, the hourly rates, while discarding that part of the scheme it does not agree with, paying for actual hearing time and providing for an extension to the grant. Once again, the Crown has done so without any proper consideration of the impact this may have on Māori applicant groups. The Crown had not undertaken a proper balancing exercise here and had breached its obligation to actively protect Māori interests.

88. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, p 96. Mr Watson's evidence is largely consistent with the memorandum the Crown filed, at our request, dated 16 May 2025 concerning the civil legal aid scheme.

(c) Funding caps

As noted above, in order to manage the funding scheme within the existing appropriation for the 2024–25 year the Crown's contribution to court costs was capped at \$140,000 per applicant for substantive hearings, \$25,000 per applicant for follow up hearings, and \$30,000 per applicant for appeals.

When questioned by Judge Armstrong, Mr Kent confirmed that these funding caps were calculated by taking the total appropriation, deducting the expected activity costs, and then dividing the balance equally among the applicant groups who had scheduled fixtures that year, with adjustments for those appearing in a substantive hearing, a follow up hearing or an appeal.⁸⁹ Mr Kent said this was a rudimentary exercise of simply dividing up the limited funds available. These caps were not based on a reasonable contribution to the actual costs associated with those hearings.⁹⁰

Surprisingly, we did not receive detailed evidence from those claimant groups who participated in scheduled fixtures over this period setting out actual costs compared to the caps to highlight the difference. However, in response to Tribunal questions, Mr Kent said that, while actual costs differed for those who had scheduled hearings over this period, in most cases the maximum amount of funding available under the caps were not sufficient to meet actual costs.⁹¹

We also have some illustrative comments from the Supreme Court on the adequacy of the caps with respect to appeals. The *Edwards* appeal came before the Supreme Court last year. One of the Māori applicant parties to that appeal sought a prospective costs award against the Crown given the changes to the funding scheme for the 2024–25 year. The Supreme Court found:

We are satisfied, too, that the payment to each applicant of a sum not exceeding \$30,000 will not remotely meet the likely level of legal costs reasonably incurred. As we note shortly, it is a fraction of the reasonable contribution awards this Court would likely make in the event of success in an eight-day appeal.

A successful party engaging senior and junior counsel for an eight-day appeal would receive costs after the event in this Court of the order of \$110,000.⁹²

The funding cap of \$30,000 for an appeal equals 27 per cent of the costs that the Supreme Court said would be awarded to a successful party in that appeal. That indicative costs award also represents a contribution to, rather than, actual costs. This highlights how insufficient the caps are when compared to actual costs in proceedings of this nature.

We are extremely concerned at such a rudimentary approach being taken to applicant funding under the Act. Given the fixed appropriation Te Arawhiti was

89. Transcript 4.1.2, p 333

90. Ibid, pp 332, 335

91. Ibid, p 337

92. *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waiōweka* [2024] NZSC 119 at 51–56

administering, there is unlikely to have been a better option to fairly distribute the limited funds available amongst those applicants who had scheduled fixtures. This underscores the serious nature of the Treaty breach by Cabinet when it declined to approve additional funding for the 2024–25 year without undertaking a proper balancing exercise and without considering the potential impact on those affected Māori applicant groups. It is this breach by Cabinet that led Te Arawhiti to set these funding caps in such a rudimentary way.

3.3.3 The context and consequences of the funding scheme changes

The Crown argued that we should consider the decisions it made in the context of the fiscal and time pressures it was facing. We agree that context is important. While the fiscal and time pressures here influenced the Crown's processes, and the decisions that followed, as we have found above, it was the mismanagement of the scheme by the Crown as to the original budgeted appropriations, and Cabinet's decision to decline additional funding, that created those pressures.

We consider that it is more appropriate to consider these changes to the funding scheme in the wider context of the MACA regime. When doing so, we draw on the earlier findings in our stage 1 and stage 2 reports in the Wai 2660 inquiry as well as our findings in this report:

- ▶ The takutai moana is a significant taonga for Māori.⁹³
- ▶ MACA is a Crown regime created by the Crown's decision to regulate rights and interests in the takutai moana through legislation.⁹⁴
- ▶ As part of that regime, the Crown chose to impose a statutory deadline by which all claims for customary marine title and protected customary rights had to be filed.⁹⁵
- ▶ Māori had to participate in this regime to have their customary rights and interests in the takutai moana recognised because those rights and interests cannot be recognised in any other way.⁹⁶
- ▶ The statutory deadline resulted in a flood of applications being filed immediately before the deadline expired (385 applications seeking the Crown engagement pathway, 202 seeking the High Court pathway, and 176 applicants applying under both pathways).⁹⁷
- ▶ Recognition of customary rights is complex and involves difficult questions of fact and law. The Act is also a complex piece of legislation.
- ▶ The Crown chose that only the High Court can determine applications in the court pathway.⁹⁸

93. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report*, p 50

94. *Ibid*, p 132

95. *Ibid*, p 56

96. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, p 80

97. *Ibid*, p 24

98. *Ibid*, p 119

- In our 2020 report, we suggested that the Crown should use the equivalent of budgeted workplans to provide certainty to the Crown, and applicants, on costs and funding.⁹⁹ The Crown chose not to implement this suggestion until 2024.
- The cost pressures arose because of the escalation of hearings in the High Court, and an increase in costs incurred by applicant groups which exceeded forecasted costs.
- The escalation of hearings in the High Court is a natural consequence of the Crown's regime, the number of applications filed, and the High Court fulfilling its judicial function of determining applications before it.
- The Crown does not suggest that the increase in costs incurred by applicant groups weren't actual or reasonable.

When we consider the claims in this context, we acknowledge that this is an expensive regime. However, it is the regime the Crown created. Māori have participated in the regime in good faith. The Crown accepts that their costs have not been unreasonable. The Crown is concerned that its own regime costs more than it would like, a problem not caused by the applicants. Cabinet refused to provide additional funding (above the standard annual appropriation) to support applicants in this process for the 2024–25 financial year. Cabinet did so knowing (or at least it should have known) that the standard appropriation was less than half (38 per cent) of the total projected costs for that financial year. Cabinet offered no reasons for this decision. There is no evidence that Cabinet undertook a Treaty-compliant balancing exercise as part of this decision.

This context highlights the serious nature of these breaches by the Crown. We find that the Crown has not acted reasonably or in good faith. It has not actively protected Māori interests in relation to this important taonga and has not exercised good government.

3.4 PREJUDICE

Counsel described the prejudice caused by the funding scheme, and the Crown's alleged Treaty breaches, as 'profound'.¹⁰⁰ They noted that, while the funding scheme 'stands to hinder' the claimants' ability to progress their applications, 'the takutai moana remains vulnerable to third party developments, expansion and interactions'.¹⁰¹ However, that prejudice was not limited 'to the health of the applicants tāonga . . . but to themselves as well'. The situation was described as 'not unlike the horrors' Māori experienced under the Native Land Court in the previous centuries, only 'now the Crown has turned its focus from the land to

99. Ibid, p 92

100. Submission 3,3.52, p10

101. Ibid

the water.’¹⁰² They submitted that the new funding regime would cause ‘severe and irreversible prejudice.’¹⁰³

We agree that significant prejudicial effects to the claimants arise from the Crown’s Treaty breaches outlined above. These assume a number of forms, both immediate and prospective. First, because the changes to the 2024–25 funding scheme went into place so quickly, and without any consultation, they impacted some applications that were just about to enter hearings. Earlier engagement and notice that this was coming would have helped the applicants – and the courts – to mitigate this prejudice. For example, counsel for Pereri Mahanga stated: ‘Having their extant legal proceedings (Whangārei Harbour Stages 1a and 1b) unjustifiably and unjustly interfered with mid-trial . . . has caused the claimant significant turmoil, angst, and uncertainty.’¹⁰⁴ As Mr Mahanga stated, ‘we are distrustful of Te Arawhiti’s ability to administer the FAS with impartiality and in accordance with Te Tiriti o Waitangi.’¹⁰⁵

Counsel for Ngāti Te Wehi stated that the funding scheme changes meant the claimants ‘were no longer able to progress their application until budgets were approved by Te Arawhiti.’ The upshot of this was ‘a complete stop to all billable work on the Ngāti Te Wehi MACA application for the remainder of 2024.’¹⁰⁶ Counsel for Arapeta and Marareia Hamilton submitted that the ‘lack of adequate funding sufficient to instruct counsel of choice or engage experienced legal practitioners and/or other experts which will ultimately lead to an extinguishment of their customary rights and interests in the takutai moana “by a side wind”.’¹⁰⁷ In their evidence, Tania McPherson detailed how Ngātiwai was forced to ‘pay a large amount of money out of our tribal funds to maintain our legal representation through the Whangārei hearings’ and that ‘we agreed with our Lawyer that we will look to find another law firm to represent us going forward as we appreciate the funding uncertainties make it challenging for them to continue.’¹⁰⁸ Counsel for the Patuharakeke Te Iwi Trust Board and the Ngātiwai Trust Board stated that the ‘regime prejudices applicants’ ability to progress their claims, subjecting them to funding cuts, delays, disputes, and the burden of self-funding some costs.’¹⁰⁹

Justice Powell’s minute of 19 December 2024 addressed the adjournment sought by the Ngāti Awa applicants concerning the Central Bay of Plenty hearing (Ngāti Hokopū and Te Wharepaia, Te Rūnanga o Ngāti Awa, Rurima Island Māori Reservation and Ngāti Hikakino). Among the reasons for seeking the adjournment, Justice Powell noted the ‘ongoing issues with funding as a result of amendment to the Takutai Moana financial assistance scheme and the resulting

102. Submission 3.3.47, pp [2]–[3]

103. Submission 3.3.50, p 3

104. Submission 3.3.65, p 6

105. Pereri Mahanga, affidavit, 11 March 2025 (doc B39), p 4

106. Submission 3.3.62, p 5

107. Submission 3.3.63, p 33

108. Tania McPherson, affidavit, 26 February 2025 (doc B7), p 3

109. Submission 3.3.64, p 15

impact on the ability of the applicants to prepare for hearing.’¹¹⁰ He added that the ‘ongoing level of uncertainty identified by the applicants is unprecedented.’¹¹¹

In their evidence, claimants also highlighted delay and uncertainty as major prejudicial impacts of the funding scheme settings. For instance, claimants told us how the funding scheme changes have impacted their ability to progress applications, for example in contracting researchers or paying existing ones. Anthony Pātete, a researcher employed by Ngāi Tūpango, provided evidence of his experiences with delayed payments from Te Arawhiti, and advised that ‘with the FAS newly-introduced priority criteria, it appears that I will not be able to progress the historical report for Ngāi Tūpango for at least two financial years.’¹¹²

Mr Pātete went on to explain the significance of the delay, saying:

kaumātua from applicant groups such as Ngāi Tūpango who possess critical information continue to pass on. This delay undermines the ability of applicant groups to provide evidence corroborating and expanding the existing documentary record with regard to their use and occupation. It has already been over seven years since Ngāi Tūpango filed their application.¹¹³

Mr Pātete also detailed the concerted efforts that he, the applicants, and their legal counsel made to build trust and confidence with hapū members to encourage them to share their valuable insights and ‘korero tuku iho’. However, due to the funding uncertainty (and resulting delays in his work), Mr Pātete claimed that this has strained those relationships, and that ‘the continual funding uncertainty and delays may potentially weaken the evidence if elderly and hapū members who have ngā korero tuku iho and sources have since passed on.’¹¹⁴ Mr Pātete also considers ‘the inability of applicant groups to access funding until close to the hearing prejudices the quality of the evidence they can put before the court.’¹¹⁵ Furthermore, abridging the timeframes to produce quality research arguably results in ‘robbing experts such as myself of the opportunity to comprehensively review all sources available and discuss these findings with the applicants’ which would lead to the ‘undermining of the strength of their applications.’¹¹⁶

Another example of researchers’ experiences was provided by Peter McBurney. Mr McBurney was contracted to draft a research report on customary interests

110. Powell J, minute, 19 December 2024 at 3

111. Ibid at 14

112. Anthony Pātete, brief of evidence, 26 February 2025 (doc B18), p 9

113. Ibid

114. Ibid, pp 4–5; see also transcript 4.1.2, p 143. We note that, in some instances, Te Tari Whakatau has considered applicants’ requests for funding to record kaumātua evidence. During the April 2025 hearing, presiding officer Judge Armstrong asked Ms Dagg, ‘are you aware of any contingency made for applicants whose hearings are not so imminent as to receive funding but still need to capture that vital kōrero, particularly from kaumātua?’ Ms Dagg replied, ‘I am aware that the funding team have worked with some applicants in that position and looked at what funding could be provided to capture that evidence, yes.’

115. Pātete, brief of evidence (doc B18), p 10

116. Ibid

for Te Whānau Tima and Ngā Ahi Kā o Te Hapū o Te Mateawa.¹¹⁷ In his evidence, Mr McBurney recounts having sent invoices for his final report to Te Arawhiti in December 2023. However, in April 2024, Mr McBurney had still not been paid.¹¹⁸

Mr McBurney outlined the significant personal impacts he experienced from the payment delays. Furthermore, he also claimed 'I was simply unable to assist the Ngā Ahi Kā o Te Hapū o Te Mateawa applicants in reply evidence as I could not be guaranteed payment.'¹¹⁹ Mr McBurney eventually joined with other legal counsel to seek summary judgment in the High Court against the Crown for unpaid invoices.¹²⁰ While this might seem an exceptional case, it may cause other researchers to become hesitant to undertake research work for MACA applicants in the future. This would be further prejudicial to applicants, preventing them from engaging the professional services needed to compile the complex research that MACA applications require.

Regarding these claimed prejudicial effects in terms of legal representation, the Crown submitted that 'there is insufficient evidence of material prejudice consequent upon findings of breach of Treaty principles.'¹²¹

Crown counsel submitted that claimant counsel appear content to continue to work at legal aid rates, saying:

Regarding the claim that legal counsel will be disincentivised from acting for applicants, the Tribunal has received no evidence of applicants being left without legal representation . . . In addition, with respect, applicant counsel withdrawing from representation (if there were evidence of this occurring) involves an element of choice by counsel. A choice that is made by individual counsel not to act does not necessarily mean an applicant group would be unable to find alternative counsel or be unable to progress their application.¹²²

In response, claimant counsel considered this assertion 'frankly insulting', arguing:

The Crown paints the choice of whether or not to withdraw as strictly financial. But withdrawal mid-way through complex and sensitive proceedings would have meant leaving applicants, during their one chance to have their customary rights recognised, either without representation or with less-than-ideal representation . . . The Crown left counsel with no real choice: absorb the cost and risk, or abandon their clients.¹²³

Other counsel submitted that the significant reduction in available MACA funding may result in 'applicants being unable to pursue their CMT and PCR

117. Peter James McBurney, affidavit, 17 February 2025 (doc B12), p 2

118. Ibid, pp 2–3

119. Ibid, p 2

120. Ibid, pp 3–4

121. Submission 3.3.73, p 5

122. Ibid, p 35

123. Submission 3.3.79, pp 5–6

applications to instruct counsel of choice or engage experienced legal practitioners and/or other experts.¹²⁴

We accept claimant counsels' argument on the impacts the 2024–25 funding scheme changes have had on applicants' access to legal representation. Claimant counsel provided examples such as the Wai 354 claimants, who have limited access to financial resource and rely predominantly on Crown funding to progress their MACA application.¹²⁵ In other examples, claimant counsel provided affidavit evidence where applicants recount having to find alternative funding sources, pay the costs themselves, or discontinue their legal representation altogether.¹²⁶

Some applicant counsel referred to the long-standing lawyer–client relationships; for example, Ngātiwai and Patuharakeke, who have complex MACA applications and have had contractual arrangements with their legal counsel since 2017.¹²⁷ Furthermore, counsel have confirmed they are still working for their clients out of a sense of dedication and duty (both moral and ethical), legal obligations under the Lawyers and Conveyancers Act 2011, in some cases whakapapa relationships and the obligations that flow from these, as well as awareness of the extensive knowledge and experience of their clients' customary interests and entitlements. In her evidence, Ms Inns said that, while her firm has made this commitment to date, it is not sustainable. She may no longer accept future instructions because of this.

In their decision in the *Edwards* matter before the Supreme Court where the Court made a prospective costs order (PCO), the Court referred to the changes made to the funding scheme and its impacts, commenting:

This development has come at the very point when the Crown has, because of the level of appropriations allowed to it by Parliament, altered the basis on which it will fund those opposing its appeal. The alteration represents a substantial disadvantage in effect now imposed by one litigant upon another, at the final stage of proceedings, despite that litigant having previously recognised the responsibility to ensure that all sides of the argument before the courts could be advanced with full and adequate funding.

We do not condemn the Crown's change in funding stance, which is the result of parliamentary appropriations. However, having regard to the combined effect of advantage to the Crown, the subject-matter concerning customary rights, and the disadvantage to the Te Kahui applicants who cannot now make alternative funding provision at this eleventh hour, we consider this the exceptional case in which it is necessary in the interests of justice to make the PCO for advance costs, the burden of which the Crown should justly bear.¹²⁸

124. Submission 3.3.63, p 33

125. Ibid, pp 28–29

126. Submission 3.3.64, p 9

127. Ibid, p 8

128. *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waiōweka* [2024] NZSC 119 at 53–54

As we have done in our previous reports, we reiterate our concerns over the lack of progress in the Crown engagement pathway. It is evident that the decision to prioritise funding in 2024–25 for those in scheduled sittings in the High Court as had the consequence of further delaying the Crown engagement pathway applications. As a result, the Crown Engagement pathway is effectively suspended at present.

3.5 RECOMMENDATIONS

In accordance with section 6(3) of the Treaty of Waitangi Act 1975, if the Tribunal has found that the claims submitted to it under section 6(1) are well-founded, it may, if it thinks fit, having regard to all the circumstances of the case, recommend actions to the Crown to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.¹²⁹ We set out our recommendations here.

As we had to prioritise this inquiry to report on the section 58 amendments in stage 1 last year, we are now coming to the end of the 2024–25 financial year. As claimant counsel noted in May’s closing submissions hearing, ‘with the end of the financial year only two and a half months away . . . the prejudice suffered by claimants as a result of the 2024/25 scheme have already been suffered.’¹³⁰ Obviously, the Crown cannot make changes to a funding scheme that has already run its course. Crown officials have also advised that the Crown is due to make a decision on the funding scheme for the 2025–26 financial year. For these reasons, we consider we should focus our recommendations on actions the Crown should take to prevent other applicant groups from being similarly affected in the future.

When revising the funding scheme for the 2025–26 financial year and beyond, we strongly recommend that the Crown adhere to Treaty-compliant processes and decision-making. The Crown should properly engage with Māori as its Treaty partner in good faith. The Crown needs to ensure that sufficient time is allowed for this engagement to be meaningful before any decisions are made. If there are legitimate time pressures that prevent full engagement from occurring, then the Crown should only make interim arrangements, to allow proper engagement before final decisions are made.

When making decisions, the Crown cannot only consider fiscal matters. It must also properly consider, in good faith, Māori interests and the potential impacts of any decisions on Māori. Such decisions should not be made in isolation. As part of this exercise, the Crown should also consider the wider context of the MACA regime as set out in section 3.3.3 above.

The Crown cannot simply assert that it is undertaking a balancing exercise, and then offer no reasons or evidence that it has done so. If a situation genuinely arises where the Crown has to balance the interests of Māori and non-Māori, as an exercise of *kāwanatanga*, the Crown must still do so in a way that meaningfully gives

129. Treaty of Waitangi Act 1975, s 6(3)

130. Submission 3.3.63, p 28

effect to the tino rangatiratanga of the claimants. Any balancing exercise must be fair and reasonable and must still actively protect Māori interests as far as possible whilst also recognising the obligations the Crown owes to the wider public. This is especially so when the customary rights of Māori in a taonga as significant as the takutai moana are at stake.

Finally, the Crown should be open and transparent with its Treaty partner. The Crown should keep Māori properly informed throughout this process and should provide clear evidence of, and reasons for, the process adopted and all decisions made. Only then will the Crown meet the obligations it owes under te Tiriti.

We also repeat the recommendation in our Stage 2 Wai 2660 report that the Crown should amend the Act by deleting sections 95(2) and 100(2) of the Act. These are the provisions that require applications in the High Court and Crown engagement pathways to be filed within six years of the commencement of the Act (the statutory deadline). As we found in that stage 2 report, the statutory deadline serves no ostensible purpose. There are already rigorous safeguards throughout the Act protecting the public, and private, interests in the takutai moana.

However, it was the statutory deadline that compelled Māori to file applications under the Act otherwise they would not be able to seek recognition of their customary rights. This caused the flood of applications that are now clogging both the High Court and Crown engagement pathways. This has also put significant pressure on the Crown funding scheme. Removing these statutory deadlines will allow those applicant groups who do not want to continue with their applications at this time to withdraw. Those groups can then choose to apply later if they wish. This would help to alleviate the pressure on the High Court and Crown engagement pathways, and the funding scheme.

Of course, it may now be too late for some applicant groups to consider withdrawing. Over eight years has passed since most applications were filed (immediately before the deadline). Those applicant groups have participated in the regime in good faith preparing their applications and their evidence. They may now be committed to seeing this process through. Nevertheless, we recommend this as a practical, low-risk option to the Crown that could have significant benefits of easing the pressure on the MACA regime including the funding scheme.

Dated at Wellington this 5th day of June 20 25



Judge Miharo Armstrong, presiding officer



Ron Crosby, member



Professor Rawinia Higgins, member



Professor Tā Pou Temara, member



APPENDIX

CLAIMANTS AND INTERESTED PARTIES

LIST OF PARTIES GRANTED CLAIMANT STATUS

Wai 1092, the Upokorehe claim
Wai 1758, the Upokorehe Hapū Ngāti Raumoa Roimata Marae Trust claim
Wai 1787, the Rongopopoia hapū claim
Wai 2603, the Marine and Coastal Area (Takutai Moana) Act (Steve Panoho and Joy Panoho) claim
Wai 2658, the Marine and Coastal Area (Takutai Moana) Act (Marise Lant) claim
Wai 3375, the Marine and Coastal Area (Takutai Moana) Act financial assistance (Tamihere) claim
Wai 2669, the Marine and Coastal Area (Takutai Moana) Act (Te Whakapiko) claim
Wai 2810, the Marine and Coastal Area (Takutai Moana) Act (Rewha and Reweti Whānau) claim
Wai 2581, the Marine and Coastal Area (Takutai Moana) Act (Ani Taniwha) claim
Wai 3379, the Marine and Coastal Area (Takutai Moana) Act financial assistance (Beazley and Klink) claim
Wai 2764, the Marine and Coastal Area (Takutai Moana) Act (Ngātiwai) claim
Wai 3380, the marine and coastal (mahanga) claim
Wai 745, the Patuharakeke hapū lands and resources claim
Wai 3383, the marine and coastal area (Rump) claim
Wai 420, the Mataikona A2 claim
Wai 2797, the Marine and Coastal Area (Takutai Moana) Act (Kemara) claim
Wai 125, the Raglan Harbour claim
Wai 354, the Tai Tokerau land claim
Wai 2787, the Marine and Coastal Area (Takutai Moana) Act (Gabel) claim
Wai 2791, the Marine and Coastal Area (Takutai Moana) Act (Kingi) claim
Wai 2604, the Marine and Coastal Area (Takutai Moana) Act (Te Ao) claim
Wai 2789, the Marine and Coastal Area (Takutai Moana) Act (Te Rarawa ki Ahipara) claim
Wai 2788, the Marine and Coastal Area (Takutai Moana) Act (Walker) claim
Wai 2778, the Marine and Coastal Area (Takutai Moana) Act (Watene) claim
Wai 2776, the Marine and Coastal Area (Takutai Moana) Act (Ngai Tupango) claim
Wai 1018, the Ngātiawa ki Kapiti lands claim
Wai 1846, the Ngāti Ruamahoe and Ngāti Kahu ki Whangaroa (Sailor Morgan) claim
Wai 1307, the Ngāti Kuta ki Te Rawhiti claim
Wai 2661, the marine and coastal area (Cletus Maanu Paul) claim
Wai 1524, the Pomare Kingi claim
Wai 1541, the descendants of Hinewhare claim
Wai 1673, the Ngāti Kawau (Collier and Dargaville) claim
Wai 1681, the Pukenui blocks claim

Wai 2147, the Ngāti Whaakaue ki Maketu lands (Waterreus and others) claim
 Wai 2577, the Marine and Coastal Area (Takutai Moana) Act (Te Kapotai) claim
 Wai 1464, the Te Kapotai and Ngāti Pare hapū claim
 Wai 1546, the Waikare Inlet claim
 Wai 1940, the Waitaha (Te Korako and Harawira) claim
 Wai 1941, the Kingi and Armstrong (Ngāpuhi) claim
 Wai 377, the Kaiwharawhara and Hutt Valley lands claim
 Wai 2796, the Marine and Coastal Area (Halkyard-Harawira) claim
 Wai 2579, the Marine and Coastal Area (Takutai Moana) Act (Ngāti Hine) claim
 Wai 49, the Taumarere River and Te Moana o Pikopiko-i-Whiti claim
 Wai 682, the Ngāti Hine lands, forests, and resources claim
 Wai 1501, the Petunia Taylor Te Rohe Potae claim
 Wai 2612, the Marine and Coastal Area (Takutai Moana) Act (Ngāti Te Wehi) claim
 Wai 2831, the Te Rūnanga nui o Te Aupōuri and Witana (MACA Act) claim
 Wai 120, the Opuā lands and waterways claim
 Wai 1312, the Whakaki claim
 Wai 972, the Ngāti Kauwhata ki te Tonga surplus lands claim
 Wai 2389, the Ngāti Ruamahue hapū lands and taonga claim
 Wai 1341, the Ngāti Rēhia hapū claim
 Wai 2691, the Marine and Coastal Area (Takutai Moana) Act (Edward Parahi Wilson) claim
 Wai 2786, the Marine and Coastal Area (Takutai Moana) Act (Harper) claim
 Wai 2707, the Marine and Coastal Area (Takutai Moana) Act (Motiti Rohe Moana Trust) claim
 Wai 3398, the Takutai Moana (Hohaia) claim
 Wai 3399, the Takutai Moana (Ratima) claim
 Wai 3401, the Takutai Moana (Tahere, Joyce, Sadler) claim
 Wai 3402, the Takutai Moana (Rata) claim
 Wai 3403, the Takutai Moana (George) claim
 Wai 3404, the Takutai Moana (Tootill) claim
 Wai 3405, the Takutai Moana (Paul) claim
 Wai 3406, the Takutai Moana (Vaughan) claim

LIST OF PARTIES GRANTED INTERESTED PARTY STATUS

Wai 558, the Ngāti Ira o Waiōweka Rohe claim
 Ngā uri o Tareha Kaiteke Te Kemara 1, Ngāti Kawa, and Ngāti Rahiri
 Te Whare ki Ngā Tai o Kāwhia
 Wai 1843, the Te Aeto hapū claim
 Wai 3026, the Marine and Coastal Area (Takutai Moana) Act (Ngāti Pāhauwere) claim
 Wai 2809, the Marine and Coastal Area (Takutai Moana) Act (Davis) claim
 Wai 100, the Hauraki claim
 Wai 2832, the Witana Whānau and Te Ihutai Ki Ōrira (MACA Act) claim
 Wai 2798, the Marine and Coastal Area (Takutai Moana) Act (Tūpara) claim
 The trustees of Rangitāne Tū Mai Rā Trust
 Te Whānau a Ruataupare ki Tokomaru

Heather Thomson, for and on behalf of Ngāti Whakamarurangi, Ngāti Koata, Ngāti Motemote, and Ngāti Tahinga
 Proprietors of Parengarenga A Incorporation
 Ngā Hapū o Mōkau ki Runga Regional Management Committee
 Wai 2799, the Marine and Coastal Area (Takutai Moana) Act (Tuteao) claim
 Ngāti Tara Tokanui Trust
 Wai 2139, the Muaupoko lands and resources (Greenland) claim
 Wai 475, the Whangapoua Forest claim
 Wai 1857, the Ngāti Korokoro and Te Puka (Sheena Ross and others) claim
 Wai 2582, the Marine and Coastal Area (Takutai Moana) Act (Rosaria Hotere) claim
 Wai 976, the Te Aitanga-a-Hauiti iwi claim
 Wai 2726, the Marine and Coastal Area (Takutai Moana) Act (Ngāti Takapari) claim
 Te Rūnanga o Ngāti Awa
 Wai 619, Ngāti Kahu o Torongare/Te Parawhau hapū claim
 Howard William Gabrielle Reti, on behalf of himself, the Reti whānau, and their hapū of Whangaruru
 Matutaera Te Nana Clendon, Robert Sydney Willoughby, and Te Aroha Rewha, on behalf of themselves and the hapū of Ngāti Kuta ki Te Rāwhiti
 Diane Black, on behalf of herself, her whānau, her hapū, and the Tāmaki ki Te Tonga communities that she represents
 Allen Webb, for and on behalf of Kanihi Umutahi me etahi atu hapū o Ngāruahine
 Te Rūnanga o Ngāti Whātua
 William Taueki, on behalf of himself and Ngāti Tamarangi
 Heta Kaukau, on behalf of Te Rauhinu Marae and Hapū
 Wai 3314, the Constitutional (Raukawa-Tait) claim
 Ngāti Koata Trust
 Wai 2767, the Marine and Coastal Area (Takutai Moana) Act (Wharekauri) claim

