

THE
MARINE AND COASTAL
AREA (TAKUTAI MOANA)
ACT 2011 INQUIRY
STAGE 1 REPORT

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

The Honourable Nanaia Mahuta
Minister for Māori Development

The Honourable Andrew Little
Minister of Justice and Minister for Treaty of Waitangi Negotiations

The Honourable Kelvin Davis
Minister for Māori Crown Relations: Te Arawhiti

The Honourable David Parker
Attorney-General

Parliament Buildings
WELLINGTON

29 June 2020

*E papaki tū ana ngā tai ki te ākau
I whakanukunukuhia, i whakanekenekia
I whiua reretia e Hoturoa a Wahinerua ki te wai
Ki tai wīwī, ki tai wāwā ki tai papaki onepū
Ki te whai ao, ki te ao marama
Tihei mauri ora.*

Tenei te mihi atu ki a koutou e ngā Minita i raro i ngā taumahatanga o te wā, me te hora i ngā hua kōrero kua puta mai i a mātou e rangahau nei i ngā whakatakotoranga kōrero e pa ana ki te wāhanga tuatahi o te ruku kōrero mō te Ture Takutai Moana.

We enclose our report on stage 1 of the Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry. This two-stage inquiry was announced in August 2017, following claims that the Act undermines Māori customary rights in the marine and coastal area, thus breaching the Treaty of Waitangi. Acknowledging the importance of the customary rights

at stake and the immediacy of the Act's alleged impacts on Māori, the inquiry was accorded a high priority in the Waitangi Tribunal's kaupapa inquiry programme.

In this first stage, the Tribunal has considered alleged deficiencies in the procedural and funding regime established under the Act. Claimants allege the regime is unfair, procedurally and financially onerous, and contrary to the Treaty; moreover, they say it is already prejudicing the many Māori whānau, hapū, and iwi with interests in the marine and coastal area. Other claims relating to the substance of the Act itself, and whether it adequately recognises and protects Māori customary rights as the Treaty requires, will be addressed in stage 2 of this inquiry and reported on at a future date.

The central focus of this report is thus the procedural and resourcing arrangements supporting the Act. We have examined those arrangements in considerable detail, assisted by the evidence of the Crown – the architect and operator of the regime – and claimants who have directly experienced it, as applicants seeking recognition of their rights. Our inquiry has ranged from the Crown's early provision of information about the Act and its supporting regime, its consultation with Māori on that regime, its administration of the Crown engagement application pathway, and its processes for dealing with overlapping interests in the marine and coastal area. We have also examined the funding policies and procedures the Crown has put in place to assist applicants in both the Crown engagement and High Court pathways.

In regard to the High Court application pathway, we have been mindful throughout of the limits of our jurisdiction, and the principles of judicial comity and the separation of powers. We have considered only the procedural and resourcing arrangements the Crown has put in place to support it; the operation of the pathway itself is entirely a matter for the High Court, and we make no comment on it.

Overall, we conclude that many aspects of the procedural and resourcing regime fall well short of Treaty compliance. This is particularly regrettable given the context in which the Marine and Coastal Area (Takutai Moana) Act was developed – as a replacement for the controversial Foreshore and Seabed Act 2004, which left such a damaging imprint on Māori–Crown relations and the social fabric of Aotearoa New Zealand. The new legislation was an opportunity for the Crown, working with Māori, to start afresh. Instead, the Act appears to reprise many of its predecessor's more egregious features, not least its capacity to generate grievances and division.

The deficiencies of the current statutory regime are doubly disappointing

given the Crown had ample time to develop and implement a robust, truly Treaty-compliant regime. Six years passed between the enactment of the Marine and Coastal Area (Takutai Moana) Act and the statutory deadline for Māori to lodge applications to have their customary rights recognised. Yet we heard that, right up until the deadline and after, Māori lacked essential information that would have helped them to choose between the available application pathways, to understand how each pathway would operate, and to engage with groups whose customary interests overlap with their own. Even today, they cannot be certain how (or indeed whether) the application pathways interact, and with what consequences: might similar applications produce different outcomes, depending on the pathway in which they are pursued?

In the Crown engagement pathway, the Crown has consistently failed to develop sufficiently detailed guiding policy and strategy, and we received no assurances that this will change any time soon. For claimants in this pathway, it is as if their applications have fallen into a kind of administrative limbo. Meanwhile they see applications in the High Court – including from groups with overlapping interests – apparently progressing, albeit slowly (and, it must be said, there is every likelihood that the High Court applications too will become mired in procedural delay). Unsurprisingly, some claimants fear that the lack of coordination between the two pathways will leave them powerless to protect their interests.

As for the funding regime the Crown put in place to assist applicants, here too we have found Treaty breaches. While acknowledging it is the Crown's prerogative to determine the mechanisms it uses to make funding available, the core premise underlying the current regime – that the Crown will only partially fund applicants' costs – breaches its Treaty duty of active protection and creates very real prejudice. So too does its failure to sufficiently fund certain milestones and tasks claimants must undertake to pursue and protect their interests, whatever pathway they have chosen. Full, flexible, and timely Crown funding of all reasonable claimant costs is an essential pre-requisite of a Treaty-compliant regime.

We have some specific concerns about funding for Crown engagement applicants. It is too early to draw conclusions about the adequacy of this funding, given the glacial progress of applications. However, it is contrary to Treaty principles that applicants receive funding only if and when the Minister agrees to engage with them. We see no logical justification for treating these applicants differently from their counterparts in the High Court, who can access funding as soon as they lodge their applications,

and then file the requisite information with the Crown (notwithstanding the evidence we heard of prolonged reimbursement delays).

We are troubled, too, by Te Arawhiti's multiple roles. Scope for conflicts of interest clearly exists when the same Crown agency is responsible for administering funding, progressing Crown engagement applications, and instructing Crown Law on litigation relating to applications in the High Court pathway. The independence and transparency of Te Arawhiti's processes for reviewing funding decisions are also open to question. We find that the Crown has placed itself in a position where its obligation to actively protect Māori interests, and its own interest, may conflict.

However, the evidence shows that not all the deficiencies we identified in the procedural and funding arrangements ultimately prejudiced claimants. It also shows the Crown did act reasonably, in good faith, and consistently with its Treaty duties in implementing some aspects of the regime – for example, the targeted approach it took when consulting with Māori over the funding policy was consistent with an earlier Tribunal recommendation. The Crown has also taken steps to improve aspects of the regime over time. We were encouraged when the Crown announced, during hearings, that it will conduct a comprehensive review of its Marine and Coastal Area Act funding policy with input from applicants. We were advised in September 2019 that the terms of reference, an engagement plan, and a detailed discussion document for this review were being drawn up. We look forward to receiving a further update on the review in due course.

Notwithstanding the positive developments, we urge the Crown to do much more – and quickly – to remedy the shortcomings we have found. On the funding side, we recommend the Crown considers the current Legal Aid scheme as a suitable model; it could also consider amending that scheme to accommodate marine and coastal area applications. When it comes to policies and procedures, we call on the Crown to work with applicants to urgently address the policy vacuum that continues to impede the Crown engagement pathway – a necessary first step in achieving greater cohesion between the two pathways, which we consider fundamental to a Treaty-compliant regime. We also recommend the Crown improve its support for applicants seeking to resolve overlapping interests. To help groups reach resolution in a timely and tikanga-consistent manner, we suggest the Crown adopt policies and processes similar to those the Tribunal has recently recommended in the *Hauraki Settlement Overlapping Claims Inquiry Report* (2019).

It is clear from the evidence that the failings of the procedural and resourcing regime supporting the Marine and Coastal Area (Takutai Moana) Act have prejudiced the ability of Māori to protect their customary rights. These are rights that they should not be expected to fight for – they are guaranteed under the Treaty. The prejudice will continue until the Crown acts to make the regime fairer, clearer, more cohesive, and consistent with its obligations as a Treaty partner. As the history of the Foreshore and Seabed Act reminds us, the stakes are high.

Nāku noa, nā



Judge Miharo Armstrong
Presiding Officer

ABBREVIATIONS

All ER	<i>All England Law Reports</i>
app	appendix
CA	Court of Appeal
ch	chapter
cl	clause
doc	document
ed	edition, editor
GST	goods and services tax
ltd	limited
MACA	marine and coastal area
memo	memorandum
n	note
no	number
NZAR	<i>New Zealand Administrative Reports</i>
NZHC	<i>New Zealand High Court</i>
NZLR	<i>New Zealand Law Reports</i>
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
pt	part
ROI	record of inquiry
r, rr	rule, rules
s, ss	section, sections (of an Act of Parliament)
sch	schedule
subpt	subpart
UKHL	<i>United Kingdom House of Lords</i>
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 2660 record of inquiry, a copy of which is available on request from the Waitangi Tribunal.

CHAPTER 1

THE CONTEXT FOR THIS INQUIRY

1.1 WHY THE INQUIRY WAS HELD

This inquiry began with a 2016 application for an urgent hearing into the Marine and Coastal Area (Takutai Moana) Act 2011.¹ Those first applicants, representing the Northland coastal hapū of Te Kapotai, claimed the Act was undermining and eroding their customary and common law rights over the takutai moana in their rohe – particularly the Waikare Inlet in the Bay of Islands where their marae is located.²

Te Kapotai claimed that the prejudice caused by the Act was threefold:

- ▶ The legislation prevented them from owning their takutai moana, but left the Crown free to exercise full authority over it.
- ▶ The Act had redefined and limited their legal rights and interests to an extent that was inconsistent with the Treaty and prevented them from exercising their rangatiratanga or partnering with the Crown.
- ▶ To seek recognition of their rights, they had to comply with a unilaterally imposed statutory deadline (3 April 2017) and follow either High Court or Crown engagement processes that were cumbersome, unfair, and risky.³

The claimants also alleged the Marine and Coastal Area Act simply carried over many of the prejudicial features of its contentious predecessor, the Foreshore and Seabed Act 2004.

The Te Kapotai application was quickly followed by 16 more applications also seeking an urgent hearing into the Act. In March 2017, the Tribunal declined them, chiefly because it considered an alternative remedy was available to the applicants: they could apply to have their rights recognised by the statutory deadline, now less than a month away. As the Tribunal's Chairperson stated:

all claimants still have until 3 April 2017 to file applications with the High Court or notify the Minister. It would appear reasonable to expect them to utilise this alternate remedy whilst it still exists. It would also appear reasonable to have expected claimants to have utilised this remedy over the last 6 years. They have not done so, and

1. Throughout this report, we refer to the Act by its full or shortened name. However, the abbreviation 'MACA' appears occasionally in quoted material.

2. Claim 1.1.1, p 2

3. Claim 1.1.1, pp 3–4

the claimants lack of action in my view cannot now be used to justify their urgency application.⁴

Nonetheless, the Chairperson acknowledged that the issues raised by the claims were significant and merited the Tribunal's consideration:

The core issue, concerning the ability of Māori to exercise their claimed customary rights in the marine and coastal environment, raises potentially serious allegations of Treaty breach and potential prejudice. The issue has also been and remains important to Māori coastal communities and to Māori generally, and overlaps with economic and citizen rights of significance to the nation.⁵

The Tribunal invited submissions on how best to proceed.⁶ After considering the views of claimants (who sought an early inquiry into their claims about the Act) and the Crown (which did not), the Tribunal released its decision in August 2017. A kaupapa inquiry⁷ would be held into the marine and coastal area/takutai moana claims, targeting 'the legislative framework and applications process established under the MACA Act'.⁸ It would be given a high priority in the kaupapa inquiry programme, reflecting the 'immediacy and significance' of the issues claimants had raised.⁹

In particular, the Tribunal noted claimant concerns about 'current procedural and resourcing deficiencies which [claimants] say are prejudicing their ability to progress their applications through the Crown-designated channels.' While these might simply be teething problems, the Tribunal said, they might also suggest systemic shortcomings. Given the importance of the customary rights at stake, allegations that the operation of the Act's regime were creating prejudice clearly warranted early investigation.¹⁰

The Tribunal established some clear parameters for the inquiry. It would not revisit issues the Tribunal had already considered in its 2004 inquiry into the Crown's former foreshore and seabed policy, except where needed for context: this inquiry would focus firmly on current Crown policy, legislation, and practice.¹¹ In addition, the Tribunal would stand well clear of the High Court and Crown engagement processes already underway to determine the hundreds of applications lodged before the deadline set by the Act. The chairperson held:

4. Memorandum 2.5.5, pp 8–9

5. Memorandum 2.5.8, p 8

6. Memorandum 2.5.5, p 9

7. The Tribunal's kaupapa inquiry programme was announced in 2015. Unlike district inquiries, kaupapa inquiries deal with nationally significant issues that affect Māori as a whole. As of 2019, 13 such inquiries were scheduled. See the memorandums of the chairperson concerning the Kaupapa Inquiry Programme, 1 April 2015 and 27 March 2019, both available at <https://waitangitribunal.govt.nz/inquiries/kaupapa-inquiries/>, accessed 7 January 2020.

8. Memorandum 2.5.8, p 9

9. Memorandum 2.5.8, p 8

10. Memorandum 2.5.8, p 8

11. Memorandum 2.5.8, p 7

this Tribunal cannot and will not intervene in the High Court proceedings now underway or pending, whether to offer ‘guidance’ or for any other purpose. Nor is it appropriate for the Tribunal to stand between applicants and the Crown where they are freely engaging in direct negotiations.

To that end, I must state clearly that the Tribunal will not inquire into the substance of applications for recognition of customary marine and coastal area rights lodged with the High Court, or applications for direct engagement with the Crown.¹²

The Tribunal in this inquiry subsequently decided it would be conducted in two stages. This first stage has looked at whether the Act’s procedural and resourcing (including funding) arrangements breach Treaty principles and prejudice Māori; the decision to prioritise these matters reflects the immediacy of their potential impact on claimants. The Tribunal’s findings on stage 1 issues are to be considered final and will not be revisited in stage 2. In that stage, the Tribunal will consider the substantive nature of the Act and accompanying regime: does it, as the Treaty requires, provide adequate protection and recognition of Māori customary rights in the takutai moana?

1.2 THE MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011 AND ITS DEVELOPMENT

1.2.1 From the Foreshore and Seabed Act to the Marine and Coastal Area Act

The Marine and Coastal Area (Takutai Moana) Act 2011 replaced the Foreshore and Seabed Act 2004, which had been controversial since its introduction.

The Foreshore and Seabed Act was the Crown’s response to a 2003 Court of Appeal decision (*Ngati Apa and Others v Attorney-General*), which held that Māori customary rights in the foreshore and seabed had not been clearly and expressly extinguished by statute. That decision recognised the ability of the High Court to declare that Māori common law rights in the foreshore and seabed still existed, and for the Māori Land Court to declare land to be customary land under Te Ture Whenua Māori Act 1993.¹³

As soon as the Court of Appeal released its decision, the Government announced it would legislate to secure Crown ownership of the foreshore and seabed.¹⁴ New legislation would be introduced, underpinned by a policy that aimed to:

establish a comprehensive, clear and integrated framework which provides enhanced recognition of customary interests of whanau, hapu and iwi in foreshore and seabed,

12. Memorandum 2.5.8, p7

13. Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p xi

14. Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy*, p147

while at the same time confirming that foreshore and seabed belongs to, and is in principle accessible by, all New Zealanders.¹⁵

The Government's was not the only response to the *Ngati Apa* decision. Reactions from the New Zealand public were strongly polarised. An 'apparently widespread fear' that Māori would control access to beaches emerged in some quarters, along with perceptions that Māori were receiving special treatment. As the Tribunal noted in the Foreshore and Seabed inquiry, the ensuing public debate was emotional, often uninformed, and tended to over-simplify and distort the issues.¹⁶ Among Māori, the Government's policy met with near-universal opposition. It became the catalyst for the formation of the Māori Party. Thousands of Māori took part in a two-month hīkoi from Northland to Wellington in April–May 2004. Others successfully applied for an immediate Tribunal inquiry into the Government's foreshore and seabed policy, which took place in January 2004.

In essence, the claimants in that inquiry argued that Māori would never accept the Government's policy because it took insufficient account of their rights and values. They told the Tribunal that the proposal to redefine Māori rights in, and relationships with, the land comprised in the foreshore and seabed was detrimental to their property rights, their rights to legal process, their Treaty rights, and sound race relations.¹⁷

While the Crown argued that the policy in fact offered considerable benefits for Māori, including more involvement in making decisions about the takutai moana, the Tribunal did not agree. It identified multiple deficiencies in the Government's policy and serious breaches of the Treaty, especially the Crown's duty to actively protect tino rangatiratanga over the foreshore and seabed, as guaranteed to Māori under article 2, and the rights of all citizens to equal treatment under the law guaranteed in article 3.¹⁸ Moreover, the policy failed to meet the 'wider norms of domestic and international law that underpin good government in a modern, democratic state . . . [including] the rule of law, and the principles of fairness and non-discrimination'.¹⁹

Chief among the policy's failings was that it removed the ability of Māori to have their legal rights in the foreshore and seabed defined and declared by the courts. By removing the means for declaring those rights, the policy effectively removed the rights themselves and replaced them with something lesser – the opportunity to participate in an administrative process.²⁰

Finally, the Tribunal recommended the Government 'accede to the claimants' request to go back to the drawing board and engage with Māori in proper

15. Wai 1071 ROI, doc A24, p1 (Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pxiii)

16. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* pp xii, 113

17. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p108

18. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp127, 129

19. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pxiv

20. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp xiii-xiv

negotiations about the way forward.²¹ It suggested six options for the Government to consider, ranging from ‘doing nothing’ to sitting down with Māori for the ‘longer conversation’ required to work through such complex and important issues.²²

Notwithstanding the Tribunal’s findings and recommendations, the Government’s policy was enshrined in the Foreshore and Seabed Act that passed into law in November 2004. But after a public consultation process, unfavourable critiques by two United Nations agencies, and the report of a ministerial review panel that viewed the Act as ‘severely discriminatory’ towards Māori,²³ a new government announced in 2010 the Act would be repealed.

Replacement legislation would seek to ‘achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed’ and ‘ameliorate or remedy the substantive and procedural issues of the 2004 Act, in particular its discriminatory effect on Māori’, reported the Attorney-General.²⁴ Key elements would include:

- ▶ the restoration of customary title interests extinguished by the 2004 Act;
- ▶ the introduction of statutory tests and awards whereby customary interests would be identified; and
- ▶ provision for public access.²⁵

The Attorney-General recommended that the foreshore and seabed area currently vested in Crown ownership from now on ‘be identified as the “New Zealand marine coastal access area”, which is predicated on no one owning the foreshore and seabed (in a fee simple sense) other than those private titles already preserved’ – in other words, a ‘no ownership’ regime. He also proposed that the High Court should hold jurisdiction for customary title and customary rights applications, with matters of tikanga able to be referred to the Maori Appellate Court.²⁶

The Attorney-General said these proposals accorded with the ministerial review panel’s call for a new Act ‘based on the Treaty of Waitangi principle of providing for both Māori and Pākehā world views.’²⁷ The proposals formed the basis of the Marine and Coastal Area (Takutai Moana) Act, which passed into law on 31 March 2011.

1.2.2 Key features of the Act

The Act’s purpose is to:

- (a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and

21. Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy*, letter of transmittal

22. Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy*, pp 139–143

23. Marine and Coastal Area (Takutai Moana) Act 2011, preamble

24. Document A131(a), p 4

25. Document A131(a), pp 5–6, 9

26. Document A131(a), pp 5–7

27. Document A131(a), p 21

- (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and
- (c) provide for the exercise of customary interests in the common marine and coastal area; and
- (d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).²⁸

The Act creates two areas – the marine and coastal area, and the common marine and coastal area.

It defines the first as the area bounded, on the landward side, by the line of mean high-water springs. As the Tribunal noted in 2004, in lay language, this means the high-tide mark.²⁹ Thus, the landward limit of the marine and coastal area is roughly the highest point washed by the high tide. On the seaward side, the marine and coastal area is bounded by the outer limits of the territorial sea, considered to lie 12 nautical miles from the shore. The marine and coastal area runs along the whole coastline of New Zealand and includes offshore islands.³⁰

The Act also refers to ‘the common marine and coastal area’, which comprises those parts of the marine and coastal area not in private ownership or within a conservation area.³¹

Māori can obtain two main kinds of legal rights to the common marine and coastal area as it is defined under the Act. *Customary marine title* recognises the relationship of an iwi, hapū, or whānau with a specified part of the common marine and coastal area.³² Customary marine title cannot be sold, and free public access, fishing, and other recreational activities are allowed to continue in customary marine title areas. It confers a range of rights including Resource Management Act permission rights (allowing the right-holder to agree to or decline activities requiring resource consents/permits in the area), conservation permission rights, rights to be consulted about changes to Coastal Policy Statements, and more.

Māori can also seek *protected customary rights* under the Act.³³ These are granted for customary activities in the common marine and coastal area, such as collecting hāngī stones or launching waka. Right-holders do not need resource consent to undertake such activities, and local authorities cannot grant resource consents for activities that would have a ‘more than minor’ adverse effect on a protected customary right.

Two application pathways are available to Māori seeking recognition of their customary rights, whether customary marine title or protected customary rights.³⁴

28. Marine and Coastal Area (Takutai Moana) Act 2011, s 4

29. Marine and Coastal Area (Takutai Moana) Act 2011, s 9; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 95

30. Document A131(a), p 179

31. Marine and Coastal Area (Takutai Moana) Act 2011, s 9

32. Marine and Coastal Area (Takutai Moana) Act 2011, ss 58–93

33. Marine and Coastal Area (Takutai Moana) Act 2011, ss 51–57

34. In fact, sections 47–50 of the Marine and Coastal Area (Takutai Moana) Act 2011 also provide for a third pathway for recognising customary interests in the common marine and coastal area:

They can engage directly with the Crown,³⁵ or apply to the High Court for a recognition order.³⁶ Applicants may follow both pathways concurrently. (For more on the application pathways, see chapter 4).

Applications in both pathways were subject to a statutory deadline. They had to be filed ‘not later than 6 years after the commencement of this Act’, meaning by 3 April 2017.³⁷ (For more on the statutory deadline, see chapter 4).

The Act sets out the *statutory tests* that must be met for rights to be granted. Applicants seeking recognition of customary marine title must prove they have held, and continue to hold, the specified area in accordance with tikanga. They must have used or occupied it without substantial interruption from either 1840 to the present, or from the time they received it through a customary transfer. When considering whether customary title exists, factors to be taken into account by the Crown and High Court may include whether the applicants also own land abutting the area and/or exercise non-commercial customary fishing rights in it. The fact that others may use the area for fishing or navigation, now or in the past, does not necessarily prevent the applicant from meeting the test.³⁸

Applicants wanting recognition of their protected customary rights must prove they have carried out the specified activity in accordance with tikanga since 1840, and still exercise it today. Activities excluded under the Act include those that are commercial, are regulated under the Fisheries Act 1996, relate to wildlife within the meaning of either the Wildlife Act 1953 or the Marine Mammals Protection Act 1978, or are covered by specified sections of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.³⁹

1.2.3 Responses to the Act

By May 2015, some four years after the Act was passed, potential applicants and the general public had received very little information about the Act. The Office of Treaty Settlements advised the Minister of Treaty of Waitangi Negotiations that its engagement to date revealed little awareness or understanding of the new regime. Misinformation and misconceptions were rife, including lingering fears in some quarters that public access to beaches would be lost. The office had received a ‘relatively low’ number of applications from iwi, hapū, and whānau despite the pending deadline, and more proactive communication about the Act was recommended.⁴⁰

The Office of Treaty Settlements conducted a more concerted information campaign, primarily in 2016, using various tools and media. Concurrently, it undertook targeted consultation aimed at developing a funding model for marine

through participation rights in conservation processes. However, as this was not identified as an issue in this inquiry, our report does not address it.

35. Marine and Coastal Area (Takutai Moana) Act 2011, ss 95–97

36. Marine and Coastal Area (Takutai Moana) Act 2011, ss 98–113

37. Marine and Coastal Area (Takutai Moana) Act 2011, ss 95(2), 100(2)

38. Marine and Coastal Area (Takutai Moana) Act 2011, s 59

39. Marine and Coastal Area (Takutai Moana) Act 2011, s 51

40. Document A131(a), pp 218–219

and coastal area applications.⁴¹ In October, officials told the Minister of Treaty of Waitangi Negotiations and the Minister of Finance ‘there is some awareness and knowledge of the Act’ as a result of its increased communications.⁴²

However, misunderstandings and opposition persisted. Hobson’s Pledge, a lobby group formed in September 2016 with the goal of ‘remov[ing] from law and practice any race-based discrimination in governance and property rights’, maintained the Act had ‘confiscated public ownership of our beautiful and priceless coastline.’⁴³ Meanwhile, Māori were calling for a Waitangi Tribunal inquiry into the Act, with 17 claimant groups and more than 30 interested parties lodging applications. In the words of one claimant: ‘It is clear that little has changed since 50,000 people marched on the Hikoi Takutai Moana in 2004. It is disturbing that the Crown would implement a regime similar to the previous one to assert its authority and further diminish ours.’⁴⁴ She concluded:

Te Tiriti o Waitangi affirmed our rangatiratanga, and therefore our mana i te moana. The . . . Act is trying to take that away.

We are deeply concerned about how the Act undermines our rights. Even if we are successful in our engagement with the Crown, any rights we are afforded will be nowhere near what we are entitled to. The . . . Act is prejudicial, and our claim is about demonstrating the nature and extent of that prejudice.⁴⁵

It was against this background that the Waitangi Tribunal announced this inquiry in August 2017.⁴⁶

1.3 THE STRUCTURE OF THIS REPORT

As we have explained, this inquiry is being conducted in two stages: the first dealing with the procedural and resourcing issues arising out of the Act’s implementation, and the second with the substantive nature of the Act itself. This report covers the first stage. Hearings were held in Wellington in March and August 2019.

This chapter has already set out the context for this inquiry, including the development of the Act and its key features. In the next chapter, we briefly profile the claimants and their claims before setting out the key issues those claims give rise to. We indicate which issues the Tribunal will consider in stage 1 and which in stage 2, along with the rationale for organising them in this way. As we explain, a small number of issues cannot be quite so cleanly compartmentalised. Consequently, for reasons we set out, this report occasionally refers to certain stage 2 issues where the context requires.

41. Document A131(a), pp 236–245

42. Document A131(a), p 210

43. <https://www.hobsonspledge.nz/>, accessed 9 January 2019

44. Document A75, p 3

45. Document A75, p 6

46. Memorandum 2.5.8, p 9

Chapter 3 summarises the Treaty principles and related Tribunal findings that most directly bear on the issues in this inquiry. It is against those principles that we will assess whether the procedural and resourcing arrangements the Crown has put in place under the Act are consistent with the Treaty – and, if not, how and to what extent they prejudice Māori.

Before beginning our analysis of the procedural and funding regime, one final piece of ‘scene-setting’ is necessary. Chapter 4 provides an overview of how the regime operates. It describes the organisational arrangements, procedures, funding mechanisms, and terminology that applicants seeking recognition of their customary rights encounter at each stage of the application process. This account is purely descriptive. It is intended to help readers unfamiliar with the workings of the Act and supporting regime, and the Tribunal makes no assessment of the adequacy of these arrangements here.

Chapter 5 addresses the central question for the Tribunal in this stage of the inquiry: do the Act’s procedural and non-financial resourcing arrangements breach Treaty principles and prejudice Māori? Chapter 6 poses the same question in respect of the Crown’s arrangements for funding applicants under the Act. Drawing on submissions and evidence presented in the inquiry, in these two chapters we analyse and make findings on the Crown’s approach to a range of procedural matters – information provision, consultation, administration of the dual application pathways, processes for dealing with overlapping interests – and the provision of funding. Where appropriate, we make recommendations on how the Crown can address any prejudice to Māori resulting from Treaty breaches under the current regime.

For ease of reference, all our findings, suggestions, and recommendations are also summarised in a final chapter – chapter 7.

CHAPTER 2

THE CLAIMANTS, THEIR CLAIMS, AND THE ISSUES FOR THIS INQUIRY

2.1 THE CLAIMANTS AND THEIR CLAIMS

The Tribunal received 92 claims for this inquiry, lodged mostly between December 2016 and July 2018. They came from individuals, whānau, hapū, iwi, and other entities including trusts, district Māori councils, and rūnanga. In addition, 75 parties were granted interested party status.¹

Geographically, the claimants and their areas of interest are spread across the country. Many are concentrated in Northland and the Bay of Plenty, but claims were also lodged by groups with interests as far afield as Whāingaroa/Raglan on the west coast of the North Island,² the Wairarapa coastline,³ Tōtaranui/Queen Charlotte Sound, and the base of Farewell Spit at the top of the South Island.⁴ Another claimant was the New Zealand Māori Council, which in 2017 filed a marine and coastal area application ‘on behalf of all Maori . . . over the entire [marine and coastal area] of Aotearoa New Zealand.’⁵

Unfortunately, the vast majority of claimants were unable to attend the Tribunal’s hearings at Waiwhetū Marae and the Waitangi Tribunal offices, in Lower Hutt and Wellington respectively, largely for cost reasons. Only 22 claimant witnesses appeared in person, with the remaining evidence ‘taken as read’. Because of time pressures, counsel and panel members chose to question many witnesses in writing and received written responses. The Tribunal was disappointed it was unable to hear from more witnesses in person, given the manifest importance of the issues at stake in this inquiry.

A full list of the claims, claimants, and interested parties in this inquiry appears in the appendix.

The claims themselves reflect some recurrent themes which we have loosely summarised below. Several relate more to the second stage of the inquiry; however, for convenience, we list them all:

1. Memorandum 2.5.26
2. Document A13
3. Claim 1.1.66, pp 2–3
4. Both locations are referred to in the brief of evidence of Trevor Watson on behalf of the Tahuāroa-Watson, Hinehou Tahuāroa-Riwaka Houra, and Henare Tahuāroa-Watson whānau: doc A56, pp 2–3.
5. Document A35(a), p 2

1. The Crown's failure to recognise, protect, and provide for hapū and iwi tino rangatiratanga over the takutai moana in their respective rohe, as recognised by the Treaty of Waitangi.
2. The lack of consultation with hapū and iwi in the development of the Act.
3. The erosion and reduction of hapū and iwi customary/common law rights in the takutai moana.
4. The removal of the claimants' ability to hold ownership rights in the marine and coastal area, despite the ownership rights of the Crown, local councils, and private owners remaining unaffected.
5. The establishment of a statutory deadline that forced hapū and iwi to engage with the process or have their customary rights extinguished without the ability to seek redress for the loss of these rights.
6. The onerous and costly nature of the application process for those seeking recognition of their customary rights under the Act.
7. The Crown's failure to adequately communicate to Māori salient advice about the Act and the procedures and resources supporting it.
8. The lack of cohesion between the two application pathways established under the Act.
9. The Crown's failure to put in place policy and procedure to support the resolution of overlapping interests.
10. The lack of an appropriate funding structure and sufficient funding for applicants.

2.2 THE ISSUES FOR THIS INQUIRY: AN OVERVIEW

2.2.1 Stage 1 issues

The Marine and Coastal Area/Takutai Moana Inquiry is being conducted in two stages. This is the report arising from stage 1, which inquires into allegations that the procedural arrangements and resources the Crown put in place to support the Act are in breach of Treaty principles and prejudicially affect Māori. In this context, 'procedural arrangements' include those used by the Crown to manage the two application pathways available under the Act, and to deal with overlapping interests. 'Resources' largely refers to the funding assistance the Crown makes available to applicants seeking recognition of their rights under the Act. However, the term also covers the Crown's provision of information to, and its consultation with, Māori about funding and other operational matters once the Act had passed into law.

These issues were expressed in the Tribunal's statement of issues in the following terms:

9. What procedural arrangements and resources has the Crown put in place in relation to the operation of the [Marine and Coastal Area (Takutai Moana)] Act?

10. To what extent, if at all, do the High Court process and the Crown engagement process work cohesively? What impact does this have on Māori applicant groups/ rights holders?
11. To what extent, if at all, are the procedural arrangements and resources inconsistent with the Treaty/Te Tiriti?
12. To what extent, if at all, do the procedural arrangements and resources put in place by the Crown prejudicially affect Māori, including in relation to:
 - a) Funding applications before the High Court and the Crown engagement process;
 - b) The management of issues concerning group representation and overlapping interests;
 - c) Utilising High Court proceedings, including the Crown's role and involvement;
 - d) Crown engagement procedures; and
 - e) Funding for the resource consent notification scheme.⁶

Thus, the issues for inquiry in stage 1 are largely practical and procedural in nature. Many relate to funding. As claimants and their counsel submitted, these issues are very much 'live' and their impact on Māori seeking recognition of their customary rights is both immediate and concrete.⁷ It was for this reason that inquiry and reporting into these issues has been prioritised by the Tribunal, and we address them in stage 1 of our inquiry.⁸

2.2.2 Stage 2 issues

Broader statutory and policy issues relating to the Act itself will be addressed in stage 2 of this inquiry. It will examine the overarching question: '[T]o what extent, if at all, are the Act] and Crown policy and practice . . . inconsistent with the Treaty in protecting the ability of Māori holders of customary marine and coastal area rights to assert and exercise those rights?'⁹ Specifically, the Tribunal will consider:¹⁰

3. What framework does the . . . Act create to recognise and provide for Māori interests in the takutai moana?
4. In developing the policy that underpins the [Marine and Coastal Area (Takutai Moana)] Act, what considerations did the Crown take into account? To what extent did the Crown consider the findings and recommendations [in the Waitangi Tribunal's foreshore and seabed report] and [the] Ministerial Review Panel?
5. What is the effect of the . . . Act on Māori interests in the takutai moana?

6. Statement of issues 1.4.1, p [3]

7. Memorandum 2.5.16, p 5

8. Memorandum 2.5.16, p 6

9. Memorandum 2.5.16, p 6

10. Statement of issues 1.4.1, p [2]

6. To what extent, if at all, are the Act and the Crown's policy and practice inconsistent with the principles of the Treaty/Te Tiriti?
7. To what extent does the . . . Act recognise and provide for tino rangatiratanga and Māori interests in the takutai moana?
8. To what extent, if at all, do the . . . Act and the Crown's policy and practice prejudicially affect Māori, including in relation to:
 - a) the statutory deadline for filing an application on or before 3 April 2017; and
 - b) dissension caused, if any, between Māori, between the public, and between Māori and the public?

2.2.3 Overlapping issues

Some issues examined in stage 1 and stage 2 unavoidably overlap; for example, the Treaty-compliance of the Crown's consultation with Māori. However, stage 1 of our inquiry has addressed only the consultation on funding and other operational matters that took place after the Act was passed. The Crown's consultation with Māori *before* the Act was passed into law – consultation on the substantive nature of the legislation itself, and the imposition of a statutory deadline for applications – will be issues for stage 2 of this inquiry.

The Tribunal has thus found it impractical to entirely exclude references to certain stage 2 issues from this report. However, we do so only where they intersect with the operational matters that are the focus of stage 1, or provide necessary context for understanding our discussion of stage 1 issues.

This is true of one issue in particular: the setting of the statutory deadline for filing marine and coastal area applications. We acknowledge that this is first and foremost a matter for the next stage of the inquiry, when we will consider the Act and associated Crown policy and practice from a substantive viewpoint. Whether it was Treaty-compliant for the Crown to impose a date by which Māori had to apply for recognition of their customary rights is clearly a question for stage 2.

Yet, the spectre of the April 2017 deadline was always in the background during this stage of the inquiry, too. From the evidence we heard, it is apparent that the deadline informed many of the actions and decisions taken (and not taken) by claimants and the Crown as it drew closer. The deadline provided crucial context for nearly all the procedural and resourcing issues this report traverses. Arguably, some may never have arisen were it not for the deadline.

For this reason, we address the statutory deadline here *to the extent* that it contextualises both the Crown's funding and resourcing decisions, and the claimants' experience of the Act's supporting regime. Specifically, we examine the deadline's impacts on process and funding matters such as the Crown's initial communications with Māori groups, the adequacy of its funding provisions, the timeliness of its decision-making, and its responses for dealing with overlapping interests. We note that the Crown, although arguing strongly that the deadline is very much a stage 2 issue, nonetheless agreed with our proposition that it provides context for the stage 1 issues we consider here.¹¹

11. Transcript 4.1.3, pp 392–394

This report does not address other criticisms of the deadline put forward by claimants – for example, that the Crown breached its Treaty obligations to protect Māori by unilaterally imposing a deadline that effectively extinguished the customary rights of groups who failed to meet it. We leave our examination of such allegations to stage 2 and the more detailed evidence and submissions we expect to receive then.

CHAPTER 3

THE TREATY CONTEXT

3.1 INTRODUCTION

This chapter identifies the Treaty of Waitangi principles and the obligations arising from them that we consider most significant in this stage of the inquiry. As such, our discussion is confined to the Treaty principles we see as most relevant to the *operation* of the Marine and Coastal Area (Takutai Moana) Act's regime. We will consider the Treaty principles relevant to stage 2 of our inquiry when we report on that stage.

We turn now to the two Treaty principles we identify as most relevant to stage 1: partnership (particularly the duty of good faith it gives rise to) and active protection. Our discussion here lays the foundation for chapters 5 and 6, which consider whether the procedural and resourcing arrangements supporting the Act are consistent with those Treaty principles.

3.2 THE PRINCIPLE OF PARTNERSHIP

In 1987, the Court of Appeal found in *New Zealand Maori Council v Attorney-General* that the Treaty signified a partnership requiring the Crown and Māori 'to act towards each other reasonably and with the utmost good faith'.¹ As the Waitangi Tribunal has subsequently commented, this and later court decisions emphasised that the duty was not one-sided. Nor was 'the standard of "reasonableness" . . . one of "perfection"'.²

The partnership principle has since been developed in numerous court rulings and Tribunal findings, with the Tribunal stating in 2007 that it derived from 'the guarantee to Maori of the right to exercise tino rangatiratanga over all their taonga, in exchange for the Crown's right to exercise kawanatanga'.³ Earlier, the Tribunal had emphasised that 'the ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources. . . .

1. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 667

2. *New Zealand Maori Council v Attorney-General* [1987], p 664 (Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp 22–23); *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA) (Waitangi Tribunal, *The Offender Assessment Policies Report* (Wellington: Legislation Direct, 2005), p 10)

3. Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), pp 20–21

Maori interests in natural resources are protected by the distinctive element of tino rangatiratanga.⁴

The idea that a successful partnership requires multiple interests to be held in balance – the national interest with Māori interests, the Crown’s right to govern with its duty to protect, kāwanatanga with tino rangatiratanga – has been repeatedly explored in Tribunal reports. The *Foreshore and Seabed Policy Report* (2004) put it like this:

The Treaty envisaged a future for both peoples, sharing resources and developing them . . . In the balancing of interests required for a successful partnership, we think that there is a place for both peoples and their interests in the foreshore and seabed.

. . . [We] accept that the Crown has the authority to develop a policy in respect of the foreshore and seabed. However, the principles of reciprocity and partnership require it to do so in a way that gives meaningful effect to te tino rangatiratanga, and balances the interests of both peoples in a fair and reasonable manner.⁵

The obligations arising from the Treaty partnership have also been extensively elaborated. First, the principle of partnership requires the Crown ‘to consult Maori on matters of importance to them’ and to avoid acting unilaterally on such matters, as the Tribunal found in 2005.⁶ In its 2008 report into central North Island claims, the Tribunal stated that the Treaty partnership obliged the Crown to

obtain [the] full, free, prior, and informed consent [of Māori] to anything which altered their possession of the land, resources, and taonga guaranteed to them in article 2. The Treaty partners were required to show mutual respect and to enter into dialogue to resolve issues where their respective authorities overlapped or affected each other.⁷

However, neither the courts nor the Tribunal have found consultation to be an automatic or immutable requirement. The need for it, and its nature, are determined by circumstances. In the New Zealand Māori Council case of 1987, Justice Richardson rejected the notion of ‘an absolute open-ended and formless duty to consult’, saying such an approach was ‘incapable of . . . practical fulfilment and

4. Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wellington: GP Publications, 1990), p 42

5. Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy*, p 131

6. Waitangi Tribunal, *The Preliminary Report on the Haane Manahi Victoria Cross Claim* (Wellington: Legislation Direct, 2005), p 15

7. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One, revised ed.*, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 173. Article 2 of the English text of the Treaty of Waitangi says: ‘Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.’

cannot be regarded as implicit in the Treaty'. He noted that in some instances a Treaty partner 'may have sufficient information in its possession' to act according to Treaty principles without specific consultation. In others, however, 'extensive consultation and co-operation will be necessary'.⁸ The Tribunal has repeatedly endorsed this view.⁹ But where the Tribunal considers consultation *is* essential to protect the legitimate Treaty interests of Māori – namely, on matters of importance to them and where important resources are at stake – it has emphasised that the principle of partnership requires the Crown to consult with hapū as well as larger groups. As the Tribunal found in 2002: 'Full discussion should take place with Māori before the Crown makes any decisions on matters that may impinge upon the rangatiratanga of a tribe or hapu in relation to its taonga.'¹⁰

The courts and the Tribunal have identified other essential characteristics of partnership and its concomitant obligation of good faith. In 1994, the Tribunal described the partnership envisaged in the Treaty as one based on 'reasonableness, mutual co-operation and trust'.¹¹ Partnership is 'a relationship where one party is not subordinate to the other but where each must respect the other's status and authority in all walks of life', the Tribunal found in 2000.¹² In 2001, the Tribunal called for the partnership relationship to be expressed through 'partnership action', an approach it said 'will commonly promote joint involvement'.¹³ And in 2003, the Tribunal found that partnership places obligations on both partners to act not only in good faith, but also 'fairly, reasonably, and honourably'.¹⁴

3.3 THE PRINCIPLE OF ACTIVE PROTECTION

The Crown's Treaty obligation to actively protect Māori rights and interests has also been well-established by the courts and the Tribunal. It resides in 'the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity', the Tribunal stated in 2008.¹⁵ Elsewhere, the Tribunal has located the principle of active protection in the fundamental exchange embodied in article 2 of the Treaty – 'the conditional cession by Maori of sovereignty to the Crown in exchange for

8. *New Zealand Maori Council v Attorney-General* [1987], p 683 (Waitangi Tribunal, *Turangi Township Report* (Wellington: Brooker's, 1995), pp 287–288)

9. For example, in Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 272; Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 68; Waitangi Tribunal, *The Offender Assessment Policies Report*, p 11; Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1237.

10. Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), p 70

11. Waitangi Tribunal, *Maori Health Electoral Option Report* (Wellington: Brooker's, 1994), p 15

12. Waitangi Tribunal, *The Mokai School Report* (Wellington: Legislation Direct, 2000), p 14

13. Waitangi Tribunal, *The Napier Hospital and Services Report*, p 58

14. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 26

15. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4

the protection by the Crown of Maori rangatiratanga, also referred to as the principle of reciprocity.¹⁶

The Court of Appeal's landmark decision in *New Zealand Maori Council v Attorney General* (1987) affirmed the importance of active protection as a central Treaty principle. The Crown's duty to protect Māori rights and interests is not passive, but 'extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.¹⁷

The Court described the Crown's obligations as 'analogous to fiduciary dut[ies]', and the nature of these duties has been elaborated by the Tribunal in numerous inquiries. Tribunal reports have repeatedly emphasised the need for 'honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected'.¹⁸ The Tribunal has also found that when the Crown omits to provide the active protection to which its Treaty partner is entitled, 'the omission . . . is as much a breach of the Treaty as a positive act that removes those rights'.¹⁹

Both the courts and the Tribunal have acknowledged that the duties imposed on the Crown by the principle of active protection are subject to certain qualifications. In *New Zealand Maori Council v Attorney-General* (1994) – commonly referred to as the *Broadcasting Assets* case – the Privy Council noted that the Crown's Treaty obligation to protect Māori taonga 'amount[ed] to a guarantee'. However, the Privy Council considered that the obligation was not 'absolute and unqualified'. Both Treaty partners had accepted that the Crown need not go beyond doing whatever was 'reasonable in the prevailing circumstances' to fulfil this obligation, and the protective steps it was reasonable for the Crown to take might change over time – for example, avoiding heavy expenditure might be acceptable in times of recession but not when the economy was buoyant.²⁰

Equally (and here the Privy Council was alluding to the precarious position of te reo Māori), 'if . . . 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 was especially true when vulnerability was attributable to the Crown's own breaches and actions, including legislative actions. 'Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility', the Privy Council found.²¹

16. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p xxv; Waitangi Tribunal, *Maori Development Corporation Report* (Wellington: GP Publications, 1993), p 33

17. *New Zealand Maori Council v Attorney-General* [1987], p 665 (Waitangi Tribunal, *Te Tau Ihu o te Waka a Mau*, vol 1, p 4)

18. *New Zealand Maori Council v Attorney-General* [1987], p 654 (Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 1, p 4)

19. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 70

20. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), p 517

21. *New Zealand Maori Council v Attorney-General* [1994], p 517

Many Tribunal inquiries have considered the extent of the protection the Crown is obliged to provide to Māori taonga, and how its duty is conditioned by both present circumstances and past events. The Tribunal has endorsed the Privy Council's view that the more vulnerable the taonga, the greater the Crown's duty to protect it.²² As the *Report on the Crown's Foreshore and Seabed Policy* stated in 2004: 'The greater the alienation on the one hand, and the more it might have affected the rights that exist . . . , the greater the Treaty obligation on the Crown to protect and conserve what remains.'²³

The Tribunal has determined that the value that Māori attach to a particular taonga also affects the Crown's obligations. In 1993, it found that where a 'very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori' is concerned, the Crown is obliged 'to ensure its protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected'. Nor can the Crown simply sidestep the obligation to actively protect Māori interests and resources by delegating responsibility to local authorities, *unless* the Crown requires such bodies to provide 'the same degree of protection' that the Treaty requires of the Crown.²⁴ This finding has been expressed in several reports, before and since.²⁵

Many Tribunal reports have specifically examined the Crown's obligation to actively protect Māori rights and interests in natural resources. Of all the taonga whose protection is guaranteed to Māori under article 2 of the Treaty, 'natural and cultural resources are of primary importance', the 1993 inquiry into the Te Arawa geothermal resource claims found.²⁶

In the *Report on the Crown's Foreshore and Seabed Policy* (2004), the Tribunal found:

The foreshore and sea were and are taonga for many hapū and iwi. . . . The Crown's duty under the Treaty, therefore, was actively to protect and give effect to property rights, management rights, Māori self-regulation, tikanga Māori, and the claimants' relationship with their taonga; in other words, te tino rangatiratanga.²⁷

Earlier, the *Report on the Muriwhenua Fishing Claim* (1988) had described natural resources (in this case, the fisheries taonga) as 'a manifestation of a complex Maori physico-spiritual conception of life and life's forces. It contains economic

22. See, for example, Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1242.

23. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 33

24. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: GP Publications, 1993), p 32

25. See, for example, Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), p 151; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 152.

26. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, p 31

27. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 28

benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.²⁸

The Tribunal has extensively considered the nature, extent, and implications of the Crown's duty to protect such prized natural resources. In *He Maunga Rongo*, its report on central North Island claims (2008), it describes any Crown failure 'to provide a form of title that recognise[s] customary and Treaty rights of Maori' to their resources as 'a prima facie breach of the Treaty principle of active protection guaranteed in article 2' – just as egregious, in fact, as if the Crown had never acknowledged Māori interests in and right to exercise rangatiratanga over the resource at all.²⁹

In the Petroleum Management Inquiry (2011), the Tribunal considered how 'active protection' could be practically achieved in situations where a natural resource was subject to a complex body of laws and many interests were at stake. The Tribunal concluded that simply engaging in consultation with Māori might not always be sufficient to fulfil the Crown's Treaty obligations. Instead, 'the only way that the Crown can guarantee Treaty-compliant outcomes is by ensuring that all key decision-making processes involve Māori participation of a kind that is appropriate to the decisions being made.'³⁰

As well as involving Māori in decision-making over their resources, the Tribunal found in the Fisheries Settlement inquiry that active protection also required the Crown to ensure 'access to the courts in appropriate cases.' Without such access, '[t]he danger is that Maori interests will become, as they have been before, overly susceptible to political convenience or administrative preference.'³¹

Similarly, the 1993 Te Arawa geothermal report found that the duty of active protection requires the Crown to ensure 'that Maori are not unnecessarily inhibited by legislative or administrative constraints from using their resources according to their cultural preferences.'³²

Having identified and discussed the Treaty principles relevant to this stage of our inquiry, we can now apply them to the operation of the Marine and Coastal Area (Takutai Moana) Act. We do so in chapters 5 and 6; first, though, we provide an overview of the Act's supporting regime for those unfamiliar with its workings. Chapter 4 sets out the organisational arrangements, procedures, funding mechanisms, and terminology that applicants under the Act encounter at each stage of the application process. It is purely descriptive, and the Tribunal makes no comment on the adequacy or Treaty-compliance of the regime in it.

28. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: GP Print, 1988), p 180

29. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1243

30. Waitangi Tribunal, *The Report on the Management of the Petroleum Resource*, p 150

31. Waitangi Tribunal, *The Fisheries Settlement Report 1992* (Wellington: GP Publications, 1992), p 9

32. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, p 31

CHAPTER 4

OVERVIEW OF THE ACT'S SUPPORTING REGIME

4.1 INTRODUCTION

This chapter provides an overview of the policies, procedural arrangements, and resources (including financial assistance for applicants) that the Crown has put in place to support the operations of the Marine and Coastal Area (Takutai Moana) Act 2011 (see section 2.2.1 for a fuller explanation of this terminology).

These arrangements have been evolving since the Act took effect and particularly since 3 April 2017, the deadline by which applications under the Act had to be lodged. This overview reflects the regime as it operates at the time of writing this report in 2019, but also takes account of significant developments in the past.

4.2 ORGANISATIONAL ARRANGEMENTS

Te Arawhiti (the Office for Māori Crown Relations), a Crown agency supported by the Ministry of Justice, is now responsible for the Act's supporting regime. Formerly, that responsibility lay with the Office of Treaty Settlements; when Te Arawhiti was established in January 2019, it took over the role. (For this reason, we refer to both the Office of Treaty Settlements and Te Arawhiti throughout this report, depending on the period under discussion. Where we discuss a policy, process, or activity ongoing under both agencies, we use the compound term 'Office for Treaty Settlements/Te Arawhiti'.) The Minister of Treaty of Waitangi Negotiations has held ministerial responsibility for the Act since it came into force.¹

Te Kāhui Takutai Moana, a dedicated rōpū (team) created within Te Arawhiti, is responsible for managing the regime. Led by the director, the team includes managers, analysts, and historians. Two more staff who administer applicant funding sit outside the Takutai Moana rōpū and report to another member of Te Arawhiti's leadership team. According to the Crown, this arrangement helps 'achieve more separation' between the administration of funding for marine and coastal area applicants and Te Arawhiti's other Act-related functions.²

In addition to administering funding, the Takutai Moana rōpū's prime functions are to:

1. Submission 3.3.58, pp 8–9
2. Document A131, pp 2–3

- ▶ assist Crown engagement applicants as they progress through the processes set out in the Takutai Moana Act;
- ▶ develop policies and procedures to assist applicants as they progress through the processes set out in the Act;
- ▶ run the third party consultation process in the Crown engagement process;
- ▶ liaise with Crown engagement applicants on a regular basis, providing information, updates, and addressing problems and concerns as they arise;
- ▶ answer correspondence on behalf of the Minister, and to process requests under the Official Information Act 1982, within the scope of takutai moana issues;
- ▶ provide advice to the Minister; and
- ▶ liaise with Crown Law, which represents the Attorney-General in relation to the High Court process.³

Reflecting the independence of the executive and the courts, Te Arawhiti has no involvement with applications made in the High Court pathway (apart from administering funding – see below). However, as we discuss in chapters 5 and 6, the Attorney-General has played a role in High Court proceedings related to applications made under the Act. As noted, Te Arawhiti liaises with Crown law in this process. Some claimants in this inquiry question the legitimacy and/or nature of the Attorney-General's involvement.

4.3 THE TWO APPLICATION PATHWAYS

As the Act was being developed, the Crown decided to provide a choice of pathways to Māori wishing to pursue recognition of their customary interests. They could do so through the High Court, by engaging directly with the Crown, or by pursuing both pathways. Applicants choosing the latter option were expected to demonstrate good faith by adjourning their Court applications while Crown engagement was underway.⁴

By the statutory deadline of 3 April 2017, 385 applications seeking Crown engagement had been received. Some 202 applications seeking High Court orders were filed. A total of 176 applicants applied under both pathways; that is, they sought both High Court orders and Crown engagement.⁵

4.3.1 High Court pathway

As noted above, the process for managing applications for recognition orders has been developed by the High Court independently of the executive branch of government. Since July 2017, general information about the process and the status of applications has been available from the Courts of New Zealand website, which is

3. Document A131, p 3

4. Document A131, p 47

5. Submission 3.3-58, p 14

under the authority of the judiciary rather than the Ministry of Justice.⁶ However, Te Arawhiti's website also gives a high-level overview of the court process (known as the 'Blue Diagram') as general guidance for applicants, interested parties, and the public.⁷

The court process comprises three phases. The first began before the April 2017 statutory deadline and is now complete.

Commencement

Under the High Court Rules, proceedings were commenced by filing an originating application,⁸ detailing the group applying, the area to which the application related, and the grounds on which it was made. An accompanying affidavit setting out the basis on which the applicant claimed entitlement to the recognition order was also required. As with all High Court applications, a filing fee was necessary – although, in practice, this was often waived.⁹

The Act required the proceeding to be filed by the statutory deadline and gave the court no discretion to 'accept for filing or otherwise consider any application that purports to be filed after that date'.¹⁰ Late applications were thus ruled out of time and did not progress. Six applications initially declined because they were submitted electronically (and out of time) were later accepted following a High Court ruling in June 2017.¹¹

Although applications could be filed in the applicant's nearest High Court registry, most were filed in the Wellington registry. Following a direction from the Chief High Court Judge, all applications have been managed centrally from Wellington since July 2017.

Accepted applications were then notified to the local authorities that exercised statutory functions in or near the specified area. The Solicitor-General and (by means of a public notice) the wider public were also notified. Any interested party can be heard by the court on a marine and coastal area application, providing they file a notice of appearance within the statutory timeframe (20 working days after the first public notice appears).¹²

Court proceedings

Consistent with the general approach in civil litigation, in the pre-hearing period the court addresses any interlocutory issues that may arise – such as discovery, pleadings, strike out, filing of evidence, and hearing requirements. Each

6. Document A130, p 4

7. 'High Court Process under the Marine and Coastal Area (Takutai Moana) Act 2011', available at <https://tearawhiti.govt.nz/assets/d97873398d/Blue-Diagram.pdf>, accessed 18 November 2019

8. High Court Rules 2016, regs 19.2, 19.10

9. Document A130, p 2

10. Marine and Coastal Area (Takutai Moana) Act 2011, s100(2); submission 3.3.58, p 82

11. Document A130, p 2

12. Marine and Coastal Area (Takutai Moana) Act 2011, s103(3)

application is assigned to a judicial support adviser responsible for liaising with counsel, organising fixtures, and preparing judicial briefings.¹³

Case management conferences to discuss the 202 applications for recognition orders began in 2018. Minutes and transcripts from these conferences are publicly available on the Courts of New Zealand website, as are the originating applications (although not the accompanying affidavits).¹⁴

Proceedings related to marine and coastal area applications are conducted according to High Court rules and procedures. According to the Blue Diagram, the court may receive as evidence any oral or written statement, document, matter, or information. Where matters of tikanga arise, the court may refer them to the Māori Appellate Court.

Recognition order

At the conclusion of the hearing, the court may grant a recognition order if it is satisfied that the relevant statutory test (set out in chapter 1) has been met.

At the time of this inquiry, only one Marine and Coastal Area Act application had completed its passage through the court – *Re Tipene*, in which the applicant sought an order recognising customary marine title over an area south-west of Rakiura (Stewart Island). Elements of the application were disputed by other parties. But in 2016, the recognition order was granted, pending further submissions on who should hold it. In 2017 – in the last of five High Court decisions on the application, spanning 2014 to 2017 – the court awarded title to the party nominated by the applicant (the supervisors of Pohowaitai and Tamaitemioka Islands).¹⁵

4.3.2 Crown engagement pathway

By its own admission, the Crown ‘had yet to implement a detailed policy for progressing Crown engagement applicants’ when the Act came into effect in April 2011. However, over the following months, a three-phase approach was developed. The proposal approved by Cabinet in February 2012 remains the general approach to Crown engagement today, and a summary (the ‘Green Diagram’) is available on the Te Arawhiti website.¹⁶

The key steps in the Crown engagement process are pre-engagement, determination, and finalisation.

Pre-engagement

This initial phase commenced before the April 2017 statutory deadline and is now complete. Prospective applicants were required to provide the Office of Treaty Settlements/Te Arawhiti with basic information: confirmation they were applying under section 95 of the Act; a description of the applicant group and contact

13. Document A130, p 2

14. Document A130, p 4

15. Submission 3.3-52, p 14; *Re Tipene* [2016] NZHC 3199; *Re Tipene* [2017] NZHC 2990

16. Document A131, pp 5–7. See also ‘Process for Crown Engagement under the Marine and Coastal Area (Takutai Moana Act) 2011’ (aka the ‘Green Diagram’), at <https://tearawhiti.govt.nz/assets/2d7cd34a90/Green-Diagram.pdf>, accessed 18 November 2019.

details; a map of the area covered by the application; and an indication of whether they were claiming protected customary rights (in which case the activity their application related to had to be specified) or customary marine title (requiring a statement of how the application met the statutory test) or both.

On the basis of this information, the Crown then undertakes an assessment to determine whether an application will proceed and what priority it will be given. At the time of our inquiry, many Crown engagement applications remained at this phase.

The Act does not prescribe the process by which the Crown will determine whether or not to engage with an applicant, although Te Arawhiti has been developing one.¹⁷ In the meantime, the Crown is guided by a range of policy objectives and criteria, including:

- ▶ efficiency and cost-effectiveness: where applications involve large areas of interest, a correspondingly large number of overlapping applications are likely and will require greater use of Crown resources;
- ▶ whether members of the applicant's wider group consider the applicant has the authority to engage with the Crown on their behalf;
- ▶ whether the particular factual scenario will serve as a useful precedent when the Crown considers other applications; and
- ▶ any immediate impediments – for example, the presence of competing interests in the same area that need to be resolved before any engagement can take place.¹⁸

Other factual considerations the Crown takes into account in this phase include evidence of 'a positive basis' for the applicant's claimed rights in the area (such as customary fishing grounds or wahi tapū) and evidence of third-party use or occupation.¹⁹

The Crown makes a preliminary appraisal and seeks comment from the applicant group. If officials consider a prima facie case for Crown engagement exists, they recommend to the Minister that engagement begins. Their recommendation is subject to the applicant meeting certain conditions – notably, demonstrating or securing a mandate from their wider group, consistent with the mandate guidelines for applicants under the Act drawn up by the Office of Treaty Settlements/Te Arawhiti and Te Puni Kōkiri.²⁰ Assuming this condition is met, the applicant and the Minister then sign terms of engagement setting out the 'ground rules' for the engagement process, funding arrangements, milestones, and more.²¹

Determination

To determine if the application meets the statutory tests set out in the Act, the Crown collects evidence of post-1840 customary use and occupation by both the

17. Submission 3.3.58, pp 10–11; doc A131, pp 13–27

18. Document A131, pp 14–15

19. Document A131, p 15

20. Document A131(a), pp 324–334

21. Document A131, pp 15–20

applicant and any third parties of the area in question. To assist, Te Arawhiti makes use of its publicly accessible National Dataset – launched in 2019 and containing many layers of geographical, historical, legal, and administrative information about coastal areas – and other data. Applicants may also undertake their own research, and a public consultation process allows third parties to provide more information relevant to determining whether the application meets the statutory tests. Those third parties may be other iwi, hapū, or whānau, local authorities, industry groups, and other users of the area in question.²²

Although not required by the Act, an independent assessor (usually a retired High Court judge) then considers all the information gathered and makes an independent, non-binding assessment to the Minister.²³ In deciding whether an application meets the statutory tests, the Minister is not obliged take an ‘all or nothing’ approach – if the statutory tests are met in some areas covered by the application but not others, the Minister may agree to engage on just the former.²⁴

If the Minister decides the tests are met in full or part, he or she will invite the applicant to enter into a recognition agreement and advise Cabinet. If the Minister determines that the tests are not met and declines the application, the applicant may apply to the High Court to judicially review the decision.²⁵

Finalisation

The initial recognition agreement is conditional on the applicant demonstrating, through a ratification process, that their wider group supports them administering or holding any customary title/rights on their behalf. Once this has been demonstrated, the recognition agreement is given legal effect – through an Act of Parliament in cases where customary marine title is being recognised, or through an Order in Council where protected customary rights are involved.²⁶

4.4 FUNDING FOR APPLICANTS

4.4.1 The development of the funding model

In 2012, Cabinet agreed that applicants in both pathways of the Act would have access to Crown funding to assist with the costs of pursuing their applications. This decision recognised the well-established principle that lack of funding should not be an impediment to those seeking access to justice. It also acknowledged that without financial assistance, applicants might be unable to gather the comprehensive evidence needed to ensure the court or the Crown could decide their application.²⁷

Soon after, officials began developing a financial assistance model. A specific solution was needed for marine and coastal area applicants; as the Minister

22. Document A131, pp 20–24

23. Document A131, pp 24–25

24. Document A131, p 26

25. Document A131, p 26

26. Document A131, pp 26–27

27. Document A131, p 28

explained to Cabinet, it was unlikely that funding could be provided under the Legal Services Act 2011 because that Act did not specifically provide for legal aid to groups.²⁸ The model needed to accommodate existing applications made under the Foreshore and Seabed Act 2004 (so-called 'phase one' applications, which would now be transferred to the new regime), as well as the new applications expected to be made under the Act.²⁹ The likely volume of these new or 'phase two' applications was as yet unknown.

In 2013, the Minister of Finance and the Minister for Treaty of Waitangi Negotiations (to whom Cabinet had delegated the responsibility of developing and approving the marine and coastal area funding policy) agreed to a proposal put forward by officials.³⁰ In summary, it proposed that financial assistance available to new (phase two) marine and coastal area applications:

1. would be tailored to the individual circumstances of each group;
2. would be provided only to groups who, prima facie, have demonstrated a reasonable chance of meeting the tests in the Act;
3. would incentivise cost savings for applicants and the Crown;
4. would not cover all costs and would instead amount to a contribution to the costs reasonably incurred;
5. would cover the following costs:
 - ▶ legal advice and representation, and expert advice;
 - ▶ internal communications and consultation (including costs associated with seeking mandates, when incurred after an applicant's financial assistance was approved);
 - ▶ court fees and public notification costs in the High Court; and
 - ▶ travel related to any of the above activities (including personal vehicle expenses paid at standard government mileage rates);
6. would not be provided to applicants to pursue their applications through the High Court and Crown engagement at the same time;
7. would be determined by use of matrices that took account of an application's complexity, scale, and evidential requirements;
8. could not be used to judicially review the Crown in relation to a [Crown engagement] decision that the tests in the Act had not been met, nor to appeal High Court decisions on applications under the Act;³¹ and
9. would be paid retrospectively upon a standard form being completed and provided to the Office of Treaty Settlements along with invoices or receipts.³²

Ministers agreed that both the policy and the matrices referred to in item 7 would be reviewed within one to two years of their implementation.³³

28. Document A131, p 28

29. Document A131, p 29

30. Submission 3.3.58, p 28

31. This policy changed in 2016: under the current funding model, financial assistance is available for appeals against High Court decisions: doc A131, p 32; doc A131(a), p 574.

32. Document A131, pp 31–32; see also doc A131(a), pp 429–430

33. Document A131, p 32

In hearings, we were told that these general features continued to guide the funding regime in 2019.³⁴ Crown counsel and witnesses also provided more detail on how they had been given practical effect. For example, we heard that the Crown had set its upper contribution limit at 85 per cent of the estimated total costs of completing various milestones and tasks during the application process. The limits differed according to the complexity of an application and whether it was being pursued through the High Court or Crown engagement.³⁵

In submissions, Crown counsel also clarified that the funding cap did not mean the Crown paid only 85 per cent of each invoice submitted to Te Arawhiti for reimbursement. Instead: 'Invoices seeking reimbursement are paid in full, provided the invoice is for work appropriate to the particular milestone and the reimbursement sought is within the funding limit for the particular milestone.'³⁶ Counsel also submitted that although payments to applicants were generally retrospective, applicants were not required to pay costs in advance from their own funds. They could forward invoices to the Crown and seek a release of funding, and the Crown might also agree to pay some costs in advance.³⁷

The funding features set out above apply to all marine and coastal area applications, whether pursued in the High Court or Crown engagement pathway. The practical process by which applicants obtain funding – outlined on Te Arawhiti's website, and the focus of this stage of our inquiry – is also largely the same, although with some significant differences that are noted in the following summary.

4.4.2 The practical operation of the applicant funding regime

Some aspects of the funding process operate differently in the two pathways. Funding is available to applicants in the High Court pathway once an application has been publicly notified and a funding application made.³⁸ In the Crown engagement pathway, funding becomes available once the Minister has agreed to engage on an application, terms of engagement have been signed, and funding formally requested.³⁹

But regardless of the pathway, the first step for applicants seeking funding is to complete a budget for the application process and a complexity assessment. This assessment allows Te Arawhiti to assign a funding band to the application, which will in turn dictate the funding caps for the various milestones and tasks required to pursue the application.⁴⁰ In submissions, Crown counsel said that factors considered in the complexity assessment include:

34. Document A131, p 32

35. Submission 3.3.58, pp 18–19

36. Submission 3.3.58, pp 18–19

37. Submission 3.3.58, p 19

38. Document A131(a), p 658

39. Document A131(a), p 659

40. Document A131(a), pp 659–660, 662–663

- ▶ the size of the applicant group and application area;
- ▶ the number of overlaps with other application areas;
- ▶ the nature of relations with neighbouring applicant groups;
- ▶ the current use of the application area;
- ▶ the number of any protected customary rights sought by the applicant;
- ▶ the amount of research already completed in the area of interest; and
- ▶ whether the applicant group has already settled historical Treaty claims with the Crown (in which case, it is assumed that applicants can draw on historical research already undertaken in the settlement process).⁴¹

Applicants can provide a self-assessment of these factors and additional information to help Te Arawhiti determine the complexity of their application – low, medium, high, or very high. The funding matrices then determine the quantum of funding available for applications of each degree of complexity.⁴²

Applicants can seek reimbursement of their costs as they complete each milestone or task.⁴³ Each separate reimbursement request must be for between \$3,000 and \$50,000. Applicants making their first request are required to forward their budget and a summary of costs to Te Arawhiti. Information about the milestone or task for which costs are being sought are also required, along with copies of invoices or receipts and other evidence that the work in question has been completed. Much of this information is also needed when making subsequent requests.⁴⁴

Te Arawhiti's website does not specify the timeframe within which applicants will receive reimbursement, noting only that: 'Reimbursements are made when sufficient information has been provided for each milestone.'⁴⁵

Reimbursements are generally paid to the applicants' nominated bank account. With written authorisation from the applicant, Te Arawhiti can also directly reimburse others engaged to help with an application, such as lawyers or historians.⁴⁶

Once the funding limit for a particular milestone or task has been reached, applicants must meet all further costs themselves. They do not receive any unspent funding. Nor can they transfer unspent money that was assigned to one milestone or task to another.⁴⁷

However, funding can be reassessed at the request of the applicant, or by Te Arawhiti if it considers the application has altered in complexity during the application process – namely, if there has been any change in the number of overlapping applications, the size or nature of the applicant group, the area covered

41. Submission 3.3.58, pp 25–26

42. Submission 3.3.58, pp 25–26

43. Document A131(a), p 658

44. Document A131(a), pp 660–661, 663–664

45. Document A131(a), pp 661, 663

46. Document A131(a), pp 660, 663; submission 3.3.58, p 26

47. Document A131(a), p 660

by the application, or the number of protected customary rights being sought. A reassessment can also be made if an application is transferred between pathways.⁴⁸

Where the two pathways' funding regimes differ most significantly is in the funding matrices, which are published on Te Arawhiti's website. They list the following milestones and tasks for which applicants may receive assistance:

What is funded in the High Court pathway (by milestone):

- ▶ *Appointment*: costs incurred in determining whether an applicant has the authority to represent the applicant group (a voluntary step).
- ▶ *Notification*: costs incurred before an application is publicly notified, including planning and project management, legal advice and court fees, and public notice of the application.
- ▶ *Pre-hearing/evidence gathering*: costs incurred before the substantive hearing of the application begins. This includes work such as project planning and project management, legal advice and court fees, historical research, and traditional evidence gathering.
- ▶ *Interlocutory hearing*: costs associated with any interlocutory hearings, including legal advice and court fees and travel and accommodation.
- ▶ *Hearing*: costs incurred throughout the substantive hearing of the application, such as project planning and project management, legal advice and court fees, research and expert witnesses, and travel and accommodation.
- ▶ *Determination*: costs incurred after the hearing and before any recognition order is sealed – for example, legal advice and court fees, project planning and project management, and the drafting of the order.⁴⁹

Since 2016, funding has also been available to applicants wanting to appeal the court's decision (see section 4.4.1 above). Again, the Crown will pay 85 per cent of the estimated costs of an appeal, including the costs of research, project management, and legal services.⁵⁰

What is funded in the Crown engagement pathway (by milestone):

- ▶ *Pre-engagement*: costs incurred for work undertaken up until the responsible Minister determines whether to engage with the applicant. This includes the process of reviewing the Crown's preliminary appraisal.
- ▶ *Terms of engagement*: costs incurred for work up until the applicant enters into terms of engagement with the Crown (including project planning and project management, the mandating process, legal advice, and any meetings with the Crown).
- ▶ *Collection of evidence*: costs incurred for work undertaken up until Te Arawhiti's assessment of the application is provided to the applicant for

48. Document A131(a), p 658

49. <http://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/funding-information-for-applicants/>, accessed 7 December 2019; see also submission 3.3.58, pp 20–21.

50. Document A131(a), pp 665–666

review. This could include project planning and project management, legal advice, historical research, and traditional evidence gathering.

- *Assessment of evidence*: costs incurred for work up until the Minister's decision on whether the statutory tests for establishing customary marine title or protected customary rights is presented to the applicant. This could include project planning and project management; responding to Te Arawhiti's assessment; preparing submissions for Te Arawhiti and an independent assessor, if appointed; and meetings with the Crown.
- *Internal consultation*: costs incurred for work to reach consensus on who should be the holder of any recognition right which might be brought into effect.
- *Consideration of draft recognition agreement*: costs incurred for work undertaken until the process of ratifying any recognition agreement begins.
- *Ratification*: costs incurred once the ratification process begins and until the ratification result is received.
- *Final agreement*: costs incurred for work undertaken until the parties sign or enter into a recognition agreement.
- *Legislation*: costs incurred for work needed to bring the recognition agreement into effect.⁵¹

Funding is not available for Crown engagement applicants to judicially review the Minister's decisions (for example, if the Minister declines to enter into engagement or a recognition agreement with an applicant).

4.4.3 Funding for overlapping customary interest groups

Crown funding is also available to help customary interest groups 'provide evidence to challenge' applications that overlap with their customary interests. Financial assistance may be provided to help with costs involved in research, project management, and legal services necessary to provide evidence.⁵²

The funding is available to groups that are not themselves applicants in either pathway, and also to groups that are applicants but have not yet received any funding. Such groups may choose to be involved as interested parties (in respect of a High Court application) or third parties (in respect of Crown engagement applications).⁵³

Crown counsel told us that this category of funding was agreed to because it was recognised that 'overlapping customary interest groups could help inform decision-making and their participation in the determination of other applications would mitigate the risk of prejudice to such groups.'⁵⁴

51. <http://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/funding-information-for-applicants/>, accessed 7 December 2019; submission 3.3.58, pp 21–23.

52. Document A131(a), p 667

53. Submission 3.3.58, pp 23–24

54. Submission 3.3.58, p 24

4.4.4 Modifications to the funding regime

The Crown has twice adjusted the level of financial assistance available to marine and coastal area applicants since the initial upper funding limits were set in 2013. The 2013 matrices specified maximum funding allocations for key tasks and milestones within four bands reflecting the number of bays and length of coastline within the application area: 'small', 'medium', 'large', or 'extra large'. Within each band, officials estimated the likely costs of activities needed to progress an application. Crown counsel submitted that the figures had to be based on estimates because, in 2013, 'no applications had yet been progressed in any substantial way under the Act'.⁵⁵

After 'targeted consultation' with Māori – prompted by a 2013 Waitangi Tribunal direction responding to claims of inadequate funding under the Act⁵⁶ – ministers agreed to adjust the matrices later in 2013. The costs of legal advice associated with evidence collection were moved to an earlier stage in the process, while project management costs were incorporated into each milestone.⁵⁷

The Crown's funding policy and matrices were again revised in 2016. According to Crown counsel, these amendments were 'informed by OTS' experience of funding applicants under the funding arrangements that had been put in place since 2012.⁵⁸ It was decided that the matrices would now apply to both phase one and phase two applicants (the small number of phase one applicants, who had initially applied for customary rights recognition under the former Foreshore and Seabed Act 2004, had been subject to their own funding arrangements since June 2012).⁵⁹ It was also at this time that funding became available to overlapping customary interest groups and for appeals against a decision of the High Court.⁶⁰

Ministers also decided to adjust the funding limits set out in the matrices 'to better reflect the likely costs incurred by applicants, and to introduce further measures for determining the complexity of an application'. This followed the Office of Treaty Settlements' analysis of the actual costs being incurred by groups receiving funding as of March 2016.⁶¹ Crown counsel told us that, as a result, the upper funding limits available to Crown engagement applicants became on average 25 per cent lower than they had been in the 2013 matrix, while the revised limits for High Court applicants became on average 37 per cent lower.⁶²

One further change to the funding policy was agreed to in 2016, following another round of targeted consultation with Māori. It was decided to lower the threshold that applicant groups had to reach before requesting reimbursements. In an effort 'to ease the process for groups with limited resources', the threshold

55. Submission 3.3.58, p 31

56. Wai 2386 RO1, memo 2.5.4; submission 3.3.58, pp 45–46

57. Submission 3.3.58, pp 46–47

58. Submission 3.3.58, p 32

59. Submission 3.3.58, p 31

60. Submission 3.3.58, p 32

61. Submission 3.3.58, pp 32–33

62. Submission 3.3.58, p 33

was reduced to \$5,000. It was subsequently lowered (in late 2017 or early 2018) to \$3,000, with the aim of helping hapū and whānau applicants in particular.⁶³

Crown counsel advised that further 'operational adjustment[s]' have been made to the funding arrangements since May 2016 and are reflected in the matrices published on the Te Arawhiti website.⁶⁴

Meanwhile, Cabinet agreed to a new budget appropriation to cover '[c]ontributions towards the costs of groups for determining customary interests in the Marine and Coastal area'. The annual appropriation was set at \$300,000 in 2011–12 and increased each year. By 2018–19, the allocation had reached nearly \$13 million, meaning a total appropriation of nearly \$28.5 million had been allocated between 2011 and 2019.⁶⁵

4.4.5 Other funding matters

As noted earlier, financial assistance is not available for applicants to pursue applications in both pathways at the same time. However, if they have applied in both, applicants are, in theory, free to move between the High Court process and Crown engagement. Funding will be available in the new pathway, although the exact amount applicants receive will depend on which milestones/tasks they have already reached in the other pathway and what reimbursements they have received. This policy is designed to prevent any duplication of funding for the same activities.⁶⁶

Funding is unavailable to help marine and coastal area applicants respond to resource consent applications or permits that may affect the area which is the subject of their application.⁶⁷ Crown counsel told us that while Cabinet did not specifically consider funding for this purpose when formulating the funding policy, the funding of resource consent work would once again fall outside the main purpose of that policy – to help applicants progress applications for recognition agreements or orders.⁶⁸

63. Submission 3.3.58, p 33

64. Submission 3.3.58, p 34

65. Document A131(a), p 424

66. Submission 3.3.58, pp 19–20

67. Submission 3.3.58, p 24; Marine and Coastal Area (Takutai Moana) Act 2011, s 62(3)

68. Submission 3.3.58, p 25

CHAPTER 5

ARE THE PROCEDURAL ARRANGEMENTS AND NON-FINANCIAL RESOURCES THE CROWN PROVIDES TREATY-COMPLIANT?

Having outlined the regime supporting the Marine and Coastal Area (Takutai Moana) Act, we turn now to the first of the two central questions for this stage of our inquiry: whether the procedural arrangements and non-financial resources the Crown provides under the Act breach Treaty principles and prejudice Māori. In considering this question, we take account of:

- ▶ the Crown's provision to Māori of information about the Act and its supporting regime, after the Act passed into law (section 5.1);¹
- ▶ the Crown's consultation with Māori about the funding regime supporting the Act, after it passed into law (section 5.2);
- ▶ the Crown's establishment and administration of procedures to support the two application pathways (section 5.3); and
- ▶ the processes the Crown put in place to deal with applicants' overlapping interests (section 5.4).

For each topic, we summarise the parties' arguments before considering whether the relevant Treaty principle(s) have been breached – and, if so, what prejudice has resulted. Where breach and prejudice have occurred, we set out our formal findings. As noted in chapter 3, these and all other stage 1 findings are to be considered final and will not be revisited in stage 2.

5.1 THE CROWN'S PROVISION OF INFORMATION ABOUT THE ACT AND ITS SUPPORTING REGIME

Here, we consider two kinds of information the Crown provided to Māori after the Marine and Coastal Area (Takutai Moana) Act passed into law – first, information enabling them to make applications under the Act if they wished, and secondly, information enabling them to progress their applications.

In our view, the Treaty principles of active protection and partnership required the Crown to provide comprehensive information and distribute it in an effective and timely manner to the right people. In this case, the standard expected of the Crown was heightened by the manifest importance to Māori of protecting their rights in the takutai moana – something that had been made clear to the Crown in the Foreshore and Seabed Act controversy only a few years earlier. Moreover,

1. As noted above in section 2.2.3, the Crown's consultation with Māori *before* the Act was passed into law will be considered in stage 2 of this inquiry.

the existence of a statutory deadline for filing applications under the Marine and Coastal Area Act increased the onus on the Crown. With Māori given only a limited time to decide to use the legislation to protect their rights, it was even more important for the Crown to provide them with full and timely information about it.

Our analysis of the Crown's provision of information focuses on three areas: the extent of its distribution, the methods of distribution employed, and the timeliness of its provision. Before turning to the parties' arguments, we briefly summarise what the Crown actually did in terms of information provision.

The Crown began disseminating information about the Marine and Coastal Area (Takutai Moana) Act to potential applicants shortly after it was enacted in April 2011. Several channels were used. In 2012, the Crown launched a website about the Act. It included diagrams explaining the common marine and coastal area; general guidance documents for potential applicants and others; maps showing the location of Crown engagement applications received so far; and diagrams explaining the application processes for both High Court orders and Crown engagement.²

In the same year, the Crown published *Recognising Customary Rights under the Marine and Coastal (Takutai Moana) Act 2011*, more commonly known as the 'Blue Book' (2014). Aimed at helping iwi, hapū, and whānau make applications under the Act, this online publication explained the administrative and funding processes the Crown had developed.³

As the deadline for lodging applications drew closer, the Crown began using more channels to spread information about the Act. These included public notices in regional newspapers, announcements on Māori radio stations, television advertisements, and two YouTube videos.⁴ In 2015, it began sending information packs about the Act and the application deadline to 600 marae and 150 iwi authorities. By October 2016, each of these marae and iwi authorities had been sent two information packs and two follow-up reminders. Similar information was also sent to central and local government agencies.⁵

Between June 2015 and August 2016, the Crown held publicly notified information hui at 13 locations around the country. A total of 122 people attended the first two rounds of hui; no attendance figures were available for four further hui (held in Christchurch, Dunedin and Invercargill).⁶

In 2016, the Office of Treaty Settlements created an application form, with accompanying guidance material, which prospective Crown engagement applicants could use.⁷ The office also invited all groups that had filed Crown engagement applications so far to consider filing High Court applications as well.

2. Document A131, p 9

3. Document A131, pp 9–10

4. Submission 3.3-58, pp 68–71

5. Document A131, p 10

6. Document A131, pp 10–11

7. Submission 3.3-58, p 70

After the deadline had passed, Crown communications included answering applicants' queries and giving them information to help progress their applications under the Act. The Te Arawhiti website remains the main source of general information about the Act and its regime.

(a) Claimants' position

The claimants allege the Crown's provision of information was inadequate, particularly before the statutory deadline. They argue that these inadequacies constitute a breach of the Crown's partnership obligation to act in good faith, and its obligation to actively protect Māori interests.

Extent of information distribution

First, claimants submit that the Crown's efforts to disseminate information about the Act were not sufficiently proactive and extensive.⁸ Some gave evidence of a lack of direct contact with the Crown, saying that they received no information at all from the Crown directly before the deadline.⁹ We heard that this lack of information was particularly troubling for coastal hapū with significant customary interests in the takutai moana, such as Ngāti Haua. Claimant Hilda Halkyard-Harawira told us that 'Kohi kaimoana from the Ngāti Haua coastline is a regular practice for all our hui.' While Ms Halkyard-Harawira was able to submit a rushed application once she became aware of the imminent statutory deadline, she noted that not receiving any information from the Crown made it feel 'almost as though the Crown hoped the deadline would just slip by unnoticed.'¹⁰

Claimants also criticise the Crown's targeted approach to providing information.¹¹ Counsel submit that this was effectively limited to communication with larger Māori groups¹² and drew heavily on Te Puni Kōkiri's notification lists.¹³ As these lists focused exclusively on marae, major iwi, and iwi organisations, claimant counsel submit that the Crown neglected smaller Māori groups such as hapū and whānau.¹⁴ They argue this approach was particularly inappropriate given the significant interest hapū have in the marine and coastal area. With nearly half (45 per cent) of the applications being filed by hapū or groups of hapū, compared with only 25 per cent of applications being filed by iwi or iwi groupings, the ramifications of this decision to direct communications towards larger Māori groups 'becom[e] even more stark.'¹⁵ Counsel submit this decision is inconsistent with the Crown's Treaty guarantee of rangatiratanga for hapū.¹⁶

8. Document A93, p 8

9. Submission 3.3.28, pp 4–5; doc A111, p 9; doc A117; p 12

10. Document A75, p 3

11. Document A131(n), pp 4–5

12. Document A112, p 8; submission 3.3.39, p 5; submission 3.3.46, p 7; submission 3.3.50, pp 5–6; submission 3.3.52, p 7

13. Document A112, p 8

14. Document A112(a), p 26

15. Document A111, p 10

16. Document A112, p 8

Counsel for several claimants argue that the Crown should have drawn on the institutional knowledge it already possessed when deciding who should be sent information about the Act and the supporting regime; namely, the interested party and notification lists of the Office of Treaty Settlements and the Waitangi Tribunal. In their submission, using these lists would have drastically improved the Crown's ability to inform Māori about the Act.¹⁷

Counsel for Te Whakapiko also argued that the Crown missed an obvious opportunity to use the knowledge of Crown officials already working on the Te Paparahi o Te Raki Waitangi Tribunal inquiry. Under cross-examination, Crown witness Ms Johnston acknowledged she was aware that colleagues, essentially 'down the hallway',¹⁸ were involved in that inquiry. However, neither she nor other members of the Takutai Moana Rōpū took advantage of this by consulting them on how best to inform Ngā Puhī and Ngāti Kahu hapū.¹⁹ Many claimant counsel also suggested the Crown should have contacted parties who had previously made submissions to the select committee on the Foreshore and Seabed Bill 2004.²⁰

Finally, claimants submit that the Crown's distribution of information to marae was ineffective. According to some, many of the information packs sent were of little use because they lacked current contact details, although the Crown did attempt to update these.²¹ Others allege that communicating with marae was of limited utility, given that some groups may have only limited contact with a marae, or do not have a marae at all.²²

Distribution methods

Claimants consider the Crown was wrong to depend so heavily on internet-based communication tools, such as Te Arawhiti's website and YouTube videos, as some potential applicants had no, or only limited, access to the internet.²³ Witness Mylie George described the difficulties her hapū faced: 'Let me tell you about the Wi-Fi in our area. We are on the coast line and black spots everywhere, so to make that assumption that everyone has access to internet, is very unfair when you are dealing with Ngāti Wai ki Whangaruru.'²⁴ Counsel argue that as a result of its reliance on internet-based communications, the Crown's communications strategy has been largely ineffective for many Māori claimants, especially those who 'do not have the benefit of a settlement and the resources that go with it and are therefore disadvantaged in terms of being able to access information, particularly where that information is internet-based'.²⁵

17. Transcript 4.1.2, pp 761–762; submission 3.3.42, pp 5–6; submission 3.3.38, p 13

18. Transcript 4.1.2, p 764

19. Transcript 4.1.2, pp 760–762; submission 3.3.42, pp 5–6

20. Transcript 4.1.2, pp 673, 837

21. Submission 3.3.38, p 13; submission 3.2.83(a), p 1

22. Transcript 4.1.2, p 506

23. Document A111, p 10; doc A112, pp 6–7; submission 3.3.39, p 5

24. Transcript 4.1.2, pp 403–404

25. Document A111, p 10

The claimants are similarly critical of the Crown's choice of communication methods in the period *after* the statutory deadline. The Tribunal heard evidence from several claimants about the inadequately staffed information phone line, the long delays in email responses, and the provision of confusing and often contradictory information due to high staff turnover.²⁶

For example, Bella Savage, a claimant representing the Whānau ā Te Harāwaka hapū, claimed that the 0800 hotline for the Act was never answered, and that all calls went through the Office of Treaty Settlements reception, which she described as 'ongoing and annoying'.²⁷ Marise Lant, a claimant representing the Ngā Hapū o Kokoronui claim, described the 'shambles' of trying to obtain information about her hapū's complexity band: 'I am a persistent person. I went to the Minister, I contacted staff. I sent probably thirty emails chasing them up'.²⁸

Claimant counsel also allege 'serious deficiencies' in the national roadshow hui arranged to provide information to marine and coastal area applicants throughout 2015 and 2016.²⁹ Attendance was poor,³⁰ and some claimants state they were unaware of the hui.³¹ Counsel also criticise their timing. The roadshow hui were held during the working week which posed difficulties for potential attendees juggling work commitments. In one instance, there was a scheduling conflict with a hui in Wellington, and that potential attendees were only provided with 10 days notice.³² Counsel argued that these factors impacted on hui attendance, which was acknowledged by Crown witness Ms Johnston.³³

Timeliness of distribution

Finally, claimant counsel argue that the Crown did not provide Māori with information in a timely manner. In the early years after the Act became operative, the Crown's communication strategy was predominantly reactive,³⁴ which counsel submits was 'completely contrary' to the principle of active protection.³⁵ Aside from providing information on websites, claimants emphasise that the Crown did not in fact even have a communications strategy until 2015.³⁶

The more proactive approach the Crown eventually adopted from 2016 came too late, claimants assert.³⁷ They acknowledge the Crown's nationwide programme of information hui, and the distribution of information packs to marae and iwi

26. Document A88, p 4; doc A90, pp 11, 17, 18; submission 3.3.12, pp 6–7; doc A128, pp 1–3; doc A41, para 5

27. Document A88, p 4

28. Document A90, p 11

29. Submission 3.3.38, p 13

30. Submission 3.3.38, p 13; submission 3.2.83(a), app A6

31. Document A111, pp 8–10; doc A93, pp 7–8

32. Transcript 4.1.2, p 635; submission 3.3.38, p 13

33. Transcript 4.1.2, p 635

34. Document A131(a), p 218

35. Submission 3.3.36, p 6; submission 3.3.16, p 6

36. Document A131(a), p 209; submission 3.3.38, p 11–14

37. Document A58, pp 2–3; transcript 4.1.2, p 458

authorities, but argue that 2016 was too late to have begun these initiatives.³⁸ It meant many potential applicants only became aware of the Act a year out from the impending deadline.

(b) Crown's position

The Crown rejects these allegations. It says none of the claimants' contentions are of sufficient strength or severity to amount to any Treaty breach in the Crown's provision of information to Māori.³⁹

The Crown acknowledges the Treaty principle of partnership requires both parties to act reasonably and in good faith with one another, and argues that its efforts to inform Māori of the Act were (and are) reasonable and therefore consistent with this obligation. Here, Crown counsel draws attention to the interpretation of 'reasonable'. The *New Zealand Maori Council v Attorney-General* case held that the ordinary meaning of the word should be used, and that the term should be 'applied "in a realistic way" to the circumstances at hand'.⁴⁰ The Crown also cited *Taiaroa v Minister of Justice*, in which the Court of Appeal held that the Crown's actions were 'far from perfect' and yet passed 'the test of reasonableness'.⁴¹ On this basis, counsel maintains that the claims of insufficient communication do not meet the necessary threshold to establish that the Crown failed to discharge its partnership obligations to Māori. Counsel argued that the Crown made considerable efforts to communicate with Māori on the Act,⁴² and those efforts constitute a reasonable and good faith attempt.

The Crown also repudiates the claimants' argument that its communication strategy and tools were flawed and ineffective.⁴³ It described using a wide range of communication tools.⁴⁴ As for the claim that the Crown failed to exploit various opportunities to communicate with Māori, Crown counsel reiterates that it made reasonable attempts. The Crown disputes that the evidence shows its communications about the Act in the lead-up to the statutory deadline had 'any actual prejudicial effect'.⁴⁵ And counsel again emphasises that its actions can fall short of perfection whilst still being reasonable relative 'to the circumstances at hand'.⁴⁶

In rejecting the claimants' arguments, the Crown accentuates the dual and reciprocal nature of Treaty obligations. Responsibility for informing prospective applicants of the Act, they submit, does not fall entirely on the shoulders of the Crown. It is also incumbent upon Māori who have an interest in the takutai moana

38. Document A58, pp 2–3; doc A131, pp 10–11

39. Submission 3.3.58, p 73

40. *New Zealand Maori Council v Attorney-General* [1987], pp 664–666 (submission 3.3.23, pp 2–3)

41. *Taiaroa v Minister of Justice*, p 418 (submission 3.3.23, p 2)

42. Document A131, pp 9–11; submission 3.3.58, pp 68–71

43. Submission 3.3.58, p 73

44. Document A131, pp 9–11

45. Submission 3.3.58, p 73

46. Submission 3.3.23, p 2

to keep themselves well informed. There is ‘an expectation that both parties will act together reasonably, honourably and in good faith.’⁴⁷

Lastly, Crown counsel reject the contention that the Crown ‘chose to remain silent until it was almost too late,’⁴⁸ or that the timeliness of the information they provided was in some other way inadequate. The Crown took multiple steps to inform applicants of the Act. This began with providing website information and contact details for Act-related queries, and progressed to a proactive nationwide attempt to raise awareness of the Act from 2015 until the statutory deadline.⁴⁹

(c) Tribunal's analysis and findings

We accept that the Crown was aware of the need to meet its Treaty obligations when providing Māori with information after the Act was passed into law. Those obligations, stemming primarily from the Treaty principles of partnership and active protection, require the Crown to make reasonable and good faith efforts to communicate information of importance to Māori about the Act and its statutory regime.

However, as we noted in chapter 3, the courts and the Tribunal have consistently emphasised that these obligations are mutual. Partnership requires *both* Treaty partners to act towards each other in good faith, fairly, reasonably, and honourably. As the Tribunal has found: ‘the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible ministers, and reasonable cooperation.’⁵⁰

We consider that ‘reasonable cooperation’ means Māori should make reasonable efforts to keep themselves informed about matters of significance to them, as the Crown submitted in this inquiry. However, we do not accept this means the Crown has no obligation to provide timely information, nor that it is entirely up to Māori themselves to keep informed. Indeed, such assumptions do not appear to have shaped how the Crown actually approached the task of providing information in this case. The evidence and submissions we received show the Crown accepting, and acting on, its responsibility to provide information on the new Act and its supporting regime. Moreover, the Crown has vastly greater capacity and resourcing to disseminate information to Māori than the capacity of individual whānau, hapū, and even iwi to inform themselves (or other Māori) about legislative initiatives affecting them. In other words, what constitutes reasonable and good faith attempts by the Crown to distribute information is not significantly

47. Submission 3.3.58, p 74

48. Submission 3.3.33, p 3

49. Document A131, pp 9–11; submission 3.3.58, pp 68–71

50. *New Zealand Maori Council v Attorney-General* [1987], p 665 (Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), p 22); Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 72

altered or diminished by the mutual obligation Māori have to keep themselves abreast of significant matters affecting them.

We turn now to consider whether the Crown fulfilled its obligations in respect of the three specific areas that were the subject of many claimant allegations and which we consider essential measures of Treaty compliance – the extent of the Crown's distribution of information, the distribution methods it employed, and the timeliness of its information provision. We address each of these in turn.

Extent of information distribution

From the evidence before us, we consider that the Crown's approach to compiling its distribution lists was flawed. In our view, it could have quite readily compiled more extensive lists, likely to reach as many Māori as possible, simply by making greater use of the institutional knowledge and sources already at its fingertips within the Office of Treaty Settlements/Te Arawhiti. Indeed, we are surprised that the Crown did not do something so apparently straightforward. Existing sources that could have been used include:

- ▶ Waitangi Tribunal notification lists the Crown had access to;
- ▶ the knowledge of Office of Treaty Settlements/Te Arawhiti officials about Māori groups involved in active Waitangi Tribunal inquiries, such as the Te Paparahi o Te Raki (Northland) inquiry; and
- ▶ any publicly available contact information about those who had made submissions to Parliament on the Foreshore and Seabed Bill in 2004.

We consider it especially concerning that it was the Office of Treaty Settlements/Te Arawhiti – the government agency specifically charged with working closely with Māori – that did not think to proactively take these steps. It is incumbent upon any agency with specialist expertise to apply that specialised knowledge when carrying out its responsibilities. Their expertise means that, compared with more generalist agencies, the bar is raised. The Office of Treaty Settlements/Te Arawhiti should have known, and done, better on this issue.

Another allegation relating to distribution is that the Crown failed to directly target information about the Act at hapū and whānau. We heard compelling evidence from claimants representing such groups. They told us of their strong relationship with the takutai moana and their abiding commitment to exercising and protecting their interests in it. We note also that the Crown's Treaty obligations are to hapū, as well as larger groups; that is what the principle of partnership requires (see section 3.2). As such, it would have been Treaty-compliant for the Crown to ensure that the information it provided on a topic of such manifest importance to hapū was distributed to hapū directly.

Instead, the evidence shows that the Crown relied on distributing information to marae and larger iwi groupings, expecting that they would help disseminate it to hapū and whānau. But it simply sent out information packs to marae with no instructions, guidance, or advice on what the recipients (presumably marae trustees) were meant to do with them. There was no indication as to whether the packs were intended for trustees personally or for the marae only. If they were to be shared more widely, who were they intended for: hapū, whānau, and/or marae

beneficiaries?⁵¹ When it came to information distribution, the Crown's idea of enlisting marae help might have been a good one, but its execution could have been improved. If the Crown expected marae trustees to disseminate the information packs, it should have made this clearer and provided resourcing and guidance in support.

Despite these concerns, we consider that the information distribution strategies the Crown adopted were reasonable in the circumstances. It did seek to disseminate information as widely as possible to Māori, as demonstrated by its attempt to use marae and existing Māori structures/organisations, which tend to represent larger Māori groups. We also accept that it was reasonable for the Crown to assume that many Māori groups asserting their customary rights to the marine and coastal area would have regular contact with their marae, despite some claimants telling us that this is not the case. Further, we acknowledge that disseminating information to Māori nationwide is notoriously difficult.

Thus, while some aspects of the Crown's distribution of information on the Act were flawed, we consider on balance that its actions were reasonable and did not breach the Treaty.

Distribution methods

The methods the Crown adopted to distribute information about the Act and its supporting regime created difficulties for some claimants, especially those with limited or unreliable internet service. They told us of the frustration and anxiety created by the Crown's reliance on internet-based methods of disseminating information.⁵² We also heard of problems with poorly timed information hui, and slow email and telephone responses.⁵³ The evidence indicates that many of these problems continued for claimants even after the statutory deadline had passed.

Nevertheless, we do not consider that the Crown's information distribution was, overall, excessively reliant on internet-based communication methods. The Crown's evidence shows it used multiple information routes. In our view, it was reasonable for the Crown to expect that the range of routes it employed would allow its information to reach as many Māori as possible, even those with limited access. Using a multiplicity of methods mitigated the flaws inherent in any one method. Finally, we accept the Crown's submission that there is no evidence to show any potential Māori applicant was prevented from utilising the Act as a result of deficiencies in the Crown's information distribution methods.⁵⁴ On balance, therefore, we consider the Crown's actions in respect of distribution methods were reasonable and did not amount to a Treaty breach.

This said, there is more for the Crown to do, in our view. We suggest that the Crown consider tailoring its distribution methods to better accommodate the economic circumstances and location of some Māori so they are not disadvantaged.

51. Transcript 4.1.2, pp 843–845

52. See, for example, the oral evidence of Mylie George: transcript 4.1.2, pp 403–404.

53. Transcript 4.1.2, p 635; submission 3.3.38, p 13; doc A88, p 4; doc A90, p 11

54. Submission 3.3.58, pp 73–74

Timeliness of distribution

The statutory deadline the Crown set for lodging applications under the Act is, as we have explained in chapter 2, primarily a matter for the next stage of our inquiry. But we mention it here too because the deadline undoubtedly created a situation whereby the provision of timely information was even more important if Māori were to exercise and assert their rights under the Act. The existence of the deadline and the importance of the Māori interests at stake heightened the requirement for the Crown to reasonably and in good faith ensure it distributed information to its Treaty partner in a timely way.

According to the evidence, the Crown's provision of information before the statutory deadline was initially reactive, becoming more proactive only from 2015.⁵⁵ According to claimant counsel, the Crown 'chose to remain silent until it was almost too late'.⁵⁶ The proactive measures eventually taken, such as the information hui held around the country, were also criticised by claimant counsel as being poorly timed.⁵⁷ However, we were also told that, as the Crown became aware of problems, it was willing to adapt and improve its methods and systems so that Māori could engage with the Act if they wished.⁵⁸

The evidence we heard about the influx of applications immediately before the deadline does not necessarily demonstrate that the Crown provided information about the Act too late for it to percolate properly through the Māori world. We heard reasonable alternative explanations that indicated such surges are common before statutory deadlines of many kinds. In fact, there is some evidence that the mere presence of a statutory deadline is likely to encourage a rush of last-minute applications.⁵⁹ On the basis of the evidence before us, we are not persuaded that the fact of so many applications being lodged at the eleventh hour is proof in itself that the Crown failed to provide sufficiently timely information. Therefore, we consider that the Crown's attempts to provide timely information about the Act did not breach the Treaty.

Summary

We have considered the evidence and submissions presented on the Crown's provision to Māori of information about the Act and its supporting regime. We have examined three key areas in which claimants allege the Crown's actions were not Treaty-compliant – the extent of distribution, distribution methods, and the timeliness of the information provided. In each of these areas, we have found that the Crown acted reasonably in the circumstances and did not breach the Treaty principles of active protection and partnership. That is not to say its information

55. Submission 3.3.58, pp 68–71

56. Submission 3.3.33, p 3

57. Submission 3.3.38, p 13; transcript 4.1.2, p 635

58. Transcript 4.1.2, p 674

59. Transcript 4.1.2, p 31; submission 3.3.8, p 14; doc A103, p 32

provision could not have been (and may yet be) improved, and we have offered a number of suggestions which we urge the Crown to act on:

- ▶ The Crown should ensure that the information it provides on topics of manifest importance to hapū is distributed to hapū directly.
- ▶ If the Crown expects to secure the help of marae/marae trustees in disseminating information, it should make its expectations clear, and provide them with sufficient resourcing and guidance.
- ▶ The methods the Crown uses to distribute important information should be tailored to accommodate the specific circumstances of some Māori and ensure they are not disadvantaged if their internet access is limited or non-existent.

5.2 THE CROWN'S CONSULTATION WITH MĀORI ABOUT FUNDING UNDER THE ACT

As noted already, the Crown's consultation with Māori about the Act before it became law is an issue for the next stage of this inquiry. But there is another discrete aspect of Crown consultation that must be considered in stage 1, where the focus is on matters of practical process *after* the Act came into effect: Crown consultation with Māori on funding policy and procedures.

Before examining the parties' arguments, we briefly summarise what kind of consultation was actually undertaken (detailed more fully in section 4.4 above).

- ▶ In 2012, Cabinet agreed that Māori seeking recognition of their rights under the Act could access Crown funding to assist with the costs of pursuing their applications. Officials began developing a financial assistance model that accommodated both 'phase one' applications (those originally submitted under the repealed Foreshore and Seabed Act 2004, now transferred to the Marine and Coastal Area Act) as well as the new applications expected to be made under the new Act (known as 'phase two' applications).⁶⁰
- ▶ In March 2012, Cabinet agreed to several parameters that would shape the development of the funding assistance model. These included an expectation that applications would be partially funded by applicants, that funding would be capped, and that the Crown would specify which applicant costs would be eligible for funding.⁶¹ The delegated Ministers agreed to the phase one funding arrangements proposed by officials in June 2012, and to the phase two funding arrangements in March 2013.⁶²
- ▶ Later in 2013, the Crown conducted the first round of what it called 'targeted consultation' with Māori about the funding assistance model developed for phase two applications. This consultation involved the Crown, Te Puni

60. Submission 3.3.58, p 30

61. Submission 3.3.58, pp 30–31

62. Submission 3.3.58, p 31; doc A131(a), pp 408, 425

Kōkiri, and counsel for a group that had recently sought an urgent Waitangi Tribunal hearing, partly to inquire into the Crown's funding for applicants under the Act and its alleged failure to consult with Māori in developing funding policy.⁶³ The Crown subsequently sought submissions on the funding assistance model from Māori groups it identified as having a recent interest in seeking recognition of their customary interests in the marine and coastal area; eight ultimately made submissions.⁶⁴

- ▶ As a result of this engagement with Māori, the Crown adjusted the proposed funding assistance model in October 2013:⁶⁵
 - the costs of 'legal advice for planning evidence collection' were moved to an earlier stage; and
 - each milestone was amended to incorporate 'project management costs'.
- ▶ A second round of targeted consultation with Māori took place in April 2016. The Crown contacted 21 groups with existing applications under the Act and 10 members of the Iwi Leaders Forum.⁶⁶ Eight hui were also held in different parts of the country; 600 potential applicant groups were invited, with 52 individuals attending.⁶⁷ This process resulted in the threshold for reimbursement requests being lowered.⁶⁸

(a) Claimants' position

The claimants contend that both the 2013 and 2016 consultation rounds on the funding assistance model were wholly inadequate, in breach of the Crown's Treaty obligations of partnership and active protection, and prejudicial to Māori.⁶⁹ Claimants and their counsel make various submissions to support this position; they address the time allowed for consultation, the groups the Crown chose to involve, the nature of the matters discussed during consultation, and its timeliness. (Claimant submissions addressing issues more relevant to stage 2 of this inquiry are not recorded here, or only in very summary form.)

Turning first to the adequacy of the time allowed for consultation on the funding assistance model, claimants allege they had minimal opportunities for input.⁷⁰ Thus, they submit, the Crown's consultation did not constitute the 'longer conversation' recommended by both the Tribunal in its report on the Foreshore and

63. The Wai 2386 claimants alleged that the lack of Crown-funded legal aid for civil proceedings was preventing Māori from seeking recognition of their customary rights in the courts, including under the Marine and Coastal Area Act: submission 3.3.58, pp 46–47; Wai 2386, claim 1.1.1.

64. According to the Crown's evidence, these groups included 'eleven iwi leaders with past involvement with the Act; Te Hunga Rōia o Aotearoa; counsel for the Wai 2386 claimants; and almost all the existing Crown engagement and High Court applicants (of which there were 13 and 12, respectively)': submission 3.3.58, pp 46–47.

65. Submission 3.3.58, p 32

66. Submission 3.3.58, p 47; doc A131(a), p 259

67. Submission 3.3.58, p 47

68. Submission 3.3.58, pp 47–48

69. Submission 3.3.38, pp 11–12; submission 3.3.57, pp 98–103; submission 3.3.56, pp 23–25

70. Submission 3.3.8, p 13; transcript 4.1.2, p 30; doc A69(a), pp 95,795–806

Seabed Act and the Ministerial Review Panel that examined the same legislation.⁷¹ According to counsel, the Tribunal's report found that when the Crown develops policy and legislation enabling the recognition of Māori rights in the foreshore and seabed, 'anything less than negotiation and agreement from Maori amounts to a breach of the treaty'.⁷² According to one claimant, the significance and impact of the new Act should have in fact 'warranted . . . a higher level of interaction and consultation' with Māori.⁷³

In reality, the Crown's targeted consultation on the funding assistance model was insufficient to constitute the requisite negotiation and agreement from Māori, counsel argue. In part, this was due to the Crown's decisions about which groups it would involve. Many claimants gave evidence that they were not approached to participate.⁷⁴ They assert that the groups who did participate were not sufficiently representative; meaningful consultation required wider consultation with hapū and iwi,⁷⁵ and with the 'recognised iwi organisations' listed in the Maori Fisheries Act 2004.⁷⁶ They were also critical of the Crown's consultation with members of the Iwi Leaders Forum. Counsel argue that the forum's annual membership fee might preclude groups of limited means,⁷⁷ leaving the Crown's consultation unfairly skewed to groups of relative wealth.

Other claimants testified to the ad hoc and inaccessible nature of the matters discussed during the consultations.⁷⁸ According to one:

[It] was the usual telling/informing us of how the Crown agents dictate how it will be. There were copious documents too large for our computers and our minds to process properly. There were meaningless words and language seemingly designed to bamboozle and confuse us into submission and overwhelm us into a sense of hopelessness and 'what can I do about it?'.⁷⁹

Lastly, claimants criticise the timeliness of the consultation.⁸⁰ They highlight that consultation on the revised funding models was still occurring as late as May 2016, when the deadline for applications was fast approaching. This created a lack of certainty about funding matters that was highly prejudicial to Māori.

71. Submission 3.3.8, p 29; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*; E Durie, R P Boast, and H O'Regan, *Pākia ki Uta, Pākia ki Tai: Summary Report of the Ministerial Review Panel: Ministerial Review Panel Review of the Foreshore and Seabed Act 2004* (Wellington: Ministry of Justice, 2009), pp 139–140

72. Submission 3.3.8, p 29; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p139

73. Document A111, pp 8–9

74. Document A44, p 2; doc A76, p 10; submission 3.3.26, pp 6,8

75. Transcript 4.1.2, pp 662–663, 765–766

76. Transcript 4.1.2, pp 663–666; Maori Fisheries Act 2004, s27, sch 4

77. Transcript 4.1.2, pp 677–678

78. Document A44, p 2; doc A76, p 10; submission 3.3.26, pp 6, 8

79. Document A51, p 5

80. Document A112, p 8

(b) Crown's position

The Crown asserts that through the two rounds of targeted consultation in 2013 and 2016, the Crown met its Treaty obligations to consult and to act in good faith, fairly, and reasonably with Māori.⁸¹

Crown counsel submits that the requirement to consult with Māori stems from the Treaty obligation of partnership, and is part of the general duty to act fairly and reasonably with Māori in good faith.⁸² The Crown argues it is well-established that consultation:

- ▶ will depend on the circumstances of each case;⁸³
- ▶ will not always be required, although the Crown's Treaty obligation to act in good faith may require consultation on 'truly major issues';⁸⁴ and
- ▶ does not require agreement to be reached.⁸⁵

Counsel argues it was thus reasonable for the Crown to undertake targeted rather than comprehensive consultation with Māori on funding matters. Claimant evidence of a lack of consultation with particular claimant groups is, Crown counsel submits, not evidence of inadequacy or insufficiency as nationwide consultation on the funding assistance model was never intended.

The Crown asserts its targeted consultation was reasonable on several grounds. First, it says the parameters for this kind of consultation were developed in light of directions from the Waitangi Tribunal.⁸⁶ As noted above, an application was made to the Tribunal in March 2013 for an urgent inquiry into, in part, the funding available to applicants under the Marine and Coastal Area (Takutai Moana) Act 2011 and the Crown's alleged failure to consult with Māori in developing its funding policy (Wai 2386).⁸⁷ The application for urgency was adjourned, as the Tribunal considered there was still time for Crown consultation on the issue. In deciding to adjourn, the Tribunal noted that nationwide consultation on the funding issue would not be necessary; it suggested the Crown instead consult with 'key Māori groups with some knowledge and experience of civil proceedings for Treaty breaches'.⁸⁸ Counsel now submits it was reasonable for the Crown to have adopted the Tribunal's suggestion, especially as neither the claimants in the 2013 (deferred) inquiry nor any other groups opposed that suggestion. Crown counsel also emphasises that after the 2016 consultation round, none of the groups from the 2013 inquiry, nor any others, sought an urgent Tribunal inquiry into the Act's funding regime on the basis that the kind of consultation the Crown conducted on the issue had breached the Treaty.⁸⁹

81. Submission 3.3.58, p 45

82. Submission 3.3.58, pp 48–49

83. Submission 3.3.58, p 16

84. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA), p 152 (submission 3.3.58, p 16)

85. Submission 3.3.58, pp 48–49

86. Submission 3.3.58, p 46

87. Wai 2386, memorandum 2.5.4, pp 1–2; Wai 2386, claim 1.1.1

88. Wai 2386, memorandum 2.5.4, p 6

89. Submission 3.3.58, p 50

Secondly, the Crown submits that the test of what constitutes reasonable consultation is dependent upon ‘the nature of the resource or taonga, and the likely effects of the policy, action or legislation.’⁹⁰ It ‘will depend on the facts of each particular case.’⁹¹ Counsel submits that targeted consultation was appropriate given these considerations. Further, counsel argues that the Crown’s targeted consultation demonstrates it took reasonable steps to make informed decisions when developing its funding policy.⁹² According to counsel, the evidence shows that the Crown:

- ▶ kept an open mind throughout the 2013 and 2016 consultations;⁹³
- ▶ revised aspects of the funding policy after each round of consultation;⁹⁴
- ▶ provided those consulted with background information before each round of consultation so they could engage meaningfully;⁹⁵ and
- ▶ ensured it was aware of the interests and concerns of a cross-section of potential applicants including whānau, hapū, iwi, and groups of varied financial means.⁹⁶

Finally, Crown counsel notes that ‘Te Arawhiti has been responsive to calls for further engagement and consultation’ with Māori on funding matters.⁹⁷ During this inquiry, the Crown also made a proposal to the Minister to review the funding regime, which was accepted. The Crown has indicated that this review will include consultation with Māori.⁹⁸

(c) Tribunal’s analysis and findings

In assessing the Crown’s consultation on the funding assistance model, we begin by setting out what we consider would have constituted reasonable, Treaty-compliant Crown consultation on this matter.

Good faith consultation between Crown and Māori is widely recognised as an expression of the Treaty principles of partnership and active protection. However, consultation is not an absolute requirement but one determined by circumstances.⁹⁹ As the Tribunal stated in the Ngāi Tahu inquiry, referring to the court’s decision in *New Zealand Maori Council v Attorney-General* [1987], ‘in some areas more than others consultation by the Crown will be highly desirable, if not essential, if legitimate Treaty interests of Maori are to be protected’. The Tribunal went on to say that such areas include matters that might affect a tribe’s (and, we add, a hapū’s) rangatiratanga, and ‘[e]nvironmental matters, especially as they may

90. Submission 3.3.58, pp 48–49; Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1236–1237

91. *Land Air Water Association v Waikato Regional Council* [2001] NZEnvC A110/01, 23 October 2001 at para 448

92. Submission 3.3.58, p 49

93. Submission 3.3.58, p 49

94. Submission 3.3.58, pp 47, 48, 49

95. Submission 3.3.58, pp 46–47, 49

96. Submission 3.3.58, pp 49–50; doc A131(a), pp 259, 647–648

97. Submission 3.3.58, p 50

98. Submission 3.3.58, p 39

99. Waitangi Tribunal, *The Offender Assessment Policies Report*, p 11

affect Maori access to traditional food resources.¹⁰⁰ Elsewhere, the Tribunal has found that consultation is required on ‘truly major issues’¹⁰¹ and also ‘when Maori have a particular interest in a matter that is within the Crown’s authority to decide and the Crown needs to be informed about Maori attitudes to the matter.’¹⁰² The Central North Island inquiry found that the test of what consultation was reasonable in particular circumstances ‘depends on the nature of the resource or taonga, and the likely effects of the [Crown’s] policy, action, or legislation.’¹⁰³

We consider that the Crown’s development of funding policy and procedures under the Marine and Coastal Area Act is an issue requiring consultation on all the grounds described above. It was relevant, desirable, and indeed essential for the Crown to consult Māori on the funding model, especially given the nature of the resource and the probable effects the Crown’s statutory regime would have on Māori.

As for the nature of the consultation the Crown undertook and its timing, here too previous court and Tribunal findings provide guidance as to what can be considered reasonable. Consultation ‘must be undertaken with an open mind and . . . the parties consulted must be provided with sufficient information for them to be able to engage meaningfully’, the Tribunal found in 2010, adding that consultation did not, however, ‘presume eventual agreement, or even negotiation.’¹⁰⁴ In the Napier Hospital inquiry, the Tribunal found that ‘[t]he mode of consultation should take appropriate account of Maori expectations and preferences’ and allow for active engagement, direct communication, and ‘collective discussion in a Maori cultural context.’¹⁰⁵ Consultation should take place ‘before the Crown makes any decisions on matters that may impinge upon the rangatiratanga of a tribe or hapu in relation to its taonga’, the Tribunal said in 2002,¹⁰⁶ and the Crown should respond by ‘listening to what others have to say . . . considering their responses and deciding what will be done.’¹⁰⁷

On the matter of who should have been involved in the Crown’s consultation about funding under the Act, we pay particular attention to the Tribunal’s directions when it adjourned the Wai 2386 urgency application in March 2013. As the Crown reminded us in submissions, the applicants alleged (in part) that the Crown had failed to consult Māori when formulating its funding policy under the Marine and Coastal Area Act. The Tribunal determined it was ‘essential that the Crown consult Māori as a part of that process’ and adjourned the urgency application for

100. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, p [241]

101. *New Zealand Maori Council v Attorney-General* [1989], p 152 (Waitangi Tribunal, *Tauranga Moana 1886–2006, Report on the Post-Raupatu Claims*, 2 vols (Wellington, Legislation Direct, 2010), vol 1, p 20)

102. Waitangi Tribunal, *The Tarawera Forest Report*, p 27

103. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1237

104. Waitangi Tribunal, *Tauranga Moana 1886–2006*, vol 1, p 20

105. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 72

106. Waitangi Tribunal, *Ahu Moana*, p 70

107. Waitangi Tribunal, *The Offender Assessment Policies Report*, p 11

that consultation to occur. But the Tribunal said the consultation did not need to be nationwide; 'rather it should focus on key Māori groups with some knowledge and experience of civil proceedings for Treaty breaches'. In adjourning the application, the Tribunal asked the Crown to update it on progress of the consultation, which it received in June 2013.¹⁰⁸ The Tribunal subsequently determined the urgent hearing would proceed but would focus only on the other issue raised in the application (concerning the provision of legal aid for civil proceedings).¹⁰⁹

Having set out our view of what would have constituted robust Treaty-compliant consultation on the funding model, we can now assess the Crown's actions against that standard.

First, we consider the evidence shows that both Treaty partners approached the consultation rounds of 2013 and 2016 reasonably and in good faith. Both rounds led to the Crown making some amendments to its funding policy, suggesting a degree of open-mindedness.

Moreover, it was reasonable for the Crown to align its consultation strategy with the Tribunal's view in the 2013 (deferred) inquiry that nationwide consultation was not necessary. We also note that if applicants had remained unsatisfied with the Crown's consultation process after the 2013 round, we would expect to have seen another application for an urgent inquiry made to the Tribunal. This did not occur, and the second round of funding consultation in 2016 built on the first. We surmise that the consultation of 2013 was considered reasonable by claimants at the time, as it was by the Tribunal. We too consider it was reasonable.

Undoubtedly, there could have been improvements. We recognise that the Crown's decision to undertake targeted consultation – even though consistent with the Tribunal's suggestion to consult with 'key Māori groups' – left some claimants feeling anxious and excluded, especially those representing whānau and hapū. Ngā Hapū o Te Moutere o Motiti, for example, submitted that the Act's funding regime was introduced 'without the consent of, or adequate consultation with, Māori in general or Ngā Hapū o Te Moutere o Motiti in particular'.¹¹⁰

We also have concerns about the usefulness of some of the issues the Crown's consultation concentrated on. The proposed funding models were complex. The vast majority of claimants probably lacked sufficient experience or expertise on technical funding matters (such as what might constitute a reasonable estimate for High Court costs) to be able to engage meaningfully in these discussions. This is reflected in the Crown's own evidence that the 'bulk of the submissions received raised administrative issues rather than substantive concerns with the funding model'.¹¹¹ Moreover, there were other issues that the consultation process could have usefully addressed, especially the statutory deadline, and the important fact that customary rights could be lost if not pursued under the Act (consultation issues we will traverse in stage 2 of this inquiry). Equally, the consultation process

108. Wai 2386 RO1, memorandum 2.5.4, pp 5–6

109. Wai 2386 RO1, memorandum 2.5.6

110. Claim 1.1.26, p 13

111. Submission 3.3.58, p 47; doc A131(a), pp 241, 260–284

could have made more use of experts familiar with proceedings like those under the Act, and the cost of those proceedings, who would have been better placed than claimants to contribute advice on technical funding issues.

We conclude that, overall, both Treaty partners engaged in the 2013 and 2016 consultation rounds reasonably and in good faith, consistent with the principles of partnership and active protection. Despite the flaws we have identified, we are not persuaded that the Crown breached its Treaty obligations.

5.3 PROCEDURES SUPPORTING THE TWO APPLICATION PATHWAYS

As we set out in chapter 4, the Act provides Māori with two main pathways for establishing legal recognition of their customary rights. They can pursue an application through litigation in the High Court¹¹² or through engagement with the Crown.¹¹³ While applications may be progressed under both pathways at the same time, applicants cannot receive funding for both simultaneously.¹¹⁴

This section of our report considers claimant allegations about the procedural arrangements the Crown has put in place – first in the High Court pathway (section 5.3.1) and then in the Crown engagement pathway (section 5.3.2). We consider whether, in establishing and administering these procedures, the Crown has breached its Treaty obligation to actively protect Māori and whether claimants have been prejudiced as a result. We also examine the extent to which the two pathways cohere and, if not, whether the Crown has breached the principles of the Treaty to the extent that Māori have been prejudicially affected (section 5.3.3). Issues related to the funding available to applicants in each pathway are addressed separately in chapter 6.

5.3.1 High Court pathway

(a) Claimants' position

Some claimant allegations about the High Court pathway cannot be examined here because they raise substantive issues about the Act itself or the Crown policy underlying it. We will address such allegations and issues in stage 2 of this inquiry. Some claimant allegations cannot be considered by the Tribunal at all, largely for reasons of judicial comity (respect between the courts).¹¹⁵ Some such allegations are noted here if essential to understanding the parties' arguments, but we neither analyse nor make findings on them.

Thus, this section is concerned primarily with claimant allegations about the procedural arrangements the Crown has put in place to support the High Court pathway. Some common themes emerge from the submissions. They allege that

112. Marine and Coastal Area (Takutai Moana) Act 2011, s 98

113. Marine and Coastal Area (Takutai Moana) Act 2011, s 95

114. Document A131, p 47

115. Submission 3.3.5, p 3; submission 3.3.17, p 4; submission 3.3.26, p 10; submission 3.3.30, p 8; doc A116, p 11; doc A44, p 20

the High Court registry was not adequately prepared to receive applications under the Act; that applicants in this pathway lacked information that would help them identify overlapping applications; and that there was a lack of guidance for the High Court's processing of applications. Claimants contend that Māori have been, and continue to be, prejudiced by these arrangements. In their submission, the nature and extent of the prejudice warrant a finding that the Crown breached its Treaty obligation to actively protect Māori.

The High Court's preparedness to receive applications under the Act

Claimant counsel submit that the High Court registry was under-prepared to process the influx of marine and coastal area applications it received in the days and weeks preceding the statutory deadline.¹¹⁶ Umuhuri Matehaere, a claimant representing the Motiti Rohe Moana Trust, described how 'the flood of . . . applications [that] overwhelmed the High Court' meant 'our application (and all other applications) were placed on hold while the Court considered how to proceed.'¹¹⁷ In identifying the root of this problem, counsel cite the oral evidence of Jane Penney, manager and registrar of the High Court of Wellington. She acknowledged that while the High Court registry identified the Act's application deadline as a risk, no planning was undertaken to mitigate that risk. 'It was very much we didn't know what we didn't know, and we would deal with it as it came in.'¹¹⁸ Counsel submit this blasé attitude prejudiced Māori trying to file their marine and coastal area applications.

Claimants are also critical that registry staff received no advance training on the procedural requirements for filing marine and coastal area applications. They say that this resulted in a confusing and shambolic filing experience for many applicants.¹¹⁹ For example, Marise Lant, a claimant representing the Nga Hapu o Kokoronui ki Te Toka a Taiau Takutai Kaitiaki Trust, gave evidence that when she attempted to file her application, the High Court registry incorrectly advised her to file it with the Māori Land Court instead.¹²⁰

Further, counsel draws attention to Ms Penney's admission that registry staff were initially unaware that a specific marine and coastal area funding regime was available to applicants.¹²¹ Ms Penney admitted:

. . . I'm a bit embarrassed to say this, but I will say it with hindsight, the High Court did not know that there was funding for High Court applications through the Office of Treaty Settlements. As far as we were concerned, we thought people would – they

116. Claim 1.1.16(a), p 22; submission 3.3.65, p 5

117. Document A116, p 6

118. Transcript 4.1.2, p 592

119. Submission 3.3.6, p 14; doc A117, p 15

120. Document A90, p 6; transcript 4.1.2, p 592. In her brief of evidence, the claimant speaks of the District Court giving her incorrect information, but it is clear from the context that she means the High Court registry, not the District Court.

121. Transcript 4.1.2, p 587

would be treated like any other civil proceeding and people would apply for legal aid.¹²²

Given that even Ms Penney was not aware that specific funding was available, counsel suggest it is highly unlikely that applicants would have known.¹²³

Lack of information about overlapping applications

Claimants experienced difficulties ascertaining which other applications, if any, overlapped geographically with their own.¹²⁴ This was important to know for two reasons. First, the Act stipulates that claimants notify all parties directly affected by their application,¹²⁵ a requirement that clearly applies to applicants claiming customary rights in the same area. However, claimants describe how hard it was to work out exactly who those parties were.¹²⁶ Verna Tuteao, a claimant on behalf of Te Ruunanga o Ngaati Mahuta, explained how she was ‘not able to notify everyone . . . as we did not know exactly who had overlapping interests with us’. There was no central database where all applications were filed and/or publicly available, she said.¹²⁷

The second reason claimants gave for needing to identify overlapping applications was in order to protect their own interests. They could only defend their interests in the proceedings of another application if they filed a notice of appearance to appear as an interested party. All notices had to be filed in the High Court within 20 working days of the public notice of the application.¹²⁸

Counsel submit that a centralised list of applications would have greatly helped claimants overcome both these challenges, and should have been available.¹²⁹

Lack of guidance for the High Court’s processing of applications

Claimants allege the Crown failed to provide procedural rules or regulations (or both) to guide the High Court’s processing of applications.¹³⁰ Counsel argue that other specific jurisdictions within the High Court often have a ‘relatively simple set of regulations’ attached. They argue that similar regulations specifically for marine and coastal area applications – including regulations allowing the electronic filing of applications and eliminating requirements to pay High Court fees – would have greatly helped applicants when lodging marine and coastal area applications.¹³¹

122. Transcript 4.1.2, p 586

123. Transcript 4.1.2, p 591

124. Document A116, p 11; doc A64, pp 6–7; doc A74, pp 3–4

125. Marine and Coastal Area (Takutai Moana) Act 2011, s 102

126. Document A74, pp 3–4; doc A44, pp 8–12; submission 3.3.54, pp 6–7

127. Document A64, pp 6–7

128. Marine and Coastal Area (Takutai Moana) Act 2011, s 103

129. Submission 3.3.54, p 6–7; transcript 4.1.2, p 117

130. Submission 3.3.34, para 32; submission 3.3.31, paras 35–36; transcript 4.1.2, pp 578, 595–596, 739–740

131. Submission 3.3.31, paras 35–36

Claimant counsel also criticise the High Court's inconsistent treatment of the statutory deadlines under the Act. The first was the deadline requiring prospective applicants to file their originating applications with the court within six years of the Act's commencement, by 3 April 2017.¹³² The registry applied this deadline strictly, rigorously monitoring the filing time of applications to ensure compliance. As a result, six applications were initially declined by the registry for being filed electronically after 5pm on 3 April.¹³³ These applications were later accepted upon review by Justice Mallon.¹³⁴

By contrast, claimant counsel submit that the High Court registry's approach to the second statutory deadline, which applied to interested parties, was comparatively relaxed. Interested parties had 20 working days to file a notice to appear in the High Court after a group's application was advertised.¹³⁵ Ms Penney admitted that some might have filed out of time, as this was not monitored. She acknowledged this could have included groups such as local authorities or Hobson's Pledge.¹³⁶ Counsel submit that the loose monitoring of this deadline (as opposed to that imposed on applicants) created the potential for more notices opposing marine and coastal area applications to be filed, causing ongoing prejudice to applicants.¹³⁷

In similar vein, counsel submits the High Court registry should have declined notices of appearance filed by the Attorney-General, on the basis that these too were filed out of time. In May 2017 the Attorney-General filed a notice of appearance on the application of Hori Turi Elkington under the Act,¹³⁸ seeking directions from the registrar that the notice be treated as 'if it was filed simultaneously, with the correct entitlement, in all other applications for recognition orders under the . . . Act that are before the High Court and for which no Crown notice of appearance has previously been filed.'¹³⁹ Justice Mallon issued directions to this effect.¹⁴⁰ However, the Crown did not file amended notices of appearance until 2018. Claimants submit this is discriminatory and a source of ongoing prejudice.

Moreover, some claimants strongly oppose the Attorney-General's participation as an interested party in all marine and coastal area applications.¹⁴¹ They reason

132. Marine and Coastal Area (Takutai Moana) Act 2011, s100(2)

133. Document A94, p 8

134. Document A94, p 9; doc A35(a), p 22

135. Marine and Coastal Area (Takutai Moana) Act 2011, s103(3); submission 3.3.58, p 76

136. Transcript 4.1.2, pp 570–571; submission 3.3.57, pp 118–121. Hobson's Pledge is a lobby group formed in September 2016. It seeks 'to remove from law and practice any race-based discrimination in governance and property rights', https://www.change.org/o/hobsons_pledge, accessed 23 June 2020.

137. Submission 3.3.57, pp 118–121; transcript 4.1.2, pp 570–571, 575–576

138. *Marine and Coastal Area Act Claim Application* High Court Wellington, CIV-2017-485-218

139. Document A76(a), pp [407], [415] n. The Attorney-General has filed in the Elkington proceeding (CIV 2017-485-218) a notice of appearance dated 22 May 2017, which the court has directed is deemed to have been filed in all applications: see Justice Mallon, minute, 26 May 2017, CIV 2017-485-218.

140. *Marine and Coastal Area Act Claim Application* High Court Wellington, CIV-2017-485-218

141. Submission 3.3.58, pp 54–58; submission 3.3.37, p 7; submission 3.3.32, para 52; submission 3.3.34, paras 59–62; submission 3.3.35, para 28; submission 3.3.31, para 26

that if the Attorney-General has any role to play, it should be one of neutrality rather than the demonstrably oppositional stance counsel asserts has been adopted thus far.¹⁴² Counsel for Te Whakapiko argues:

The Crown's role in the High Court process fails to demonstrate any elements of their duties of partnership or active protection, rather, the Crown is on record with the position that they will oppose and push back against the application by Te Whakapiko and every other application.¹⁴³

Meanwhile, counsel for New Zealand Māori Council members and other claimants notes the Attorney-General opposes the proposal for a Ngāpuhi title application 'test case'. Counsel argues this further exemplifies the Crown's oppositional position.¹⁴⁴ Counsel also notes disparaging public comments made by the former Attorney-General and Minister for Treaty of Waitangi Negotiations about Maanu Paul, chairperson of the Mataatua District Māori Council, and the application he submitted on the council's behalf.¹⁴⁵ Counsel submits that these comments demonstrate an absence of good faith, and call into question the neutrality of the Attorney-General's position.¹⁴⁶

(b) Crown's position

The Crown initially responds by emphasising the parameters of the Waitangi Tribunal's jurisdiction. While the Tribunal has power to inquire into legislative, regulatory, and executive actions, counsel argues this power does not extend to inquiring into judicial functions. Crown counsel reminded the Tribunal that 'care needs to be taken' to ensure that our considerations do not interfere with judicial process.¹⁴⁷

Overall, the Crown submits that 'the administrative arrangements and resources put in place by the High Court registry to process applications for recognition orders are Treaty-consistent'.¹⁴⁸ It also argues that there was no evidence to show the registry process prejudiced applicants (including prospective applicants) 'to an extent or in a manner that supports a finding of Treaty breach'.¹⁴⁹

Regarding the specific allegations that the registry was under-prepared for the statutory deadline, the Crown concedes that the deadline did create considerable pressure. It acknowledges the registry was briefly under-resourced for the task of processing applications.¹⁵⁰ However, the Crown highlights the flexible

142. Submission 3.3.57, pp 68, 72-73

143. Submission 3.3.4, p 5. This argument was also made by counsel for Wai 266, Wai 1524, Wai 1537, Wai 1673, Wai 1681, Wai 2674, Wai 2675, Wai 2680, Wai 2147, and Wai 1846.

144. Submission 3.3.57, p 57

145. Submission 3.3.57, pp 72-73

146. Submission 3.3.25, p 12

147. Submission 3.3.58, p 79; Treaty of Waitangi Act 1975, s 6(1)

148. Submission 3.3.58, p 79

149. Submission 3.3.58, p 80

150. Submission 3.3.58, pp 79-80; transcript 4.1.2, pp 590-591

and proactive steps the court implemented to mitigate any prejudicial impact on claimants. These included:

- ▶ Dispensing with the High Court Rules requirement that requests for information on other High Court applications be formally requested (and charged a search fee).¹⁵¹
- ▶ Placing additional information on marine and coastal area applications on the Courts of New Zealand website (including a spreadsheet detailing key features of each application).¹⁵²
- ▶ Granting fee waivers for the lodgement of marine and coastal area applications.¹⁵³
- ▶ Refunding any filing fees that had already been paid by claimants when lodging their claim.¹⁵⁴
- ▶ Accepting applications to the Wellington registry even where this was not the correct registry for the filing of those applications.¹⁵⁵
- ▶ The judicial decision to accept applications that had been filed electronically or after 5pm on the date of the statutory deadline.¹⁵⁶

Further, the Crown notes that claimants did not present any evidence of a prospective interested party being unable to file a notice of appearance because there was no publicly available database.¹⁵⁷

As for the claimants' arguments in favour of practice notes or specific rules and regulations,¹⁵⁸ the Crown observes that issuing a practice note is a judicial decision that falls outside both the Crown's ambit and the scope of this inquiry.¹⁵⁹ The Crown also remains unconvinced 'a clear need' exists for such rules and regulations, and notes that the judiciary has not expressed any interest in their introduction. Counsel acknowledges that the matter could be considered further in the Crown's proposed funding review, which it announced during the course of this inquiry. However, the Crown doubts whether the authorising legislation¹⁶⁰ is in fact intended to facilitate the issuing of regulations addressing judicial procedures.¹⁶¹

The Crown makes a threefold response to claimant allegations of inconsistency in the High Court registry's treatment of the two statutory deadlines (one for filing applications and the other for filing notices of appearance). First, the Crown

151. High Court Rules 2016, pt 3, subpt 2; doc A130, p 3; submission 3.3.58, p 76

152. Submission 3.3.58, pp 77, 80; doc A130, pp 4–5; transcript 4.1.2, p 565

153. High Court Fees Regulations 2013, reg 18; submission 3.3.58, p 81; doc A130, p 3; transcript 4.1.2, p 586

154. High Court Fees Regulations 2013, reg 23; submission 3.3.58, p 81

155. Submission 3.3.58, p 81; High Court Rules 2016, pt 5, subpt 1, pt 19, subpt 7

156. Submission 3.3.58, pp 75–76; doc A130, p 2

157. Submission 3.3.58, pp 80–81

158. Submission 3.3.58, pp 82–83

159. Treaty of Waitangi Act 1975, s 6(1); submission 3.3.58, pp 79, 82–83

160. Marine and Coastal Area (Takutai Moana) Act 2011, s 118

161. Submission 3.3.58, p 83

notes that the decision to accept late notices of appearances was a judicial decision outside this Tribunal's purview.¹⁶²

Secondly, counsel points out that the statutory phrasing describing the two deadlines is different.¹⁶³ No discretion is allowed if the deadline for filing an application is missed, but the legislation remains silent on the implications of missing the deadline for filing a notice of appearance. Counsel submit this is intentional, as Justice Mallon considered in *Re Tipene* and *Tangiara v Attorney-General*. In her decision, the Judge commented that it was likely the Act intended the court to retain some control over whether an interested party should be permitted to appear, even if they were to miss the deadline for a notice of appearance.¹⁶⁴

Thirdly, counsel submit that as most notices of appearances filed out of date were filed by applicants rather than public interest groups, this measure has clearly assisted rather than prejudiced applicants.¹⁶⁵

The Crown's response to the argument that the High Court is an unsuitable forum for resolving applications under the Act is also threefold. First, it again emphasises that this is a live issue before the High Court and, as a matter of judicial comity, it would be inappropriate for the Tribunal to make a finding.¹⁶⁶ Secondly, even if it were appropriate for the Tribunal to weigh in on this issue, the Crown argues that the role of the High Court is a substantive matter more relevant to stage 2 of this inquiry. Finally, the Crown notes Cabinet's original rationale for providing the High Court pathway: namely, it enables applicants to have their legal interests tested independently and by the court that 'is the lynchpin of New Zealand's judicial system' – a court that has determined many legal issues concerning Māori customary and Treaty rights.¹⁶⁷

Finally, the Crown argues that it is inappropriate for the Tribunal to inquire into the question of the Attorney-General's role in High Court proceedings under the Act because the issue is (at the time of our hearings) also before the High Court. The Crown argues that it would be a breach of judicial comity for the Tribunal to comment.¹⁶⁸ The Crown does concede it is within the Tribunal's jurisdiction to consider whether the Act is inconsistent with the Treaty because it inadequately prescribes the Attorney-General's role in High Court proceedings. However, as this also raises a substantive issue, counsel submits it too falls outside the scope of stage 1 of this inquiry. Moreover, the Crown submits that the Tribunal does not

162. Transcript 4.1.2, p 599; submission 3.3.58, p 82

163. Marine and Coastal Area (Takutai Moana) Act 2011, ss 100, 103

164. Submission 3.3.58, p 82; *Re Tipene* [2014] NZHC 2046 at paras 22–23; *Tangiara v Attorney-General* [2014] NZHC 2049 at para 27

165. Submission 3.3.58, p 82

166. Submission 3.3.58, p 13; doc A131(a), p 1

167. Submission 3.3.58, p 13; see also our summary of Cabinet's rationale for the pathway in chapter 4.

168. Submission 3.3.23, pp 3–4; submission 3.3.58, p 84. In support of its argument, the Crown cites *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petroleo* [2017] NZAR 1617; *Re Queenstown Airport Corporation Ltd* [2018] NZEnvC 52, para 34; *McDonald v Police* High Court Rotorua CRI-2006–463–17, 10 March 2006, para 12.

have all the relevant information it requires to make an informed finding on the issue.¹⁶⁹

(c) Tribunal's analysis and findings

The Crown premises several of its submissions on the need to maintain the clear separation of executive, legislative, and judicial powers. It contends that various claimant allegations made to us about the adequacy of the High Court's procedural arrangements and resources are judicial matters outside the realm of the executive.¹⁷⁰

We agree. As the Tribunal has stated previously, the courts are 'not the Crown nor are they agents of the Crown'.¹⁷¹ Thus the executive cannot be held accountable for the independent processes and decisions of the courts. Equally, the decisions and actions of both the judiciary and the High Court registrars (who, when acting in their registrarial roles are effectively an extension of the judiciary) are squarely outside the purview of the Tribunal.¹⁷²

However, it is legitimate for us to consider – and, if necessary, make findings on – whether the Crown is supporting the High Court pathway to an extent and in a manner consistent with its Treaty obligations. We would expect that when an Act affecting Māori is passed requiring new Court processes, the Crown would properly notify the court in advance, ensure Court officials have appropriate information and training, and make available sufficient resourcing so officials can cope with a surge in applications (which the Crown acknowledges can be expected whenever there is a statutory deadline).

In our view, the Crown's actions did not meet this standard. As a result, High Court officials were not sufficiently well-versed in the operational aspects of the Act's regime to provide applicants with the help and advice they were entitled to expect. And, as the manager and registrar of the High Court conceded, mistakes occurred. Perhaps the most obvious were the erroneous advice provided to an applicant to file her application at the Māori Land Court, and Ms Penney's admission that the registry was initially unaware that marine and coastal area applications are funded through the Act's funding regime rather than through Legal Aid. Such mistakes were no doubt a source of frustration to affected applicants already having to negotiate unfamiliar legislation in an unfamiliar environment.

In our view, the Crown could have better supported the High Court pathway in several ways. For example, it could have highlighted to Court officials the identified resourcing risk posed by the statutory deadline, and the existence of a unique funding policy catering to the legislation. Indeed, the significance to Māori of the *takutai moana* and their customary rights in it placed an extra onus on the Crown

169. Submission 3.3.58, pp 79–84

170. Submission 3.3.58, p 79

171. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker & Friend Ltd, 1991), pp 191–192; see also Waitangi Tribunal, *The Ngai Tahu Report*, pp [510]–[511]; *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2003] 1 NZLR 779 at para 161; *R v Lyons* [2002] UKHL 44, [2002] 4 All ER 1028 at para 40.

172. Waitangi Tribunal Act 1975, s 6(1)

to correspond and coordinate with High Court officials in advance of the Act's introduction, albeit within the constitutional limits prescribed by the separation of powers.

For these reasons, and on the basis of the evidence presented to us, we consider that the procedural arrangements the Crown put in place to support the High Court registry and the operation of this pathway were inconsistent with its Treaty obligations of partnership and active protection.

That said – and mindful of the limits of our jurisdiction – it is only fair to note that the High Court largely managed the challenges posed by untested legislation well. Undeniably, there were mistakes and missteps, but no evidence was presented that claimants suffered ongoing prejudice as a result. For example, while some claimants' applications were initially rejected for having been filed out of time or electronically, these applications were later accepted by Justice Mallon. Furthermore, we heard evidence that the High Court registry was responsive to certain problems, even though they were in what were essentially uncharted waters. Filing fees were waived, mitigating the prejudice applicants might have suffered due to the cost of lodging an application. The Court also accepted applications filed in the incorrect registry and, upon seeing a need, sought judicial directions to approve the uploading of additional website information (which was granted).

In light of all these mitigating steps taken by the High Court, we are not persuaded that the Crown's actions – despite being inconsistent with the Treaty – caused prejudice to claimants. All groups who used the High Court pathway to make an application under the Act ultimately had their applications accepted.

Notwithstanding our finding, we suggest one step the Crown could take to ensure the High Court pathway better meets claimant needs and its own Treaty obligations. Some claimant counsel propose that the Crown's duty to actively protect Māori interests should extend to the provision of cultural competency training for registry staff. We consider this an idea worth exploring further. The exact nature of the training and the practicalities of delivery would need considerable discussion. But we consider that its provision would likely improve the experiences of Māori interacting with the High Court, both on marine and coastal matters and more generally.

We do not comment here or make findings on the parties' arguments about the High Court's suitability to address matters of tikanga, as that is for stage 2 of the inquiry. As Crown counsel points out, this – along with the role of the Attorney-General in High Court proceedings and the 'test case' proposal – remain live issues before the High Court. We agree with the Crown that it is inappropriate for the Tribunal to comment on them, as a matter of judicial comity. We note only that since the closing of hearings and submissions, the High Court has issued a decision on the role of the Attorney-General, concluding that the Attorney-General is permitted to appear and be heard as an interested party in respect of all High Court applications under the Act.¹⁷³

173. *Re Rihari and others* [2019] NZHC 2658; submission 3.2.168, p 1

While making no comment or findings here on the appropriateness of the High Court as a forum for deciding marine and coastal area applications, we do want to record in passing our concern at the extremely protracted nature of these proceedings in the High Court. We note with some alarm the Crown briefing paper to Minister Finlayson, estimating that marine and coastal area applications could take 40–50 years to work through.¹⁷⁴ These timeframes reflect the complexity inherent in the High Court marine and coastal area proceedings, which involve major interlocutories and multiple parties. We do not doubt that the protracted nature of the proceedings has caused real concerns for claimants. The implications are demonstrated by some of the evidence we heard – for example, that an eight-week High Court fixture has been scheduled for the Whakatōhea application.¹⁷⁵ It has taken more than two years since the statutory deadline passed just for this fixture to be put in place. Yet the area covered by the application amounts to only a tiny part of New Zealand’s coastline.

5.3.2 Crown engagement pathway

(a) Claimants’ position

A lack of procedural clarity, especially poor communication, is the first allegation claimants make in respect of this pathway. Counsel submit that this is an ongoing source of prejudice to applicants.¹⁷⁶ Between the introduction of the Act and the statutory deadline for lodging applications, counsel submit that the ‘Crown did not appear to communicate with Maori how it intended to progress Crown engagement applications. This was despite a number of applicant groups asking how they could apply under this pathway.’¹⁷⁷ Furthermore, counsel submit that while the Crown is now developing what it calls a ‘longer-term strategy’ for progressing Crown engagement applications, it is still uncertain when claimants will know even whether the Minister will recognise their application.¹⁷⁸

Secondly, counsel argue that significant delays have beset the Crown engagement pathway. For 369 of 385 applicants in this pathway, the Crown has done no more in the two years since the statutory deadline passed than acknowledge receipt of their applications. Only 16 applications have progressed in any measurable way. Fourteen of these remain 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.’¹⁷⁹ Only two have progressed to the second stage: engagement with the Crown. Counsel allege that by failing to progress the vast majority of applications in a timely and reasonable manner, the Crown has failed to act in good faith and actively protect Māori, and to work in partnership with

174. Document A62, p 7; doc A62(a), app 1, pp 76–77

175. Justice Churchman, minute 2, High Court, 27 August 2019, CIV-2011–485–817 (re Edwards’ and others on behalf of Te Whakatōhea), para 3

176. Submission 3.3.2, pp 5–6

177. Submission 3.3.8, p 22

178. Submission 3.3.8, p 22

179. Submission 3.3.58, p 11; doc A131, paras 52–111; transcript 4.1.2, p 849

them.¹⁸⁰ These unreasonable delays are, they submit, a Treaty breach and a denial of justice.

Claimant counsel further argue that the Crown's failure to progress engagement applications in a timely and reasonable manner is especially prejudicial to Māori with applications in both pathways. Because of the delays, over which the applicants 'have little agency or control',¹⁸¹ they are compelled to pursue applications in the High Court in the meantime even if Crown engagement is their preferred pathway: 'Their hand is effectively forced'.¹⁸²

Underlying these prejudicial delays, counsel submit, is the Crown's slowness to formulate a policy that would guide the progression of applications. Counsel for several claimants submit that the Crown:

- ▶ did not introduce an initial policy outlining the procedural elements of the Crown engagement pathway until 10–11 months after the legislation came into force;
- ▶ was still making final decisions on the Crown engagement process 12 months after the Act came into force;
- ▶ continued to receive submissions on, and revise, the funding policy until May 2016;
- ▶ was still briefing the Minister on a potential strategy for engaging with claimants in the Crown engagement pathway in August 2017; and
- ▶ continues to say, even in 2019, that the Crown is still learning, and still developing the engagement process. In hearings, the Crown told the Tribunal that, in the remaining months of 2019, it expected to provide applicants with a 'clearer picture' of when they might expect to have an engagement process.¹⁸³

In light of these delays, counsel argue it is 'disingenuous' for the Crown to say claimants had six years to lodge their Crown engagement applications.¹⁸⁴ They argue that in reality, the limited statutory window for Crown engagement applications was further reduced by the delays and by the practical effects of unclear policies and procedures. For a significant portion of this time, the policies guiding the Crown engagement pathway (to the extent that any policies existed at all) were vague and ambiguous. Counsel argued that this was, and remains, detrimental to claimants. (We will also explore these allegations in section 5.4, where the absence of Crown policy for managing overlapping applications has also, in the submission of claimants, been a source of ongoing prejudice to applicants.)

Lastly, claimant counsel maintain that section 95(3) of the Marine and Coastal Area (Takutai Moana) Act is highly prejudicial to claimants. This section declares that: 'Nothing requires the Crown to enter into [an] agreement, or to enter into negotiations for [an] agreement: in both cases this is at the discretion of the

180. Submission 3.3.26, p 12; transcript 4.1.2, p 848

181. Submission 3.3.6, pp 13–14

182. Document A64, pp 4–5; submission 3.3.6, p 16; doc A44, p 15

183. Submission 3.3.38, pp 11–12; see also transcript 4.1.2, pp 615, 616

184. Submission 3.3.38, p 11

Crown.’ The criteria or process by which the Crown will determine its decision is not specified in the Act. Counsel argue that there is inherent prejudice in the Crown being the sole arbiter of whether claimants can engage with the Crown for legal recognition of their customary rights.¹⁸⁵

Counsel highlight that very few applicants, outside those who originally applied for recognition of their customary rights under the Foreshore and Seabed legislation, have been accepted for engagement by the Crown.¹⁸⁶ Of the few marine and coastal area applicants who have received a response, the Crown has declined to engage with most of those who have overlapping claims. The basis for this seems to lie in the Office of Treaty Settlements’ recommendation to the Minister that, amongst other criteria, the decision to engage should be guided by whether there are any ‘competing claims in the same area that should be resolved before any decision to enter formal terms of engagement is made.’¹⁸⁷

Counsel submit this is highly prejudicial to claimants, and creates a reality for many where ‘[t]here is not a choice between the two processes.’¹⁸⁸ Claimant counsel for Te Whakapiko emphasised this further, saying that ‘the Crown has established a policy which it has now consistently applied, that is, to refuse to engage with any but settled or negotiating groups.’¹⁸⁹ This means that every applicant the Crown declines to engage with loses the ability to choose their pathway. If they also submitted an application in the High Court, the applicant will be forced to pursue their application down that route. If they did not submit an application in the High Court, they will be left with no course of action available to them. Either way, counsel submit that this makes the applicants’ supposed ability to choose their preferred pathway a fallacy.

(b) Crown’s position

In reply, the Crown contends that it has acted reasonably, and implemented procedures and resources that allow the Crown engagement pathway to operate successfully. The Crown argues that claimants have not been prejudiced by the present arrangements. Alternatively, it submits that if Māori have suffered any prejudice, it is not sufficient to warrant a finding that the Crown breached its Treaty duties.

As for the claimants’ allegations of delays in developing supporting policy for this pathway, the Crown points out that an initial framework setting out the broad parameters was in fact available from February 2012.¹⁹⁰ It asserts that, until mid-April 2017, this initial policy was sufficient for the number of applications filed and

185. Document A58, para 14; submission 3.3.6, pp 13–14; submission 3.3.4, p 4; submission 3.3.1, p 3; submission 3.3.15, p 5; doc A47, p 8

186. Submission 3.3.42, p 18; transcript 4.1.2, p 848; doc A69, pp 15–16

187. Document A131(a), p 317

188. Submission 3.3.4, p 4

189. Submission 3.3.4, p 4

190. Document A131, p 7; submission 3.3.58, p 61; see also ‘Process for Crown Engagement under the Marine and Coastal Area (Takutai Moana Act) 2011’ (aka the ‘Green Diagram’), <https://tearawhiti.govt.nz/assets/2d7cd34a90/Green-Diagram.pdf>, accessed 22 April 2019

– even though it was not developed before the Act came into force – applicants did not suffer any prejudice as a result.¹⁹¹

The Crown also highlights the unexpected volume of Crown engagement applications received immediately before the statutory deadline. Faced with over 500 applications, officials had the ‘difficult task’ of developing a work programme that could deal with such a high volume of applications.¹⁹² Counsel submit that this was not straightforward.¹⁹³ Even if a work programme had been developed before the influx of applications, it would have been rendered largely obsolete by the significant under-estimate of applications on which it was based.¹⁹⁴

Counsel also stress that since that initial influx, the Crown has devoted considerable time, effort, and resources to developing a work strategy to manage the Crown engagement applications. This has included:

- ▶ prioritising applications transferred from the repealed Foreshore and Seabed legislation to the Marine and Coastal Area (Takutai Moana) legislation;
- ▶ prioritising applications which the Crown had already begun processing at the time of the statutory deadline; and
- ▶ increasing the capacity of Te Kāhui Takutai Moana to enable the team to focus more intently on issues pertaining to the Crown engagement pathway.¹⁹⁵

Crown witness Ms Johnston expressed confidence that the strategy would be further progressed in 2019.¹⁹⁶ Counsel advised a work programme was also in development, which would ‘provide greater certainty for applicants as to when the Crown is likely to engage with them on their applications.’¹⁹⁷ At the time of these hearings in 2019, the Crown was actively engaged in discussions with 35 Crown engagement applicants, and anticipated progressing more applications throughout the year.¹⁹⁸

Responding to claims that delays in the Crown engagement pathway are forcing claimants to pursue their applications in the High Court, the Crown argues several contextual factors need to be taken into account when assessing whether the delays were reasonable. For example, counsel notes that the Crown received almost twice as many applications as the High Court did.¹⁹⁹ The sheer number of applications and their overlaps have presented considerable complexities for Crown officials, which are consequently taking time to work through and resolve.

Additionally, the Crown contends that the comparative pace at which High Court applications are progressing to substantive hearing should be taken into account when assessing the Crown’s processes.²⁰⁰ It submits that applications

191. Submission 3.3.58, p 61

192. Submission 3.3.58, p 60

193. Submission 3.3.58, p 60; transcript 4.1.2, pp 615–616

194. Submission 3.3.58, pp 61–62

195. Submission 3.3.58, pp 60–61

196. Transcript 4.1.2, p 615; submission 3.3.58, pp 60–61

197. Submission 3.3.58, p 60

198. Submission 3.3.58, p 60

199. There were 385 Crown engagement applications as opposed to 202 High Court applications.

200. Submission 3.3.58, p 64

in the Crown engagement pathway are essentially on par with the High Court. The Court has so far determined only one application, *Re Tipene*, out of a total of 202 High Court applications.²⁰¹ Substantive hearings for the next High Court application will not start until August 2020.²⁰² Counsel point out this is not even an application made under the Marine and Coastal Area (Takutai Moana) Act, but one transferred over from the now repealed Foreshore and Seabed legislation.²⁰³

Given this context, counsel submits that the Crown has acted reasonably and in good faith by taking time to develop a strategy to deal with all the applications. Counsel also argues that any consequent prejudice has been insufficient to warrant a finding that the Crown has breached its Treaty obligations to Māori.²⁰⁴

(c) Tribunal's analysis and findings

The Marine and Coastal Area Act provides Māori with a choice of pathways through which to pursue recognition of their rights in the takutai moana. Given the significance of the resource and the rights at stake, it is incumbent on the Crown to protect the options available under the Act. Its duty of active protection requires the Crown to provide applicants with guidance, based on clear policy and strategy, and to ensure that the progress of their applications is not unreasonably delayed.

In our view, the Crown has failed to discharge this duty properly in the very pathway over which it has the greatest degree of control. Almost all Crown engagement applicants have experienced, and continue to experience, a high level of uncertainty over the process and unreasonable delays in progressing their applications. We accept the claimants' arguments that a lack of supporting policy and strategy has been a major contributor.

Faced with an imminent statutory deadline, claimants were placed in the invidious situation of having to choose an application pathway without clearly understanding how the Crown engagement pathway would operate. We accept that any policy developed before the statutory deadline might well have required finessing once the final number of Crown engagement applications was known. But we do not consider this an adequate excuse for the Crown delaying developing policy and strategy for so long. Both should have been in place as soon as the legislation became operative or, at the very latest, by the statutory deadline. Even now, more than seven years after the Act's introduction, we are troubled to learn that the delays in developing policy and strategy in the Crown engagement pathway show no immediate signs of ending. In 2019, the Crown advised the High Court that the strategy it was then formulating would take another 18 months to complete.²⁰⁵

201. *Re Tipene* [2016] NZHC 3199; submission 3.3.58, p 64

202. Submission 3.3.58, p 64

203. Transferred under section 125 of the Marine and Coastal Area (Takutai Moana) Act 2011: submission 3.3.58, p 64.

204. Submission 3.3.58, p 64

205. *Re Elkington* CIV-2017-485-218, Justice Collins, minute 5, 18 July 2018, para 81 (referenced in Justice Churchman, minute 2, 25 July 2019, CIV-2017-485-218 (re Case Management Conferences 2019), para 21)

While everyone has been waiting for it to emerge, claimants with applications in both pathways have effectively lost control of their options as to which pathway to follow; they must prioritise their High Court application, even if it is not their preferred pathway. Understandably, the High Court has pushed on with judicial case management conference procedures for all the applications before it, and claimants have had to participate in them – irrespective of whether they would prefer direct Crown engagement, and regardless of the cost implications. In some situations (and, again, quite understandably) the court has issued directions about evidence preparation requirements and other interlocutory steps which applicants must comply with.

Therefore we consider that the Crown has failed to provide Māori seeking to utilise the Act with adequate guidance about the Crown engagement pathway, based on clear policy and strategy. This is a breach of the Treaty principle of active protection and has caused those attempting to use that pathway, or both pathways, significant prejudice.

5.3.3 Clarity and cohesion between the two application pathways

(a) Claimants' position

Claimants criticise the lack of cohesion between the two pathways, and argue that it is causing – or has the potential to cause – prejudice. Their allegations identify:

- ▶ a lack of clarity about how the pathways interact. Claimants say this is prejudicial because it has created uncertainty for the applicants, both when deciding what option to choose and in understanding how (or whether) their applications are progressing.
- ▶ a lack of consistency between the two pathways, which they argue is prejudicial because:
 - an application may have a different outcome depending on which pathway it is pursued in.
 - some claimants may be left with no remedy or alternative course of action if the Crown chooses not to engage with them.
- ▶ a lack of remedy or alternatives for unsuccessful Crown engagement applicants. Claimants allege this is prejudicial because it may leave such claimants with no means of having their rights in the takutai moana recognised under the Act.

Claimant counsel also contend that the Act's funding regime exacerbates the lack of cohesion between pathways. However, we leave these arguments for chapter 6, our funding chapter.

Lack of clarity

Counsel point out that neither the Act itself nor any Crown policy clarifies how the two pathways are intended to operate with one another, or indeed if such cohesion is even intended or feasible.²⁰⁶ Counsel submit:

206. Submission 3.3.2, pp 5–6; submission 3.3.16, p 6

The connection, if any, between these two systems has not been revealed. In fact, it is possible that these two systems may work at cross-purposes with each other, with unclear effects on the recognition and protection of the customary rights at stake. It is doubtful that two systems of these two types are needed or appropriate, and both appear to be underfunded and understaffed.²⁰⁷

Counsel submit that this lack of clarity leaves claimants in a state of ‘limbo’²⁰⁸ in which they are uncertain about:

- ▶ the consequences of electing their chosen pathway;²⁰⁹
- ▶ the consequences if their chosen pathway progresses more slowly than the alternative route;
- ▶ whether the two pathways will yield consistent results, and if not, which one is more likely to yield a positive outcome;²¹⁰
- ▶ whether one pathway may prove more affordable;
- ▶ which pathway will take precedent if a conflict between the two arises;²¹¹
- ▶ how overlapping applications in different pathways will be resolved, and how applicants can seek to protect their interests across the two pathways.²¹² (This will be explored further in section 5.4, where we deal with overlapping interests.)

Claimant counsel submit that these myriad forms of uncertainty are highly prejudicial to applicants.²¹³ As well as constraining their choice of pathway, these uncertainties make it hard for applicants to know if (or how) their rights might be affected by other applications progressing in a different pathway.²¹⁴ The prejudice thereby created is sufficiently serious to warrant a finding that the Crown has breached its duty of active protection, counsel argue.

Lack of consistency

The different pace at which applications are progressing in the two pathways is a particular area of concern. Claimants submit that the High Court process is proceeding at a faster pace than the Crown engagement process. According to counsel for Ngāti Korokoro, Te Pouka, and Ngāti Pou: ‘This means the rights and interests of applicants to the High Court are likely to be addressed before applicants for Crown engagement have even begun negotiations.’²¹⁵ For fear of losing their customary rights, Crown engagement applicants are instead forced to pursue their claim in the High Court if they can, even where this is not their preference.²¹⁶

207. Submission 3.3.9, p 2; submission 3.3.10, p 2

208. Submission 3.3.2, p 6

209. Submission 3.3.24, p 4

210. Document A69, pp 26–27

211. Submission 3.3.24, p 5

212. Submission 3.3.44, p 8; submission 3.3.43, p 3; submission 3.3.50, p 14; submission 3.3.2, pp 5–6

213. Submission 3.3.24, p 5; submission 3.3.50, pp 14–15

214. Document A96, p 7; submission 3.3.44, p 8; submission 3.3.43, p 3

215. Submission 3.3.1, p 4

216. Submission 3.3.6, p 16

Moreover, the Office for Treaty Settlements/Te Arawhiti has made it clear that if the Crown does decide to engage with an applicant, it expects the applicant to 'seek adjournment of their [High] Court application.'²¹⁷ Robert Willoughby of Ngāti Kuta Ki Te Rawhiti summarised the quandary that claimants are left in: '[A]pplicants need to maintain and progress their claims in the High Court while they wait to find out whether the Crown decides to engage with them, incurring costs (and more importantly, claimants paying them up front) with no prospect of full reimbursement for their costs, time and energy'. If the Crown does then agree to engage, the applicant must adjourn their High Court application, 'reducing all the cost, time and efforts to nothing in the hope of receiving something more through the alternative avenue.'²¹⁸

Claimants allege that the lack of consistency between pathways may also mean similar applications produce different outcomes, depending on which pathway they are pursued in. This possibility is exacerbated by the lack of information about how Crown engagement applications are determined, whereas High Court applications are determined transparently. Claimants express frustration that while the Crown has developed guidelines for applying the statutory tests, these were not made available to this Tribunal or to claimants.²¹⁹

Further, counsel argue that because claimants do not know exactly how Crown engagement decisions are made, some fear that Crown engagement applicants might be able to negotiate directly with the Minister over the recognition of their rights. If so, they worry that rights could be more readily recognised through Crown engagement than in the High Court.²²⁰

The possibility that the two pathways may deliver inconsistent outcomes has also contributed to the Act damaging relationships among Māori, claimants argue. Robert Willoughby claimed that '[a]ny friction created by the Crown engagement or litigation processes imposed upon us could jeopardise all existing partnerships with iwi/hapu and negatively impact our ongoing projects and initiatives which we have already invested so much of our time, resources and effort into.'²²¹ Similarly, Ngātiwai witness Mylie George said claimants considered that the two-pathway process meant '[w]e're basically forced into fighting what I assume are our whanaunga . . . It's going to waste money, it's going to waste time, it's going to damage whanaungatanga and a lot of it is avoidable.'²²²

Counsel drew attention to the Tribunal's finding in the Tamaki Makaurau Settlement Process Inquiry, where the Crown's failure to protect whanaungatanga was described as 'a great wrong' that affected Māori society at its very core.²²³ Counsel argue that in light of this and other Tribunal findings, the Crown had effectively been given notice – and thus should have known – that its flawed policy

217. Document A93(a), p 186

218. Document A93, pp 9–10

219. Transcript 4.1.2, p 41

220. Transcript 4.1.2, p 41

221. Document A93, p 11

222. Document A96, p 9

223. Submission 3.3.35, para 30

could significantly damage whanaungatanga relationships.²²⁴ They argue that the Crown has breached the Treaty by failing to develop processes and procedures that do not damage relationships between Māori.

Lack of remedy or alternatives for Crown engagement applicants

The Minister has absolute discretion to accept or decline Crown engagement with an applicant.²²⁵ If engagement is declined, the applicant may seek a High Court review of the Minister's decision. If this is unsuccessful, counsel argues that the applicant will have no other means of having their rights legally recognised, unless they also have an application lodged in the High Court pathway. Counsel submit that this breaches the Crown's Treaty obligation of good faith and 'directly prejudices Māori seeking to engage with the Crown.'²²⁶

Such applicants may still find themselves compelled to participate in the High Court proceedings of other overlapping claims to protect their interests. According to counsel this too is prejudicial. Applicants are forced to spend time and resources litigating to prevent the applications of other groups intruding on their customary rights, while unable to have their own customary rights positively recognised.

(b) Crown's position

The Crown begins by submitting that some claimants' criticisms about the relationship between the two pathways properly belong in the next stage of this inquiry.²²⁷

The Crown argues that the two pathways are intended to be separate and distinct. Their separation reflects the fact that the High Court is independent of the Crown and determines its own procedure. Given this inherent distinction between the pathways, there are therefore limits to what it is reasonable to expect the Crown to do in order to make the pathways cohere.²²⁸

However, the Crown points out that some cohesion does in fact arise by virtue of the claimants' ability to participate in either pathway, whether or not they are applicants in it themselves. For example, Crown engagement applicants can participate in High Court proceedings as interested parties, and High Court applicants can participate in the determination phase of the Crown engagement pathway as third parties.²²⁹ While the Crown concedes that an applicant who chooses to participate in both pathways must potentially invest significant time and resources, the choice is a real one – especially as funding from one pathway can be used for activities in the other.²³⁰

224. Submission 3.3.35, para 31

225. Marine and Coastal Area (Takutai Moana) Act 2011, s 95(3); submission 3.3.58, p 23

226. Document A61, pp 4–5

227. Submission 3.3.58, p 66

228. Submission 3.3.58, p 66

229. Submission 3.3.58, pp 66–67

230. Submission 3.3.58, p 67

During hearings, the Crown drew our attention to the National Dataset that officials have developed. It was launched in late 2019, after hearings closed. According to counsel, this tool is expected to ‘improve cohesion between the two pathways, by providing a consistent and transparent base level of information for all applicants.’²³¹ It will:

- ▶ map all applications for both recognition agreements and recognition orders;
- ▶ assist applicants to produce more accurate maps of their own application area; and
- ▶ create regional maps that show the spread of application areas in a particular region.²³²

In summary, the Crown considers that it has acted reasonably by facilitating cohesion between the two pathways wherever feasible, while also respecting the Act’s intention for separate and distinct pathways. The independence of the High Court requires this separation, and the Crown must thus determine its own procedures. Ultimately, the Crown contends that any lack of co-ordination or consistency between the two pathways is not sufficiently prejudicial to warrant a finding of Treaty breach.²³³

(c) Tribunal’s analysis and findings

Our task in this stage of the inquiry is not to determine why and how two separate pathways were created – that is a substantive matter for stage 2. Rather, we are concerned here with the processes the Crown has provided in each pathway: do they allow Māori to use one or both pathways to pursue and protect their rights, as the Act provides? Only by putting in place such processes can the Crown be said to have acted consistently with its Treaty duties.

In our view, this requires the Crown to ensure that the processes it provides in the two pathways are consistent and not in conflict. The Crown should also ensure that the information available to applicants about the pathways and their interaction (including the likely costs and possible outcomes in each) is sufficiently clear and comprehensive to allow them to choose the application route that suits them best. Māori should not be put in a position where uncertainty and apparent inconsistencies between the pathways mean they really have to choose to participate in both, with all the significant prejudice in terms of time and cost thereby created.

Based on the evidence before us, we agree with claimant counsel that a lack of clarity surrounds the two pathways’ interaction. In our view, the opacity of the Crown engagement pathway and its underlying policies is primarily responsible. As there is no publicly available information about the policy supporting the Crown engagement pathway, its workings remain something of a mystery to claimants. Meanwhile the High Court pathway, while not without its challenges, is nonetheless transparent. We consider that where there are two pathways but only one functions transparently, a lack of cohesion is inevitable.

231. Submission 3.3.58, pp 67–68

232. Document A131(n), pp 12–13

233. Submission 3.3.58, p 66

We note that from the introduction of the Act to the passing of the statutory deadline, the Crown had six years to devise policies for the Crown engagement pathway. Yet it did not – or, at least, it did not to a sufficient extent to ensure that applicants were properly informed. Nor has such a policy or indeed any policies for the two pathways’ cohesion been developed since the deadline.

The Crown did however develop a useful tool, the National Dataset. This is welcome. Applicants in both pathways will no doubt appreciate having access to consistent, transparent data, which should go some way towards alleviating their current frustrations about the lack of information – especially where overlapping applications are concerned.

But there is much more the Crown could have done. While we appreciate that any new legislation is bound to encounter ‘teething issues’, the length of time applicants have waited for clarity on how the two pathways will operate together (and independently, in the case of Crown engagement) is unreasonable. That information should have been readily available – preferably before applicants had to choose which pathway to apply in, and certainly in the period since.

We are also concerned by the uncoordinated pace at which applications are proceeding through the two pathways. We heard from claimants that Crown engagement applications seem to be languishing, while High Court applications are progressing more quickly (although we note that very few hearings have taken place or even been scheduled to date).²³⁴ It seems to us that this situation might also completely reverse in the future: it is highly conceivable that the progress of High Court applications will slow and Crown engagement applications gain momentum. We consider that the complexity of marine and coastal area claims, especially those involving multiple parties and interlocutories, is very likely to keep causing delays in the High Court. Moreover, if appeals are lodged challenging High Court decisions – as is probable – the delays will only worsen for High Court applicants.

Finally, we note Ms Johnston’s acknowledgement that coordinating two independent pathways is an ongoing challenge for the Crown:

I’d admit that the fact that we have two pathways is . . . making things more complicated . . . [T]hat is the challenge that the Crown faces and I suppose to some extent now the Court is facing the same thing and that’s why . . . we haven’t been able to go out and say, ‘this is how we are going to engage with you all’. [H]ow do we step through this process about making this Act work when you’ve got two pathways and many people are participating in both pathways, people have got a free choice to make about which pathway they want to engage in[?] So, yes, you’re raising valid issues, I can’t yet say what the outcome of all of that is going to be.²³⁵

We agree that the existence of two pathways does indeed represent a ‘complicated’ situation that the Crown needs to find a Treaty-compliant way to

234. Submission 3.3.1, p 4; doc A69, p16; doc A72, p10; doc A66, pp1–2

235. Transcript 4.1.2, p719

operationalise.²³⁶ As stated earlier, this means ensuring the processes it provides in the two pathways are consistent and not in conflict.

At present, we consider the Crown's processes do not fulfil this requirement. The lack of coherence between the application pathways has already caused prejudice to claimants. They have been required to choose their pathway in the face of uncertainty, insufficient information, and apparent inconsistencies. They will continue to be prejudiced for as long as policies, processes, and procedures that ensure the pathways operate coherently are lacking. As the Crown has as yet failed to put such policies in place, we find it has breached the principle of active protection.

5.4 PROCESSES FOR DEALING WITH OVERLAPPING INTERESTS

This section deals exclusively with the processes the Crown has put in place to manage overlapping interests in the takutai moana, in both pathways. It does not address the funding the Crown has provided for this purpose, which is set out in chapter 6.

Nor does this chapter address claimant allegations about the Crown's approach to overlapping interests that we consider belong more properly in the next stage of this inquiry. These include submissions that the Act provides a purely negative form of 'active protection' (by allowing interested parties to oppose others seeking recognition of their rights) and that the Crown has already decided that the presence of overlapping interests in the same area precludes applicants from meeting the statutory test to customary marine title. We will return to these matters in our report on stage 2.

(a) *Claimants' position*

Many applications made under the Act concern marine and coastal areas in which more than one group claim customary interests. Some claimants say that no policies or procedures for managing and resolving such overlapping interests across the two pathways seemingly exist. Others say that they create needless problems and tensions. Counsel for Patuharakeke, for example, submit that the Act does not allow for the resolution of overlapping interests but 'merely provides a process in which conflict and competition between overlapping interests of whanau hapū and iwi will be validated by the High Court.'²³⁷

Tensions between groups could be avoided, claimants argue, if 'application areas were defined in more traditional forms' instead of 'lines on a map' – in other words, they consider application areas should be defined according to tikanga.²³⁸ One claimant calling for a tikanga-based approach submits that '[t]raditionally, boundary lines were not the way that interests and rights were defined. . . . Who could catch fish in a certain area determined who had superior interests in that

236. Transcript 4.1.2, p 719

237. Submission 3.3.26, pp 10, 11

238. Submission 3.3.49, pp 6–7

area, not boundary lines drawn in the sand.²³⁹ Another states that because current procedures do not provide for a tikanga-based approach, they prejudice Māori by ‘forc[ing] us to individualise and segregate our interests in a pākehā or western way’.²⁴⁰

Claimants submit that the Crown’s manifestly inadequate approach to managing overlapping interests is prejudicial to Māori because it damages whanaungatanga. This is a breach of the Crown’s Treaty duty to actively protect relationships amongst Māori, they argue.²⁴¹ For example, Ngāti Takapari claimant Keatley Hopkins submits that the Crown’s approach potentially causes ‘division and tension amongst the various applicant groups, pitting whānau and hapū against one another in a fight to have their respective customary interests recognised’.²⁴²

Moreover, some groups told us they had actively avoided applying for recognition of their customary rights because they knew other groups were doing likewise in the same rohe. Riria Reuma Dolly Pohatu Stone, a claimant for Ngāti Mihiroa, told us that her hapū chose not to make an application under the Act because they wanted to avoid conflict. In her submission, filing an application would have implied ‘that we have “mana” over a particular area . . . when we know there are other Māori there too. So, we didn’t. Doing so was too whakahihi and it would have damaged our relationship with our Waimarama cousins in particular’.²⁴³

Claimants also record concerns about the Crown’s attitude to dealing with overlapping claims within the Crown engagement pathway. This was expressed in the policy criteria Te Arawhiti developed to help the Minister determine if applications should proceed to engagement. Counsel representing members of the New Zealand Māori Council drew attention to the following criteria in particular:

- a) Does the application offer an efficient and cost-effective means to investigate rights in the area (Applications which have a large area of interest and a correspondingly high number of overlapping applications require more research and evaluation on the part of ORS [Te Arawhiti], which in turn takes resources away from other applicants).
- b) Are there immediate impediments to the application, that is, are there competing claims in the same area that should be resolved before any decision to enter formal terms of engagement is made?²⁴⁴

According to counsel, these criteria show that if the Crown decides there are too many ‘complex and overlapping’ customary rights in an area, it may decide not to engage with a potential applicant.²⁴⁵ Counsel argues that the Crown’s ability to refuse engagement on this basis is prejudicial to claimants, especially as the

239. Document A129, p 4

240. Document A117, p 20

241. Submission 3.3.16, p 8; submission 3.3.3, p 3; doc A96, pp 8–9

242. Document A87, p 8

243. Document A63, para 18

244. Submission 3.3.30, p 7; doc A131, pp 14–15

245. Submission 3.3.30, p 8

complexities arising from overlapping claims reflect an issue of the Crown's own making.

Many claimants say that the process for groups wanting to assert their overlapping interests is complex, burdensome, and haphazard.²⁴⁶ First, they say applicants lack information about potential overlapping interests affecting them. Some point out that the Act 'does not set any requirements for the Crown to notify affected third parties of its decision to engage with an applicant group, which means this is up to the Crown's discretion.'²⁴⁷ They simply do not know whether successful Crown engagement applicants whose applications involve overlapping interests will notify them of the outcome. Moreover, even if they are made aware of overlapping Crown engagement applications, they have no means to engage with them.²⁴⁸ As a claimant in the Ngāti Te Wehi claimant cluster stated, 'it is still uncertain how applicant groups involved in different pathways will effectively negotiate their overlapping claims. There is currently no forum to facilitate negotiations between parties.'²⁴⁹

Meanwhile, the only way High Court applicants have been able to discover if another High Court applicant is claiming customary interests in the same area is by monitoring public notices in newspapers. Claimants Sailor Morgan and Frances Goulton describe the this as a time-consuming and unreliable exercise: 'We do not know whether we have seen all of the applications that affect our foreshore as we simply looked where we could, when we could and quite possibly others could have been advertised in other places.'²⁵⁰ And despite diligent newspaper checking, there was 'no guarantee that the application would be described in such a way that we could identify it as overlapping with our own.'²⁵¹

Claimants also submit that the timeframe within which groups with overlapping claims were expected to notify one another was too tight. Once becoming aware of an overlap, applicants had to respond with their own newspaper advertisement within 20 working days of the original advertisement being published.²⁵² This was especially difficult when they did not know exactly who had overlapping interests in their rohe.²⁵³

In sum, claimants allege that the Crown's approach to overlapping interests has had a raft of adverse consequences for Māori, including:

246. Document A47, p10; doc A70, p7

247. Document A62, p6

248. Document A87, pp6-7

249. Document A62, p6

250. Document A47, p10

251. Document A72, p9

252. Marine and Coastal Area (Takutai Moana) Act 2011, ss103, 104; transcript 4.1.2, pp129-130. The Tribunal heard evidence that some notices of appearance were filed out of time, but still allowed. The extension is not contained in the Act but appears to be an extension of the power of the High Court judge under the High Court Rules. In the case of Ngāi te Rangī, filing fees were also paid out of time. Despite this, as far as claimant Joshua Gear could ascertain, the notices were accepted and as a result Ngāi te Rangī suffered no lasting prejudice. This may not have been the case for all applicants, however.

253. Document A64, pp6-7

- ▶ ‘[S]erious issues of unfairness and injustice,’ which arise when parties in different pathways do not know the status of one another’s applications.²⁵⁴ For example, the Crown may be negotiating with a ‘certain hand selected group’ of applicants in the Crown engagement pathway, whose overlapping claims have not yet been resolved; at the same time, an affected party in the High Court pathway remains unaware and thus unable to protect their interests.²⁵⁵
- ▶ Prejudicial disparity: applicants in the Crown engagement pathway can not only participate in High Court proceedings as interested parties, but also receive funding to do so.²⁵⁶ High Court applicants do not receive funding to participate as interested parties in the Crown engagement process. This disparity ‘perpetuat[es] the divisive nature of the . . . Act.’²⁵⁷
- ▶ A lack of clarity over whether claimants can jointly apply for a shared exclusivity recognition order of a combined application area.²⁵⁸ While the Crown has raised this as an option in internal documents,²⁵⁹ it has not yet announced any decision.
- ▶ Uncertainty about the practical consequences of parties resolving their overlapping claims before their applications are heard in court, an approach which the High Court has encouraged. However, claimants argue ‘there is no certainty that what applicants negotiate amongst themselves will be workable under the . . . Act.’²⁶⁰

Claimants submit that the Crown’s inadequate policies and procedures have caused Māori significant prejudice and will continue to do so. Some counsel go further, asserting that the Crown decided to fund, and thereby facilitate, the participation of non-applicant groups as interested parties in High Court applications to deliberately undermine those applications.²⁶¹ They contend that this necessitates a Tribunal finding that the Crown has breached its Treaty obligation to actively protect Māori.

(b) Crown’s position

The Crown submits it is well aware that shared customary interests exist in the marine and coastal area.²⁶² It submits that it has consistently advised applicants to discuss their overlapping interests with other groups, in accordance with their tikanga, and seek agreement on how they can be resolved. Counsel points out that the Crown has provided funding for this purpose since 2016, and made it available

254. Document A97, p 9

255. Document A97, p 9

256. Transcript 4.1.2, p 711

257. Document A87, p 8

258. Document A61, p 9; doc A62, p 9

259. Document A131(a) pp 6, 46, 454, 494

260. However, the Tribunal did not have evidence that this was the case for all applicants: doc A64, p 7.

261. Transcript 4.1.3, p 145, submission 3.3.65, pp 3–5

262. Transcript 4.1.2, pp 617–618; submission 3.3.58, p 62

both to groups who have lodged applications under the Act and those who have not (or are not already funded).²⁶³

Counsel submits that the provision of funding demonstrates the Crown's desire to help customary interest groups resolve overlapping interests. So too do officials' efforts to attend hui that applicants have held to discuss their overlapping interests with other groups.²⁶⁴ Such actions are consistent with the Minister's assertion that 'overlapping customary interest groups could help inform decision-making and their participation in the determination of other applications would mitigate the risk of prejudice to such groups'.²⁶⁵

The Crown maintains that claimants with overlapping interests will not find their prospects jeopardised by their choice of pathway. Regardless of pathway, counsel emphasises applicants have many options for resolving their overlaps.²⁶⁶ For example, once they have discussed them with the relevant groups, applicants may:

- ▶ adjust their application areas;
- ▶ combine their applications by agreeing on who will hold any recognition order or agreement that may be made (and perhaps withdrawing others); or
- ▶ ask for independent facilitation.²⁶⁷

High Court applicants may also seek a judicial settlement conference. Crown engagement applicants may carry out further research to clarify the interests in question, or advise the Minister in writing that they support the boundaries of another group's application area.

Notwithstanding these options, the Crown acknowledges that the sheer number of overlapping claims is creating 'considerable challenges for the judiciary'²⁶⁸ and the Crown.²⁶⁹ It also recognises that the availability of Crown funding to help groups (including non-applicant groups) resolve overlapping interests needs to be made clearer.²⁷⁰

However, the Crown argues that the absence of an explicit process for managing overlapping applications in the Crown engagement pathway 'in no way indicates an intention' on its behalf 'to promote division' between or within groups. It has consistently encouraged applicants to discuss their overlapping claims with one another and resolve them wherever possible. It has provided financial assistance to facilitate this, and actively supported the process. Crown counsel rejects the claimants' submissions that it has acted inconsistently with Treaty principles.²⁷¹

Finally, counsel argues it is inappropriate for the Crown to express a firm view, at this stage, on whether the existence of overlapping interests precludes an applicant

263. Submission 3.3.58, p 62

264. Submission 3.3.58, p 63

265. Submission 3.3.58, p 24; doc A131(a), p 581

266. Submission 3.3.58, p 63

267. Submission 3.3.58, p 63

268. Submission 3.3.58, pp 64–65; Justice Collins, minute, 18 July 2018, CIV-2017–485–218

269. Transcript 4.1.2, p 719

270. Submission 3.3.58, p 28

271. Submission 3.3.58, p 65; transcript 4.1.2, pp 796–797

from satisfying the statutory test for customary marine title. This is 'a substantive interpretation question' appropriate for consideration in stage 2 of this inquiry.²⁷²

(c) Tribunal's analysis and findings

The Marine and Coastal Area Act provides for overlapping interests to be considered and resolved when applications are being decided. It is the responsibility of the Crown to provide processes in both pathways that allow parties with overlapping interests to achieve resolution.

From the evidence before us, we do not consider the Crown has done so. This seems largely because the Minister and officials initially expected relatively few Māori would apply to have their rights in the marine and coastal area recognised. As already noted, they originally anticipated that no more than 4 per cent of the country's coastline would be available for the establishment of customary marine title.²⁷³ The inevitable result has been a process that fails to adequately cater for the number of overlapping claims that ultimately eventuated.

However, we reject the allegation that the Crown's decision to fund, and thereby facilitate, the participation of non-applicant groups as interested parties in High Court applications was driven by a deliberate strategy to undermine those applications. We accept the Crown's submission that the decision was a good faith endeavour to protect the interests of groups who had chosen not to apply or who were unable to do so. We concur with the Crown that this is consistent with its Treaty obligations of partnership and active protection.

But we remain unsure that the Crown's decision to fund interested parties who are not applicants offers any real benefit to those interested parties. Customary rights can only be recognised through the pathways provided for in the Act. Therefore, while an interested party in High Court proceedings may influence the outcome of an application, doing so will not give them any customary rights of their own. At best, all the interested party will gain is a 'right by way of exclusion.'

As we discussed when examining the Crown engagement pathway (section 5.3.2), the Crown has declined to engage with most applications that involve overlapping claims. This decision is based on the Crown's view that competing claims should be resolved before the Minister makes a decision to enter formal terms of engagement.²⁷⁴ We are concerned by the consequences of this policy. First, it causes undue delay: it is complex and time-consuming for groups to resolve their overlapping interests themselves. That the Crown encourages them to do so is, in general, consistent with its Treaty obligations. But its encouragement is effectively meaningless without supporting mediation processes or decision-making guidelines.

In our view, there are obvious analogies with the approach the Crown takes to resolving overlapping interests in settlement negotiations. We note the Tribunal's *Hauraki Settlement Overlapping Claims Inquiry Report*, which was released during

272. Submission 3.3.58, p 63

273. Document A131(a), p 309; submission 3.3.8, p 13

274. Document A131(a), p 317

our deliberations, and we have come to a similar view in this aspect of our own inquiry. There, the Tribunal found that the Crown's approach to resolving overlapping interests – in the context of settlement redress negotiations – breached the Treaty. It said the Crown had a duty to actively and practically support efforts to resolve overlapping interests, including by 'facilitat[ing] consultation, information-sharing, and the use of tikanga-based resolution processes'.²⁷⁵ The Tribunal identified principles and practices it considered essential for a robust tikanga-based process, including flexibility, transparency, and timeliness.²⁷⁶ While it was not the Crown's role to design or implement such a process, the Tribunal emphasised that the Crown was responsible for 'provid[ing] funding, administrative support, access to facilitators or mediators, and more'.²⁷⁷

We have come to a similar view here and consider the Crown should do likewise for groups with overlapping interests in the marine and coastal area. The fact that it has not yet done so constitutes a breach of the principle of active protection. This breach has caused and/or will cause prejudice to Māori if not addressed.

Secondly, we heard from claimants (such as those from Motiti) who have already been declined Crown engagement on the basis of overlapping interests issues. They chose only to pursue Crown engagement when making their application and are thus now left without any means to have their customary rights recognised. This is troubling. At the same time, other groups that have a High Court application in train may have been forced down a pathway that was not their preference. We note that over 100 applicants still await the Minister's decision and remain in limbo about the impact their overlapping interests may have on their option of pathway – an issue we will return to in stage 2 of our inquiry, as it raises substantive questions about the legislation.

But it is also a matter of Crown policy and process – specifically, its lack of policy for managing overlapping claims across the two pathways. We find this a breach of the Treaty principles of active protection and partnership, as the lack of policy creates a prejudicial degree of uncertainty for applicants.

Finally, we heard many claims that the Crown's approach to overlapping interests has harmed, or will harm, relationships between whānau, hapū, and iwi. In our view, it is reasonable to assume such harm will occur, and perhaps has occurred already. Again, we take note of the recent *Hauraki Settlement Overlapping Claims Inquiry Report*, which identified instances where the Crown's approach during settlement redress negotiations had indeed damaged relationships among Māori groups, and between Māori and the Crown.²⁷⁸ We will consider the impacts on those relationships of overlapping interests in the marine and coastal area in stage 2.

275. Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report, Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), p 118

276. Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report*, pp 90–91

277. Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report*, p 90

278. Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report*, pp 93–94, 117–118

CHAPTER 6

ARE THE CROWN'S FUNDING ARRANGEMENTS SUPPORTING THE ACT TREATY-COMPLIANT?

This chapter is a counterpart to chapter 5, which examined the procedural arrangements and non-financial resourcing the Crown provides to support the Marine and Coastal Area Act. Here, we consider the funding arrangements the Crown provides for applicants seeking recognition of their customary interests under the Act.

We begin by examining funding issues common to both pathways, before looking at particular issues unique to each. This chapter also considers the funding arrangements for appeals of High Court decisions and judicial review of ministerial decisions, for overlapping customary interest groups, and, lastly, for resource consent applications. On each topic, we consider the evidence and then determine whether the Crown's actions have been Treaty-compliant – and, if not, whether claimants have been prejudiced as a result. Our findings are accompanied by recommendations or suggestions where appropriate.

6.1 GENERAL FUNDING FEATURES COMMON TO BOTH APPLICATION PATHWAYS

6.1.1 Crown's contribution towards applicants' costs

The Crown contributes 85 per cent of the total estimated costs of an application.¹ For funding purposes, the various stages of an application are broadly categorised into milestones, each carrying an 'upper funding limit' that represents 85 per cent of the actual anticipated costs for that milestone. As discussed in chapter 4, this does not mean only 85 per cent of each submitted invoice is approved for funding by the Crown. Rather, each successful invoice is paid in full until the upper funding limit representing 85 per cent for that milestone has been reached. Once met, no further funding is available for that milestone and claimants must meet the remaining costs themselves.² This is a primary issue of contention between claimants and the Crown.

1. Submission 3,3,58, pp18–19

2. Submission 3,3,58, p 41

(a) Claimants' position

Claimant counsel allege that the expectation claimants will partly fund their application is onerous, prejudicial, and in breach of the Crown's Treaty obligations of active protection.

First, claimants assert that funding arrangements such as the Crown's capped contribution are 'targeted to prioritise "cost savings and efficiencies" over the claimants' rights to protect and preserve their interests'.³ Counsel argue that in prioritising cost savings over adequately supporting claimants to progress their applications, the Crown has failed to meet its Treaty obligation to actively protect Māori.⁴

Secondly, counsel argues that the expectation claimants will contribute 15 per cent towards their application is unduly onerous and unreasonable – especially for smaller hapū and whānau, and groups who have not settled their Treaty claims. Claimants argue it is likely that many non-settled applicants will lack the means to cover the 15 per cent of costs the Crown anticipates, meaning they are unable to complete the application process.⁵ Alternatively, they may seek to limit costs where possible, risking their application being denied through poor evidence or argument. In either case, claimants' ability to access justice by seeking legal recognition of their customary interests in the takutai moana is impeded. The requirement that claimants contribute 15 per cent of costs is prejudicial and a 'barrier to their full participation' which 'disincentivises groups from pursuing their claims', witness Hohipere Williams asserted.⁶

Counsel argue that not only has the Crown implemented a funding regime that constrains claimants' ability to have their customary rights acknowledged, but the Crown has also failed to establish in the first place whether applicants have the financial means to meet the demands imposed by the regime.⁷ Again, claimants say that this failure to ascertain whether claimants are financially able to access justice is critical, and a breach of the Crown's Treaty obligation to actively protect Māori interests.

Thirdly, claimant counsel highlight the disparate degree of risk this arrangement places on each party. The Crown is completely sheltered from the prospect of escalating costs, whereas claimants will be liable for any costs beyond the 85 per cent contribution offered by the Crown. This could ultimately represent a financial burden well beyond the anticipated 15 per cent. Again, many claimants, particularly those representing smaller or unsettled groups, simply cannot meet such escalating costs. Claimants are deeply concerned about the impact this will have on their ability to see their applications through to completion. Hokimatemai Kahukiwa, a claimant representing the Koromatua hapū of Ngāti Whakaue,

3. Submission 3.3.28, p 6

4. Submission 3.3.7, p 7

5. Document A43, p 6; transcript 4.1.2, pp 515–516, 679; submission 3.3.40, p 7; doc A71, p 1

6. Document A69, p 9

7. Submission 3.3.73, p 5; submission 3.3.71, pp 5–6; submission 3.3.19, p 3; doc A71, pp 1–2; doc A131(a), p 130

expressed the common concern that Māori 'have been effectively forced to participate but may not have the resources to see our application through if the funding runs out and we are unable to make up the shortfall'.⁸ Claimants argue they are prejudiced in being exposed to this risk, and that the more amply resourced Crown has actively protected its own interests at the expense of, and rather than, the interests of Māori.

Finally, counsel argue that the prejudice resulting from setting an upper funding limit is exacerbated by the context in which claimants lodged their applications. The Act prohibited applications from being lodged after the statutory deadline, and prevented customary rights being recognised through any vehicle other than those prescribed in the Act. Claimants submit that this level of compulsion bears directly on, and aggravates, the degree of prejudice affecting applicants.⁹

(b) Crown's position

The Crown maintains that the financial contribution it makes towards applications, capped at 85 per cent of projected costs, is reasonable and consistent with its Treaty obligations.¹⁰ Counsel emphasises that the quantum of its contribution is significant and covers the vast majority of estimated costs.¹¹ The Crown also points out that a claimant may ultimately contribute less than 15 per cent, or nothing at all, should the actual cost prove less than the estimate.¹²

The Crown likens the funding available under the Marine and Coastal Area (Takutai Moana) Act to the funding it provides groups negotiating settlements for historical Treaty claims, which is likewise a contribution to the full costs.¹³ The Crown also likens it to the funding provided to applicants under the Foreshore and Seabed Act 2004.¹⁴ In the context of these funding regimes, the Crown submits that its 85 per cent contribution to costs here is 'neither unusual nor inappropriate' and is instead both consistent and reasonable.¹⁵

Furthermore, the Crown submits that the upper funding limit and funding caps within each milestone 'incentivise cost savings and efficiencies'. Applicants are more encouraged to reach particular milestones when they are aware that the funding allocated to them is finite.¹⁶ Capping financial assistance also provides certainty to the government about its projected expenditure.¹⁷

In response to claimant criticism of the adequacy of the funding caps – particularly the purported failure to distinguish between settled and non-settled

8. Document A43, p 6

9. Document A72, p 11

10. Submission 3.3.58, pp 44–45

11. Submission 3.3.58, p 41

12. Submission 3.3.58, p 41; doc B1(h), pp 2–3

13. Submission 3.3.58, p 41; doc A131(a), p 413

14. Document A131(a), p 413

15. Submission 3.3.58, p 41

16. Document A131, p 30; submission 3.3.58, p 18

17. Submission 3.3.58, p 18; doc A131(a), p 145

claimants – the Crown notes that the funding matrices for both Crown engagement and High Court applications do factor in whether a claimant has settled historical Treaty claims.¹⁸ In both matrices, this ‘supplementary indicator’ accords a higher complexity rating to unsettled applicants. This in turn contributes to their total complexity rating, which determines the funding band and associated funding available to an applicant. Higher complexity applicants who fall into higher funding bands will receive higher funding caps.¹⁹

The Crown acknowledges that the statutory deadline does have a bearing on how claimants engage with the funding regime.²⁰ However, it maintains that, despite the purported element of compulsion created by the statutory deadline, the funding caps are reasonable.

(c) Tribunal's analysis and findings

The parties' arguments and the evidence they presented require us to address two related questions. First, is it consistent with Treaty principles for the Crown to make only a contribution to the costs applicants incur in seeking recognition of the rights under the Act? If so, is it reasonable for the Crown's contribution to be 85 per cent of applicants' costs?

In our view, neither the Crown's policy of making only a partial contribution to claimant costs, nor the processes developed to implement that policy, are consistent with its obligation to actively protect Māori. On the basis of the evidence we heard, we consider the Crown decided to partially fund applications primarily on the basis of fiscal concerns, with insufficient regard for Treaty considerations. We consider that the Crown's objectives – cost saving and appropriate management of Crown funds – can be effectively achieved through other means, such as auditing and monitoring of expenditure.

Moreover, as the funding regime makes no provision for means testing, the Crown has no way of knowing whether applicants have the financial means to cover 15 per cent (or possibly more) of their application costs. By dispensing with means testing, the Crown failed to ascertain whether a 15 per cent (or more) financial burden would be an insurmountable obstacle to claimants' access to justice. The Crown should have been more mindful of this fundamental tenet of New Zealand's legal system, in addition to its own Treaty obligations to act in good faith and actively protect Māori interests.

The Crown likens the 85 per cent funding contribution to its funding for groups engaged in settlement negotiations.²¹ While the settlement process may have some similarities to the Crown engagement process under the Marine and Coastal Area Act, it is completely unlike the High Court application process. Settlement negotiations involve Māori and the Crown negotiating in good faith to settle historical claims that the Crown acted inconsistently with the principles of the Treaty. While

18. Submission 3.3.58, p25; doc B1(h), p12; doc B1(h)(i), p4; doc A44(a), p342

19. Document A131(a), p253

20. Transcript 4.1.3, pp392–394

21. Submission 3.3.58, p18

such negotiations can be challenging, they are rooted in good faith discussions and agreement being reached. The impact on Māori of funding levels being reached before the settlement is concluded is less severe than the impact on Māori making marine and coastal area applications in the High Court. A settling group still has the opportunity to continue negotiations with the Crown and has greater certainty on what redress will be provided under the settlement to meet excess costs. This is not the case in the High Court application process, which, in essence, is standard civil litigation. If the funding is exhausted in the High Court process, the applicants' ability to effectively participate, protect, and advance their position will be severely undermined. This may have a direct bearing on the court's decision – which, unlike settlement negotiations, is determined by the presiding judge, and is not negotiated and agreed. Funding exhaustion could also occur at a crucial stage, such as during the hearing, placing the claimant in an extremely vulnerable position with no certainty of outcome or ability to meet any excess costs. Such prejudice would be exacerbated by the additional costs that arise where there are overlapping claims from other groups (as is likely for most applicants).

We are aware of other funding regimes that are *not* based on a cost contribution policy (such as Legal Aid for Waitangi Tribunal proceedings) and instead provide far more comprehensive funding.²² We therefore find the Crown's comparison unconvincing. Of course, in some jurisdictions, applicants are expected to contribute to costs, as they are in the present circumstances. For example, the Crown referred us to funding arrangements under the 2004 Foreshore and Seabed Act and to Crown settlements of Treaty claims.²³ But, in regard to the marine and coastal area, the Crown has a duty of active protection to Māori of Treaty-guaranteed rights, which we consider makes the provision of full and adequate funding even more critical.

The importance of providing full funding is still greater given that the Crown's funding regime affects customary rights in a 'very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori'. As the Tribunal's report on the *Te Arawa Representative Geothermal Resource Claims* found, in such instances the Crown is obliged 'to ensure its protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected'.²⁴ The marine and coastal area is clearly one such taonga: customary rights are at stake and Māori have repeatedly shown a high interest in protecting and preserving those rights.

We therefore find the Crown is in breach of its Treaty obligations of active protection and partnership in only partially funding applications from Māori seeking legal recognition of their customary rights in the takutai moana. If not remedied, this will cause significant prejudice to applicants under the Act.

22. Detailed in the expert evidence provided to the Tribunal by Leo Watson, barrister and solicitor: doc B1.

23. Document A131(a), p 413

24. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, p 32

In light of the Treaty breaches and resulting prejudice we have identified in respect of the Crown providing only partial funding, we recommend that the Crown instead cover all reasonable costs that claimants incur in pursuing applications under the Act, regardless of pathway. This would mean the Crown abandoning its present policy of covering only 85 per cent of costs and instead fully funding:

- ▶ all costs currently funded under the model – such as hearing costs, which are inadequately covered at present;
- ▶ costs not currently funded under the model – such as the cost of judicially reviewing ministerial decisions on customary rights in the Crown engagement pathway; and
- ▶ any GST payable by claimants.

This overarching recommendation also relates to other aspects of the Crown's funding regime noted elsewhere in this chapter.

6.1.2 Retrospective and delayed funding reimbursements, and the minimum funding threshold

The Act's funding regime for applicants operates primarily on the basis of reimbursement. Applicants in both pathways receive retrospective financial assistance,²⁵ and can only seek reimbursement once they have expended at least \$3,000 (the minimum funding threshold).²⁶

(a) Claimants' position

Claimant counsel submits that the retrospective nature of the Act's funding regime leaves claimants continually 'on the backfoot'²⁷ and beholden to others.²⁸ Claimants for Ngāti Kahu o Torongare described the effect on their hapū:

We struggled to find the thousands of dollars to pay for the upfront hui costs. We had to get loans from people, from banks, from loan sharks, because the applicant doesn't have that sort of income. So that's what we had to do. Become a debtor to someone for something. Borrowing asking for loans, begging people that rather than pay cash upfront we could repay them once monies were sent through from OTS. . . .

This put pressure and a real financial burden on my whanau. We shouldn't personally have had to carry such costs simply to be recognised as holding rights we know we have.²⁹

Claimants contend that the prejudice created by the primarily retrospective funding regime has been further exacerbated by the existence of a minimum funding threshold. Claimants lauded the Crown's downward adjustments of the

25. Document A131, p 32

26. Document A131, p 49

27. Document A107, p 11

28. Submission 3.3.12, pp 7–8

29. Document A128, pp 5–6

minimum funding threshold from \$50,000 (initially reduced to \$5,000 and then to the current threshold of \$3,000). However, they submit that even this minimum funding threshold has already caused significant hardship to applicants who lack the financial resources to easily float such a sum.³⁰ For many Māori, particularly in the far north, this remains a major impediment.³¹ According to claimant counsel, groups like those in the north who have yet to receive settlement funding are particularly prejudiced.³²

Lastly, claimants describe protracted delays in receiving reimbursement, which they claim have been highly prejudicial to their hapū and whānau, and wholly unreasonable. Te Ringahuaia Hata, a claimant representing Ngāti Irapuāia, described how the funding processes for both the High Court and Crown engagement pathways are 'bureaucratic overkill that bottle-necks access to funding for smaller groups such as hapū'.³³ Amber Rakuraku-Rosieur of Ngāti Ira recalled the '[h]undreds of emails and tens of phone calls over six months' it took before the hapū received the reimbursement they needed to settle outstanding accounts for legal and research work already undertaken. She described the delay as 'absolutely unacceptable' and bordering on abuse.³⁴ Waimarie Bruce Senior and Waimarie Bruce Junior of Ngāti Kahu o Torongare painted a stark picture of the effect of seemingly endless reimbursement delays:

We used the letter that OTS originally sent, from the legal counsel, that showed the approval of funding, so that it would be security to have accounts set up – it worked for a little while, but the seven days for reimbursement became weeks, then more weeks, then a month and then beyond a joke. So there was stop credits, cancelled accounts and us personally paying for the costs and praying that it would be returned from OTS. Credibility was lost with stores and the stereotypical regard of being another "Maori organisation, ripping us off" was more than degrading – so I Waimarie junior, personally made sure things were being paid in the end, so our already discredited name wouldn't go any further.³⁵

Witness Yvette Rigby, a lawyer who managed the funding applications for various marine and coastal area claimants while working for Phoenix Law, spoke about the lengthy delays she encountered. In one case, almost an entire year passed from when she submitted an invoice on behalf of a client and when she received payment. Ms Rigby notes that the Crown's vague funding requirements (which seem to be in a constant state of flux) were a key contributor to the slow progress of applications. In her view, the protracted delays

30. Document A69, p 8; doc A96, pp 3–4

31. Transcript 4.1.2, p 401

32. Document A71, p 1

33. Document A107, p 11

34. Document A110, p 6

35. Document A128, pp 5–6

undermined the applicants' ability to properly participate before the High Court. They [the applicants] needed to appear and file evidence in various timetabling and interlocutory matters as directed by the High Court. However, they could not participate without funding. The delays have resulted in serious interferences with their ability to properly participate in the processes which have been established by the Crown.³⁶

Counsel for various claimants also described how '[t]he administration and clerical overhead required to meet the demands of the . . . unit is grossly disproportionate to the sums involved', arguing that 'the processes of the . . . unit is an impediment to payment and a mechanism by which the real value of the payment is eroded'.³⁷

Counsel submit that the prejudicial impacts of the retrospective payments – coupled with the unreasonable delays in reimbursement, and exacerbated by the administrative burden of the funding regime and the minimum funding threshold – are significant and ongoing. As such, they submit that the Crown's policy of retrospectively funding applicants' costs is inconsistent with its Treaty obligation to actively protect Māori.

(b) Crown's position

The Crown submits that it has acted reasonably and in good faith in providing funding to applicants, and that neither the retrospective nature of the funding regime nor the minimum funding threshold are inconsistent with its Treaty obligations of active protection.

First, Crown witness Ms Johnston highlights that it is common practice in the public sector to develop a funding policy that retrospectively reimburses applicants for costs incurred.³⁸ The Crown cites the expert evidence of Leo Watson, who in his review of four financial assistance regimes available to Māori litigants, noted that all four featured this practice.³⁹ The Crown submits that retrospective reimbursement is thus consistent with prudent financial management, as it ensures that 'funds are spent in line with the Crown's guidelines in a measured and accountable manner'.⁴⁰

Furthermore, the Crown notes that it is possible for applicants to provide Te Arawhiti with invoices as soon as work has been completed, and seek a release of funding to pay the invoice.⁴¹ Thus '[p]ayment by way of reimbursement does not, contrary to some claimants' suggestion, necessarily require applicants to pay costs in advance from their own funds'.⁴² Ms Johnston elaborates further on how the financial burden on applicants can be mitigated, noting that applicants could

36. Document A99, pp 3, 5

37. Submission 3.3.5, p 6

38. Document A131, pp 48–49

39. Document B1(h)(i), p 10; submission 3.3.58, p 40

40. Submission 3.3.58, pp 19, 39; doc A131(a), pp 243, p 635

41. Submission 3.3.58, pp 19, 40; doc A131(a), pp 432–437

42. Submission 3.3.58, p 40

apply for advance funding if circumstances warranted and (with the applicant's agreement) Te Arawhiti can pay the service provider directly.⁴³

In response to claimants' criticisms that the Crown has set the minimum reimbursement threshold prejudicially high, the Crown submits it had acted reasonably and shown good faith by lowering it twice (in 2016 and 2017–18). Counsel reiterates that on both occasions, the aim was to assist hapū and whānau groups in particular, and to ease the process for groups with limited resources.⁴⁴

Lastly, the Crown submits that the average time for processing reimbursement requests is manifestly reasonable.⁴⁵ Ms Johnston submits that from the date Te Arawhiti receives the information it requires to process a request, the average processing time is 12.2 working days for Crown engagement applicants and 11.8 working days for High Court applicants.⁴⁶

(c) Tribunal's analysis and findings

In our view, it is reasonable for the Crown to have implemented a policy that (primarily) reimburses applicants' costs retrospectively. Retrospective payment, as a principle, does not breach the Treaty principles of active protection and partnership. As the evidence has shown, retrospective payment is a common feature of other funding regimes Māori litigants might access. These include the Crown Forestry Rental Trust regime, funding provided under the Legal Services Act 2011 (both for Waitangi Tribunal claimants and for civil legal aid in the High Court and appellate jurisdictions) and under the Te Ture Whenua Māori Act 1993 (for special aid in the Māori Land Court and Māori Appellate Court).⁴⁷

In our view, the real difficulty claimants face is not so much the retrospective nature of the funding, as the length of the delays that so often accompany funding reimbursements. We consider that this is where the Crown risks Treaty breach: it can only meet its obligation of active protection by reimbursing applicants without unreasonable delay.

The Crown's evidence indicates that average reimbursement processing times are 12.2 and 11.8 working days (for Crown engagement and High Court applicants respectively).⁴⁸ However, we note that these figures only reflect the processing time *from the date Te Arawhiti is satisfied it has received all the necessary information*. Claimants and their counsel told us that these timeframes do not accurately reflect their experience of the reimbursement process. They said that calculating the processing time from the date the applicant first submits the application would give us a truer picture. Doing so would certainly inflate the average processing times and is likely to more accurately represent the typical experience of claimants and their counsel.

43. Transcript 4.1.2, p 609–610; doc A131, p 32; doc A131(a), pp 432, 437

44. Submission 3.3.58, p 33

45. Submission 3.3.58, pp 55–56

46. Document A131, p 45

47. Submission 3.3.58, pp 39–40

48. Submission 3.3.58, pp 55–56

However, we are not convinced of the fairness of applying this metric either. We did not hear sufficient evidence to indicate where responsibility lies for the delays in applicants supplying the correct information. Is it generally the fault of the Crown, either because it fails to provide clear, consistent, and accessible criteria or because it is too slow to process reimbursements even when applicants provide the right information? Or are the applicants responsible? The evidence we do have certainly indicates that the Crown encountered a number of teething problems during the early stages of processing funding requests. New policies and processes, staff turn-over, and embedding new systems all seem to have been regular occurrences. All, no doubt, contributed to the Crown providing incorrect or incomplete information to applicants seeking reimbursement and also slowed down the processing of reimbursement claims.

Despite that, we do not have sufficiently cogent evidence before us to determine if the overall delays were the result of fault by the Crown or claimants. Thus we make no finding of Treaty breach on this matter.

Nonetheless, we are concerned by the many claimant accounts of significant delays. For any reimbursement system to function well, it needs to be made clear what information applicants need to supply, and in what form. This information should be accessible, detailed, and consistent across time. Without it, reimbursement delays are inevitable. Further, implementing a reimbursement system of this kind could also reduce much of the 'administrative overhead' that claimants allege is required to meet the marine and coastal area funding regime's requirements.

We do cautiously note that the delays with reimbursements seem to be reducing as both claimants and Te Arawhiti become more familiar with this new and previously untested funding regime. We anticipate further improvements in this respect.

We also acknowledge the Crown's revisions of the minimum funding threshold – first from \$50,000 to \$5,000, and then to \$3,000. These improvements are no doubt welcome to applicants. However, we accept the evidence we heard from claimants about the difficulties even this reduced threshold has caused; we consider that \$3,000 is still a significant and burdensome sum for many applicants under the Act.

Because of our lingering concerns about reimbursement delays and the funding threshold, we suggest the Crown improve this area of the Act's funding regime 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 (something we return to elsewhere in this chapter). That scheme allows the claimant (or lawyer) to specify the exact work and cost that they intend to commission over a prescribed period; the work is not commissioned until the legal services commissioner approves the estimate of costs.⁴⁹ By contrast, when an applicant under the Marine and Coastal Area (Takutai Moana) Act determines they need a certain service to progress their application (such as legal work for

49. The Legal Services Act 2011, s71

an interlocutory, or historical research), they consult the relevant funding matrix to confirm that funding is available to cover that cost; if so, they commission the work. They must proceed on the assumption that funding will be authorised without actually knowing for certain.⁵⁰

We consider the Legal Aid model, where applicants seek authority for specific work in advance, is superior to the current marine and coastal area funding arrangements in terms of the clarity and certainty it offers applicants.

6.1.3 Funding not available to pursue both pathways simultaneously

As we have outlined earlier, financial assistance is not available for applicants to pursue both pathways under the Act simultaneously. While applicants who have applications in both can move between pathways, the financial assistance they receive in the new pathway will depend on what milestones/tasks have already been reached, and what reimbursements have already been received, in the other pathway.⁵¹

(a) Claimants' position

Counsel argue that parties should be able to progress their applications in both pathways simultaneously, and be funded to do so.⁵²

(b) Crown's position

The Crown submits that this policy is designed to prevent any duplication of funding for the same activities. It also submits that limiting applicants' funding access to one pathway at a time does not constrain applicants from moving between pathways.⁵³ Moreover, the Crown points out that work done in one pathway may be used in another – for example, a Crown engagement applicant with funding could use historical and traditional research prepared for Crown engagement when participating as an interested party in a High Court proceeding.⁵⁴

(c) Tribunal's analysis and findings

We acknowledge the reasonableness of the Crown's objective; to prevent the unnecessary funding of tasks that have already been funded in another pathway. However, the Act promises Māori options and the ability to choose either or both pathways to suit their circumstances. While it is reasonable for the Crown to avoid unnecessary duplication of funding for the same work, the means by which it does so must also be Treaty-compliant. Those means must not unreasonably undermine or create barriers for applicants seeking to use the Act to protect their rights. Otherwise, the Crown would be breaching the Treaty principles of partnership and active protection.

50. Submission 3.3.58, pp 59–61

51. Submission 3.3.58, pp 19–20

52. Submission 3.3.26, pp 7, 9

53. Submission 3.3.58, pp 19–20

54. Submission 3.3.58, p 67

In our view, other alternatives are available to the Crown to achieve its objective which are preferable to limiting applicants' ability to pursue both pathways simultaneously. The alternatives include close auditing and monitoring, and flexible reviews of grants. Moreover, we consider the Crown's argument that its current approach does not constrain applicants from moving between pathways is somewhat disingenuous. High Court applicants wanting to move to the Crown engagement pathway must first adjourn their Court application. Doing so is far from easy, for several reasons. An adjournment is only granted at the discretion of the High Court judge. Where granted, an adjournment is usually for a specific period or applies to a certain event. An adjournment 'sine die' (indefinite) is increasingly rare in modern civil litigation. Moreover, we note that the High Court has now adopted a grouped, regional approach to addressing marine and coastal area applications. The Court may thus be more reluctant to grant an adjournment as doing so may delay the High Court applications of other applicants in the same region.

We also note that because the Minister has so far made very few decisions about whether to engage with Crown engagement applicants, applicants are being forced into the High Court pathway even if they would prefer to progress their application directly with the Crown. In a recent minute, Justice Churchman stated that the 'single biggest contributor to the relative lack of progress' in the High Court pathway was that most applicants would clearly prefer the option of Crown engagement over litigation.⁵⁵ We consider that the Crown's decision to refuse to fund applications in both pathways simultaneously contributes to this problem.

Despite our concerns, and despite the availability of alternative options for avoiding duplicate funding, we consider that the Crown's refusal to simultaneously fund both application pathways does not amount to a breach of the Treaty principle of active protection. The real problem – and the Treaty breach – stems from the Crown's ongoing failure to set comprehensive and clear policy to guide the Crown engagement pathway (discussed above in section 5.3.3).

6.1.4 Milestones and tasks in the funding matrices

The marine and coastal area funding matrices delineate the various phases that an application will progress through in each pathway. These phases, or 'milestones', are then further sub-categorised into 'tasks' which will likely need to be undertaken to progress the application. Funding caps are allocated to both the individual tasks and the overall milestone. Applications that Te Arawhiti has assessed as more complex receive higher funding allocations for each task and milestone.

(a) Claimants' position

Claimant counsel submit that the milestones and tasks, and their accompanying funding caps, are inadequate and inflexible. They submit that these failings warrant a finding that the Crown has breached its Treaty obligation to act reasonably and in good faith with Māori, and to actively protect their interests.

55. Justice Churchman, minute 2, 25 July 2019 (re Case Management Conferences 2019), para 9

First, the claimants argue that the task and milestone definitions are unclear, which creates uncertainty for applicants about whether work will be funded and under which milestone.⁵⁶ Claimant counsel also submit that the inadequacy of the milestones, tasks, and caps can be attributed to the flawed design of the Crown's funding policy and its subsequent revisions. They argue that the Crown:

- ▶ significantly underestimated the number of marine and coastal area applications that would ultimately be lodged,⁵⁷ resulting in insufficient funding caps for certain tasks. Claimants argue that the funding caps for legal services, including hearing time costs and interlocutory costs, are especially inadequate.⁵⁸
- ▶ has not been able to illustrate or justify how it estimated the actual and reasonable costs for activities set out in the original 2013 funding matrices.⁵⁹
- ▶ reduced the original funding matrices in 2016 on the basis of insufficient information. The Crown's revisions were informed by the real costs of only a small handful of applicants, whose application areas (before the statutory deadline) were not overlapped to any great extent.⁶⁰
- ▶ approved revisions to the funding policy in 2016 on the basis of mistaken advice from officials; they advised that overall funding would increase, when in fact it significantly decreased (by 25 per cent).⁶¹

Referring specifically to the funding caps attached to the milestones and tasks, claimants submit that many are inadequate and unfit for purpose.⁶² Claimants drew our attention to the 'public notice' task within the 'notification' milestone of the High Court matrix to illustrate the inadequacy of this particular funding cap. Statutorily mandated, this task requires High Court applicants to give public notice of their application 'not later than 20 working days' after filing it.⁶³ The funding cap is \$1,000, regardless of the application's complexity rating. Angeline Greensill, a claimant in the Pomare Hamilton consolidated claim, told us this was plainly inadequate: the notice her hapū placed cost \$3,215.⁶⁴ Other claimants submit that they felt compelled to advertise in both regional and national newspapers to ensure their application was properly publicised, but the cost of doing so exceeded the funding provided.⁶⁵ They argue that the Crown's failure to adequately fund such compulsory tasks required under the Act is prejudicial to applicants.

Claimants also argue that the inflexibility of the milestone funding caps exacerbates an already flawed funding regime, with prejudicial results, and limits

56. Transcript 4.1.2, p 216

57. Document A131, pp 37–38; doc A131(n), pp 40–41; doc A131(a), p 583

58. Transcript 4.1.2, pp 62–63, 496–497; submission 3.3.55, pp 6–7

59. Transcript 4.1.2, pp 692–693, 723–724

60. Transcript 4.1.2, pp 805–807; submission 3.3.32, para 31; submission 3.3.53, p 10

61. Submission 3.3.53, pp 25–26. While Ms Johnston concedes this error, no evidence was presented that Ministers have been, or will be, advised of this mistake.

62. Submission 3.3.24, p 4

63. Marine and Coastal Area (Takutai Moana) Act 2011, s 103

64. Document A60, pp 6–7

65. Document A44, p 7; transcript 4.1.2, p 865

their ability to determine how best to spend their funding. Counsel submit that the funding model is ‘straight-jacketed to abstract conceptions of process’⁶⁶ and, when compared to analogous funding regimes, overly rigid. 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 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’.⁶⁷

Claimants contend that they are also prejudiced by the already insufficient caps being stretched to accommodate activities not originally contemplated for that milestone. Several claimants gave the example of mapping. They say that while this is crucial to their applications, there is no specific provision for it under the prehearing/evidence gathering milestone of the High Court funding matrix.⁶⁸ Although the Crown’s submissions clarify that funding is in fact available for mapping (in the ‘research’ and ‘traditional evidence gathering’ task allocations of the prehearing/evidence gathering milestone),⁶⁹ to applicants this seems like an afterthought. Counsel submit that it is neither acceptable nor Treaty-compliant for the Crown to clarify these issues at such a late stage, more than two years since the passing of the statutory deadline.⁷⁰ Claimants argue it also reduces the real value of funding available for the tasks the milestone was originally designed to cover.⁷¹

In some instances, funding for tasks is entirely non-existent, claimants submit. For example, the High Court matrix provides no funding for counsel to attend case management conferences.⁷² Nor is there any funding in the ‘Appointment’ phase for groups to maintain their mandate.⁷³ Counsel submit it is wholly inadequate and prejudicial for the funding matrix to completely omit funding for tasks such as these.

(b) Crown’s position

The Crown maintains that it developed the milestones, tasks, and caps in the funding matrices on the basis of available information, and it was reasonable for it to do so. It acknowledges that it did not anticipate the number of High Court

66. Submission 3.3.24, p 4

67. Document B1, p 4

68. Transcript 4.1.2, p 198; doc A66, p 4

69. Submission 3.3.58, p 29. The Crown and Ms Johnston acknowledge that this needs to be made clearer.

70. Submission 3.3.63, p 5

71. Submission 3.3.74, p 9

72. Document A44, pp 12–13

73. Document A76, pp 10–11

and Crown engagement applications that were ultimately made.⁷⁴ However, counsel submits that it is unreasonable for applicants to claim, with the benefit of hindsight, that the Crown should have anticipated a further 200 or so High Court applications and a further 300 or so Crown engagement applications before the statutory deadline closed.⁷⁵

The Crown also argues that the revisions it made to the funding matrices in 2013 and 2016 were reasonable, given that the Act had been in force for five years and only minimal applications had been received. After the statutory deadline passed, it was reasonable to maintain the funding policy's milestone and task caps until it became apparent that adjustments were needed. The Crown reiterates that it was initially uncertain what impact the high numbers of applications would have on the likely costs an applicant would incur in progressing an application.⁷⁶

Crown counsel also highlight that the matrices do have some flexibility – Te Arawhiti officials can, within a milestone, move unspent funding from one task to another to alleviate pressure.⁷⁷ Moreover, if an applicant exhausts the funding available to them for a specific milestone, counsel submits that it is possible for the Minister to approve additional funding. This may be done by transferring unspent allocations from another milestone. Counsel confirms that officials are currently developing policy to guide ministerial decisions on whether to approve such additional funding.⁷⁸

The Crown rejects claimants' submission that the current appropriation is insufficient, noting that expenditure to date is within the total funding allocation. Ms Johnston stated further:

if we look at the total allocation of money and the . . . funding at the moment, and we look at how that has been spent at the moment and we look at the flexibility that officials have to address that, and we look at the fact that we have agreed to have a review. I do not think yet, we can say there is insufficient money.⁷⁹

The Crown does acknowledge, however, that the allocation for legal advice and court fees appears to be coming under mounting pressure.⁸⁰ The Crown also acknowledges that the High Court matrix does not refer to the payment of real court fees, instead combining legal advice and court fees into one task.⁸¹ Ms Johnston clarifies in her evidence that funding will reflect the real court fees paid.

Finally, Crown counsel advises that in light of the concerns raised by claimants – particularly about the 'building pressure on legal spend', and the need for

74. Transcript 4.1.2, p 602

75. Submission 3.3.58, pp 36–37

76. Submission 3.3.58, p 37; transcript 4.1.2, p 602

77. Submission 3.3.58, pp 38–39

78. Submission 3.3.58, p 28; transcript 4.1.2, p 608

79. Transcript 4.1.2, pp 607–608, 800

80. Document A131(f), p 3; submission 3.3.58, p 38

81. Submission 3.3.58, pp 38–39

more clarity about the actual costs in the High Court – Te Arawhiti has sought ministerial approval for a full review of the funding regime.⁸²

At the time of writing this report, the Crown has filed two further memoranda updating the Tribunal on this proposal. The first advised that ministers have agreed to a full review, and are awaiting more information from Te Arawhiti, including:

- ▶ terms of reference for the review;
- ▶ a detailed engagement plan, including the details of any reference group proposed; and
- ▶ a detailed discussion document, once initial options for public consultation have been developed.

The Crown also advised that Te Arawhiti intended to consult with all the applicant groups for feedback, to inform the development of the funding review's terms of reference.⁸³

The Crown's second and latest memorandum advises that Te Arawhiti has sent all applicants under the Act a 'pānui and accompanying document pack providing information relating to the funding review and a draft Crown engagement strategy'.⁸⁴

(c) Tribunal's analysis and findings

In assessing the adequacy of the milestones and tasks within the Crown's funding matrices, we recognise that the Crown has the right to determine how to provide funding, including the use of pre-determined tasks and capped matrices as it has done here.

However, this right is constrained by the Crown's duty to actively protect Māori interests. We consider that this duty requires the Crown to ensure claimants have adequate funding to pursue and protect their rights. This is in line with our overarching recommendation that the Crown should fund all reasonable costs to enable claimants to pursue their applications under either pathway. Here, the Crown's revisions to the funding matrices cause us some concern. We consider that the 2013 matrices were based on data that was not especially robust and when scrutinised, could not be explained. Furthermore, we are not convinced that the revisions of the matrices in 2016 took sufficient account of Treaty principles – they could be seen more as an exercise in cost-cutting.

One way the Crown can ensure its funding arrangements do actively protect Māori interests is by making the funding tasks and matrices sufficiently flexible to provide for the unknown. The regime supporting the Act – which is untested legislation operating in uncharted waters – must be able to accommodate issues that have not yet arisen or been adequately prepared for. The fact that Te Arawhiti staff can transfer funding between tasks within the same milestone is a promising start: this flexibility is important.

82. Submission 3.3.58, p 39; transcript 4.1.2, p 603

83. Memorandum 3.2.139, p 1

84. Memorandum 3.2.189, p 1

But a similar degree of flexibility must also be built into the milestones themselves. Currently, their flexibility is limited – the Minister's approval is required to transfer funding from previous or future milestones into the current milestone to alleviate pressure. Ms Johnston advises that this is partly to 'prevent applicants from spending their entire financial allocations too early'.⁸⁵ The aim is reasonable, but we question whether it is achieved by preventing applicants from accessing unused funds from previous milestones. Allowing them to do so seems an expedient means of increasing flexibility for all but the first milestone, without impinging on the ability of applicants to fund their claims to completion. Another reason to make the matrices more flexible is the impracticality of requiring ministerial approval for funding transfers when there are so many marine and coastal area applications. It is also unclear what criteria would guide the Minister's decision on such issues, as Te Arawhiti is still formulating policy in this area.⁸⁶

We agree with the claimants that more consideration should have been given to amending the Legal Services Act to accommodate marine and coastal area applications. Such a move would not have solved all the funding issues that have been raised. But at least it would have put the funding arrangements in the hands of an experienced agency that is both familiar with applying legal aid policies and sufficiently flexible to react to the specific steps required in a proceeding. Instead, the Crown chose to charge a new agency with the task of trying to guess what those steps might be.

We also concur with claimants' criticisms of tasks within the matrices, some of which are capped prejudicially low, while others were not listed for funding at all. As an example, many applicants referred to the \$1,000 funding cap for formally notifying applications, saying it was not sufficiently funded to enable comprehensive notification.⁸⁷ This example is worth examining more closely. Generally, when High Court proceedings are filed, personal service is required on those parties affected by the application. The Court can direct substituted service by way of newspaper notice, but in most cases that is the exception to the rule.⁸⁸ The Act is quite unconventional, as it requires direct service on local authorities and the Crown, but only public notice for others (including Māori) who are affected by the application.

The \$1,000 limit is based on the cost of 'a single column ad in a local newspaper'.⁸⁹ In order to come within this limit, applicants are discouraged from placing more expensive, but more effective, detailed notices which are widely circulated and visually prominent. The Tribunal also heard evidence that this sum did not adequately cover placing notices in both national and local newspapers, as several claimants chose to do.⁹⁰ By not sufficiently funding national and local

85. Document A131, p 33

86. Submission 3.3.58, p 28

87. Document A60, pp 6-7; doc A44, p 7

88. High Court Rules 2016, subpart 14, rules 5.70, 5.71

89. Transcript 4.1.2, pp 863-865

90. Document A44, p 7

advertising, the likelihood that other affected Māori would see the notice in time and have sufficient opportunity to respond was diminished.

We consider therefore that the low funding cap discouraged comprehensive notification, despite full and proper notification being a crucial tenet of the principles of natural justice. This is particularly important in the context of this Act's regime, where notices of proceedings were personally served on (only) some parties, such as local authorities and the Crown. The cap prejudiced Māori.

To return to the task and milestone caps in general, the Crown has effectively conceded they are inadequate in some respects.⁹¹ Crown counsel described how some significant costs have been retrospectively accommodated into existing milestones and some original funding caps amended (such as those for parties to oppose overlapping applications, and for notification expenses).⁹² We consider this admission indicates the insufficiency of those particular milestones: the quantum of funding initially deemed necessary for one task has been reduced by the addition of another task which does not carry with it any additional funding. In our view, the Crown has also conceded the insufficiency of (and consequently amended) the original funding caps for parties to oppose overlapping applications, and for notification expenses.

We therefore find, on balance, the funding caps of the milestones and tasks set out in the funding matrices are broadly inadequate. Many milestones and tasks were set too low initially or revised down. Additional tasks which were not initially provided for have been retrospectively accommodated into existing milestones without any extra funding being provided. The funding caps are not sufficiently flexible to accommodate new and untested legislation and procedures. In many cases, it is clear that without amendment, claimants will suffer further prejudice as a result of the current caps' insufficiency. We conclude that the Crown has breached its Treaty obligations to act reasonably and in good faith with Māori, and to actively protect their interests.

We also emphasise our overarching recommendation that the Crown fund all reasonable costs to pursue applications under either pathway.

6.1.5 The application of GST to funding

(a) Claimants' position

Counsel contends that the marine and coastal area funding regime is unclear in its treatment of GST, and this is prejudicial to claimants.

Claimants submit that funding is most accurately defined as:

not attract[ing] GST. Therefore the contribution the Crown makes is 85 per cent of an applicant's costs inclusive of GST. Where an invoice includes GST, the contribution is 73.91 per cent of actual costs, as any GST paid on an invoice is not kept by the invoice but must be passed on to the Inland Revenue Department.⁹³

91. Document 3.3.58, p 28; transcript 4.1.2, pp 787–789, 810

92. Transcript 4.1.3, pp 355–360

93. Submission 3.3.55, p 5

In their submission, this arrangement indicates that the Crown 'does not account for, anticipate or cover the GST costs which will accrue to applicants when they contract professionals to complete work to assist them with their applications, leaving them accountable for an additional 15 per cent of those costs'.⁹⁴

Counsel maintains that the Crown continues to misunderstand the impact of GST on claimants,⁹⁵ and especially dispute the Crown's assertion that it makes an 85 per cent contribution to applicants' total costs. Claimants say that while the Crown's contribution reflects 85 per cent of the total cost an *applicant* faces, the cost to the *Crown* is in fact reduced to a 74 per cent contribution through the mechanism of GST. This is because a fraction ($\frac{3}{23}$) of every Crown contribution ultimately returns to the Crown through Inland Revenue.⁹⁶ Thus, claimants submit, the 85 per cent contribution figure cited by the Crown misleadingly portrays (and inflates) the reality of the Crown's expenditures.

Finally, counsel point out that, even at the time of this inquiry, the Crown needed to seek clarification from the Department of Inland Revenue on whether funding was inclusive or exclusive of GST, six years after implementing the marine and coastal area funding regime.⁹⁷ They submit that such relatively basic information, 'fundamental to setting the fiscal parameters of the scheme',⁹⁸ should have been clarified as the regime was being developed; clearly it was not. Counsel allege that the lack of clarity over GST is prejudicial to claimants.

(b) Crown's position

In response to claimant submissions, the Crown submits that the funding does not attract GST.⁹⁹ In written responses to claimant counsel's questions, Ms Johnston also advises that '[t]herefore, the contribution the Crown makes is 85 per cent of an applicant's costs, not 74 per cent as suggested'.¹⁰⁰

(c) Tribunal's analysis and findings

In our view, a Treaty-compliant funding regime would be one in which the funding provided by the Crown to applicants included payment of GST. This is consistent with the overarching recommendation we have already expressed in this chapter: the Crown should cover all reasonable costs that claimants incur in pursuing applications under the Act.

However, the evidence we heard on the payment of GST was not sufficiently clear to support any findings on Treaty breach. We accept the claimants' arguments that this lack of clarity around GST has added to their general confusion over the funding regime. The Tribunal also appreciates the inherent complexity of GST, which was not helped by the parties' unusual terminology about funding

94. Submission 3.3.65, p 2

95. Submission 3.3.55, p 5

96. Submission 3.3.55, para 22

97. Transcript 4.1.2, pp 604, 828–829

98. Submission 3.3.55, p 5

99. Submission 3.3.58, p 28; doc A131(n), p 9

100. Submission 3.3.55, p 5

‘attracting’ GST. Because of the confusion arising from differing perceptions of the GST impact and the unhelpful use of the phrase ‘attracting GST’, we do not consider the Crown’s decision to seek further expert clarification of GST matters during this inquiry reflected a failure to understand its own regime.

In any event, whether the payment of GST is best characterised from the financial perspective of the claimants or the Crown is immaterial; it is only an issue in a funding scheme where applications are not fully funded. We therefore include the payment of GST in our overarching recommendation on funding matters – that the Crown cover all reasonable costs that claimants incur in pursuing applications under the Act (see section 6.1.1(c) above).

6.1.6 Funding for claimants to establish and maintain a mandate

(a) Claimants’ position

Establishing a mandate

Claimants submit that inadequate funding is available to support applicant groups in obtaining the mandates they need to make applications under the Act.¹⁰¹ They also allege the provision of this funding is inconsistent across the two pathways. Within the Crown engagement pathway, groups must demonstrate a mandate before they enter into terms of engagement with the Crown.¹⁰² However, no funding of any kind is available until these groups enter terms of engagement with the Crown, which leaves them in a financial quandary.¹⁰³ In contrast, applicants in the High Court pathway do not have to meet any mandate test to bring a claim, and yet they are eligible for funding immediately upon filing their application.¹⁰⁴

Counsel conclude that claimants in the Crown engagement pathway are prejudiced by the inadequate funding matrix, which does not provide funding in a timely manner and – in the case of applicants the Minister decides not to engage with – forces them to bear the costs of gaining the mandate. It is also prejudicial when compared to the relative ease with which High Court applicants can gain access to funds for establishing mandate, despite the lack of any explicit requirement that they do so.

Counsel submit that the Crown has thus breached its obligation to actively protect the interests of Māori by putting in place such prejudicial and inconsistent funding arrangements.¹⁰⁵

Maintaining a mandate

The claimants differed in their views of how, and how often, they needed to actively maintain their mandate to advance their group’s application under the Act. But many considered that the applicants were bound by tikanga to report

101. Document A64, pp 5–6

102. Document A131, p 17

103. Submission 3.3.48, p 4

104. Submission 3.3.48, p 5

105. Submission 3.3.24, p 5, doc A64, p 4–5; doc A91, pp 5–6

on their progress (and other matters) to their constituent whānau, hapū, or iwi at annual hui.

Claimant Rowan Tautari of Te Whakapiko told us that because regular mandate maintenance was important to her hapū, she specifically sought confirmation from Te Arawhiti that there would be funding for annual hapū hui where this could take place. She suggested the 'Appointment' milestone could be used for this purpose.¹⁰⁶ While Te Arawhiti initially considered this acceptable, it later advised that annual hui were not necessary and could not be covered by the 'appointment' milestone.¹⁰⁷ Counsel submit that, by failing to provide financial assistance for groups to maintain their mandates, the Crown's funding policy is inadequate and prejudicial to applicants like Te Whakapiko whose tikanga requires it.¹⁰⁸

(b) Crown's position

The Crown submits that funding is available for applicants in both the Crown engagement pathways and High Court pathways to establish mandate.¹⁰⁹ However, it acknowledges that 'funding is not available for the ongoing maintenance of an applicant's mandate to represent the applicant group.'¹¹⁰ The Crown concedes that this aspect of the funding policy 'could be made clearer.'¹¹¹

(c) Tribunal's analysis and findings

We reiterate the views we have expressed already in this report: a Treaty-compliant funding regime would be one in which the Crown covers all reasonable costs that claimants incur in pursuing applications under the Act. It would do so in a timely way. It would treat all applications consistently, regardless of pathway.

In our view, the cost to an applicant of establishing a mandate is a necessary and reasonable cost which the Crown should cover. This applies to applications in both pathways. Evidently, the Crown agrees or it would not have made funding available for this purpose. But that is not how the funding regime works in practice. High Court applicants can apply for funding to cover the costs of establishing their mandate immediately upon filing their application, which is entirely reasonable in our view. It is thus perverse (and prejudicial) that the Crown provides no funding for applicants in the Crown engagement pathway to establish their mandate *at the time they need to do so*, given this is a fundamental prerequisite for Crown engagement. That the Crown will not reimburse the costs of unsuccessful Crown engagement applicants – significant costs they have borne in good faith to establish a mandate and in the hope that the Crown would engage with their application – compounds the prejudice.

With regard to maintaining a mandate, we note that tikanga commonly requires members of a hapū or iwi to report back regularly on any matter they have been

106. Submission 3.3.42, p 9

107. Document A76(a), p [71]

108. Submission 3.3.42, p 14

109. Submission 3.3.58, p 30

110. Submission 3.3.58, pp 28–30; transcript 4.1.2, pp 782, 859–860

111. Submission 3.3.58, p 30

given a mandate to progress – which would surely include applications under the Marine and Coastal Area Act. However, whether tikanga also requires their mandate to be actively and regularly maintained varies between groups. But given that the tikanga of many groups making applications under the Act *does* require mandate maintenance, we consider the Crown’s funding regime should accommodate these costs, as well as those incurred in mandate establishment.

Thus, we find that the Crown has breached the principles of active protection and partnership by establishing processes that significantly delay – and may even deny – the provision of funding for mandate establishment to some applicants under the Act. By requiring Crown engagement applicants to bear the costs of mandate establishment for an unreasonable length of time – costs which in the case of unsuccessful applications will never be reimbursed – the Crown’s actions have caused claimants significant prejudice. The Crown has also breached Treaty principles by failing to fund the costs of mandate maintenance for groups whose tikanga requires this: this too is a wholly reasonable cost, in our view.

To remedy these breaches, we again suggest the Legal Aid funding regime serves as a valuable model – especially its use of pre-authorised grants. In our view, applicants under the Marine and Coastal Area Act could submit to Te Arawhiti, in advance, detailed descriptions of the mandate activities they plan to undertake. Te Arawhiti could then decide whether to pre-authorise a grant, allowing claimants to incur costs in the certain knowledge that they would later be reimbursed. This would also allow a suitable measure of flexibility to accommodate the different requirements of claimant groups who are required to maintain their mandate.

6.1.7 Potential for real or perceived conflicts of interest

(a) Claimants’ position

Counsel for various claimants contend that the administration of funding decisions should be independent of Te Arawhiti. That it is not, breaches the internationally recognised principle of independence, they submit.¹¹²

They argue that, as proceedings have evolved, ‘claimants have found that the funding is neither independent nor free from bias or interference from the Crown as it is administered by Te Arawhiti, as opposed to being administered by Legal Aid Services.’¹¹³ Claimants submit that this conflict of interest is particularly apparent in Te Arawhiti’s decision to decline funding for an interlocutory application to refer the proceeding to the Māori Appellate Court to determine questions of tikanga (the so-called ‘test case proposal’).¹¹⁴ Even those who did not support

112. Submission 3.3.25, p 3

113. Submission 3.3.27, p 9

114. Marine and Coastal Area (Takutai Moana) Act 2011, s 99; transcript 4.1.2, pp 522–523. In July 2018, Ngāpuhi applicants Louisa Te Matekino Collier, Awhirangi Lawrence, Arthur Mahanga, Hayward Norman, and Mitchell Arapeta Collier filed an application in the High Court for their application to be heard in two parts. They proposed that the first part of their application ‘be used to provide a factual and evidential basis, as a test case, so that the Courts could determine what criteria are required to prove customary marine title’. This became known as ‘the test case proposal’: Justice Collins, minute 3, High Court, CIV-2017–485–398 (re test case proposal), para 2.

the interlocutory application nevertheless stated they supported the right of their fellow claimants to bring it, and to be funded.¹¹⁵ In counsels' submission, it is not the place of the Crown to determine the merits of a claimant's litigation strategy, and decline funding on that basis. The fact it has occurred is a clear conflict of interest and calls into question the independence of the funding regime.

Expert witness Dr Alexander Gillespie, a professor of international law, submits:

the fact that the legal aid administered under this Act is not subject to the same provisions of the Legal Services Act, especially in terms of promises of independence and review, is a source of legitimate concern. As such, the promises the Crown made of avoiding conflicts of interests, transparency and appropriate accountability, have not yet been fulfilled.¹¹⁶

Various counsel also note the disparity between the resourcing available to claimants for legal services and the resources available to the Crown. They submit that the disparity creates an 'inequality of arms'¹¹⁷ which demonstrates the lack of independence in the administration of the marine and coastal area funding regime. They say that claimants' funding is not only inadequate, but is controlled by Te Arawhiti – a department of the Ministry of Justice and part of the Crown.¹¹⁸

Finally, counsel submit that, collectively, these issues disincentivise claimants from engaging with the Act and the supporting funding regime. While claimants have felt compelled to engage because 'their obligations to their taonga are forever', they cannot help but wonder if the Crown is really waging 'a battle of attrition . . . to wear them down from asserting the ownership to their rohe moana.'¹¹⁹

(b) Crown's position

The Crown rejects the claimants' submissions of a conflict of interest.¹²⁰ Counsel cites the steps the Crown has taken to minimise real or perceived bias, including by ensuring that:

- ▶ funding for marine and coastal area applicants is administered by two funding administrators who sit outside Te Kāhui Takutai Moana, the team advising the Minister on the Crown engagement process. These administrators also have separate reporting lines.¹²¹
- ▶ little practical discretion is involved in determining the upper funding limit for applicants, as it is based on an application's complexity ranking.¹²²

115. Transcript 4.1.2, p 523

116. Submission A103, p 44

117. Transcript 4.1.2, p 238

118. Submission 3.3.57, p 122

119. Submission 3.3.27, p 10

120. Submission 3.3.58, pp 54–55

121. Document A131, p 2; doc A131(n), p 6; submission 3.3.58, pp 54–55

122. Submission 3.3.58, p 55; doc A131(a), p 626

- ▶ administrators do not share with Te Kāhui Takutai Moana any information sought from applicants to verify their reimbursements.¹²³

Crown counsel also submits there is no conflict in the responsible Minister engaging with, or entering into a recognition agreement with, a Crown engagement applicant¹²⁴ while at the same time 'issuing instructions to Crown Law (acting on the Attorney-General's behalf) in relation to the conduct of High Court proceedings under the Act'. Crown counsel submits that the Act clearly distinguishes between the two situations.¹²⁵

(c) Tribunal's analysis and findings

Consistent with its Treaty obligation to act reasonably and in good faith, the Crown should seek to avoid situations where its Treaty obligations to Māori and its own interests come into conflict. But the requirement to avoid such conflicts is not absolute. The Crown owes obligations to all New Zealanders. Generally, the Crown must weigh the obligations it owes to the public when discharging its obligations to Māori. However, that is not the issue raised here.

In regard to applications under the Marine and Coastal Area Act, we consider there is clear potential for the Crown's obligations and interests to come into conflict. Through Te Arawhiti, the Crown is both administering funding under the Act while also being the Crown agency primarily responsible for dealing with Crown engagement applications. At the same time, as the Crown confirmed in closing submissions, the Minister (through Te Arawhiti) is instructing Crown Law on the conduct of litigation in the High Court pathway – which may concern the same applications that are going through the Crown engagement process.

We accept that the Crown has taken steps to try and minimise any potential conflict, including having the funding administrators sit outside Te Kāhui Takutai Moana. Despite that, we heard evidence that an actual conflict has already arisen – namely, Te Arawhiti's decision to decline funding for a particular interlocutory application in the test case proposal because it purportedly did not 'advance' the applicant's claim.¹²⁶ We accept counsel submissions that for the Crown to deny funding on this basis is, in effect, an attempt to determine the litigation strategy of claimants – an inappropriate role for the Crown to play when it is also a contesting party to the litigation.

We find that by having the same Crown agency administer funding, deal with Crown engagement applications, and instruct Crown Law on litigation in the High Court, the Crown has placed itself in a position where its obligation to actively protect Māori interests, and its own interest, may conflict. This is in breach of the principles of acting reasonably and in good faith. An actual conflict arose when it denied funding for the test case proposal, causing those claimants prejudice. We recommend that the funding regime should be administered by an independent

123. Submission 3.3.58, p 55

124. Marine and Coastal Area (Takutai Moana) Act 2011, s 95

125. Submission 3.3.58, p 55

126. Marine and Coastal Area (Takutai Moana) Act 2011, s 99; transcript 4.1.2, pp 522–523

agency that is not associated with either pathway under the Act. Once again we recommend that the Crown consider the use of existing specialist agencies such as Legal Aid Services. We consider further below at section 6.1.8 the lack of independence for reviewing funding decisions.

6.1.8 Te Arawhiti's process for reviewing funding decisions

(a) Claimants' position

Claimants submit that the Crown's funding regime is prejudicial to Māori as it provides no independent review or appeal mechanisms for applicants who are denied, or granted insufficient, funding. By instituting a regime where the funding bands and caps are 'beyond the scope of either reconsideration or appeal',¹²⁷ claimant counsel submit that the Crown has breached its Treaty obligations to act reasonably and in good faith with Māori, and to actively protect their interests.

While claimants acknowledge Te Arawhiti's ability to internally review both an applicant's upper funding limit, and specific reimbursement decisions that have been made,¹²⁸ claimants question the independence of this arrangement. Counsel draw attention to the expert evidence of Mr Watson, who compared Te Arawhiti's review processes with the arrangements of other regimes.¹²⁹ He gave evidence that under the Legal Services Act 2011, applicants are advised that decisions can be reconsidered, and there is explicit provision for an independent review and appeal system 'which is not apparent from the [marine and coastal area] policy/guidelines'. He stated that the review system provided for in the Legal Services Act also 'has more prescriptive detail' than the marine and coastal area funding policy/guidelines.¹³⁰ Counsel elaborated on the effects of this for applicants:

[W]hat the applicants have found is that their [marine and coastal area] funding has been turned down, denied, that's it . . . [I]f this was Legal Aid and funding was denied then we have processes, you can go through and get the decision reconsidered and then if you don't like the outcome you can go and get it reviewed, you can go to the legal aid Tribunal . . . [Under the marine and coastal area funding regime] [t]hose steps of reconsideration and review and appealing the decision are gone; there is nowhere you can go if they turn you down no matter how unfair it seems.¹³¹

As such, claimants maintain that Te Arawhiti's review processes are insufficiently independent.

More generally, claimants also say there is a perceived lack of independence in the administration of funding. Until October 2018, funding was administered by the same team that made recommendations to the responsible Minister on whether to enter into Crown engagement with an applicant, and also instructed

127. Submission 3.3.24, p 4

128. Submission 3.3.25, p 11; submission 3.3.57, pp 8, 103

129. Submission 3.3.57, pp 104, 107; submission 3.3.24, p 4

130. Document B1(h), p 5

131. Transcript 4.1.2, p 238

Crown Law on High Court applications. Citing the expert evidence of Professor Gillespie, counsel submitted that the legal aid regime again offered a more suitable model.¹³²

The [Legal] Aid Regime, both historically and contemporarily, is meant to be at an arm's length from the Crown. This is to ensure that, inter alia, Aid decisions were, and are, seen to be free from undue political and judicial interference. At the very least, though the administration of Aid is within [the Ministry of Justice], its functions are mandated to be carried out independently of the Ministry.

In contrast, funding for [marine and coastal area] applications are administered directly by the MCRS Office, which is a departmental agency forming part of [the Ministry of Justice]. In such arrangements, the possibility for conflicts of interest and lack of independence are real, no matter how much integrity individuals working within the [the Ministry of Justice] may possess.¹³³

Counsel for the New Zealand Māori Council members submit that the marine and coastal area regime lacks proper review and appeal procedures and 'arguably breaches New Zealand's international law obligations' under which

the Crown is expected to provide assistance for its indigenous citizens to protect their rights to retain taonga as guaranteed by te Tiriti/the Treaty. This is especially so in the current circumstances, where it is the Crown who has imposed the complicated systems and processes under the [marine and coastal area] Funding Regime on Māori.

Furthermore, claimants criticise the absence of a published procedure for formally reviewing decisions made by funding administrators. Counsel point to the evidence of Mr Watson, who stated that he had seen no explicit policy setting out who within Te Arawhiti would conduct the re-assessment, nor any provision for the assessment decision to be reviewed or appealed.¹³⁴

(b) Crown's position

Crown counsel submits that an applicant's upper funding limit may be reassessed either at the applicant's request, or if Te Arawhiti considers that the application's complexity has changed. To request a reassessment, applicants must submit a complexity self-assessment form to Te Arawhiti and (where applicable) a copy of any revised High Court application and other relevant supporting documents. The process is set out in Te Arawhiti's public guidelines.¹³⁵ Crown counsel also submit that applicants can request Te Arawhiti's decisions on specific reimbursement requests be reviewed.

132. Submission 3.3.57, p 83

133. Document A136, pp 9–10 (submission 3.3.57, p 83)

134. Document B1(h), p 4

135. Submission 3.3.58, p 27; doc A131(a), pp 661, 664

Expert witness Mr Watson describes how the Crown's contribution to an applicant's costs can be reassessed either at the applicant's request or if Te Arawhiti believes an application's complexity has changed.¹³⁶ This is done through the 'standard escalation processes' for reviewing 'delegated decision-making in a government department'. The issue is escalated within Te Arawhiti and ultimately to the Minister; if necessary, there is recourse to the Ombudsman.¹³⁷ Counsel acknowledges, however, that 'there is currently no application form for making such a request'.¹³⁸

Lastly, counsel emphasises the evidence of Ms Johnston, who explains that the Crown's proposed review of the Act's funding regime will provide an opportunity to address any remaining issues with the clarity and transparency of the Crown's funding policy. Counsel submit that the Crown is acting reasonably and in keeping with its Treaty obligations by undertaking a review of the issues raised by claimants.¹³⁹

(c) Tribunal's analysis and findings

We have already commented in section 6.1.4 on the Crown's ability to alleviate funding pressure by transferring unspent funding, either within a milestone or between milestones. Here, we address only the mechanisms for reviewing Crown funding decisions – including decisions on applicants' upper funding limits and on specific reimbursement requests.

The Crown's duty to act reasonably and in good faith requires it to provide clear and transparent processes for reviewing such funding decisions. Decisions should be reviewed independently of the decision maker, in this case Te Arawhiti.

From the evidence presented, the present arrangements clearly fall short of this standard. Reviews take the form of an internal escalation process within Te Arawhiti – the same organisation that has made the original funding decision. With no written guidelines available to applicants about how this process will work, it lacks clarity and transparency. As the Crown admits, Te Arawhiti does not even have an application form for applicants seeking review.

We find the Crown's processes for reviewing funding decisions lack clarity, accessibility, transparency, and independence, and thus breach its Treaty obligations to Māori. On the basis of the evidence, we find that claimants are thereby prejudiced.

In future, we recommend the Crown offers independent mechanisms allowing claimants to review funding decisions, rather than the present internal escalation arrangements. Again, we consider the current Legal Aid regime – with its independently constituted Legal Aid Panel review process – provides a useful model. For this reason and others, we recommend the Crown give serious consideration

136. Document B1(h), p 3

137. Transcript 4.1.2, p 702

138. Submission 3.3.58, p 27

139. Submission 3.3.58, pp 29, 39; transcript 4.1.2, pp 603–604; doc A131(n), p 37

to amending the Legal Aid scheme to accommodate marine and coastal area applications.

6.2 FUNDING FOR HIGH COURT APPLICANTS

We have already made it clear that we accept the High Court, the High Court registry and their judicial processes are outside the jurisdiction of this Tribunal. We also recognise that the Crown has no authority over the fees required in the High Court – this is governed by the High Court Rules 2016 and the High Court Fees Regulations 2013.

This section nonetheless makes reference to these matters, for the simple reason that they were raised by claimants. However, they do not form part of our findings and recommendations, which are confined to the adequacy of the Crown's funding arrangements for High Court applicants.

6.2.1 Initial High Court filing fees and notice of appearance fees

High Court rules required marine and coastal area applicants to pay a \$540 filing fee when they lodged their originating applications.¹⁴⁰ In this section, we address allegations that the requirement to pay this fee is a breach of the Treaty causing prejudice to claimants.

(a) Claimants' position

Counsel note that the initial filing fee was a considerable upfront cost.¹⁴¹ Claimants variously described it as 'extremely burdensome' and a 'huge strain.'¹⁴² Others gave evidence that their lawyers had to carry the cost of the filing fee until it was reimbursed.¹⁴³ Ngāti Hine claimant Pita Tipene acknowledged this was undesirable but necessary, stating 'we were at a loss with the pending deadline and no means to raise the funds.' He added that it would have been preferable for legal aid to be made available for this purpose.¹⁴⁴

Claimants say that the filing fee for lodging individual notices of appearance (required in the case of overlapping applications) added greatly to costs and was unreasonable.¹⁴⁵ For those involved in numerous overlapping applications, the requirement to pay a filing fee of \$110 per notice quickly became exorbitant – more than \$2,000 in the case of one claimant who had to file 19 notices of appearance.¹⁴⁶ Several other applicants faced similar costs. Counsel submit that it was highly prejudicial for the Crown to expect claimants to carry such high costs before reimbursement. According to counsel for Te Ūpokorehe, these costs 'would have been

140. High Court Fees Regulations 2013, sch

141. Submission 3.3.5, p 3

142. Document A129, p 2; doc A91, p 6

143. Document A70, p 5; doc A72, p 7

144. Document A72, p 7

145. Submission 3.3.15, p 3; submission 3.3.30, p 8

146. Document A58, p 3

incredibly prejudicial to an Iwi that does not have the benefit of a large putea' and significantly cut into whatever Crown funding they received.¹⁴⁷

Claimants acknowledge they now know that the High Court has discretion to waive both originating application fees and notice of appearance fees. However, many were either uncertain or unaware of this option when they lodged their applications.¹⁴⁸ Counsel drew attention to the evidence of Ms Penney, who stated under cross-examination that the registry did not proactively advise applicants of the possibility of obtaining a fee waiver – it relied on applicants asking.¹⁴⁹ Nor did the registry assist self-represented applicants or inexperienced lawyers by publishing advice that waivers could be obtained on the grounds of public interest or hardship.¹⁵⁰

Counsel therefore submit that the fees for both originating applications and notices of appearance were prejudicial to applicants. This was exacerbated by the High Court registry's passive position on fee waivers and the retrospective nature of the funding regime.

(b) Crown's position

The Crown reiterates its position that the High Court's processes fall outside the Tribunal's jurisdiction.¹⁵¹ However, counsel submits that no lasting prejudice has been caused by the filing fees. The registry has granted all applications for fee waivers under the High Court Fees Regulations 2013.¹⁵² Applicants who did not request a fee waiver can still do so. The registry will refund both the originating application fee and their notice of appearance fees, provided the applicant meets the criteria for a waiver.¹⁵³

(c) Tribunal's analysis and findings

We reiterate that the High Court, the High Court registry, and their processes are outside the jurisdiction of this Tribunal. Nor does the Crown have any authority over the fees required in the High Court – this is governed by the High Court Rules 2016 and the High Court Fees Regulations 2013. Notwithstanding, it was the Crown, by means of the legislation, that determined proceedings under the Act had to be heard in the High Court. As such, the Crown cannot divorce itself from the impact of that decision – including the fees associated with taking proceedings in the High Court (as opposed to other courts such as the Māori Land Court).

However, the appropriateness of the High Court as the jurisdiction to hear applications under the Act is an issue for stage 2 of our inquiry: we thus make no findings here about the Treaty-compliance of High Court fees. Even if we were to consider this issue during stage 1, we are not persuaded that the High Court's

147. Submission 3.3.33, p 4

148. Transcript 4.1.2, p 131

149. Transcript 4.1.2, p 579

150. High Court Fees Regulations 2013, regs 18–20

151. Submission 3.3.58, p 79

152. High Court Fees Regulations 2013, reg 18; submission 3.3.58, p 81

153. High Court Fees Regulations 2013, reg 23

fee requirements caused any lasting prejudice to Māori. As the Crown explains, claimants could seek a fee waiver (and still can seek a refund) for both originating application fees and notice of appearance fees. While there is evidence of claimant groups paying large sums for those fees, this was due to their limited knowledge that they could apply to have them waived or refunded.

6.2.2 Hearing and interlocutory costs

(a) Claimants' position

The Crown has set a funding cap of \$3,000 for interlocutories, which applies to applications of all complexity levels. This one-size-fits-all approach is illogical, claimants allege. Some applications cover a larger rohe than others, and often this means more overlapping claims. Counsel submit that the cap is far too low for applications with a large number of interested parties, numerous case management conferences, and/or many opposed interlocutory applications.¹⁵⁴

Claimants argue that the inadequacy of the cap illustrates the Crown's failure to anticipate the complexity and quantity of case management conferences required. Two series of case management conferences have occurred to date (each comprising 10 conferences), and a host more are scheduled.¹⁵⁵ Kara George, a claimant on behalf of Te Kapotai, submitted that '75% of the funding available to us for legal fees for this stage of our application has already been used on the interlocutory steps so far, and we are a long way from a hearing. This demonstrates to me that the Crown funding is inadequate and that we are going to run into real problems trying to pursue our application.'¹⁵⁶

Again, claimants submit that an adapted Legal Aid regime would have been a far better funding mechanism for sustained and complex marine and coastal area proceedings. They cite the expert evidence of Mr Watson, who was asked to compare the marine and coastal area High Court funding regime with the scheme for civil legal aid in the High Court and appellate courts. He said that under the legal aid scheme,

the activities are set maximum hours per task, although there is no limit on hearing time, which is paid based on actual hours. This is further supported by the High Court Rules 2016 (and previous iterations) which sets out in Schedule 3 the time allocation for steps in proceedings, as a basis for an award of costs. For hearing time, the formula used is 'The time occupied by the hearing measured in quarter days.'¹⁵⁷

In the Marine and Coastal Area (Takutai Moana) Act funding regime, however, High Court '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'. When asked

154. Document A72, p12; doc A40, paras 3–6

155. Justice Churchman, minute 2, 25 July 2019, NZHC CIV-2017-485-218 (re Case Management Conferences 2019), paras 3–7, 118, 126, 141, 148–149, 153–159, 161, 163, 166, 174, 178

156. Document A70, p 8

157. Document B1, p 4

whether he had a view on which scheme is more capable of sustaining the likely reality of litigation, Mr Watson advised:

[the] Legal Aid funding regime for the Waitangi Tribunal is probably the regime likely to have the “greater overall efficacy in sustaining the likely reality” of [marine and coastal area] proceedings. . . . My assessment of the Legal Aid funding regime for High Court proceedings, referenced in your question, is that because hearing time is remunerated on an actual hours basis, rather than based on a pre-determined cap, then that would also be preferable to the current [marine and coastal area] funding model.¹⁵⁸

(b) Crown's position

The Crown acknowledges that the complexity of progressing multiple and overlapping applications is creating additional work and costs for applicants. It accepts that these ‘were not fully anticipated in the development of the funding policy, including the levels of funding in the Crown's funding matrices.’¹⁵⁹

While the Crown notes that overall expenditure to date remains within the total allocation of funding available to applicants, it acknowledges that the amounts the funding matrix allocates to legal costs are coming under pressure.

The Crown submits that it takes these issues seriously and will address them in its forthcoming funding review.¹⁶⁰

(c) Tribunal's analysis and findings

We have already found that a Treaty-compliant funding regime should fund all reasonable claimant costs to prosecute an application – in this case, in the High Court. The High Court is now beginning to confirm hearings for some marine and coastal area applicants, and their likely length and complexity is becoming apparent. For example, the Edwards (Te Whakatōhea) application has been initially scheduled for an eight-week hearing. The Taylor application is set down for a seven-week hearing commencing in February 2021.¹⁶¹

Clearly, the longer the hearing, the higher the costs, and the greater the financial burden for applicants – on whom the funding matrix expects 15 per cent of the costs to fall.

It has also become clear that the Crown did not anticipate the number of interlocutories or overlapping interests that would characterise marine and coastal area proceedings in the High Court. The Crown concedes as much. Because of the Crown's under-estimate, we consider hearing and interlocutory costs are woefully underfunded in the current funding matrix and the caps for legal costs are clearly insufficient.

158. Document B1(h), pp 8–9

159. Submission 3.3.58, p 4

160. Submission 3.3.58, pp 38–39

161. Justice Churchman, minute 2, 25 July 2019 (re Case Management Conferences 2019), para 130

The cap for an eight-week hearing (such as the Whakatōhea hearing), for example, is \$15,000–\$30,000, depending on the complexity of the application. By contrast, under the scale costs in the High Court Rules, legal costs for an eight-week hearing range from \$63,600–\$141,200, depending on factors like complexity. This scale is also based on a two-thirds contribution to legal costs rather than actual costs.¹⁶²

Thus, even if an application has been accorded the *highest* complexity rating under the Act's funding matrix, and the applicant is therefore eligible to receive the maximum funding of \$30,000, this will cover less than half the legal costs associated with the *lowest* scale costs in the High Court Rules (\$63,600). And if, as is more likely, an applicant whose application has been accorded the *highest* complexity rating under the funding matrix is correspondingly given the *highest* scale costs in the High Court Rules, the discrepancy between their funding and the High Court scale costs balloons from \$33,600 (in the first example) to \$111,200.¹⁶³ This example demonstrates the extent to which the current marine and coastal area funding matrix fails to accommodate the actual legal costs of High Court hearings.

We find that the Crown's funding matrix does not adequately fund the hearing and interlocutory costs claimants face and, in particular, the associated legal costs. If the caps remain as they are, it is highly likely that the sums claimants will need to contribute will be prohibitive for many, if not most. They will certainly be significantly more than the 15 per cent contribution anticipated by the Crown. The current funding matrix is not adequate in this regard; it is in breach of the Crown's obligation to actively protect Māori interests, and will cause significant prejudice if not remedied.

We appreciate that the Crown has acknowledged this concern, and is currently conducting its review of the funding policy. Any new funding policy it puts in place will need to ensure that there is adequate funding available for claimants to participate in a full and meaningful way during the interlocutory and substantive hearing stages of a proceeding. We also urge the Crown to implement our overarching recommendation (set out in section 6.1.1) to fully fund all reasonable costs to prosecute applications under the Marine and Coastal Area (Takutai Moana) Act, which include hearing costs.

6.2.3 Possibility of exposure to legal costs orders

(a) Claimants' position

Claimants submit that the funding regime does not protect against an award of legal costs for either interlocutory or substantive applications.¹⁶⁴ Thus claimants are unsure whether they could potentially be liable for legal costs orders, should

162. High Court Rules 2016, rr 14.2–14.5, schs 2, 3

163. While this issue was discussed during hearings (see transcript 4.1.2, p 866), the figures quoted in this report reflect the scale costs effective at the time of publication, and thus differ from those discussed during hearings.

164. Transcript 4.1.2, pp 424–425

their application for recognition of their customary rights fail. The same issue arises for those claimants participating as interested parties in other applications.

(b) Crown's position

The Crown made no submissions on this issue.

(c) Tribunal's analysis and findings

We are troubled by the applicants' potential exposure to legal costs orders. Whether to award costs, and in what amount, is at the discretion of the court.¹⁶⁵ Generally, the party who fails in a proceeding or an interlocutory application should pay costs to the party who succeeds.¹⁶⁶ As such, there is a presumption in favour of awarding costs. However, where the unsuccessful party is in receipt of legal aid, an order for costs cannot be made against them unless the court is satisfied that there are exceptional circumstances. Where such an award is made, the quantum cannot exceed an amount that is reasonable for the aided person to pay.¹⁶⁷ These protections are provided for in the Legal Services Act 2011. There is no corresponding provision protecting applicants who are funded under the Marine and Coastal Area (Takutai Moana) Act's funding regime.

We do not know how the High Court will treat an application for costs in marine and coastal area proceedings. Clearly, that is an issue for the presiding judge. It is possible that the High Court may draw an analogy with the legal aid regime, and take a similar approach. However, the fact that there is no legislative protection for applicants – coupled with the possible involvement of private parties or local authorities in the litigation – clearly puts applicants at risk. Not only may they face an award of costs, but the amount may potentially be significant – particularly given the anticipated duration of the initial application hearings and the fact that the High Court costs order rules are based primarily on daily hearing rates.¹⁶⁸

Given the absence of protective provisions in the Act, or the funding regime itself, we find that the Crown's funding regime breaches its Treaty duty of active protection. This could cause significant prejudice to Māori if they are faced with a large costs order and have no ability to meet it.

If the High Court does choose to order legal costs under the Act, we recommend that the Crown amend its funding regime so that these costs are explicitly and completely covered. This is consistent with our overarching recommendation that all reasonable claimant costs be fully funded. Alternatively, we recommend that the Crown enacts statutory protection for High Court applicants by amending the current Legal Aid regime to cover applications under the Act, or by enacting similar legislative protection elsewhere.

165. High Court Rules 2016, rule 14.1

166. High Court Rules 2016, rule 14.2

167. Legal Services Act 2011, s 45

168. As noted above, scale costs for an eight-week hearing alone, without including interlocutory matters preceding the hearing, range between \$63,600–\$141,200.

6.3 FUNDING FOR CROWN ENGAGEMENT APPLICANTS

6.3.1 Funding contingent on the Minister's decision to engage with the applicant

(a) Claimants' position

Claimants are critical that funding in the Crown engagement pathway only becomes available when, and if, the Minister chooses to engage. This means applicants may have spent significant funds preparing their applications, only to have them declined.¹⁶⁹ This leaves applicants 'at the Crown's mercy', they claim.¹⁷⁰ Sailor Morgan and Frances Goulton describe the predicament facing their hapū Ngāti Ruamahue and Ngāti Kahu ki Whangaroa in the following terms: 'The Crown has made it almost impossible for Ngāti Ruamahue to succeed in having our customary interests recognised because it holds all the decision-making power, has yet to engage with us, and has left us with no meaningful or easy way to ensure funding.'¹⁷¹

Claimant counsel submit this is prejudicial to Māori. They argue that the prejudice is heightened by the significant delays (more than two years) that most applicants have endured while waiting for the Minister's decision. All the while, applicants have had to bear the costs of their applications.¹⁷²

(b) Crown's position

The Crown confirms that there is no funding available to Crown engagement applicants for work undertaken to prepare an application. However it notes that some funding is available for them to review the Crown's preliminary appraisal of their application's suitability for engagement.¹⁷³

(c) Tribunal's analysis and findings

How the Crown exercises its discretion to engage with applicants in this pathway is a substantive matter for stage 2 of our inquiry. However, the Treaty-compliance of the funding arrangements for Crown engagement applicants falls squarely into stage 1.

We start by reiterating principles we have articulated throughout this funding chapter: to meet its Treaty obligations, the Crown should cover all reasonable costs claimants incur in making applications under the Act, regardless of pathway. Both its funding matrix and supporting policy need a suitable measure of flexibility. Claimants also need clear information about the workings of the funding regime. These principles inform the analysis that follows.

There is very little evidence at this point to indicate whether the quantum of funding in the Crown engagement pathway is adequate, relative to claimant costs. Essentially, the only applicants to be funded so far are phase one applicants, whose

169. Document A61, p 12

170. Document A75, p 5

171. Document A47, p 13

172. Document A75, p 5

173. Document A61(a), p 112; submission 3.3.58, pp 11–12

claims for customary title were transferred over from the repealed Foreshore and Seabed legislation. They seem to have been funded generously relative to the funding that phase two applicants may be entitled to under the Crown engagement funding matrix. The lack of evidence means we are unable to make a finding on the overall adequacy of the Crown's funding for this pathway.

However, compelling evidence has been provided on another funding issue: the fact that funding for applicants in this pathway is wholly contingent upon when, and if, the Minister chooses to engage. Claimants told us of being exposed to significant delays – almost two years, in many cases – before being reimbursed for the considerable costs they had incurred in preparing their applications.¹⁷⁴ This situation can be contrasted with the funding regime in the High Court pathway, which is not contingent on the merits or success of the application and allows for reimbursement as soon as a funding application is made.

It is clearly prejudicial that the Crown's policy requires applicants in one pathway who have incurred significant costs to remain out of pocket for an indefinite period. The prejudice is even greater in cases where the Minister ultimately chooses not to engage with the applicant group, and so they receive nothing. We thus find the Crown has not acted reasonably and in good faith by establishing funding arrangements that prejudice Crown engagement applicants, and this is a breach of the principles of partnership and active protection. We recommend the Crown provide these applicants with access to funds immediately upon lodging their applications, along with any necessary supporting information, consistent with the availability of funding in the High Court pathway.

6.4 FUNDING FOR APPEALS AND JUDICIAL REVIEW

(a) *Claimants' position*

Claimants submit that the Crown has inadequately funded them to review or appeal ultimate decisions on their customary interests.¹⁷⁵ They submit this breaches the Crown's Treaty obligation to actively protect Māori interests.

Within the High Court pathway, the Crown's funding regime provides funding for:

- ▶ applicants to appeal a determination on their customary interests;¹⁷⁶ and
- ▶ Māori interested parties to an application (which can include both applicant and non-applicant groups) to appeal that application's determination on customary interests.¹⁷⁷

In all instances, the funding is capped at 85 per cent of the anticipated costs of an appeal.¹⁷⁸ Claimants say that this is prejudicial as it significantly constrains their

174. Document A44, p 6; doc A47, p 8

175. Document A111, p 16

176. Submission 3.3.58, p 23; doc A131, p 36; doc A131(a), pp 575, 578, 656–666

177. Submission 3.3.58, p 23; doc A131(a), p 665

178. Submission 3.3.58, p 23; doc A131(a), pp 581–582

ability to appeal a determination of their customary rights. Moreover, this funding was not introduced until 2016.¹⁷⁹

By contrast, in the Crown engagement pathway there are no such funding provisions for judicial review of ministerial decisions on the existence of customary rights. Claimants submit that the Crown 'should work in partnership with Māori to establish a review or appeal process for those who have been rejected from engagement or from entering a recognition agreement'.¹⁸⁰

Claimant counsel submit that Crown engagement applicants are prejudiced by the disparate provision of review/appeal funding between pathways. Counsel further submit that the Crown has failed to provide any convincing rationale for this unequal treatment of applicants.¹⁸¹

(b) Crown's position

The Crown confirms that funding is available so applicants and interested parties to an application can appeal High Court determinations on the existence of customary rights.¹⁸² Consistent with the funding regime as a whole, the Crown contributes 85 per cent of the estimated costs of an appeal. The funding is intended to cover the 'actual and reasonable costs' of research, project management, and legal services required to appeal a decision.¹⁸³

Crown counsel also acknowledge that there is no funding for applicants (or those with overlapping customary interests) to judicially review a ministerial determination on the existence of customary rights. According to counsel, the Minister determined that doing so would be inconsistent with the overall purpose of the funding scheme, which is to support applications under the Act rather than legal challenges.¹⁸⁴

(c) Tribunal's analysis and findings

This is another instance where the Crown's funding regime treats applicants in the two pathways unevenly, prejudicing those in the Crown engagement pathway. High Court applicants and Māori interested parties can receive funding to appeal the court's decisions about their customary rights, whereas in the Crown engagement pathway, neither applicants nor those with overlapping interests can receive funding to judicially review ministerial decisions.

We are unconvinced by the Crown's rationale for this inconsistency – that funding is intended to support applications under the Act rather than legal challenges. An appeal of a High Court decision – which the Crown *will* fund – is surely just as much a legal challenge. In our view, there is no logical justification for the Crown's distinction between this and a judicial review of a ministerial decision. The policy

179. Document A131, p 32; doc A131(a), p 574

180. Document A61, p 5; transcript 4.1.2, pp 470–471

181. Document A61, p 5

182. Submission 3.3.58, p 23

183. Submission 3.3.57, pp 49, 111

184. Submission 3.3.58, p 23

is moreover highly prejudicial to Crown engagement applicants, as it constrains them from seeking review of decisions affecting their customary rights.

Thus, we again find that the Crown has not acted reasonably and in good faith by establishing funding arrangements that prejudice Crown engagement applicants, and this is a breach of the principles of partnership and active protection. We recommend the Crown makes funding for judicial review available to Crown engagement applicants and Māori third parties.

6.5 FUNDING FOR OVERLAPPING CUSTOMARY INTEREST GROUPS WITHOUT APPLICATIONS

Since 2016, financial assistance has been available for those customary interest groups who are not applicants under the Act to participate in the determination of applications that overlap with their customary interests.¹⁸⁵

(a) *Claimants' position*

Counsel argue that the Crown's decision to fund non-applicant groups exacerbates the funding pressures applicants already face.¹⁸⁶

Counsel argue that this is because of the way an application's complexity (and consequent funding) is calculated. Te Arawhiti considers various 'complexity rating factors', and rates each application as low, medium, high, or very high complexity for that rating factor. Cumulatively, these factors determine an application's overall complexity, and the corresponding quantum of funding available for it.¹⁸⁷

The number of claims overlapping an application is one such rating factor. An application with six or more overlapping claims is rated as being of 'very high' complexity for that particular factor.¹⁸⁸ Counsel argue that this parameter is far too open-ended. They submit there are vast differences in complexity between an application with six – as opposed to, say, 16 – overlapping claims. They say the 'six or more' provision reflects the Crown's early thinking that few applications would be lodged, and thus few claims would overlap.¹⁸⁹

Moreover, counsel submit that these parameters should have been adjusted to reflect the Crown's decision to fund non-applicant groups, which has inflated the numbers of overlapping interests for any one application. For example, some applicants face as many as 20 overlapping claims, some of which represent non-applicant groups. Counsel argue that as the matrices were developed without taking account of the impact of these non-applicant groups' claims, the funding is therefore insufficient – especially for groups such as Ngāi Tamahaua, who describe 'having to defend their position on all fronts.'¹⁹⁰

185. Document A131(a), p 667

186. Transcript 4.1.2, p 793–795

187. Document A131(a), p 670

188. Document A131(a), p 670; transcript 4.1.2, p 80

189. Document A69, pp 14–15; submission 3.3.53, p 11

190. 30 Submission 3.3-7, p 6

Claimants also contend that, until our hearings, it was ‘ambiguously unclear’ how they would be funded to respond to non-applicant overlapping interests. During hearings, the Crown clarified that funding allocated under the pre-hearing/evidence-gathering milestone could be used for this purpose.¹⁹¹ However, claimants argue that this arrangement is an afterthought. And because the milestone cap has not been increased to reflect the task of responding to non-applicants, the funding available for other essential tasks within that milestone is eroded.¹⁹²

Finally, some claimants query the Crown’s motive in funding and facilitating the participation of non-applicant groups in proceedings under the Act.¹⁹³

(b) Crown’s position

The Crown concedes that the complexity of dealing with overlapping claims is creating extra work and costs for applicants ‘that were not fully anticipated in the development of the funding policy, including the levels of funding in the Crown’s funding matrices’ Counsel submits this is one reason why the Crown is considering adjusting its funding policy to make it clearer, more consistent, and adequate to help groups advance their applications.¹⁹⁴

The Crown also acknowledges its funding matrices have caused misunderstandings and ‘a lot of confusion.’¹⁹⁵ It accepts that the matrices need to make it clearer that funding to resolve overlapping interests is available under existing milestones.¹⁹⁶

Finally, counsel submits that the Crown encourages groups (including non-applicants) to try and resolve overlaps among themselves.¹⁹⁷ It does not – as claimants suggest – seek to pit whānau against each other. To this end, the Crown acknowledges that it is ‘inapt’ for its guidelines to refer to funding non-applicant groups (or any others) to ‘disprove’ another group’s claims. Te Arawhiti intends to remove the reference from its funding guidelines, counsel submitted.¹⁹⁸

Lastly, the Crown maintains that by funding non-applicant groups to participate in proceedings under the Act, it is meeting its Treaty obligations.¹⁹⁹

(c) Tribunal’s analysis and findings

The Crown’s decision in 2016 to fund Māori non-applicant groups to engage with applications under the Act in which they have overlapping interests was, in our view, reasonable and Treaty-compliant. For many reasons, customary interest groups may have either chosen not to apply for recognition of their rights or

191. Submission 3.3.46, p 11; transcript 4.1.2, p 794

192. Submission 3.3.57, pp 50–51

193. Document A75, pp 5–6; doc A74, p 6; submission 3.3.49, p 14; submission 3.3.46, p 11

194. Submission 3.3.58, p 4

195. Transcript 4.1.2, p 711

196. Submission 3.3.58, p 28

197. Submission 3.3.58, p 7

198. Submission 3.3.58, p 62; transcript 4.1.2, p 794

199. Submission 3.3.58, p 65

missed the deadline. It is appropriate that they receive funding so they can seek to protect their interests.

However, we have some concerns about the effects of this policy. First, the availability of funding does not mean that non-applicant customary interest groups can obtain any other rights. Even if the non-applicant succeeds in 'disproving' the interests of an applicant group under the Act, there is no tangible benefit to them in doing so. We agree with Ngāti Mihiroa (who chose not to make an application for customary rights recognition under the Act) when they say 'it is unlikely that the Crown will give recognition to [their] interests as the deadline has passed. Regardless of the availability of this funding, the rights and interests of Ngāti Mihiroa will not be recognised and will be legally unenforceable.'²⁰⁰ Why, then, should non-applicant groups with customary interests even bother applying for funding? However, as this is a question more appropriately addressed in stage 2, we make no more comment on it here.

Our remaining concerns, are with the Crown's failure to communicate clearly some important information – for example, that the funding for applicant groups to engage with the overlapping claims of non-applicants is available within the existing evidence-gathering milestones. Applicants remain unclear about the potential consequences of accessing this funding for their overall allocation. If they use some of it on resolving overlapping interests with non-applicants, before undertaking core evidence-gathering work essential to their application, will they have enough funding left to protect their interests? It seems to us that funding for overlapping interests has been buried in an existing milestone as an afterthought, and with little thought for the possible consequences.

Finally, we share the claimants' discomfort with the terminology the Crown has adopted in its funding guidelines. For the Crown to say that overlapping claims funding allows groups to 'challenge' and 'disprove' customary interests claimed by others, strikes us as divisive and jarringly at odds with whanaungatanga and tikanga. We agree with the Crown's belated recognition that the choice of words is singularly inapt. But it is also, unfortunately, accurate. Although the Crown intends amending the wording in its funding guidelines – a move we welcome – doing so will not alter the policy's impact on claimants.

Overall, we find that the Crown acted reasonably and in good faith by deciding to fund Māori non-applicant groups to engage with applications under the Act in which they have overlapping interests. There is no Treaty breach. However, we urge the Crown to take note of our concerns about how it communicates this policy and its effects, and amend its communications accordingly.

We also note that there may be funding implications if the Crown adopts our recommendation to ensure groups with overlapping interests have access to timely and appropriate mediation, and can engage in tikanga-based resolution processes (see section 5.4 above). The funding model should explicitly provide for these activities and all reasonable costs of undertaking them.

200. Submission 3.3.45, p 4

6.6 LACK OF FUNDING FOR RESOURCE CONSENT APPLICATIONS

Anyone applying for a resource consent within part of the common marine and coastal area where a group has sought recognition of customary marine title must notify that group and get their views.²⁰¹ Once customary marine title is recognised, the group's written permission is needed before a resource consent will be granted. If permission is not given within 40 working days, the acceptance of the customary marine title group is assumed.²⁰² Meanwhile, in areas where a group has been granted protected customary rights,²⁰³ resource consents for activities likely to have 'more than minor' adverse effects on those rights will only be granted if that group gives its written permission.²⁰⁴

(a) Claimants' position

Under the Crown's funding policy, applicants receive no funding for the task of monitoring and engaging with resource consent applications. Yet, claimants submit that since the Act was introduced, they have faced a flood of resource consent applications.²⁰⁵ According to one claimant who has received more than 114 requests for feedback on resource consent applications since filing their own application under the Act, 'our responses to the requests are crucial to our customary title application.'²⁰⁶

Claimants gave evidence that, depending on location and geography, the volume of resource consent applications they are required to respond to is significant and a strain on their limited resources.²⁰⁷ Witness Juliane Chetham, who leads the Patuharakeke Te Iwi Trust Board's Resource Management Unit, describes typically receiving several applications a week. She says that on top of her hapū's other consultation and resource management responsibilities (which include Department of Conservation concessions and Heritage NZ Archaeological authorities), reviewing them is 'an administrative nightmare' they are not properly resourced to deal with.²⁰⁸ She asserts that the lack of funding prevents the hapū from responding meaningfully to all applications.²⁰⁹ In some cases, though, a response has proved imperative. For example, Patuharakeke opposed a New Zealand Refinery Ltd dredging application that would have seen larger oil tankers enter the Whangārei Harbour, threatening the structural integrity of Mair Bank – a mahinga mataitai and site of extreme cultural significance. The hapū incurred 'extensive' legal and other costs in opposing the application, and 'the skill set, human capacity and time

201. Marine and Coastal Area (Takutai Moana) Act 2011, s 62. Exceptions to this requirement are set out in section 64(2).

202. Marine and Coastal Area (Takutai Moana) Act 2011, s 67

203. Marine and Coastal Area (Takutai Moana) Act 2011, s 96(1)(a)

204. Marine and Coastal Area (Takutai Moana) Act 2011, s 55. Exceptions to this requirement are set out in section 55(3).

205. Document A39, p 3; doc A42, p 6; submission 3.3.9, p 3; submission 3.3.26, p 12

206. Document A39, p 3; doc A65, pp 10–11; submission 3.3.47, pp 14–15

207. Document A42, pp 6–7; doc A65, pp 10–11; submission 3.3.47, pp 14–15

208. Document A65, pp 10–11

209. Submission 3.3.35, para 41

required to engage in this process was demanding'. Nonetheless, Ms Chetham states that 'it is our duty as kaitiaki and the holders of customary rights and interests in the takutai to continue to participate in these processes regardless of cost and resource requirements'. Had Patuharakeke not participated in this particular resource consent hearing and subsequent Environment Court mediation, she asserts, the conditions imposed on the company would have been 'far less stringent'.²¹⁰

Sometimes, claimants do not have the capacity to respond to applications at all. In such cases, counsel submits that their silence 'giv[es] the appearance of consent when no such outcome is intended by the rights holders'.²¹¹ The Ngātiwai Trust Board submitted that because they are not sufficiently resourced to respond to all the 166 resource consent applications they have received to date.²¹² 'Construction of private jetties, moorings and structures, discharge consents and a sea of other [marine and coastal area] related resource consent applications are being processed without Ngātiwai input.' According to counsel: 'These resource consents are changing the face of Ngātiwai's takutai moana forever'.²¹³

It is also claimed that the Crown's policy on funding resource consent work is inconsistent. Counsel for claimant Arapeta Hamilton submitted that the first time he applied for reimbursement for engaging with resource consent applications, his request was granted. Yet subsequent requests were turned down.²¹⁴ Counsel also pointed to evidence given in cross-examination that the initial version of the Crown's funding guidelines did not mention whether resource consent work would be funded. It only became clear in subsequent reiterations that it would not.²¹⁵

Overall, claimants contend that they are significantly prejudiced by the lack of funding for the resource consent monitoring work the statutory regime requires them to undertake. In the words of Ms Chetham, 'the Crown should not be allowed to absolve itself from any responsibility for [marine and coastal area] applicants having to deal with these notifications and should be obliged to provide resources to us for this work'.²¹⁶ Claimants submit that the absence of funding leaves them in a position where they are unable to protect their customary interests, and thus represents a breach of the Crown's duty of active protection.²¹⁷

(b) Crown's position

The Crown submits that it does not fund applicants to respond to resource consent notifications because to do so would be inconsistent with its funding policy. As

210. Transcript 4.1.2, pp144–145

211. Submission 3.3.9, p 4

212. Submission 3.3.32, paras 55–64; doc A45(a), pp 31–42

213. Submission 3.3.32, paras 55–64

214. Submission 3.3.47, pp13–14

215. Submission 3.3.47, p13; transcript 4.1.2, p370

216. Document A65, p10

217. Submission 3.3.16, p 9; submission 3.3.32, paras 55, 65(c); submission 3.3.35, paras 10(f); doc A65, p10

Crown witness Ms Johnston explained, ‘the policy is intended to help applicants progress their applications for recognition agreements or orders’. Thus, ‘activities that do not progress an application’ – such as responding to resource consent applications – are not funded.²¹⁸

The Crown rejects the claimants’ argument that the absence of funding compromises their efforts to gain recognition of customary rights or to protect their latent rights in practical terms until formally protected under the Act. According to the Crown, the Act ‘provides a degree of protection to applicants who have applied for orders or agreements’. Counsel points to section 58(2) of the Act, which states that resource consents granted after it came into effect ‘do not constitute substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area.’²¹⁹

Finally, on the specific example that a claimant had been reimbursed for resource consent monitoring work on one occasion but not others, Ms Johnston said in cross-examination that if reimbursement had been made, this was a mistake and ‘not a common pattern’. It has not happened again, she stated.²²⁰

(c) Tribunal's analysis and findings

We accept the claimants’ submission that the lack of funding diminishes their ability to scrutinise and respond to resource consent applications with the rigour that those applications demand. In our view, the absence of funding for this task makes the monitoring and feedback role envisaged in the Marine and Coastal Area (Takutai Moana) Act essentially toothless. If claimants lack the practical means to exercise that role, the ability the statutory regime gives them to participate in the resource consent process is of negligible value.

Claimants also allege that the Act’s resource management provisions may lead to an erosion of their customary rights. This is a substantive legal issue which we will consider in stage 2. But we note here that claimants’ rights are also threatened by the delays and complexities besetting the Act’s administrative and funding regime. As we have seen, the progress of hundreds of applications through both the High Court and Crown engagement pathways is painfully slow. While applications languish, claimants cannot access the funding they need to respond adequately (or at all) to the deluge of resource consent applications required to be served on them. As their resulting silence may be interpreted as agreement, resource consents continue to be granted – often against their will – and the customary rights they are seeking to protect are exposed to being undermined in practical terms.

We accept the Crown’s argument that the grant of any resource consent after the Act came into force does not constitute a ‘substantial interruption’ to exclusive use and occupation of a specified area. Accordingly, any such resource consent will not affect an application for customary marine title. But it will affect what Māori will receive if their application is successful: namely, a customary marine

218. Submission 3.3.58, p 25; doc A131, p 48

219. Submission 3.3.58, p 43

220. Transcript 4.1.2, p 682

title that is effectively encumbered by an existing resource consent. That consent may allow for not only harmful activities, such as dredging, but also the erection of structures such as jetties and wharfs on the marine and coastal bed.

We note that the Marine and Coastal Area Act does not in itself influence the volume of resource consent applications affecting customary rights, whether inherent at customary law (that is, existing before the Act) or recognised by statute under the Act. All the Act does is require an extra statutory service step: resource consent applications must now be sent to applicant groups. On one hand this helps applicant groups, as it explicitly informs them that a resource consent application exists (they may otherwise be aware of it only if they regularly scrutinise general public notices of resource consent applications). We do not address this fully here. However, in stage 2 we will consider whether the fact such resource consent applications can be granted undermines, in practical terms, the purpose of recognition orders or agreements under the Act.

Finally, we note that the question of funding for applicants engaging with resource consent applications is one of many issues currently being raised about the resource management regime in general.²²¹ These broader issues will be the subject of another Tribunal kaupapa inquiry, which has been charged with examining natural resources and environmental management issues of national significance.

Overall, while we have concerns about how the lack of funding to respond to resource consent applications potentially affects claimant interests, we also consider that claimants would be in the same position if the Marine and Coastal Area (Takutai Moana) Act had never been enacted. As this is an issue affecting the resource management regime generally, we consider that the concerns and questions raised here should be further examined in the Tribunal's forthcoming kaupapa inquiry on natural resources and environmental management. Accordingly, we make no finding here on whether the lack of funding is in breach of the Treaty and prejudices Māori.

221. See, for example, the findings made by the Waitangi Tribunal in its *Stage 2 Report on the National Freshwater and Geothermal Resources Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), pp xx-xxi.

CHAPTER 7

SUMMARY OF FINDINGS AND RECOMMENDATIONS FOR STAGE 1 OF OUR INQUIRY

This chapter duplicates the findings and recommendations made in chapters 5 and 6. The wording is unchanged, although some minor abridgements or insertions have been made where necessary for comprehension and clarity.

7.1 FINDINGS AND RECOMMENDATIONS FROM CHAPTER 5

This chapter considers whether the procedural arrangements and non-financial resources the Crown provides to support the Act are Treaty-compliant. We make the following findings, recommendations, and suggestions.

The Crown's provision of information about the Act and its supporting regime (section 5.1)

On the Crown's provision to Māori of information about the Act and its supporting regime, we have examined three key areas – the extent of distribution, distribution methods, and the timeliness of the information provided. In each of these areas, we have found that the Crown acted reasonably in the circumstances and did not breach the Treaty principles of active protection and partnership. That is not to say its information provision could not have been (and may yet be) improved, and we have offered a number of suggestions which we urge the Crown to act on:

- ▶ The Crown should ensure that the information it provides on topics of manifest importance to hapū is distributed to hapū directly.
- ▶ If the Crown expects to secure the help of marae/marae trustees in disseminating information, it should make its expectations clear, and provide them with sufficient resourcing and guidance.
- ▶ The methods the Crown uses to distribute important information should be tailored to accommodate the specific circumstances of some Māori and ensure they are not disadvantaged if their internet access is limited or non-existent.

The Crown's consultation with Māori about funding under the Act (section 5.2)

Overall, both Treaty partners engaged in the 2013 and 2016 consultation rounds reasonably and in good faith, consistent with the principles of partnership and active protection. Despite the flaws we have identified, we are not persuaded that the Crown breached its Treaty obligations.

Procedures supporting the High Court pathway (section 5.3.1)

The significance to Māori of the takutai moana and their customary rights in it placed an extra onus on the Crown to correspond and coordinate with High Court officials in advance of the Act's introduction, albeit within the constitutional limits prescribed by the separation of powers.

We consider that the procedural arrangements the Crown put in place to support the High Court registry and the operation of this pathway were inconsistent with its Treaty obligations of partnership and active protection.

However, in light of mitigating steps taken by the High Court, we are not persuaded that the Crown's actions – despite being inconsistent with the Treaty – caused prejudice to claimants. All groups who used the High Court pathway to make an application under the Act ultimately had their applications accepted.

We suggest one step the Crown could take to ensure the High Court pathway better meets claimant needs and its own Treaty obligations. Some claimant counsel propose that the Crown's duty to actively protect Māori interests should extend to the provision of cultural competency training for registry staff. We consider this an idea worth exploring further. The exact nature of the training and the practicalities of delivery would need considerable discussion. But we consider that its provision would likely improve the experiences of Māori interacting with the High Court, both on marine and coastal matters and more generally.

Procedures supporting the Crown engagement pathway (section 5.3.2)

We consider that the Crown has failed to provide adequate and timely information about the Crown engagement pathway for Māori seeking to utilise the Act. This is a breach of the Treaty principle of active protection and has caused those attempting to use that pathway, or both pathways, significant prejudice.

Clarity and cohesion between the two application pathways (section 5.3.3)

The lack of coherence between the application pathways has already caused prejudice to claimants. They have been required to choose their pathway in the face of uncertainty, insufficient information, and apparent inconsistencies. They will continue to be prejudiced for as long as policies, processes, and procedures that ensure the pathways operate coherently are lacking. As the Crown has as yet failed to put such policies in place, we find it has breached the principle of active protection.

Processes for dealing with overlapping interests (section 5.4)

The Crown has declined to engage with most applications that involve overlapping claims. This decision is based on the Crown's view that competing claims should be resolved before the Minister makes a decision to enter formal terms of engagement.¹ We are concerned by the consequences of this policy. First, it causes undue delay: it is complex and time-consuming for groups to resolve their overlapping interests themselves. That the Crown encourages them to do so is, in general,

1. Document A131(a), p 317

consistent with its Treaty obligations. But their encouragement is effectively meaningless without supporting mediation processes or decision-making guidelines.

In our view, there are obvious analogies with the approach the Crown takes to resolving overlapping interests in settlement negotiations, which the Tribunal considered in the *Hauraki Settlement Overlapping Claims Inquiry Report*. There, the Tribunal said the Crown had a duty to actively and practically support efforts to resolve overlapping interests, including by ‘facilitat[ing] consultation, information-sharing, and the use of tikanga-based resolution processes.’² The Tribunal identified principles and practices it considered essential for a robust tikanga-based process, including flexibility, transparency, and timeliness.³ While it was not the Crown’s role to design or implement such a process, the Tribunal emphasised that the Crown was responsible for ‘provid[ing] funding, administrative support, access to facilitators or mediators, and more.’⁴ We have come to a similar view in this inquiry, and consider the Crown should do likewise for groups with overlapping interests in the marine and coastal area. The fact that it has not yet done so constitutes a breach of the principle of active protection. This breach has caused, and/or will cause prejudice to Māori if not addressed.

7.2 FINDINGS AND RECOMMENDATIONS FROM CHAPTER 6

This chapter considers whether the funding arrangements the Crown has put in place to support the Act are Treaty-compliant. We make the following findings, recommendations, and suggestions.

General features common to both application pathways

The Crown’s contribution towards applicants’ costs (section 6.1.1)

We find the Crown is in breach of its Treaty obligations of active protection and partnership in only partially funding applications from Māori seeking legal recognition of their customary rights in the takutai moana. If not remedied, this will cause significant prejudice to applicants under the Act.

In light of the Treaty breaches and resulting prejudice we have identified in respect of the Crown’s providing only partial funding, we recommend that the Crown instead cover all reasonable costs that claimants incur in pursuing applications under the Act, regardless of pathway. This would mean the Crown abandoning its present policy of covering only 85 per cent of costs and instead fully funding:

- ▶ all costs currently funded under the model – such as hearing costs, which are inadequately covered at present;
- ▶ costs not currently funded under the model – such as the cost of judicially reviewing ministerial decisions on customary rights in the Crown engagement pathway; and

2. Waitangi Tribunal, *Hauraki Settlement Overlapping Claims Inquiry Report*, p 118

3. Waitangi Tribunal, *Hauraki Settlement Overlapping Claims Inquiry Report*, pp 90–91

4. Waitangi Tribunal, *Hauraki Settlement Overlapping Claims Inquiry Report*, p 90

- ▶ any GST payable by claimants.

This overarching recommendation also relates to other aspects of the Crown's funding regime.

Retrospective and delayed funding reimbursements, and the minimum funding threshold (section 6.1.2)

Retrospective payment, as a principle, does not breach the Treaty principles of active protection and partnership.

In our view, the real difficulty claimants face is not so much the retrospective nature of the funding, as the length of the delays that so often accompany funding reimbursements. We consider that this is where the Crown risks Treaty breach: it can only meet its obligation of active protection by reimbursing applicants without unreasonable delay.

We do not have sufficiently cogent evidence before us to determine if the overall delays were the result of fault by the Crown or claimants. Thus, we make no finding of Treaty breach on this matter.

Because of our lingering concerns about reimbursement delays and the funding threshold, we suggest the Crown improve this area of the Act's funding regime 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. We consider the Legal Aid model, where applicants seek authority for specific work in advance, is superior to the current marine and coastal area funding arrangements in terms of the clarity and certainty it offers applicants.

Funding not available to pursue both pathways simultaneously (section 6.1.3)

Despite our concerns, and despite the availability of alternative options for avoiding duplicate funding, we consider that the Crown's refusal to simultaneously fund both application pathways does not amount to a breach of the Treaty principle of active protection. The real problem – and the Treaty breach – stems from the Crown's ongoing failure to set comprehensive and clear policy to guide the Crown engagement pathway (discussed in section 5.3.3).

Milestones and tasks in the funding matrices (section 6.1.4)

We find, on balance, the funding caps of the milestones and tasks set out in the funding matrices are broadly inadequate. Many milestones and tasks were set too low initially or revised down. Additional tasks, which were not initially provided for, have been retrospectively accommodated into existing milestones without any extra funding provided. The funding caps are not sufficiently flexible to accommodate new and untested legislation and procedures. In many cases, it is clear that without amendment, claimants will suffer further prejudice as a result of the current caps' insufficiency. We conclude that the Crown has breached its Treaty obligations to act reasonably and in good faith with Māori, and to actively protect their interests.

We also emphasise our overarching recommendation that the Crown funds all reasonable costs to pursue applications under either pathway.

The application of GST to funding (section 6.1.5)

The evidence we heard on the payment of GST was not sufficiently clear to support any findings on Treaty breach.

In any event, whether the payment of GST is best characterised from the financial perspective of the claimants or the Crown is immaterial; it is only an issue in a funding scheme where applications are not fully funded. We therefore include the payment of GST in our overarching recommendation on funding matters – that the Crown cover all reasonable costs that claimants incur in pursuing applications under the Act, including any GST.

Funding for claimants to establish and maintain a mandate (section 6.1.6)

We find that the Crown has breached the principles of active protection and partnership by establishing processes that significantly delay – and may even deny – the provision of funding for mandate establishment to some applicants under the Act. By requiring Crown engagement applicants to bear the costs of mandate establishment for an unreasonable length of time – costs which in the case of unsuccessful applications will never be reimbursed – the Crown's actions have caused claimants significant prejudice. The Crown has also breached Treaty principles by failing to fund the costs of mandate maintenance for groups whose tikanga requires this: this too is a wholly reasonable cost, in our view.

To remedy these breaches, we again suggest the Legal Aid funding regime serves as a valuable model – especially its use of pre-authorised grants. In our view, applicants under the Marine and Coastal Area Act could submit to Te Arawhiti, in advance, detailed descriptions of the mandate activities they plan to undertake. Te Arawhiti could then decide whether to pre-authorise a grant, allowing claimants to incur costs in the certain knowledge that they would later be reimbursed.

Potential for real or perceived conflicts of interest (section 6.1.7)

We refer to Te Arawhiti's decision to decline funding for a particular interlocutory application in the 'test case proposal' because it purportedly did not 'advance' the applicant's claim.⁵ We accept counsel submissions that for the Crown to deny funding on this basis is, in effect, an attempt to determine the litigation strategy of claimants – an inappropriate role for the Crown to play when it is also a contesting party to the litigation.

We find that by having the same Crown agency administer funding, deal with Crown engagement applications, and instruct Crown Law on litigation in the High Court, the Crown has placed itself in a position where its obligation to actively protect Māori interests, and its own interest, may conflict. This is in breach of the principles of acting reasonably and in good faith. An actual conflict arose when it denied funding for the 'test case proposal', causing those claimants prejudice. We recommend that the funding regime should be administered by an independent agency that is not associated with either pathway under the Act. Once again we

5. Marine and Coastal Area (Takutai Moana) Act 2011, s 99; transcript 4.1.2, pp 522–523

recommend that the Crown consider the use of existing specialist agencies such as Legal Aid Services.

Te Arawhiti's process for reviewing funding decisions (section 6.1.8)

We find the Crown's processes for reviewing funding decisions lack clarity, accessibility, transparency, and independence, and thus breach its Treaty obligations to Māori. On the basis of the evidence, we find that claimants are thereby prejudiced.

In future, we recommend the Crown offers independent mechanisms allowing claimants to review funding decisions, rather than the present internal escalation arrangements. Again, we consider the current Legal Aid regime – with its independently constituted Legal Aid Panel review process – provides a useful model. For this reason and others, we recommend the Crown give serious consideration to amending the Legal Aid scheme to accommodate marine and coastal area applications.

Funding for High Court applicants

Initial High Court filing fees and notice of appearance fees (section 6.2.1)

The appropriateness of the High Court as the jurisdiction to hear applications under the Act is an issue for stage 2 of our inquiry: we thus make no findings here about the Treaty-compliance of High Court fees. Even if we were to consider this issue during stage 1, we are not persuaded that the High Court's fee requirements caused any lasting prejudice to Māori.

Hearing and interlocutory costs (section 6.2.2)

We find that the Crown's funding matrix does not adequately fund the hearing and interlocutory costs claimants face and, in particular, the associated legal costs. If the caps remain as they are, it is highly likely that the sums claimants will need to contribute will be prohibitive for many, if not most. They will certainly be significantly more than the 15 per cent contribution anticipated by the Crown. The current funding matrix is not adequate in this regard, it is in breach of the Crown's obligation to actively protect Māori interests, and will cause significant prejudice if not remedied.

Any new funding policy the Crown puts in place will need to ensure that there is adequate funding available for claimants to participate in a full and meaningful way during the interlocutory and substantive hearing stages of a proceeding. We also urge the Crown to implement our overarching recommendation (set out in section 6.1.1) to fully fund all reasonable costs to prosecute applications under the Marine and Coastal Area (Takutai Moana) Act, which include hearing costs.

Possibility of exposure to legal costs orders (section 6.2.3)

Given the absence of protective provisions in the Act, or the funding regime itself, we find that the Crown's funding regime breaches its Treaty duty of active protection. This could cause significant prejudice to Māori if they are faced with a large costs order and have no ability to meet it.

If the High Court does choose to order legal costs under the Act, we recommend that the Crown amend its funding regime so that these costs are explicitly and completely covered. This is consistent with our overarching recommendation that all reasonable claimant costs be fully funded. Alternatively, we recommend that the Crown enacts statutory protection for High Court applicants by amending the current Legal Aid regime to cover applications under the Act, or by enacting similar legislative protection elsewhere.

Funding for Crown engagement applicants

Funding contingent on the Minister's decision to engage with the applicant (section 6.3.1)

There is very little evidence at this point to indicate whether the quantum of funding in the Crown engagement pathway is adequate, relative to claimant costs. Thus we are unable to make a finding on the overall adequacy of the Crown's funding for this pathway.

However, it is clearly prejudicial that the Crown's policy requires applicants in one pathway who have incurred significant costs to remain out of pocket for an indefinite period. The prejudice is even greater in cases where the Minister ultimately chooses not to engage with the applicant group, and so they receive nothing. We thus find the Crown has not acted reasonably and in good faith by establishing funding arrangements that prejudice Crown engagement applicants, and this is a breach of the principles of partnership and active protection. We recommend the Crown provide these applicants with access to funds immediately upon lodging their applications, along with any necessary supporting information, consistent with the availability of funding in the High Court pathway.

Funding for appeals and judicial review (section 6.4)

We find that the Crown has not acted reasonably and in good faith by establishing funding arrangements that prejudice Crown engagement applicants, and this is a breach of the principles of partnership and active protection. We recommend the Crown makes funding for judicial review available to Crown engagement applicants and Māori third parties.

Funding for overlapping customary interest groups without applications (section 6.5)

Overall, we find that the Crown acted reasonably and in good faith by deciding to fund Māori non-applicant groups to engage with applications under the Act in which they have overlapping interests. There is no Treaty breach. However, we urge the Crown to take note of our concerns about how it communicates this policy and its effects, and amend it accordingly.

Lack of funding for resource consent applications (section 6.6)

Overall, while we have concerns about how the lack of funding to respond to resource consent applications potentially affects claimant interests, we also consider that claimants would be in the same position if the Marine and Coastal

Area (Takutai Moana) Act had never been enacted. As this is an issue affecting the resource management regime generally, we consider that the concerns and questions raised here should be further examined in the Tribunal's forthcoming kaupapa inquiry on natural resources and environmental management. Accordingly, we make no finding here on whether the lack of funding is in breach of the Treaty and prejudices Māori.

Dated at Wellington this 29th day of June 20 20



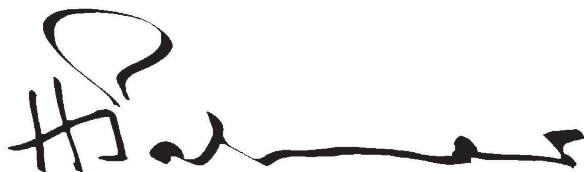
Judge Miharo Armstrong, presiding officer



Ron Crosby, member



Dr Rawinia Higgins, member



Dr Hauata Palmer, member



APPENDIX

LIST OF CLAIMS, CLAIMANTS, AND INTERESTED PARTIES

CLAIMS AND CLAIMANTS

Wai 120 (Opua lands and waterways claim)

Claimants: Te Raumoia Balneavis Kawiti and others

Wai 203 (Mokomoko claim)

Claimants: Karen Stefanie Mokomoko and Pita Tori Biddle

Wai 375, Wai 520, Wai 523 (Whakarara mountain claim, Kerikeri lands claim, and Kapiro Farm claim)

Claimants: Anaru Kira and Pita George (deceased)

Wai 420 (Mataikona A2 claim)

Claimant: George Matthews

Wai 475 (Whangapoua Forest claim)

Claimant: Wanda Brljevič

Wai 619 (Ngāti Kahu o Torongare – Te Parawhau hapū claim)

Claimant: Waimarie Bruce-Kingi

Wai 745 (Patuharakeke hapū lands and resources claim)

Claimants: Paki Pirihi (deceased) and Luana Pirihi

Wai 966 (Ngāpuhi Te Tiriti o Waitangi claim)

Claimants: Gray Theodore, Pereme Porter, and Rangimarie Maihi

Wai 1092 (Ūpokorehe claim)

Claimant: Charles Aramoana (deceased)

Wai 1308 (Patuharakeke Hapuu ki Takahiwai claim)

Claimants: Ngakawa Pirihi, Paraire Pirihi, Harry Midwood, Patricia Heperi, Crete Milner, and Terence Pirihi

Wai 1341 (Ngāti Rēhia hapū claim)

Claimants: Remarie Kapa (deceased), Te Huranga Hohaia (deceased), and Nora Rameka

Wai 1524 (Pomare Kingi claim)

Claimants: Louisa Collier, Hineamaru Lyndon, and Ira Norman

Wai 1537 (descendants of Wiremu Pou claim)

Claimants: Louisa Te Matekino Collier, Amiria Waetford, and Hineamaru Akinihī Lyndon

Wai 1541 (descendants of Hinewhare claim)

Claimants: Louisa Te Matekino Collier and Frederick Collier junior

Wai 1673 (Ngāti Kawau (Collier and Dargaville) claim)

Claimants: Louisa Te Matekino Collier and Rihari Richard Takuira Dargaville

Wai 1681 (Pukenui blocks claim)

Claimants: Popi Tahere, Louisa (Ruiha) Te Matekino Collier, and Arthur Mahanga

Wai 1758 (Ūpokorehe Hapū Ngāti Raumoā Roimata Marae Trust claim)

Claimants: Wallace Aramoana, Lance Reha, Gaylene Kohunui, Wayne Aramoana, and Sandra Aramoana

Wai 1787 (Rongopopoia hapū claim)

Claimants: Mekita Te Whenua, Richard Wikotu, and Kahukore Baker

Wai 1837 (Whānau and hapū of Te Tai Tokerau settlement issues (Nehua) claim)

Claimant: Deidre Nehua

Wai 1842 (Tauhara, Waiaua, and Te Kaitoa whānau lands claim)

Claimant: The Reverend Pereniki Tauhara

Wai 1846 (Ngāti Ruamahue and Ngāti Kahu ki Whangaroa (Sailor Morgan) claim)

Claimant: Sailor Morgan

Wai 1857 (Ngāti Korokoro and Te Pouka (Sheena Ross and Kim Isaac) claim)

Claimants: Sheena Ross and others

Wai 1940 (Waitaha (Te Korako and Harawira) claim)

Claimants: Jane Mihingarangi Ruka Te Korako, and Te Rungapu (Ko) Ruka

Wai 2003 (Ngāti Korokoro, Ngāti Wharara, and Te Pouka (Turner and others) resource management claim)

Claimants: Cheryl Turner and others

Wai 2217 (children of Te Taitokerau (Broughton) claim)

Claimant: Maringitearoha Kalva Emily Pia Broughton

Wai 2577 (Marine and Coastal Area (Takutai Moana) Act (Te Kapotai) claim)

Claimants: Te Riwhi Whao Reti, Hau Hereora, Romana Tarau, Karen Herbert, and Edward Cook

Wai 2579 (Marine and Coastal Area (Takutai Moana) Act (Ngāti Hine) claim)

Claimants: Waihoroi Shortland and Pita Tipene

Wai 2580 (Marine and Coastal Area (Takutai Moana) Act (Te Waimate Taiamai) claim)

Claimant: Bonny Craven

Wai 2581 (Marine and Coastal Area (Takutai Moana) Act (Ani Taniwha) claim)

Claimant: Ani Taniwha

Wai 2582 (Marine and Coastal Area (Takutai Moana) Act (Rosaria Hotere) claim)

Claimants: Rosaria Hotere and Jane Hotere

Wai 2583 (Marine and Coastal Area (Takutai Moana) Act (Pomare Hamilton) claim)

Claimants: Arapeta Hamilton, Angeline Greensill, and Te Rua Rakuraku

Wai 2584 (Marine and Coastal Area (Takutai Moana) Act (Tangi Tipene) claim)

Claimants: James Maxwell, Arapeta Mio, Muriwai Jones, Dave Peters, Te Aururangi Davis, Nola Melrose, and Bettina Maxwell

LIST OF CLAIMS, CLAIMANTS, AND INTERESTED PARTIES

- Wai 2585 (Marine and Coastal Area (Takutai Moana) Act (Aorangi Kawiti) claim)**
Claimants: Te Raumoa Kawiti and Rhonda Kawiti
- Wai 2586 (Marine and Coastal Area (Takutai Moana) Act (Gray Theodore) claim)**
Claimants: Gray Theodore, Pereme Porter, and Rangimarie Maihi
- Wai 2587 (Marine and Coastal Area (Takutai Moana) Act (Deidre Nehua) claim)**
Claimant: Deidre Nehua
- Wai 2588 (Marine and Coastal Area (Takutai Moana) Act (Violet Nathan) claim)**
Claimants: Maringitearoa Broughton and Violet Nathan
- Wai 2602 (Marine and Coastal Area (Takutai Moana) Act (Te Whānau a Apanui) claim)**
Claimants: Maruhaeremuri Stirling (deceased), Ruiha Stirling, Parehuia Herewini, and Haro McIlroy
- Wai 2603 (Marine and Coastal Area (Takutai Moana) Act (Te Rae Trust) claim)**
Claimants: Steve Panoho and Joy Panoho
- Wai 2604 (Marine and Coastal Area (Takutai Moana) Act (Te Ao) claim)**
Claimants: Maggie Ryland-Daigle and Roger Tichborne
- Wai 2612 (Marine and Coastal Area (Takutai Moana) Act (Ngāti Te Wehi) claim)**
Claimants: Nancy Awhitu and others
- Wai 2658 (Marine and Coastal Area (Takutai Moana) Act (Marise Lant) claim)**
Claimant: Marise Lant
- Wai 2661 (Marine and Coastal Area (Takutai Moana) Act (Cletus Maanu Paul) claim)**
Claimants: Cletus Maanu Paul, Desma Kemp Ratima, Rihari Richard Takuira Dargaville, Titewhai Harawira, and William Jackson
- Wai 2669 (Marine and Coastal Area (Takutai Moana) Act (Te Whakapiko) claim)**
Claimants: David Peters, Marie Tautari, Allan Peters, and Rowan Tautari
- Wai 2674 (Marine and Coastal Area (Takutai Moana) Act (Tangihia hapū)**
Claimants: Cletus Maanu Paul and David Potter
- Wai 2675 (Marine and Coastal Area (Takutai Moana) Act (Reti) claim)**
Claimant: Elvis Shayne Reti
- Wai 2680 (Marine and Coastal Area (Takutai Moana) Act (Collier and others) claim)**
Claimant: Ruiha Collier
- Wai 2690 (Marine and Coastal (Takutai Moana) Act (Glennis Rawiri) claim)**
Claimant: Glennis Rawiri
- Wai 2691 (Marine and Coastal Area (Takutai Moana) Act (Edward Parahi Wilson) claim)**
Claimant: Edward Parahi Wilson
- Wai 2692 (Marine and Coastal Area (Takutai Moana) Act (Harvey Ruru) claim)**
Claimant: Harvey Ruru
- Wai 2707 (Marine and Coastal Area (Takutai Moana) Act (Motiti Rohe Moana Trust) claim)**
Claimants: Kataraina Keepa, Umuhuri Matehaere, Graham Hoete, and Nepia Ranapia

Wai 2710 (Marine and Coastal Area (Takutai Moana) Act (Hokianga hapū Whānau claim))

Claimants: Anania Wikaira, Ipu Absolum, Claire Morgan, Pairama Tahere, Ellen Toki, Oneroa Pihema, Fiona Reihana Ruka, Hinerangi Puru, and Kyrke Watkins

Wai 2711 (Marine and Coastal Area (Takutai Moana) Act (Muaūpoko Tribunal Authority) claim)

Claimant: Di Rump

Wai 2712 (Marine and Coastal Area (Takutai Moana) Act (Watson) claim)

Claimant: Trevor Tahuaroa Watson

Wai 2726 (Marine and Coastal Area (Takutai Moana) Act (Ngāti Takapari) claim)

Claimant: Keatley Hopkins

Wai 2756 (Descendants of Ani Ngapera and Whānau claim)

Claimant: Arohanui Harris

Wai 2764 (Marine and Coastal Area (Takutai Moana) Act (Ngātiwai) claim)

Claimant: Haydn Edmonds

Wai 2765 (Marine and Coastal Area (Takutai Moana) Act (Ngāti Tu) claim)

Claimant: Hori Manuirirangi

Wai 2766 (Marine and Coastal Area (Takutai Moana) Act (Ngāti Pu) claim)

Claimant: Edward Shaw

Wai 2767 (Marine and Coastal Area (Takutai Moana) Act (Wharekauri) claim)

Claimant: Jack Daymond

Wai 2768 (Marine and Coastal Area (Takutai Moana) Act (Willoughby and Papuni) claim)

Claimants: Robert Willoughby and Glenys Papuni

Wai 2769 (Marine and Coastal Area (Takutai Moana) Act (Ngāi Te Rangī) claim)

Claimant: Charlie Tawhiao

Wai 2773 (Marine and Coastal Area (Takutai Moana) Act (Mahanga) claim)

Claimant: Pereri Mahanga

Wai 2774 (Marine and Coastal Area (Takutai Moana) Act (Ngāti Te Ara) claim)

Claimant: Roimata Minhinnick

Wai 2775 (Marine and Coastal Area (Takutai Moana) Act (Koromatua Hapū) claim)

Claimant: Hokimate Kahukiwa

Wai 2776 (Marine and Coastal Area (Takutai Moana) Act (Ngai Tupango) claim)

Claimant: Michael John Williams

Wai 2777 (Marine and Coastal Area (Takutai Moana) Act (Ngāti Taimanawaiti) claim)

Claimants: Jasmine Cotter-Williams and Faenza Bryham

Wai 2778 (Marine and Coastal Area (Takutai Moana) Act (Watene) claim)

Claimant: Kahura Watene

Wai 2779 (Marine and Coastal Area (Takutai Moana) Act (Pikari) claim)

Claimant: John Pikari

- Wai 2780 (Marine and Coastal Area (Takutai Moana) Act (Te Tuhi) claim)**
Claimant: James Henare Te Tuhi and Esmeralda Te Tuhi (deceased)
- Wai 2781 (Marine and Coastal Area (Takutai Moana) Act (Te Harāwaka) claim)**
Claimants: Bella Savage and Waipae Persese
- Wai 2782 (Marine and Coastal Area (Takutai Moana) Act (hapū ki Marokopa) claim)**
Claimants: Loretta Poa and Natasha Willison
- Wai 2785 (Marine and Coastal Area (Takutai Moana) Act (Griggs) claim)**
Claimant: Ryshell Griggs
- Wai 2786 (Marine and Coastal Area (Takutai Moana) Act (Harper) claim)**
Claimant: Rebecca Harper
- Wai 2787 (Marine and Coastal Area (Takutai Moana) Act (Gabel) claim)**
Claimant: Robert Gabel
- Wai 2788 (Marine and Coastal Area (Takutai Moana) Act (Walker) claim)**
Claimant: Violet Walker
- Wai 2789 (Marine and Coastal Area (Takutai Moana) Act (Te Rarawa ki Ahipara) claim)**
Claimants: Rueben Taipari Porter, John Matiu, Christopher Takana Murray, Linda Waimirirangi Matenga Harrison, and Sandy Murupaenga
- Wai 2790 (Marine and Coastal Area (Takutai Moana) Act (Taueki) claim)**
Claimant: William J Taueki
- Wai 2791 (Marine and Coastal Area (Takutai Moana) Act (Kingi) claim)**
Claimant: Malcolm J Kingi
- Wai 2792 (Marine and Coastal Area (Takutai Moana) Act (Tau) claim)**
Claimant: Rawiri Te Maire Tau
- Wai 2793 (Marine and Coastal Area (Takutai Moana) Act (Jones) claim)**
Claimant: Muriwai Maggie Jones
- Wai 2794 (Marine and Coastal Area (Takutai Moana) Act (Ngāi Tamahaua) claim)**
Claimants: Tracy Hillier and Rita Wordsworth
- Wai 2796 (Marine and coastal area (Halkyard-Harawira) claim)**
Claimant: Hilda Halkyard-Harawira
- Wai 2797 (Marine and Coastal Area (Takutai Moana) Act (Kemara) claim)**
Claimant: Te Rangikaiwhiria Kemara
- Wai 2798 (Marine and Coastal Area (Takutai Moana) Act (Tūpara) claim)**
Claimant: Nick Manu Pouwhare Tūpara
- Wai 2799 (Marine and coastal area (Tuteao) claim)**
Claimant: Verna Tuteao
- Wai 2801 (Marine and coastal area (George and others) claim)**
Claimants: Samuel George, Huhana Lyndon, and Puawai Leuluai-Walker
- Wai 2803 (Marine and Coastal Area (Takutai Moana) Act (Te Parawhau) claim)**
Claimants: Mira Norris and Marina Fletcher

Wai 2804 (Marine and Coastal Area (Takutai Moana) Act (Toki) claim)

Claimant: Valmaine Toki

Wai 2808 (Marine and Coastal Area (Takutai Moana) Act (McGrath) claim)

Claimants: Richard McGrath and Maraina McGrath

Wai 2809 (Marine and Coastal Area (Takutai Moana) Act (Davis) claim)

Claimant: Joseph Davis

Wai 2811 (Marine and Coastal Area (Takutai Moana) Act (Ngāti Mihiroa) claim)

Claimant: Ned Tomlins

Wai 2861 (Marine and Coastal Area (Takutai Moana) Act (Te Whānau a Kai) claim)

Claimant: David Hawea

INTERESTED PARTIES

Wai 78 (Torere claim)

Wai 88 (Kapiti Island claim)

Wai 89 (Whitireia block claim)

Wai 121 (Ngāti Whatua Lands & Fisheries claim)

Wai 156 (Oriwa block claim)

Wai 230 (Matauri and Putataua Bays claim)

Wai 234 (Motukawanui claim)

Wai 246 (Puhipuhi State Forest claim)

Wai 492 (Kororipo Pa claim)

Wai 549 (Ngapuhi land and resources claim)

Wai 654 (Ngāti Rahiri Rohe claim)

Wai 861 (Mangakahia Hapū Claims Collective claim)

Wai 884 (Te Pa o Tahuhu (Richmond, Auckland) claim)

Wai 919 (Ngāti Tupango Lands and Resources (Bay of Islands) claim)

Wai 1148 (Paremata Mokau A16 land claim)

Wai 1312 (Whakaki claim)

Wai 1313 (Ngapuhi (Mahurangi and Tamaki Makau Rau) claim)

Wai 1460 (Tauhinu ki Mahurangi claim)

Wai 1526 (Mahurehure claim)

Wai 1536 (descendants of Te Kemara uri o Maikuku rāua ko Hua claim)

Wai 1661 (Ngāti Rua (Wood, Smith, and Wood) claim)

Wai 1623 (Ngāti Rangatahi kei Rangitikei claim)

Wai 1728 (Ngāti Pakau and Ngāti Rauwawe (Kire and others) claim)

Wai 1838 (Ngāti Ruamahoe hapū (HikuWai whānau) claim)

Wai 1843 (Te Aeto hapū claim)

Wai 1896 (descendants of Patuone of Ngapuhi claim)

Wai 1941 (Kingi and Armstrong (Nga Puhi) claim)

Wai 2179 (Ngā Uri o Tama, Tauke Te Awa, and others lands (Dargaville) claim)

Wai 2188 (Kanihi me etahi Lands (Noble and others) claim)

Wai 2244 (descendants of Ngatau Tangihia (Dargaville) claim)

Wai 2355 (Te Taumata o Te Parawhau (Tuhiwai, Tito, and Nepia) claim)

Wai 2257 (Te Whānau a Apanui Mana Wahine (Stirling) claim)

Wai 2468 (Kaipara lands (Public Works Act and Soliders Resettlement Act) claim)

Wai 2484 (Te Hika a Pāpāuma settlement policy claim)
 Wai 2772 (Ngāti Torehina ki Matakāa claim)
 Wai 2831 (Te Rūnanga Nui o Te Aupōuri Trust claim)
 Wai 2832 (Marine and Coastal Area (Takutai Moana) Act (Tito) claim)
 The Ngāti Makino Heritage Trust
 Kenneth Kennedy
 Derek Huata
 Ngāi Te Hapū Incorporated on behalf of Ngāi Te Hapū
 Ngāti Hinewaka me ona Karangaranga Trust on behalf of Ngāti Hinewaka
 Hinehau Tahuāroa, Riwaka Houra whānau, Puketapu hapū
 Tahuāroa-Watson whānau, Puketapu hapū
 Henare Tahuāroa, Watson whānau for the Whanganui inlet
 Mōkau ki Runga Regional Management Committee on behalf of Ngā Hapū o Mōkau ki Runga
 Christopher Henare Tahana, Edward (Fred) Clark, Hayden Turoa, Novena McGuckin on behalf of Te Patutokotoko
 John Hata on behalf of Ngāti Patumoana, hapū of Whakatohea
 Ngāi Tu-āhu-riri hapū
 Apakura Rūnanga Trust Incorporated on behalf of Ngāti Apakura
 Te Tawharau o Ngāti Pukenga on behalf of Ngāti Pukenga
 Clive Moses Tongawākau Chairperson on behalf of Araukuuku hapū
 Anthony Olsen on behalf of Te Mana o Ngāti Rangitīhi
 Lesley Te Maiharoa-Sykes on behalf of Waitaha Taiwhenua o Waitaki Trust
 Te Rūnanga o Ngāi Tahu
 Otakanini Topu Māori Incorporation
 Te Rūnanga o Ngāti Tama
 Ngā Potiki a Tamapahore Trust
 Te Rūnanga o Ngāti Whakaue Incorporated for and on behalf of Ngāti Whakaue ki Maketū Hapū
 John Henry Tamihere on behalf of Te Rūnanga o Ngāti Porou ki Hauraki
 Tui Tuakana Makea Marino and others for Te Aitanga-a-Hauiti iwi-hapū
 Bella Thompson for the Rewha and Reweti whānau
 Susan Taylor and Wirihana Morris for members of Ngāi Tumapuhia-a-Rangi ki Motuwairaka, Ngāi Tumapuhia-a-Rangi ki Okautete and Ngā Marae o Te Kotahitanga o Kahungunu ki Wairarapa
 A Edwards of Whakatōhea hapū
 Sir Hekenukumai (Hector) Busby on behalf of Ngāti Kahu and Te Rarawa and Te Uriohina
 Robert Sinclair for whānau-a-Kahu
 William Kurtis Moran of Ngāti Manu and Ngāti Rahiri
 Kare Rata on behalf of Ngā Hapū o Ngāti Wai iwi
 Raemon Michael Parkinson on behalf of Te Uri a Te Hapū
 John Leonard Pita Tiatoa on behalf of Ngā Hapū o Taiamai ki te Mairangi
 Larry Delamare of Te Whānau-a-Apanui hapū
 Christina Davis of Ngāti MuriWai hapū
 Nicola MacDonald on behalf of Te Whānau o Hone Pipita rūa ko Rewa Ataria Paama
 Dean Flavell of Hiwarau c, Turangapikitoi, Waiotahe, and Ohiwa of Whakatōhea
 Te Rūnanga o Ngāti Whatua

