BEFORE THE WAITANGI TRIBUNAL **WAI 3060**
TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER Te Rau o te Tika: the Justice System Inquiry

AND

IN THE MATTER OF Whakatika ki Runga: Mini-inquiry

BRIEF OF EVIDENCE OF ANITA JEAN MILES FOR CROWN FORESTRY RENTAL TRUST

22 July 2022

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Introduction

1. My name is Anita Jean Miles. I am the Principal Advisor Funded Services at the Crown Forestry Rental Trust (the **Trust**). I have been employed by the Trust since 2004. Prior to joining the Trust, I was a contract researcher supporting claimants in Waitangi Tribunal's Te Urewera Inquiry. I have also been a senior research officer at the Waitangi Tribunal where I authored or co-authored research reports in several inquiries and was claims facilitator in the Te Ika Whenua and Te Urewera inquiries. I have a BA (Hons) in Anthropology from Victoria University of Wellington.

2. I am authorised to provide this brief of evidence on behalf of the Trust.

3. The Trust is an interested party in relation to Whakatika ki Runga, the Tribunal's mini-inquiry into Crown funding for claimant participation in Waitangi Tribunal inquiries.

4. This brief of evidence is provided by the Trust to assist the Waitangi Tribunal's consideration of issues set out at Memorandum-Directions Wai 3060, #2.5.9(a) Appendix A: Questions that will be addressed in Whakatika ki Runga.

Summary

5. This brief of evidence provides information on the following matters:

   (a) Establishment of the Crown Forestry Rental Trust:

   (b) Trust Purpose, Status and Trustees;

   (c) Trust Powers and Obligations;

   (d) The Trust Fund:

   (e) Funding Claims involving Crown Licenced Forests:

   (f) Trust Funding for District Inquiries:

   (g) Trust Funding for Remedies Inquiries; and

   (h) Disbursing Trust Funds.

Establishment of Crown Forestry Rental Trust

6. The Trust is a common law trust established pursuant to a deed of trust date 30 April 1990 (as amended and restated by the High Court on 26 September 2018). It is a direct outcome of the settlement of litigation between Māori interests (represented by Sir Graham Latimer and the New Zealand Māori Council) and the Crown over the Crown's proposed sale of Crown-owned exotic forests in the 1980s.

New Zealand Māori Council v Attorney-General (1987)

7. In March 1987, the New Zealand Māori Council (**NZMC**) challenged the proposed transfer of assets, including Crown Licenced Forests, from the Crown to Crown-owned companies (**SOEs**) under the State-Owned Enterprises Act 1986 (**SOE Act**). The concern was that Crown assets transferred to SOEs might no longer be available for the settlement of Māori claims of breaches of the Treaty of Waitangi.

8. In June 1987, in the landmark case of *New Zealand Māori Council v Attorney-General* (known as the *Lands Case*), the Court of Appeal ruled that the transfer of Crown assets to SOEs would be unlawful without establishing a system to consider whether transfers were inconsistent with the principles of the Treaty. The Court directed the Crown to prepare a scheme of safeguards protecting existing or foreseeable claims against lands intended to be transferred to SOEs.

9. The Treaty of Waitangi (State Enterprises) Act 1988 gave effect to agreements subsequently made between NZMC and the Crown to protect the position of Māori claimants and ensure the Treaty compliance of actions under the SOE Act. It made amendments to legislation, including the Treaty of Waitangi Act 1975 and the SOE Act, and gave the Waitangi Tribunal the power to order resumption of SOE land to Māori.

10. In July 1988, the Crown announced its intention to sell Crown commercial forestry assets. In February 1989, NZMC challenged the proposed forest sales as inconsistent with the decision of the Court of Appeal in the *Lands Case*. In March 1989, the Court of Appeal ruled that NZMC was entitled to apply for relief under leave reserved in the *Lands Case*.

Forestry Agreement (1989)

11. In July 1989, NZMC and the Federation of Māori Authorities (**FOMA**) reached an agreement with the Crown resolving the further proceedings, which is often referred to the "Forestry Agreement".[1] A copy of the Forestry Agreement is attached as **Appendix A** to this brief of evidence.

12. The Forestry Agreement established a framework to enable the Crown to sell forestry assets while meeting Māori concerns to preserve their potential interest in those forests. The Forestry Agreement allowed the Crown to sell cutting rights to trees on Crown Forest land through the issue of forestry licenses (**Crown Forest licenses or CFLs**). Forestry companies would pay a capital payment for the tree crop, and an annual rental for the use of the underlying land (**CFL Land**). Title to CFL Land was not able to be transferred by the Crown without a recommendation from the Tribunal.

13. The Forestry Agreement provided that the rentals paid for use of CFL Land were to be set aside:[2]

> The annual rental payments from the land are to be set aside in a fund administered by a trust (to be known as the Rental Trust). The final beneficiaries of the Rental Trust will be the successful claimants and the Crown. Both Māori and Crown interests will appoint trustees to the trust.

14. The Forestry Agreement further provided that:[3]

> The interest earned by the fund will be made available to assist Māori in the preparation, presentation, and negotiation of claims before the Waitangi Tribunal which are involved with, or could involve, forest lands covered by this agreement. The trustees will be responsible for setting appropriate criteria for, and allocating funds to, claimants in a timely fashion and for ensuring confidentiality of all information supplied by claimants.

15. The Forestry Agreement anticipated that the accumulated rentals and the CFL Land would eventually transfer to claimants if their claims for resumption were successful before the Waitangi Tribunal or otherwise revert to the Crown if they were unsuccessful.[4] At the time, predictions were that relevant

[1] Agreement between the Crown, New Zealand Māori Council and the Federation of Māori Authorities Incorporated dated 20 July 1989.

[2] Forestry Agreement, clause 11(i).

[3] Forestry Agreement, clause 11(ii).

[4] Forestry Agreement, clause 11(iii).

forestry claims would be resolved by the Waitangi Tribunal within a relatively short timeframe.

16. The main principles under which the parties negotiated the Forestry Agreement are set out in an annex to the Agreement.[5] The principles set out in the Annex are expressed as "Māori principles" and "Crown principles". The Māori principles are to:

    (a) uphold the articles of the Treaty of Waitangi and the protections in current legislation;

    (b) minimise the alienation of property which belongs to Māori; and

    (c) optimise the economic position of Māori.

17. The Crown principles are to:

    (a) safeguard the integrity of forestry sales by guaranteeing security of tenure to purchasers, avoid discounting and encourage investment in the forestry industry; and

    (b) honour the principles of the Treaty of Waitangi by adequately securing the position of claimants relying on the Treaty.

18. The Forestry Agreement provided that the provisions of the agreement would be embodied, where appropriate, in legislation, and in a Trust Deed and consent order, with the terms of each to be agreed between the parties.[6]

Crown Forest Assets Act 1989

19. The legislation anticipated in the Forestry Agreement became the Crown Forest Assets Act 1989. The long title of the Act confirms the purpose of the Act is to provide for:

    (a) the management of the Crown's forest assets;

    (b) the transfer of those assets while at the same time protecting the claims of Māori under the Treaty of Waitangi Act 1975; and

[5] Forestry Agreement, clause 15 and Annex.
[6] Forestry Agreement, clause 16.

(c) in the case of successful claims by Māori under the Act:

(i) the transfer of CFL land to Māori ownership; and

(ii) the payment by the Crown to Māori of compensation.

20. Section 34 of the Act provided for the establishment of the Trust:

> **34. Forestry rental trust**
>
> (1) The responsible Ministers shall, on behalf of the Crown, establish by deed a forestry rental trust.
>
> (2) All licence fees payable under Crown forestry licences shall, until such time as the Waitangi Tribunal makes a recommendation in relation to the land under section 8HB or section 8HE of the Treaty of Waitangi Act 1975, be collected by the Crown and shall be paid into an account held in the name of the forestry rental trust.
>
> (3) All payments by the Crown to the forestry rental trust may be made without further appropriation than this section.

Crown Forestry Rental Trust Deed (1990)

21. As required by section 34(1) of the Crown Forests Assets Act, the Crown settled the trust deed for the Crown Forestry Rental Trust on 30 April 1990 (the **Trust Deed**).

22. The Trust Deed has subsequently been varied by orders of the High Court on 16 August 2011 and 26 September 2018. A copy of the present Trust Deed (incorporating these variations) is attached as **Appendix B** to this brief of evidence**.**

Trust Purpose, Status and Trustees

23. Clause 2.1 of the Trust Deed sets out the function and purpose of the Crown Forestry Rental Trust, namely to:

(a) receive the Rental Proceeds [commonly referred to as 'accumulated rentals'] from [Crown Forestry] Licences; and

(b) make the interest earned from the investment of those Rental Proceeds available to assist Māori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, [Crown Forest] Licensed Land.

24. Clause 2.3 of the Trust Deed makes the Trust's independence from the Crown clear:

> The trust is not an instrument of the Crown nor of the Government of New Zealand. The Crown shall not be liable to contribute any sum towards the payment of satisfaction of any debts or liabilities of the Trust, other than any sum payable to the Trust by the Crown under clause 2.2 [being the accumulated rentals].

25. Clause 3.2 of the Trust Deed declares a trust over the Trust assets for the benefit of the "Beneficiaries" (who are defined as the Crown, the Claimants and any other person who has registered a claim under the Treaty of Waitangi Act 1975 to CFL Land)[7]:

> The Trustees will hold the amounts paid under Clause 2.2 [being the accumulated rentals] and any other property becoming part of the Trust Fund or the Trust on trust for the Beneficiaries in accordance with the terms and conditions of this Deed. All investments made with the Assets of the Trust Fund shall be held by the Trustees as the exclusive property of the Trust and investments shall be held exclusively for the benefit of the Beneficiaries.

26. Clause 5 of the Trust Deed provides that there will be six trustees of the Trust; three appointed by the Crown (**Crown Trustees**), and three by Māori (**Māori Trustees**). NZMC and FOMA together are the Māori Appointor of the three Māori Trustees and the Minister of Finance is the Crown Appointor.

27. The present trustees of the Trust are:

(a)	Crown Trustees:	Rakihia Tau (Chair)
		Lynell Huria
		Tau Henare
(b)	Māori Trustees:	Paul Majurey
		Bronwyn Koroheke
		Annette Sykes

28. If the number of trustees falls below six, the remaining trustees may continue to function, provided there are at least two Crown and two Māori Trustees. However, the Trust Deed also provides for the appointment of alternates

[7] Clause 1.1 of the Trust Deed, definition of *Beneficiaries*.

where trustees unable to attend meetings or there are conflicts of interest.[8] The Trust Deed provides that where a unanimous decision cannot be made on any matter relating to the Trust Fund, the decision of a majority of Trustees (two Crown Trustees and two Māori Trustees) shall be binding, failing which there can be no valid decision of the Trustees.[9]

Trust Powers and Obligations

29. The powers and duties of the Trustees are set out at clause 7 of the Trust Deed and include:

    (a) a duty on Trustees to ensure proper accounts are kept and to deliver annual financial statements on the accounts and activities of the Trust to the Crown Appointor and the Māori Appointor;[10]

    (b) a requirement to keep records relating to the rental proceeds received in respect of each license; payments made to each beneficiary or group of beneficiaries; and all investments of the Trust Fund and all income from those investments;[11] and

    (c) the power to invest or re-invest any portion of the Trust Fund not immediately required for the purpose of the Trust.[12]

30. The investment powers of the Trust are very limited relative to the investment powers that apply to general trustees under the Trusts Act 2019 (as well as those that applied under the Trustee Act 1956). Even though these powers were broadened in the 2018 amendments to the Trust Deed, the Trust is only permitted to invest in fixed income securities and interest-bearing deposits with NZ registered banks for terms of up to 12 months.[13] Each investment must also meet minimum credit rating criteria.[14]

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[8] The current alternate trustees are Mark Bogle, Anne Carter and Anne Haira (alternates for Crown Trustees), John Paki (alternate for Paul Majurey), Riria Te Kanawa (alternate for Bronwyn Koroheke), Roimata Kirikiri (alternate for Annette Sykes) and Simon Karipa (as a fourth alternate Māori Trustee).

[9] Trust Deed, clause 7.7.

[10] Trust Deed, clause 7.1.

[11] Trust Deed, clause 7.2.

[12] Trust Deed, clauses 7.8 and 7.11.1.

[13] Trust Deed, clause 7.11.1(a).

[14] Trust Deed, clause 7.11.1(b).

31. The Trustees may also hold all or any part of the Trust Fund or income in a bank account or uninvested for any period, for the purpose of:[15]

(a) accumulating sufficient of the Trust Fund until it can be invested; or

(b) holding sufficient of the Trust Fund to meet anticipated payments as they fall due.

32. Further fundamental provisions concerning the Trust's power to provide funding to "Claimants" (referred to by the Trust as "Approved Clients"[16]) are found in clauses 9 and 10 of the Trust Deed. Clause 9.2 relevantly provides:

> 9.2 Interest earned from investment of the Trust Fund[17] shall be accumulated by the Trustees to be applied at the Trustees' sole discretion:
>
> 9.2.1 to pay the expenses of the Trustees and of the Trust, including the remuneration of the Trustees and all taxes and other levies on income or assets of the Trust; then
>
> 9.2.2 subject to Clause 10, to assist any Claimant in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, Licensed Land.

33. Clause 9.2.2 is crucial as it states that the interest earned from investment of the Trust Fund is to be applied at the Trustees' sole discretion to assist any Claimant in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, CFL Land. Funding distributed to the Trust's Approved Clients is therefore not deducted from the accumulated rentals, but is instead derived from the interest earned on those accumulated rentals through investment.

34. Clause 10 addresses payments to Claimants and provides that:

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15 Trust Deed, clause 7.11.6.

16 "*Claimant*" is defined at clause 1.1 and means a person who the Trustees recognise and accept as meeting the criteria laid down by the Trustees in accordance with Clause 10. The Trust uses the term Approved Client to mean "Claimant" as used in the Trust Deed. The Trust Deed does not, itself, refer to 'Approved Client'.

17 "*Trust Fund*" is defined as "the Assets of the Trust", that is capital held by the Trust, income from it and any proceeds of collection or realisation. The Deed permits majority decision making "on any matter relating to the Trust Fund" (clause 7.7). Although the Deed permits majority decision making the majority must include at least 2 Māori and 2 Crown Trustees.

(a) the Trustees shall decide:[18]

(i) the criteria for those persons applying for distributions of income under Clause 9.2.2 to qualify as Claimants;

(ii) the basis for allocating funds to Claimants; and

(iii) the machinery for ensuring confidentiality of information supplied to the Trustees by Claimants and persons seeking the status of Claimants.

(b) the Trustees may vary such criteria and decisions from time to time, which variations take effect from a date specified by the Trustees;[19]

(c) before deciding or varying funding criteria, the Trustees must consult with:[20]

(i) NZMC, FOMA and the Crown; and

(ii) any other persons or groups which they consider appropriate;

(d) payments to Claimants shall be made to the individual, group or body, which the Trustees in their sole discretion consider represent the Claimants;[21]

(e) the Trustees may, in their sole discretion, decline any application of funds;[22]

(f) the Trustees shall only make payments for expenditure or activities, and in amounts, that the Trustees have approved before the expenditure is incurred or activity undertaken and, in giving such approval, the Trustees may specify maximum or interim amounts where the scope or cost of any activity is uncertain at the time of the approval;[23] and

[18] Trust Deed, clause 10.1.
[19] Trust Deed, clause 10.2.
[20] Trust Deed, clause 10.3.
[21] Trust Deed, clause 10.4.
[22] Trust Deed, clause 10.5.
[23] Trust Deed, clause 10.6.

(g) the Trustees may only make payments:[24]

(i) to Claimants, upon delivery to the Trustee of satisfactory evidence and detail of any expenditure to be reimbursed and of any activity for which the Trustees have agreed to pay; and

(ii) to others, to meet costs incurred by or for the benefit of Claimants, upon delivery to the Trustees of satisfactory evidence of those costs and the authority for incurring them.

35. The Trustees also have and are subject to all the general powers (to the extent they are not limited by the Trust Deed), obligations and duties of trustees, including those mandatory duties now set out in Part 4 of the Trusts Act 2019. Those mandatory duties, which cannot be excluded or modified by the Trust Deed, are to:[25]

(a) know the terms of the Trust;[26]

(b) act in accordance with the terms of the Trust;[27]

(c) act honestly and in good faith;[28]

(d) hold or deal with trust property and otherwise act for the benefit of the beneficiaries, in accordance with the terms of the trust, or, for a trust for a permitted purpose, to further the permitted purpose of the trust, in accordance with the terms of the trust;[29] and

(e) exercise the Trustee's powers for a proper purpose.[30]

36. These mandatory duties inform the exercise of Trustee discretion under those specific powers set out in the Trust Deed.

[24] Trust Deed, clause 10.7.
[25] Trusts Act 2019, section 22.
[26] Trusts Act 2019, section 23.
[27] Trusts Act 2019, section 24.
[28] Trusts Act 2019, section 25.
[29] Trusts Act 2019, section 26.
[30] Trusts Act 2019, section 27.

37. Accordingly, in exercising their discretion in the context of funding decisions, the Trustees must:

(a) be mindful of their fiduciary duties and the need for even-handedness, equity, impartiality and affordability; and

(b) act prudently and rationally having regard to, among other things:

(i) the overall purpose of the Trust;

(ii) section 34 of the Crown Forest Assets Act (under which the Trust was created);

(iii) the amount of funding assistance available;

(iv) benchmarks developed in the light of historic experience; and

(v) the specific powers and duties set out in the Trust Deed.

38. Further, as detailed in the section which follows below, the Trust Fund from which Trustees provide these funding contributions is diminishing. Trustees therefore must make prudent funding decisions. Trust funding policies (including its Benchmark and Fundable Activities Policy) are all aimed at generating the best efficiencies from a diminishing fund.

39. These circumstances mean the Trust cannot fund:

(a) the full costs of every activity within a district inquiry, a remedies inquiry, or settlement negotiations;

(b) activities above their allocated benchmark amounts; and

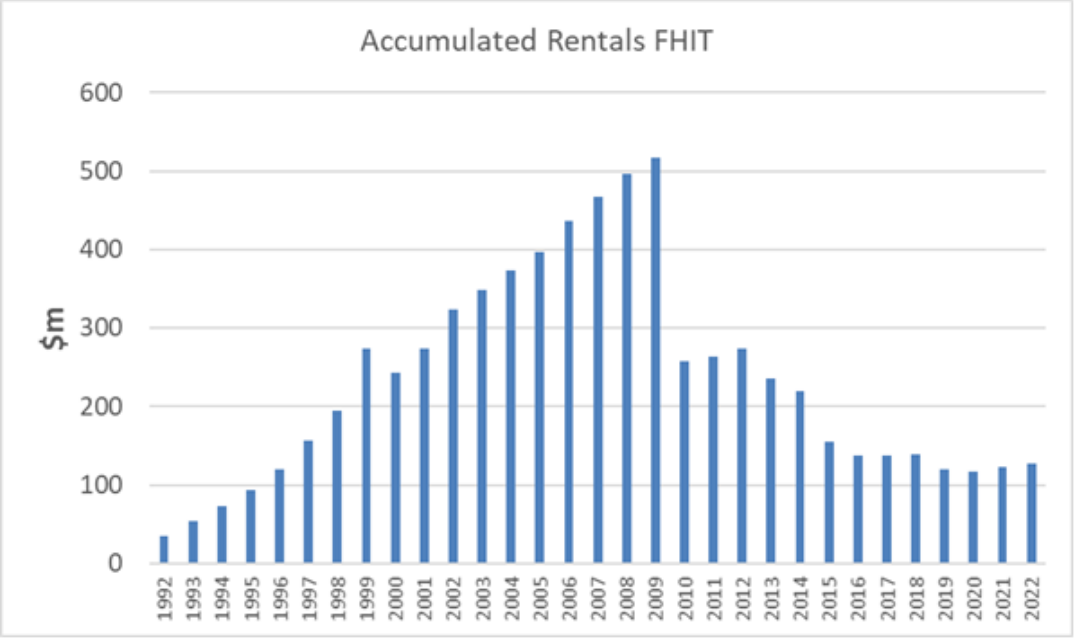
(c) activities and costs outside the terms of the Trust.

The Trust Fund

The Trust's Decreasing Investment Portfolio

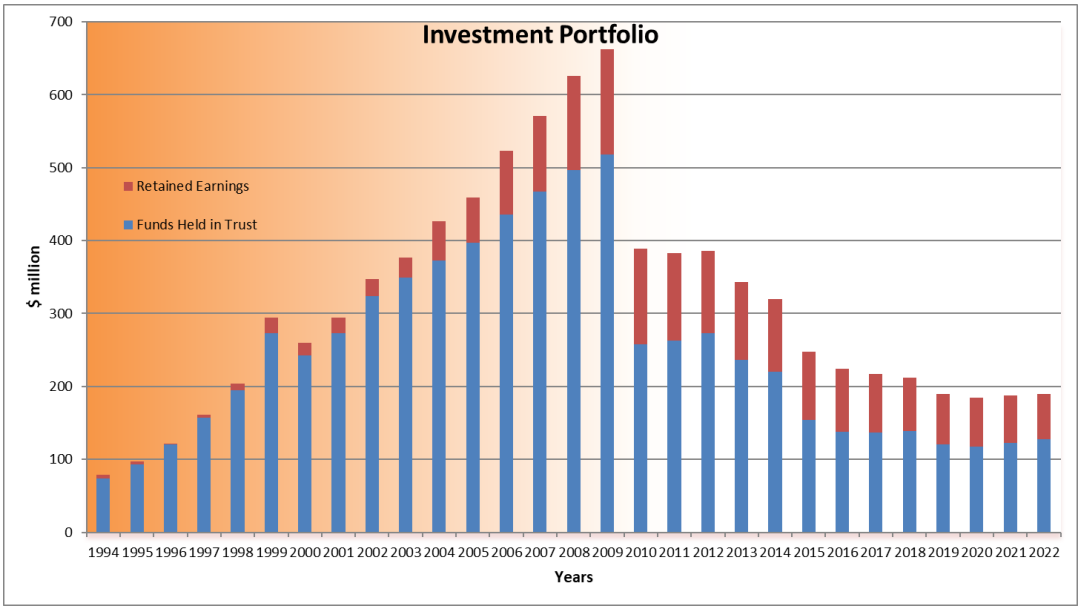
40. As Treaty settlements occur and accumulated rentals for Crown Licenced Forests transfer to confirmed beneficiaries, the Trust's investment portfolio decreases. So does its annual income, meaning there is less money to support the Trust's operations. This is shown in Graph 1, which illustrates the accumulated rentals held in Trust from 1992-2022.

Graph 1: Accumulated Rentals – Funds Held in Trust (FHIT):



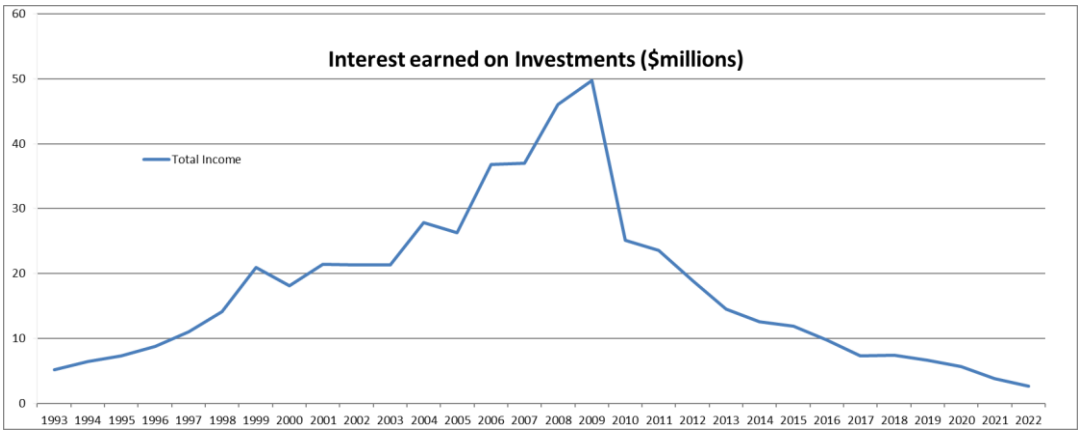
41. Graph 2 further illustrates the Trust's decreasing Investment Portfolio which is made up of retained earnings and accumulated rentals held in Trust from 1994 - 2022.

Graph 2: Investment Portfolio:



42. Graph 3 shows the Trust's interest earned on its investment of accumulated rentals and retained earnings. The income line in the graph also highlights the huge decline in income generated per annum from the Trust from $50m in 2009 when the Investment Portfolio was at its peak and interest rates were significantly higher to $2.7m last financial year (2021/22). The accumulated rentals collected by and received from LINZ are held on trust and are not counted as income.

Graph 3: Interest Earned on Investments:



43. The funding that the Trust provides to or on behalf of Approved Clients for their participation in Waitangi Tribunal processes only comes out of the Trust's income (the interest earned on investment) and not from the accumulated rentals. The funding amounts the Trust contributes for any

particular Approved Client or inquiry does not affect the quantum of the accumulated rentals that are ultimately transferred as redress in the settlement of relevanthistorical claims.

Funds Spent on Supporting Waitangi Tribunal Claimants

44. Any figure provided by the Trust on total funds spent to support Approved Clients and claimant participation in Waitangi Tribunal processes since 1990 is a 'best endeavours' estimate. This is because, over 32 years, there have been changes to accounting and financial reporting data practice.

45. The total funds disbursed by the Trust to date to support Approved Clients and claimants in Waitangi Tribunal inquiries is estimated to be $104 million of which $1.17 million was spent on supporting Approved Clients in remedies hearings. That includes all types of Trust funding (e.g. operations funding, hearings hosting funding, research and mapping funding, and indirect costs).

46. Information on Trust disbursements to Approved Clients can be found in the Trust's Reports to Appointors from 1990 to the year ended 31 March 2021, and documents containing details of the Trust Funds and total disbursements to claimants, which can all be accessed on the Trust's website.[31]

Managing Costs - The Long-Term Forecast

47. The Trust uses a financial forecasting model called the Long-Term Forecast to help estimate future revenues and costs, and to forecast the Trust's financial position going forward. It is used to forecast the level of funding that will be needed to fund current and future Approved Clients through to when the last CFL Land is expected to transfer to its confirmed beneficiaries.

48. The Long-Term Forecast is updated regularly, and takes into account:

[31] The total disbursements to claimants are broken down by region and Approved Client. The disbursements to Approved Client figures do not specify whether they are for Waitangi Tribunal or settlement negotiations processes. Disbursements to Approved Clients is funding paid directly to Approved Clients (for example operations funding for Tribunal inquiries, or operations and specialist advise funding for settlement negotiations). However, some Trust funding is funding disbursed on behalf of Approved Clients, and this means that research costs, and indirect costs paid for hearings, site visits, printing etc are not included in Approved Client disbursement figures.

(a) changes to, or developments regarding, Waitangi Tribunal inquiries, settlement negotiation timeframes and settlement legislation timeframes;

(b) changes to or developments regarding eligible or potentially eligible Approved Client groups;

(c) changes to the outlook for interest rates reflecting the latest market information available (regular external interest rate reviews are sought);

(d) changes to the level of accumulated rentals for each CFL Forest; and

(e) relevant Trust benchmark data, including funding approved by Trustees.

49. The first four items are outside the Trust's control and have a significant impact on the Long-Term Forecast. The last item is clearly within the Trust's control because it involves decisions by Trustees about whether to approve funding, and the level of that funding.

50. The Long-Term Forecast is based on the premise that Approved Clients will receive funding contributions up to the Trust's funding benchmark levels, not above.

51. As a general rule, standard funding requests (i.e. within benchmark and for fundable activities) must provide clear rationale for the type and level of funding requested as well as a detailed budget for each activity. They must also include appropriate supporting information and documents to support this rationale (e.g. appropriate quotes and/or costings, information confirming the progress of hearings or negotiations, etc).

52. The threshold for non-standard funding requests (i.e. above benchmark and for non-fundable activities) is higher. In these cases, an Approved Client must satisfy Trustees that, not only does a compelling case exist justifying them to exercise their discretion and depart from Trust policy, but a compelling case also exists for Trustees to treat them more favourably than other Approved Clients. If this threshold is not met, then non-standard requests will not be approved.

53. The over-riding responsibility for Trustees is to ensure that there are sufficient funds to provide reasonable funding assistance to all current and future claimant groups with historical Treaty claims involving or that could involve CFL Land so that they are able to prepare, present and negotiate those claims.

Managing Funds – the Trust's Investment Strategy

54. Trustees have a fiduciary duty to prudently manage the Trust's investment base so that there is a reasonable level of funding available to all eligible claimants.[32] The Trust's Investment Committee and Finance and Risk Committee are key to this. So is the Trust's investment strategy, which is another tool the Trust uses to prudently manage funds held in trust.

55. The investment powers of the Trust are set out in the Trust Deed in clause 7.11. As previously noted, the investment powers of the Trust are very limited compared to the investment powers that apply to general Trustees under the Trusts Act 2019 (and the Trustee Act 1956).

56. In 2018 the Trustees sought to broaden the investment powers under the Trust Deed to enable greater returns to be achieved on investments while ensuring funds continued to be invested in a prudent manner. This was because the original investment clauses of the Trust Deed did not reflect the growth in low-risk financial instruments available in the modern market, and the permitted investment options in the Deed had historically low interest rates. This required an amendment to the Trust Deed.[33]

57. The High Court issued a decision on 26 September 2018 approving the amendments sought by the Trustees to the terms of the trust, broadening the investment powers of the Trust.[34]

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[32] The Trust's Investment Committee is responsible to the Finance and Risk Committee. The Finance and Risk Committee are in turn responsible to the Trustees for the development and recommending of the investment strategy for the Trust, overseeing and monitoring its implementation and recommending any proposed changes in strategy to the Trustees.

[33] The Trust Deed does not have a provision governing how the Trust Deed is to be amended. The Trustees therefore applied to the High Court seeking amendments to the terms of trust. As part of that application, the Trustees sought the approval of the Minister of Finance (as Settlor and Crown appointor) and NZMC and FOMA as the Māori appointor.

[34] The Trust is limited to investing in fixed income securities and term deposits with any bank, for terms of up to twelve months, but not longer. Further these investments must have a long-term credit rating from an Approved Rating Agency that is not lower than three Credit

Trust Benchmark Policy

58. The Trust has a Fundable Activities and Benchmark Policy which:

    (a) lists the activities in settlement negotiations, Waitangi Tribunal District Inquiries and Remedies Inquiries involving Crown Licenced Forests that the Trust will contribute funding towards; and

    (b) sets funding benchmarks or caps for Approved Clients in settlement negotiations, Waitangi Tribunal District Inquiries and Remedies Inquiries involving CFL Land.

59. Specific funding criteria and fundable activities are set out in more detail below.

60. Trust benchmarks apply to all activities that the Trust funds. Trust benchmarks help the Trust to manage costs by setting maximum amounts of funding for activities. This is important for long term financial forecasting purposes because it enables the Trust to forecast with more certainty the Trust's financial position going forward, and whether it will have enough funds to support Approved Clients until the last CFL Land is transferred to confirmed beneficiaries. The Trust's benchmarks and fundable activities also assist in ensuring funding relativities and even-handedness across Approved Clients.

61. The Trust regularly reviews its funding policies including its funding benchmarks to ensure reasonable funding assistance is available to all eligible claimants. In the 32 years since 1990, the Trust benchmarks and fundable activities have changed from time to time in response to changing market rates, assessments of the effectiveness of its funding contributions, assessments of its financial position and the affordability of its funding contributions.

62. Trust funding benchmarks are confidential but are released to Approved Clients to help them prepare funding requests.[35]

Rating Grades under the New Zealand Government sovereign foreign currency credit rating from an Approved Rating Agency.

[35] There are also templated application forms, business plans, and budget templates to assist Approved Clients to make funding requests.

Funding Claims involving Crown Licenced Forests

The Trust's evolving approach to funding

63. When the Trust was established in 1990, it was expected that the Crown would negotiate 'Wai claim' specific settlements, some involving CFL Land. Because of this, Trust funding before the mid-1990s, was provided to support claimants to prepare, present and negotiate claims into specific forest land blocks rather than a comprehensive claim or claim/s.

64. The Tribunal did not give forest claims any particular priority above other claims. Few claims, if any, related solely to CFL Land. Rather the CFL elements of a claim were addressed alongside other elements of a group's claim/s. This is because the alienation of forest lands from Māori ownership was part of much broader and complex processes. Claims involving CFL Land were therefore commonly addressed alongside other non-CFL Land claims as part of a Waitangi Tribunal district inquiry and/or a comprehensive negotiation of historical claims with the Crown.

65. From the mid-1990s the Tribunal moved to grouping claims into district inquiries. It also required research casebooks for inquiry districts to be completed before hearings were scheduled. This caused the Trust to change its funding approach for district inquiries. Rather than funding claims into specific forest land blocks, the Trust began to fund comprehensive claims, which included claims to CFL Land. The provision of funding and research and mapping is therefore no longer confined to claims specific to CFL Land. Provided a comprehensive claim includes a claim or claims involving CFL Land, it will be eligible for Trust funding.

Nexus with Crown Forest Licensed Land

66. The Trust can only assist Approved Clients if they have claims '*which involve, or could involve, [Crown Forest] Licensed Land*'.[36] This is a Trust Deed requirement. A claim may *'involve or could involve [Crown Forest] Licenced Land*' because of a prejudicial effect of a Crown action or inaction on CFL Land or because the remedy being sought by a claimant involves a CFL Land.

[36] Trust Deed, clauses 2.1(b) and 9.2.2.

67. Eligible claims need not exclusively relate to CFL Land. Nor will they be ineligible for Trust funding if they involve matters other than CFL Land. provided a *comprehensive* claim includes a claim which involves or could involve CFL Land (and the group meets the Trust's other eligibility and capability criteria), the comprehensive claim will be eligible for Trust funding.

68. The Court of Appeal, in *Latimer v Commissioner of Inland Revenue* [2002] said that the purpose of clause 2.1(b) of the Trust Deed is the funding or provision of high-quality research to enable the Waitangi Tribunal to assess the historical claims before it.[37] In particular, the research should assist in determining the circumstances in which the Crown came into possession of the land; so that any breach of the Treaty suffered by the claimants can be given recognition and, if appropriate, the land returned. Assistance and funding of high-quality historical research includes the proper presentation of the research to the Waitangi Tribunal and its utilisation during the negotiation process.

69. The funding assistance and research that the Trust may provide can be wide-ranging as long as it can be linked to assisting the Waitangi Tribunal in determining whether a breach of the Treaty has occurred in relation to claims concerning CFL Land. There must be a demonstrable linkage of expenditure by the Trust to claims that may come before the Tribunal in relation to CFL Land.

Urgent Inquiries, Kaupapa Inquiries, Remaining Historical Claims Inquiries

70. The Trust does not fund Kaupapa inquiries and urgent inquiries because of the lack of direct nexus between the claims being considered within these two types of inquiries and CFL Land. Kaupapa inquiries for instance are about nationally significant issues affecting Māori. These claims are unlikely to involve a prejudicial effect of Crown action or inaction on CFL Land or are unlikely to involve a remedy being sought by a claimant involving CFL Land. Urgent inquiries typically challenge the status, method or outcomes of the Crown's negotiations and settlement processes or the Waitangi Tribunal's process. Such claims are about the policies, practices and decisions of the

[37] *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195, p 207 at [37].

Crown and Waitangi Tribunal rather than claims to the Waitangi Tribunal involving CFL Land.

71. The Trust does not yet have criteria or funding policies for Remaining Historical Claims Inquiries. As a general observation, it is not yet clear how many claims in the currently constituted Wai 2800 (Remaining Claims) inquiry would involve or could involve CFL Land given that claims relating to the CFL Lands within the inquiry area either:

    (a) have been settled (and the CFL Lands and relevant the accumulated rentals returned to iwi groups); or

    (b) are currently in the process of being settled by Approved Clients through settlement negotiations.

Trust Funding for District Inquiries

Approved Client Status

72. Key tenets of the Trust's funding policies are that funding cannot be distributed in the absence of an Approved Client, and funding must be distributed to or for the benefit of an Approved Client. This means that to be eligible to receive Trust funding a claimant group must first become an Approved Client of the Trust. To become an Approved Client for a district inquiry, a claimant group must satisfy Trustees that it meets the Trust's eligibility and capability criteria for a district inquiry. These criteria are set out in summary form in Appendix C to this brief of evidence. Different eligibility and capability criteria apply for a remedies inquiry and settlement negotiations. Trustees have established these criteria pursuant to clause 10.1 of the Trust Deed. The Trust's current Claimant Guide is also attached as **Appendix D** to this brief of evidence.

73. A key requirement of the Trust's eligibility criterion is for a group to either:

    (a) represent a cluster of Wai claims including one claim involving CFL Land; or

    (b) represent a claim involving CFL Land which has a significant number of claimants.

74. This latter criterion is important because the Trust cannot afford to fund Wai claims from individuals, whānau, hapū or from groups that do not represent a significant proportion of all potential claimants in a Waitangi Tribunal district inquiry. Clustering, therefore, enables efficiency in the allocation of funding (which is reducing).[38]

75. The Trust does not limit or prescribe the number of Approved Clients in any district inquiry. If Trustees approve an application, the group will become an Approved Client of the Trust, typically for two years. During this period, the claimant group must maintain its eligibility and capability. Trust staff will actively monitor this. If a group's eligibility and/or capability is affected by a material change (e.g. a Waitangi Tribunal district inquiry is stayed, or the group's financial systems and processes are compromised), a group's Approved Client status could be affected.

76. At the end of a group's Approved Client status period, it must reapply to Trustees to remain an Approved Client for a further period.

77. Approved Client status is not transferable between district, remedies inquiries and settlement negotiations. In other words, a group that has Approved Client status for a district inquiry cannot use this status to receive funding to participate in a remedies inquiry or settlement negotiations.

78. Becoming an Approved Client and obtaining Trust funds are two different processes. Becoming an Approved Client does not guarantee funding from the Trust. Rather, it is a mandatory step that must be achieved for a claimant group to be able to submit a funding request to Trustees.

79. In relation to a district inquiry Trust funding may have consequential benefits for other claimants in an inquiry who are not Approved Clients, and the Trust may fund activities wider than forestry specific claims in order for the Waitangi Tribunal to report on district inquiries that involve claims to CFL Land.

The Trust's total funding contribution to a district inquiry

[38] However, the Trust must guard against the inappropriate bundling of claims, *New Zealand Māori Council v Angela June Foulkes* [2014] NZHC 1777 29 July 2014, at [111].

80. The amount of funding that Trustees may approve for a Waitangi Tribunal district inquiry depends on several factors, including:

(a) the number of Approved Client groups;

(b) the number of scheduled hearing weeks;

(c) the complexity and efficiency of the inquiry;

(d) the amount of research and mapping required to support the claims; and

(e) the logistical and infrastructure requirements for each hearing week.

81. The Trust's potential funding contribution for a district inquiry is not capped at a set amount. This means there is no capped amount for operations funding that an Approved Client can receive for the time they participate in a district inquiry. Instead, Approved Clients can apply for funding for operational activities, up to benchmark amounts, for a 12-month period. Before that period expires, Approved Clients can apply again for operational funding for the next 12-month period and for further periods after that, provided they remain active in the inquiry. Operations funding may commence years before hearings begin, as claimants are engaged in the interlocutory and research phases of the inquiry.

82. As the overall inquiry funding amounts are not capped it is impossible to accurately forecast the maximum funding contribution the Trust may make to an inquiry at its outset. Waitangi Tribunal district inquiries represent a challenge to financial forecasting and requires the Trust to assess the likely duration of a given inquiry and the number of Approved Clients to be able to determine the likely amount of funding needed. This can be a difficult exercise, especially at the early stages of an inquiry. Timeframe extensions to inquiries caused by delays or additional hearing weeks also present a challenge for the Trust. The larger the inquiry, the longer it runs and the more Approved Clients there are, the larger the funding impact. Regular financial forecasting, therefore, occurs as updates about district inquiries are received.

83. Trust funding is also available for research and mapping. This is discussed more fully below. There are also client-specific research and mapping

funding benchmarks that each Approved Client is eligible to seek Trust funding for. The Trust does not pay for all research reports in a research casebook for an inquiry. When the Waitangi Tribunal defines its research requirements and issues Directions setting out the reports that it needs, the Trust's Approved Clients will seek funding for some but not all of those reports. However, the Trust will pay for the total costs of the individual reports it funds. In this sense, the Trust's research contribution is a substantial proportion of the required casebook but not all of it. That funded proportion is variable between inquiries.

Hearing Hosting and Operations

84. Trust funding is available for the following fundable activities for hearing hosting and operations in a district inquiry (and each fundable activity below has a benchmark):

Hearings and Judicial Conference Hosting

FUNDABLE ACTIVITY	**COMMENT**
Judicial Conference Costs	Funding available for judicial conference costs may include venue hire, catering and/or equipment hire costs.
Judicial Conference Travel Costs	Travel costs for the Approved Client to get to a judicial conference.
Hearing Venue Costs	The Trust will consider making contributions of funding for venue hire, catering, equipment hire (including audio visual equipment), security, and marae accommodation. May include an on-site facilitator role and/or presentation support for tangata whenua evidence.
Hearing Site Visit	Includes catering, transport costs, pōwhiri, site visit booklet production and printing costs.
Hearing Tangata Whenua Witness Costs	Contributions of funding for tangata whenua witness preparation and presentation costs.
Approved Client Travel to Hearings	Travel costs for the Approved Client to get to hearings.

Operations Funding

FUNDABLE ACTIVITY	COMMENT
Office Costs	Includes office rent, equipment hire/lease, power, phone and office supplies. Also includes pānui, and printing costs, website development/maintenance, advertising. Travel-related costs
Project Management	The maximum contribution for project management costs per annum could be allocated to any of the following: • Project Management; or • Claims Manager/Coordinator; or • Up to 2 Claims Administrators.
Accounting	The maximum contribution for accounting costs associated is based on a monthly amount.
Hearings Week Co-ordination	Activities covered include the co-ordination of and implementing a hearings programme strategy, hearing week presentations and timetabling for WT District Inquiries. Activities could be allocated to any combination of the following: • Project Management; and • Co-ordination/Administration
Audit	Contribution to an audit of accounts for contracted funding.
Governance Hui	Includes a contribution to the Approved Client's governance board overseeing the preparation and presentation of evidence to the Waitangi Tribunal. These costs may include governance fees or travel costs. Includes venue and catering costs.
Claimant Hui	Claimant hui, and may also include management meetings. Includes travel, venue and catering costs.
Research Hui	Hui which could include both Oral and Traditional, Overview and/or Gap-filling research and/or mapping. May include a Research Facilitator role, travel, venue and catering costs.

Research and Mapping

85. Trust funding is also available for the following fundable research and mapping activities:

RESEARCH FUNDABLE ACTIVITY
Scoping Report
Gap-filling Research
Full Historical report

Oral and Traditional History Project
Quality Assurance or Peer Review
Expert Witness Preparation and Presentation
Expert Advice to Claimant Counsel
MAPPING FUNDABLE ACTIVITY
Mapping Scoping project
District Overview Map Book
Imagery and Datasets
Approved Client Mapping Project
Mapping for Research Reports (per report or project)
Gap-filling Mapping

86. The Trust's research and mapping funding contribution is not capped. There are benchmarks for individual activities or types of reports or maps but no overall maximum amount. The potential amount of research funding forecast by the Trust for an inquiry reflects (at least initially) Trust staff knowledge about the likely research reports required for a district inquiry. This forecast is refined and updated as the Waitangi Tribunal decides what specific evidence it needs and as Approved Clients determine their evidential requirements.

87. The Trust uses maximum contractor benchmark and disbursement rates for various roles (e.g. historians, cultural advisors, translators, etc). The total number of hours a contractor works is capped by this benchmark.

88. The Trust funds overview technical research and mapping projects, which benefits all Approved Clients and other claimants participating in a district inquiry, and client-specific research and mapping projects, which are commissioned for a specific Approved Client only.

Funding for the use of Te Reo Māori and Accessible Formats

89. The Trust notes that it has a translation benchmark and may provide translation funding in a district inquiry but this is applied to translation of te reo Māori historical sources into English to support its commissioned

research projects in Waitangi Tribunal district inquiries to make te reo Māori sources accessible to historians and claimants.[39]

90. The Trust does not have a separate and specific benchmark for the funding of translations of tangata whenua witness briefs of evidence. The Trust makes a contribution to Approved Clients' tangata whenua witness costs. As a general comment, that contribution would be insufficient funding to resource a translation of a brief of evidence.[40]

91. The Trust does not have any funding benchmarks relating to translations of key documents into accessible formats, or audio-captioners, audio-describers or NZ sign language interpretation.

Trust funding for Remedies Inquiries

92. A group must first become an Approved Client for a remedies inquiry involving CFL Land to be eligible to receive Trust funding. This involves satisfying the Trust's eligibility and capability criteria for a remedies inquiry, namely, a group must:

(a) have a registered claim with the Waitangi Tribunal which involves or could involve CFL Land; and

(b) be seeking a binding recommendation for resumption of CFL land from the Waitangi Tribunal; and

(c) have confirmation from the Waitangi Tribunal that its application for an urgent remedies hearing has been granted (and preferably a hearing date and the scope of the hearing has been confirmed by the Waitangi Tribunal); or

[39] The range of Trust-funded translation projects includes: one-off translations of relevant historical documents or interview transcripts for inclusion in research projects or briefs of evidence; sizeable projects to complete the summary translation or abstraction of a large corpus of relevant historical material (e.g. minute books of the Papatupu Block Committees); Te Reo Māori Sources projects in its research assistance programmes in Tribunal districts, involving the sourcing and abstraction of key historical Māori language documents. Requests for full translations of some of the sources often result.

[40] From time to time, Trustees have agreed to fund the translation from te reo Māori to English of expert witness briefs of evidence filed on Waitangi Tribunal records of inquiry. This was for expert witnesses commissioned by the Trust to undertake technical and traditional history/mana whenua reports, as well as other experts, such as linguists and knowledgeable traditional historians who chose to have their evidence translated.

(d) be actively engaged in a remedies negotiation with the Crown.

93. Unlike district inquiries, there is no requirement in the Trust's remedies eligibility criteria for claimants to cluster. This is because applicant groups in this case are exclusively seeking the resumption of a CFL Land rather than other remedies for a multitude of other claims typical to a district inquiry.

94. The Trust has a benchmark for an Approved Client contribution and a benchmark contribution for an entire remedies inquiry and the 90-day negotiation phase. Both benchmarks are capped. This is different from a Waitangi Tribunal district inquiry where operations funding for an Approved Client is not capped (i.e. Approved Clients can receive operations funding for as long as an inquiry lasts) and research and hearing hosting funding is also not capped. These capped benchmarks help the Trust manage its potential funding contribution.

95. The Trust's benchmarks include funding for Approved Clients for expert witness briefs of evidence (including the expert witness costs), travel costs and legal costs in the hearings phase. The Trust also funds a forest valuation (given to all Approved Clients) and hearings venue costs, which are inquiry costs rather than client-specific costs. If an Approved Client proceeds to a 90-day negotiations phase, then the Trust will make a funding contribution towards negotiators' costs, legal fees and travel costs.

96. The fundable activities for a remedies inquiry are:

FUNDABLE ACTIVITY	**COMMENT**
Evidential preparation and presentation costs.	Can be used for all evidential preparation requirements including specialist advice, research and mapping, and/or expert witness costs. Benchmark includes all disbursements required for evidence preparation.
Legal advice	Up to 10% of approved funds may be used for disbursements, or actual and reasonable.
Travel costs	Approved Client travel and accommodation costs to attend Remedies hearing weeks.

FUNDABLE ACTIVITY	COMMENT
Venue costs	Benchmark contribution applies to hearing weeks scheduled at venues outside of Wellington. Benchmark is applied per Remedies Inquiry, not per hearing week. Benchmark includes venue hire, catering, equipment hire and audio visual equipment).
CFLL Valuation	The maximum contribution to a valuation of the CFLL that is the subject of the Remedies application. Valuer's preparation and presentation costs for hearings (if required) may be included in this benchmark **or** taken from evidential preparation and presentation costs benchmark.
Negotiation costs	Negotiator fees for up to 3 negotiators for 90 days and will include any non-legal specialist advice (if required)
Negotiation Travel costs	Travel and accommodation costs for negotiators, non-legal specialist advisors, and Approved Clients to attend negotiations.
Negotiation Legal advice	Up to 10% of approved funds may be used for disbursements, or actual and reasonable.

Disbursing Trust Funds

97. The Trust disburses funds either directly (paid to Approved Clients) or indirectly (paid to suppliers/contractors on behalf of Approved Clients). This is permissible under the Trust Deed. Different funding types (e.g. operations, hearings hosting, research) are contracted and disbursed differently.

98. The Trust has well-established systems and processes in place to ensure the efficient and timely payment of claimant funding and service provider invoices.

Operations funding

99. The Trust agrees funding contracts for operational funding with its Approved Clients in a district inquiry. Becoming an Approved Client means the group warrants that it has the capacity, capability, systems and procedures in place to manage Trust funding.

100. The Trust will pay a portion of the contract value as advanced funds in an on-signing amount to resource the Approved Client until the first milestone report is due under the funding contract.

101. Milestone reports are usually due quarterly, and must report on the activities that the Approved Client has progressed under the funding contract, including how they have tracked against the milestone dates set out in the funding contract.

102. Financial reports are due monthly. The financial reporting includes a statement of financial position specifying unspent funds, actual expenditure vs budgeted expenditure, variance and transaction analysis, bank statements and transaction listings. Approved Clients are funded for accountants who assist them to meet these financial reporting requirements. The Approved Client's spend as set out in financial reporting will be reflected in the reporting on activities undertaken in preparation of hearings claims. The Trust and the Approved Client both rely on good financial reporting – it assures everyone that spend is within the terms of the funding contract.

103. The Trust has a fortnightly pay run. Payments for milestones are made within 10 working days after the Approved Client demonstrates to the Trust's satisfaction that they have met their milestone under the funding contract and their financial reporting is acceptable. The Trust cannot pay if milestone and financial reporting is incomplete or inadequate. For this reason, the Trust works closely with Approved Clients, especially new Approved Clients, to give feedback on milestone and financial reporting.

104. As a funding contract progresses, certain line items of an Approved Client's budget (which forms part of the funding contract) may come under pressure. In order that the Approved Client has some flexibility in the application of funds (that reflects their actual need and activities in an inquiry) the Trust may agree to vary the budget within the funding contract (i.e. move money across line items). For example, a client may need less hui funding but may need more human resource funding. The Trust has a Variations to Funding Approvals Policy which sets out the delegations and rules about how much money can be moved around but generally, most requests can be accommodated.

105. At the conclusion of a funding contract a reconciliation of the total spend under the contract occurs. Any unspent funds are returned to the Trust, or a contract variation is agreed to extend the end date of the funding contract so that the unspent funds may be applied to a further period before the Approved Client seeks a new funding approval from Trustees.

Hearing Hosting Funding

106. Hearings hosting funding is disbursed by the Trust in the most practical and timely way to meet an Approved Client's requirements. This is done by agreement. For example, if the Approved Client has been able to confirm arrangements, identify suppliers, assemble quotes/invoices and deposit requirements and agree a proposed budget with Trust staff, then the Trust will make an initial payment to the Approved Client so that all required hearing week bookings can be made, and deposits paid, in advance of the hearing week. The Approved Client will then pay the suppliers themselves. In some cases, the Trust may pay the suppliers directly on behalf of the Approved Client to avoid double-handling and to save time.

107. The balance of the hosting money for a hearing week is paid after the hearing when the Approved Client has received final invoices from suppliers.

Research and Mapping Funding

108. Research and mapping funding is usually contracted by the Trust on behalf of Approved Clients directly with providers. This is because of the complex nature of research and mapping activities, which many Approved Clients are unfamiliar with.

109. In some circumstances, for client-specific projects, the Trust may agree a research funding contract with an Approved Client so that they can directly commission and contract a researcher or team to undertake a project. The Trust will only do this if Trustees are satisfied that the Approved Client has the capability to complete the research to the required evidential standard and within time and budget requirements.

Remedies Funding

110. Remedies funding approvals may be contracted with Approved Clients (who manage and pay their own expert witness, legal and travel costs) or paid

directly to providers who have been contracted by the Trust on behalf of Approved Clients (e.g. expert witnesses, counsel).

111. Remedies funding does not involve operations funding so operations funding contracts are not relevant. Hearings costs (venue, catering) are paid directly by the Trust. A valuation of CFL Land will be contracted by the Trust and the valuation provided to all of the Trust's Approved Clients in the inquiry.

Final Comments

112. This brief of evidence is intended to provide an overview of the role and responsibilities of the Trust in relation to the funding that the Trust provides to claimant groups for claims involving or relating to CFL Land in order to assist the Tribunal in its Whakatika ki Runga mini-inquiry.

113. As noted, the Trust is independent from the Crown, and the Trust and its activities are therefore beyond the scope of the Crown funding regimes that are the focus of the Tribunal's mini-inquiry. The Trust is also legally constrained in its funding by the requirements of the Crown Forest Assets Act and its Trust Deed, which are matters unique to the Trust. The Trust appreciates, however, that information regarding the nature of, and basis for, the funding provided by the Trust may be of contextual relevance to the Tribunal.

114. The Trust would be pleased to provide clarification to the Tribunal of any matter arising from this evidence (and confirms its strong preference to do so in writing in order that any response properly represents the position of the Trustees).

115. The Trust would also be pleased to consider requests for additional information that may be of assistance to the Tribunal (such to any legal or practical limits applying to the provision information).

DATED this 22nd day of July 2022

Anita Jean Miles