

WAI 3400 – MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT

COALITION CHANGES URGENT INQUIRY

STAGE TWO CLOSING SUBMISSIONS

HELD AT WAITANGI TRIBUNAL OFFICES, WELLINGTON

MONDAY 12 MAY 2025

Tribunal: Judge Miharo Armstrong
Ron Crosby
Dr Rawinia Higgins (via AVL)

Crown Counsel: Tim Stephens KC
Daniel Hunt
Zoe McCoy

Mikaere Paki (Te Tari Whakatau)

Claimant Counsel: Bryce Lyall
Hannah Swedlund (via AVL)
Darrell Naden
Harry Clatworthy
Charls Hirschfeld (via AVL)
Jackie Cole
Annette Sykes (via AVL)
Rox Soriano
Carmen Mataira
Cree Ratapu
Aroha Herewini (via AVL)
Ihipera Peters (via AVL)
Linda Thornton (via AVL)
Toni Talamaivao (via AVL)
Harriett Morrow (via AVL)
Heather Jamieson (via AVL)
Gabiella Brayne (via AVL)
Umar Kuddus (via AVL)

Interpreter: Conrad Noema

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PLEASE NOTE: In recognising that the spelling of names, dialect, and kupu differ across hapū and iwi, we acknowledge that each kupu has a whakapapa that is valid. With respect of these differences, the following transcripts have been specified for continuity in our mahi. The dialectal variations have been transcribed verbatim.

HEARING COMMENCES ON MONDAY 12 MAY 2025 AT 8.49 AM**(08:49) CONRAD NOEMA: (MIHI)**

Nau mai ki roto i tēnei whare. Nau mai ki te Rōpū Whakamana i te Tiriti. Nau mai ki te Kaiwhakawā a Judge Armstrong me tōna tira kotahi. Ahakoa ko
 5 Ron Crosby i tae ā-tinana mai, ko wētahi kei te haramai mā runga ipurangi, arā, ko Pāpā Tā Pou Temara tētahi ahakoa kua taka tētahi aituā i runga i a ia kei te noho i te taha o tērā o wā mātou pāpā a Tamati Cairns e takoto iho nei i tōna marae ki Ruatāhuna, kei reira tērā o tātou o te hunga pānera kāre anō i tae mai, ā, mā runga wairua kē a ia ka hono mai ki tēnei o ngā rukurūtari. Ā, tae rā anō
 10 ki Rawinia Higgins, tōku nei mōhio mā runga ipurangi tērā e tae mai ki konei. Nō reira, nau mai, haere mai, whakatau mai.

E te hunga rōia, nau mai, whakatau mai. Koutou i haere mai tawhiti, koutou i haere mai tata noa iho, nau mai, haere mai, hoki mai anō ki te Taraipiunara.
 15 Otirā, ki te Karauna, nau mai, hoki mai e Tim me tō tira. Ka hoki ngā mahara ki tērā o wā mātou pāpā o mua, arā, ko Bill Kaua, Te Wiremu Kaua o te rangi tērā. Hoki wairua mai e te pāpā ki te taha o mātou. Nō reira e te Karauna, nau mai, haere mai, whakatau mai.

Mātou ngā āpiha, ngā kaimahi kei mua, kei muri e mahi tonu, ngākaunui ki ngā mahi kei mua i a tātou. Nō reira tēnei te mihi mai i a mātou, tēnā koutou, tēnā koutou, tēnā koutou katoa. Ko te āhua o ngā kōrero ināianei, ka tuku te rākau ki tērā taha o te hunga rōia, māna e kōrero ana mō taua hunga, mō te iwi whānui hoki, tae rā anō ki tō mātou hunga mā runga ipurangi, ā, kei a koe te kōrero e
 25 te hoa, whakatau mai. **[Nil.]**

(08:52) MR HARRY CLATWORTHY: (MIHI)

Tēnā tātou e te whare. Tuatahi, tēnei te mihi e Conrad mō te whakatuwhera i ā tātou hui i te ata nei. Tēnā koe e te Kaiwhakawā, otirā tēnā koutou e te Rōpū Whakamana i te Tiriti o Waitangi. E Tā Pou, e te Karauna, e koutou katoa
 30 kua tae mai i te ahiahi nei, māku e mihi poto mō te hunga kaikerēme me rōia. Tuarua, tēnei te mihi ki ngā hunga mate, ko ō tātou whānau me hoa kua

whetūrangitia. Ko Shane Solomon nō Waikato-Tainui, haere, haere, haere atu rā. Ko te hunga mate ki te hunga mate, ko te hunga ora ki te hunga ora.

5 Kei runga te rā whakamutunga o tēnei huihui mō te MACA Inquiries. Me mihi ahau ki ngā kaikerēme katoa. Kua tae mai he huarahi uaua mō te whakatinana te mana o te iwi Māori i roto te moana, ā, koinei te whāinga, te whakatutuki te mana o ngā iwi Māori i raro te ture Pākehā nei. Ahakoa he mahi roa, he mahi rangatira, he mahi whakahirahira. Tēnā koutou katoa. **[Nil.]**

(08:54) MS ANNETTE SYKES: (MIHI)

10 Kei konei a Annette Sykes. Kei te tautoko i ngā mihi kua mihia. Engari kua mahue koe tētahi o ngā tino rangatira o te ao i moe mai hoki i ngā rā kua pahure ake nei. Ana, kei te tū tonu te maunga a Maungapōhatu i tae mai ki Rotorua i te rā nei ki te whakanui tētahi o ngā rangatira o Tūhoe, Te Arawa, Pouakani, a Tamati Cairns. I runga i taua tūāhuatanga, kei te tino hiahia kia mōhio mai
15 tātou, tae atu ia ki te tua o te ārai. **[Nil.]**

E tino pōuri mātou o Te Arawa i runga i tana mahuetanga. Ana, kei te mihi atu ki a koe e te pāpara, moe mai rā, moe mai rā, moe mai rā. **Te Arawa people are in grievance over this huge loss. So with that, we wish to
20 acknowledge Tamati Cairns in that vein.**

(08:55) MR MIKAERE PAKI: (MIHI)

Tēnei rā ka kōrihi ake i te pō, tēnei rā ka kōrihi atu ki te ao, tēnei hoki te tū ki te tautoko i ngā mihi kua mihia kua horahia nei ki mua i te aroaro o tātou i tēnei ata. Ka mutu, te pari tōtika atu rā ki a koe kai te Kaiwhakawā, otirā te tumu
25 manukura o te rangi nei me tō tira e mea ana ko te Rōpū Whakamana i te Tiriti o Waitangi, tēnei ka tūpou ake nei. **And as I stand and I acknowledge and express my gratitude to those who have spoke before me. Certainly, I must pay homage to you there, Sir, and of course the panel members you have with you that gives impetus and status.**

30

Huri āwhiowhio ki ngā pae manu e noho mai ana hei māngai ki ngā hapū maha huri noa i te motu. Kei taku rangatira, tēnā koe i āu kupu e whakararanga ana

i te tira huri noa i te motu, ika mai, waka mai, kua pau nei i a koe ērā mihi me ērā kupu rangatira āu. **I wish to acknowledge counsel and the relevant communities that they represent. Your presence is valued, it brings your positional status here being present.**

5

Tēnei hei māngai mō te Karauna e mea ana nei e whakaaro nui ana ki ngā āhuatanga o te wā. E tika tonu ai ngā hua ka puta ake nei i tēnei huinga, ā, ka mutu kia pau ake nei i a tātou ngā whakamahuki hei āpitihanga huruhuru nei ki ngā mihi kua mihia ki te hunga kua mate. **And again, we represent Crown and we have given deep thought of what is before us. But however, I shall leave matters to be carefully considered, but again there's no assuaging from acknowledging those people that have led with distinction and who are no longer with us.**

10

15 Nō reira, ka nanaiore i ērā kōrero a koutou me te korenga o tō tātou pāpā a Tā Pou i tēnei rā, kei te rongohia, kei te rangona, engari koia hoki taku mihi ki a koe kei te tuakana e Con nāu te rangi nei i koke ki te whakaaro nui me ngā kupu oha o te rangi nei. Nō reira, kei aku rangatira o te whare nei, anei ngā pūrākautanga o Te Arawhiti, otirā Te Tari Whakatau e hono mai ana ki te
20 Karauna e noho mai ana nei. E te iwi, tēnā koutou, anei mātou, tēnā tātou katoa. E tau ana. **And it's very intimate listening to Sir Pou unable to be present because of standing with our dear koro who is lying at rest as Con mentioned. But here we are, we are part of Te Arawhiti of the past, now Te Tari Whakatau, but however we are present, and we are ready.**
25 **Thank you for this opportunity.**

(08:57) JUDGE MIHARO ARMSTRONG: (MIHI)

Tēnā koutou. E tautoko ana au ngā mihi kua mihia. Ki tō tātou pāpā ki a Tamati e takoto ana, moe mai rā, moe mai rā. Ki a koutou katoa te hunga ora, e ngā rauawa o te motu, e ngā rōia, e te Karauna, nau mai hoki mai. He mihi hoki ki
30 a koutou e ngā kaikōrero kua kōrero i tēnei ata, ka nui te mihi, ā, tēnā koutou katoa. **I certainly do wish to express sentiments given. Tamati Cairns who is lying at state at this time. Te Arawa laments, the country laments. But**

again, for those who have made yourselves available, thank you for being here.

Good morning and welcome back to this sitting of the Waitangi Tribunal. As everyone will see we have much smaller numbers in attendance today on both sides. As you may have heard during the mihi sadly one of our esteemed leaders Tamati Cairns has passed away who was a close relation to Tā Pou. Tā Pou is fulfilling his obligations to his whanaunga by overseeing the funeral proceedings. However, fortunately we do have Professor Higgins who is a member of this inquiry panel attending today online. She hasn't been able to participate in the earlier sittings, but she is attending today. And of course, Tā Pou will return and will assist us in our deliberations when we make our decisions and issue our report, so I just wanted to raise that just so that everyone is aware of the constitution of the Tribunal panel today. Mr Stephens, are there any concerns with that from the Crown?

MR TIM STEPHENS:

Not at all, thank you, Sir, and our condolences to Tā Pou's whanaunga.

JUDGE ARMSTRONG:

Thank you, ka pai. With that, I will take appearances please.

20 (08:59) MR BRYCE LYALL: (MIHI, APPEARANCE)

E te pā whakawairua, te kaituku karakia, tēnā koe. Tēnā koe e te Kaiwhakawā, anō hoki ki a koutou ngā mema o te Rōpū Whakamana i te Tiriti o Waitangi, tēnā koutou. **Again, thank you for leading us in prayer. Again, to the Waitangi Tribunal.** Mōrena, Sir. Counsel's name is Lyall. I am joined this morning by Ms Swedlund via AVL.

We are here on behalf of five claimant groups: Te Upokorehe Iwi, the Panoho Whānau, and Te Rae Ahu Whenua Trust. And I will pause there, Sir, to acknowledge the passing of Maia Pittman who was a rangatira for that group, she was a stalwart as the group participated in the Whangārei Harbour Marine and Coastal Area Act hearings and in the Waitangi Tribunal in Northland on top

of all of the other kaupapa that she was a part of, and if I could speak, well, personally, there's a real hole there in terms of representation for that group that she leaves behind that will be hard to fill. Sir, I am also here on behalf of Ngā Whānau Hapū o Te Aitanga a Hauiti Takutai Moana, Ngāti Porou ki Hauraki and Te Roroa Iwi. We also represent two interested parties, Heta Kaukau for Te Rauhina Marae and Hapū and William Taueki for Ngāti Tamarangi. As your Honour pleases.

JUDGE ARMSTRONG:

Thank you, Mr Lyall.

10 **(09:01) MR DARRELL NADEN: (MIHI, APPEARANCE)**

E te Rōpū Whakamana i te Tiriti o Waitangi, te Kaiwhakawā, Mr Crosby, me ō kōrua tira kua tae mai nei i tēnei rā, tēnā koutou, tēnā koutou, tēnā tātou katoa. E te Karauna me ngā hoa mā e noho ana, i haere mai ana mā runga ipurangi, e ngā hoa mā, tēnā koutou. E ngā mana, e ngā reo kua tae mai ki tēnei nohonga, tēnā hoki anō koutou ki a koutou mā. **To you Judge Armstrong and to your panel members, thank you, and for the opportunity. Crown counsel, my fellow colleagues, I certainly want to extend our online community, again I wish to thank the wider public for making themselves available for this.**

20

Ko Darrell Naden tōku ingoa, ko au te rōia mō ngā kairēme e whai ake nei:

I am Darrell Naden, I represent the following claimant groups:

Ms Maria Knight and Karena Karauria on behalf Ngā Hapū o Tokomaru Ākau, of Tokomaru Bay, o Te Aitanga a Hauiti; Mr Michael Williams on behalf of himself and Ngāi Tūpango of Ngāpuhi; Kahura James Watene on behalf of himself and Ngāi Tukōkō and Ngāti Moe of Ngāti Kahungunu and Rangitāne; Ripeka Harper on behalf of the Pirere Whānau of Te Hika o Pāpāuma of the Wairarapa; Robert Gabel on behalf of himself and Ngāti Tara of Ngāti Kahu of the North; Violet Walker on behalf of herself and Te Whānau ō Rataroa of Whangaroa; Reuben Porter, John Matiu, Christopher Murray, Linda Harrison and Sandy Murupaenga on behalf of Te Iwi ō Te Rarawa ki Ahipara; and

Malcolm Kingi on behalf of himself and Ngāi Tāhū ō Mōhaka ki Waikare. Anei rā ngā kaikerēme. Tēnā koutou.

(09:03) MR CLATWORTHY: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā, otirā tēnā koutou e te Rōpū Whakamana i te Tiriti
5 o Waitangi. Ko Mr Clatworthy taku ingoa, nō te tari o Te Mata Law. Kei konei ahau mō e rua ngā kerēme mō 1501/2612 for Ngāti Te Wehi me Wai 1857 mō Ngāti Korokoro. **[Nil.]** Sir, my learned friend Mr Hirschfeld is also appearing via AVL, so I believe he would also log his own appearance regarding those claims he is representing. Tēnā koe.

10 **(09:03) MR CHARLS HIRSCHFELD: (MIHI, APPEARANCE)**

Tēnā koe e te Kaiwhakawā. May it please the Tribunal, Hirschfeld, Sir, for a number of claimants. The Record of Inquiry reference is #3.3.061 being the closing submissions on behalf of Wai 420, 475, 100, 2767, 2797, 2809, and 2832. Please, your Honour.

15 **(09:04) MS JACKIE COLE: (MIHI, APPEARANCE)**

E te Kaiwhakawā, ko Ms Cole tōku ingoa. Members of the Tribunal, I appear together with my friend Ms Sykes who is online, you have already heard from her, in relation to claims Wai 125 which is a claim by Angeline Greensil for and on behalf of Whāingaroa Harbour rōpū Tainui Hapū o Tainui Waka, together
20 with Wai 354 claim by Arapeta Hamilton and Marareia Hamilton on behalf of the descendants of Pōmare II and members of Ngāti Manu, Te Uri Karaka, Te Uri o Raewera and Ngāpuhi ki Taumārere Tribes. May it please the Tribunal.

(09:05) MS ROX SORIANO: (MIHI, APPEARANCE)

25 Tēnā koe e te Kaiwhakawā, otirā e te Rōpū Whakamana i te Tiriti o Waitangi, tēnā koutou. Te tuatahi, tautoko mārika hoki i ngā mihi kua mihia i tēnei ata. He mihi aroha atu ki ngā whānau pani i tēnei wā. Te tuarua, tēnei te mihi atu ki a koutou kua tae mai ki te tautoko tēnei kaupapa o te huihui, ētahi i runga i te whare, ētahi i roto i te ipurangi, tēnā koutou, tēnā koutou, tēnā koutou katoa.

30 **I certainly want to endorse all the expressions given thus far. Secondly,**

I wish to acknowledge all those who are able to participate, and here I stand representing people of hikurangi [sic].

Ko Rox Soriano tōku ingoa. Kei konei au nō te tari o Mahoney Horner Lawyers,
 5 ā, e whakakanohi au i te rā nei mō ngā kerēme e toru me ētahi interested party.
 Wai 972 arā ko Donald Tait rāua ko Edward Penetito mā, tētahi kerēme mō
 Ngāti Kauwhata ki te Tonga. Wai 1312 arā ko William Hori rāua ko Hinemoa
 Pourewa mā, tētahi kerēme mō ngā uri o Whakaki me Te Hapū o Ngāti Kawau.
 Wai 2389, arā ko Tahua Murray rāua ko Kawhena Paul mā, tētahi kerēme mō
 10 Ngāti Ruamahue. He interested party a Wai 1843 arā ko Terry Tauroa, tētahi
 kerēme mō Te Aeto Hapū. Mauri ora.

(09:06) MS CARMEN MATAIRA: (MIHI, APPEARANCE)

Tēnā tātou katoa. Ka tū ake au ki te tuku mihi ki ngā kaikōrero katoa o te ata
 nei me te tautoko au i ngā mihi kua mihingia ki ngā tini mate o te wā, otirā ki a
 15 tātou katoa te hunga ora, ā, ki a kōrua ngā rangatira o te Rōpū Whakamana i
 tō tātou nei Tiriti o Waitangi, a tēnā kōrua. Otirā, ki aku hoa rōia, ā, ki te
 Karauna, tēnei te mihi ki a koutou, ki a tātou hoki. Ko Ms Mataira tēnei. Kei
 runga i te AVL a Mr Ratapu. **I wish to acknowledge all those who have
 spoken before me. Certainly, acknowledging all those who have passed.**
 20 **And again, to the leadership of the Waitangi Tribunal, I want to
 acknowledge that. I wish to acknowledge Crown counsel and colleagues
 as well.**

I tēnei rā, mā Mr Ratapu e tuku atu i ngā – e kōrero atu ngā tāpaetanga mō ā
 25 māua kiritaki katoa. **Mr Ratapu will be giving and introduction via AVL, and
 so he will be speaking to that.**

Ko ā māua kiritaki ko Ngā Hapū o Mōkau ki Runga, Ngāti Tara Tokanui Trust,
 Parengarenga A Incorporation, Rangitāne Tū Mai Rā Trust, Te Ruunanga o
 30 Ngaati Mahuta ki Te Hauaauru, Taruke Thomson on behalf of
 Ngaati Whakamarurangi me Tainui, rātou ko Te Whānau a Ruataupare. Nō
 reira, tēnā koutou, tēnā koutou, a tēnā tātou katoa.

JUDGE ARMSTRONG:

Do we have any further appearances online?

(09:08) MS AROHA HEREWINI: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā, otirā e te Rōpū Whakamana i te Tiriti o Waitangi.

5 E mihi ana ki a koutou otirā ki a tātou kua tae mai i runga i te karanga o te rā. Ko Ms Herewini tōku ingoa, e te Kaiwhakawā, ko māua ko Ms Peters tēnei e whakakanohi ana i ngā kerēme e toru, a Wai 1341 mō Ngāti Rēhia tērā, a Wai 2691 tērā mō Ngāti Tamainupō, ā, me Wai 2707 he kerēme mō Ngāi Te Hapū. E mihi ana ki a koutou. **Again, I wish to acknowledge**
 10 **everyone who has made themselves able to participate. We represent three clients: Ngāti Rēhia, Ngāti Tamainupō, Ngāi Te Hapū. Making an appearance.**

(09:09) MS LINDA THORNTON: (MIHI, APPEARANCE)

Tēnā koutou. Ko Linda Thornton ahau. I am here today on behalf of Wai 2581,
 15 a claim by Hone Heke Taniwha for himself and others, and also a claim, Wai 3379, a claim by Fletcher Beazley and Kelly Klink on behalf of Ngātiwai. Tēnā koutou.

(09:09) MS TONI TALAMAIVAO: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā, koutou hoki te Rōpū Whakamana i te Tiriti. Ko
 20 Ms Talamaivao tōku ingoa, kei konei ahau māua ko Ms Morrow mō te kerēme Wai 745 the Patuharakeke Te Iwi Trust Board, and Wai 2764 the Ngātiwai Trust Board. E mihi ana. **[Nil.]**

(09:09) MS HEATHER JAMIESON: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā, otirā tēnā koutou katoa. Ko Ms Jamieson tēnei,
 25 kei konei ahau mō Te Kapotai, Ngāti Hine, Ngāti Haua, Te Aupōuri, me Te Whare ki Ngā Tai o Kāwhia. Tēnā tātou. **[Nil.]**

(09:10) MS GABRIELLA BRAYNE: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā me e mihi ana ki te Rōpū Whakamana i te Tiriti o Waitangi. Ko Ms Brayne tōku ingoa, nō te tari o Corban Revell au. Kei konei

au mō te claimant Wai 3380, a claim by Mr Pereri Mahanga on behalf of Te Waiariki, Ngāti Korora, me Ngāti Takapari. Ngā mihi ki a koutou. **[Nil.]**

(09:10) MS SYKES: (MIHI, APPEARANCE)

E te Kaiwhakawā, kei konei a Ms Sykes ki te tautoko i ngā whakaaro o te rā
 5 nei, engari e whakapā ana ki a koutou ko tāku nei hiahia kia haere ki te tangihanga ā te 11.00 i te ata nei, ana ka wehe au i tērā wā mēnā kei te whakaae koutou. Kia ora. **This is Ms Sykes here and I've just been listening astutely. I just want to make a request. I will be leaving to go to a funeral so I will ask leave if I may.**

10 **JUDGE ARMSTRONG:**

Ka pai. Tēnā koe, Ms Sykes.

(09:11) MR UMAR KUDDUS: (MIHI, APPEARANCE)

Good morning. May it please the Tribunal, counsel's name is Kuddus
 15 appearing on behalf of the 13 claimants represented by Phoenix Law. Our claimant for Wai 3401, Wai 2147, Wai 1940, Wai 1524, Wai 377, Wai 1846, Wai 1941, Wai 120, Wai 1018, Wai 3406, Wai 1307, Wai 2661, and Wai 3399.

JUDGE ARMSTRONG:

Thank you, Mr Kuddus. Any further appearances from claimant counsel?

(09:12) MR TIM STEPHENS KC: (MIHI, APPEARANCE)

20 Tēnā koe e te Kaiwhakawā, e te Rōpū Whakamana i te Tiriti o Waitangi, tēnā koutou. Ko Stephens tōku ingoa. Kei konei mātou ko Ms McCoy, ko Mr Hunt mō te Karauna. Tēnā tātou katoa. **[Nil.]**

JUDGE ARMSTRONG:

Mr Lyall.

25 **MR LYALL:**

Tēnā koe, Sir. So, I think to give the Tribunal an idea of how we plan to approach the day, we have filed the timetable which you have since confirmed,

that simply lists the claimants that have filed closing submissions. There's no time allocation recorded against each one, but we've again practiced a ruthless efficiency amongst claimant counsel, and we expect to be done by the very latest at the lunch break which should allow time for the Crown and Tribunal questions to follow. If there are any points which need to be addressed by way of reply at the end of the day arising from that interaction we've reserved time, but that's not to say that we consider that there will be.

Sir, before I begin with the closing submissions there's just a matter that the Crown has raised concerning the affidavit or the brief of evidence filed by Mr Tamihere. I don't know if you wish to address that before we kick off this morning? I think my thoughts on that should be well known. We were granted leave to make a reply to the Crown's documents that they were to file. They filed an affidavit and supporting documentation. That affidavit contained interpretations of events that the person giving the evidence wasn't present at, and Mr Tamihere as someone who was at that hui decided that it was incumbent on him to correct the record. We don't see any issue with the evidence remaining on the record in its current form.

JUDGE ARMSTRONG:

Thank you, Mr Lyall. Mr Stephens?

MR STEPHENS:

The Crown has put in a memorandum, and I don't intend to address you further than what's in the contents of the memorandum, Sir. Thank you.

JUDGE ARMSTRONG:

Mr Stephens, looking at the Crown memorandum, it seems from the memo itself that the concern the Crown really wanted to raise was the comment by Mr Lyall that the Crown had gone beyond the scope of the leave granted in terms of filing the brief from Ms Dagg with appendices, and I just wanted to seek your clarification on that because it seemed that that was the bigger concern for the Crown, was the statement that it had gone beyond the scope of the leave rather than the brief in reply that Mr Tamihere had filed. Because if that's the issue, I

can indicate that I consider the Crown didn't go beyond the scope of the leave. I think the Crown were entitled to file the brief that you have, and if that is a primary concern then I am happy just to leave matters where they are.

MR STEPHENS:

5 That is the issue, yes, thank you, Sir.

JUDGE ARMSTRONG:

Okay. Well, in that case then, I can confirm that it is not beyond the scope of the leave that was granted, and if that is the primary concern of the Crown it seems then that that will simply remain as will the brief in response from
10 Mr Tamihere, and we will now move to closing submissions.

MR LYALL:

As your Honour pleases. I think I will present from the lectern and just take a second to move across, your Honour.

JUDGE ARMSTRONG:

15 Thank you.

(09:16) MR LYALL: (GENERIC CLOSING STATEMENT)

Now, your Honour, and members, late last night I filed a joint generic closing statement for claimants and interested parties and I am hopeful that a hardcopy has made its way to you. Our apologies for filing it so late in the piece and we
20 appreciate that you won't have had time to work your way through it and come to terms with it necessarily, so what I propose to do this morning is to work through that document.

In this document we have tried to capture the essence of all of the arguments
25 raised through the various Crown, claimant and interested party closing submissions so that you won't be having repetition by way of each counsel standing up and re-presenting.

REFERS TO WAI 3340 GENERIC CLOSING STATEMENT

But I do need to emphasise obviously that this statement doesn't prevent claimants or interested parties from raising their own matters, and following my presentation there will be other counsel rising to give their claimants' unique
5 submissions where they consider that's necessary. After I have presented this generic closing statement I will also point you to what my, the claimants that I represent say are the key issues for them in this inquiry.

But to begin with this generic closing statement. We as counsel have received
10 instructions and we can move forward saying that there is consensus amongst all claimants and interested parties that the Crown has failed to uphold its obligations under Te Tiriti o Waitangi in the development, and most particularly in the settling of, the 2024/25 Takutai Moana Financial Assistance Scheme settings.

15 In 2020 this Tribunal found that the Crown was in breach of its Treaty obligations concerning the funding scheme settings in place at that time. The overarching recommendation as you will know is that the Crown must cover all reasonable costs incurred by claimants in pursuing applications under the
20 Marine and Coastal Area Act—regardless of the pathway that they choose. **That, Sir, is the claimants' bottom line. That is what they say rangatiratanga demands.**

Following release of that report, the Crown through Te Arawhiti took steps to
25 implement that recommendation. The 85% caps on funding then in place were dropped, activity funding was increased, and the actual and reasonable costs of hearings were met within a defined parameter of course, but the evidence shows that the fact that applicants have moved forward through the court pathway shows that that was a workable system. Applicants relied on these
30 settings in good faith and advanced their applications—blind to the possibility that those settings would be unilaterally, and without warning, changed in the drastic manner which they were for the 2024/25 year.

Your Honour, I can speak for all claimants when I say that there was surprise on receiving the Crown's submissions that they are now backtracking on their prior acceptance of the Tribunal's recommendation and state in closing submissions that the Crown "has not accepted the recommendation". We say
5 that that flies in the face of the facts here. The Crown's own evidence shows acceptance of that recommendation. And at paragraph 5 of the Generic Closing Statement I've selected just one example of that from the Common Bundle. The final sentence there in a document prepared by Te Arawhiti says:

10

The changes to the FAS (the Funding Scheme) in 2022 aimed to address this (the Tribunal recommendations) by providing funding for applicants' 'actual and reasonable' court costs with no cap.

15 The fact is, the 2024/25 Scheme settings imposed are worse for applicants than those in place at the time of the 2020 Report. Gone are the 85% caps, now replaced with even more restrictive caps based on a rough divvy up of remaining funding. To now reverse course without consultation or justification—and to impose settings even more restrictive than those found to
20 breach te Tiriti o Waitangi already—is to act with full knowledge of the prejudice to follow. Your Honour, the claimants' view is that whether the Crown has prejudiced applicants should not even be up for serious debate here. In the Crown's own words in submissions to the High Court, the settings would cause:
25 "significant disruption to the Senior Court's scheduling, and to applicants, interested parties and counsel". That in and of itself is prejudicial. Again, that's just one example that we've selected from the evidence before this Tribunal.

To address the key points raised in closing submissions. The first is that the Crown, the claimants say, is seeking to shift responsibility or shift the level of
30 responsibility which it owes applicants.

The Crown refers only selectively to Treaty principles, seeking to narrow its obligations to partnership and active protection in form only. By that, we mean watered down versions of those duties. Instead, the Crown adopts a position

in which kāwanatanga is elevated over rangatiratanga. This is not genuine observance of the Crown's duties. It is performative institutional speech where the Crown professes commitment but does not act.

- 5 For the claimants, rangatiratanga is not optional — it is fundamental. The Scheme was designed to facilitate recognition of customary rights, not to be reduced to an instrument of Crown convenience and cost control. A regime intended to support recognition of Māori customary rights has been reduced to an exercise in fiscal gatekeeping. That attempt to narrow obligations is itself a
10 breach of Tiriti principles and an attempted repudiation of the constitutional foundations on which the Funding regime and the MACA regime rests.

At the same time, the claimants say that the Crown evidence and approach of submissions in this inquiry shows a Crown which is seeking to evade
15 responsibility for its own failures. Months-long delays in paying invoices, a policy of silence about the financial viability of the Scheme, freezing funding for all but a chosen few, and slashing support while applications were part-heard are all ignored or excused as minor inconveniences or challenges for applicants to bear. Instead of owning these failures, the Crown has sought to shift blame
20 onto applicants and counsel. Minor invoicing errors do not justify severe funding restrictions. A line-by-line defence of internal reasoning misses the point of this inquiry. The evidence shows a clear pattern: the appropriation was inadequate; funding caps were imposed without rationale nor reflection of reality as to what High Court litigation costs; administrative burdens were again
25 increased; and major policy changes were introduced mid-process, without even limited consultation (which was sought to be excused by reason of urgency).

These failures breach te Tiriti and its principles, lock applicants out of the very
30 process designed to recognise their rights and interests, and materially advantage the Crown. The responsibility lies not with those forced to operate within this system (the applicants)—but with the Crown.

Turning to the appropriation that I've just mentioned.

The claimants accept that the Crown must be a careful steward of public funds. There's no argument about that. And as we've said, they are not asking for a blank cheque. The starting point however must be that the applicants' actual and reasonable costs will be met. There is no evidence that the Crown has undertaken analysis of what those costs might be.

The 2024/25 appropriation was set without reference to actual expected costs, at a level far below forecasted demand, and with full knowledge that it would be insufficient and inadequate. And we only need to look to the 15 May minute of his Honour Justice Churchman which reflects that the Crown's estimation that the Whangārei hearing itself would exceed the entire annual appropriation. The appropriation at that point just won't work.

The Crown in evidence and submissions treats the appropriation as a fixed external constraint, claiming that Te Tari Whakatau was simply managing within limits set by Cabinet. But the appropriation isn't imposed on the Crown—it's a limit which the Crown has chosen for itself.

While the Crown asserts that the Scheme had "significant issues" requiring urgent action, there's no evidence of significant schemes requiring that action beyond the Crown feeling that this was just costing too much. That's reflected by the handwriting from the Minister: "\$12 million is a justifiable budget".

Now, the Crown is critical of the claimants citing that handwritten note from the Minister given the timing of it. We refer to that because it's the only evidence we have from ministers, from the Crown about why that decision was taken, why the \$12 million was the restriction. We have nothing else to go on. I will return to that.

But the claimants say, budgetary preferences and Ministerial views do not displace the Crown's duty to act lawfully and in accordance with Te Tiriti. The courts have made clear that a claim of financial unsustainability does not entitle the Crown to automatic deference where decisions limit fundamental rights. And we say that the Tribunal can and should look behind the curtain or under

the hood as it were to the extent that it can, but then we encounter the problem of the fact that there's just no evidence there.

5 Rangatiratanga is a limit on the Crown's right to govern, the Crown's choices concerning allocation of resources are subject to constitutional constraints. This Tribunal has recognised that the Crown right to determine how to provide funding is constrained by the Crown's duty to actively protect Māori interests. And we ought not forget that the Marine and Coastal Area Act is a constitutional piece of legislation and that customary rights are at stake here. This isn't an
10 inquiry just into some funding decisions, this is whether the system works or not. **Limitations of fundamental rights, such as customary rights, by resource constraints cannot be justified if those constraints (as here) are of the Crown's own making.**

15 Now, to paragraph 17. *Consultation and Engagement*

Now, through submissions, the Crown describes the period in early 2024 as "unexpected and challenging"—seeking a calm and somewhat restrained telling of what was, for applicants, a period of procedural confusion, financial strain, and institutional silence. Significant and complex hearings were underway at
20 the time. Applicants, counsel, and even High Court Judges were asking for clarity. That was clarity that the Crown was not able to provide them in real time. Counsel, applicants, and historians at the time were not just seeking answers to what was to happen but were chasing long-overdue reimbursements. The Crown, the claimants say, was unravelling the Scheme in real time, as they took an increasingly adversarial stance in the litigation.
25 When applicants looked for partnership, the claimants say that the Crown looked away.

On consultation, the Crown's own documents say that the changes were
30 originally intended to be subject to consultation. That commitment was quietly abandoned to enable implementation by 1 July. I think it's accepted by all parties that there was in fact no consultation. We do have the Crown position that the Tribunal ought to take the fact that there wasn't intent to consult into

consideration. The claimants dismiss that out of hand. Intended consultation doesn't remedy any prejudice, doesn't mitigate anything here.

5 What occurred was not partnership, it was not dialogue, there was not information to sufficiently enable participation from applicants—it was a unilateral imposition, made with clear foresight of the harm to be caused.

10 The Crown also says that there was no material prejudice even though there was no consultation. The Crown maintains it is able to choose between a range of possible policy options provided that it is acting reasonably and in good faith. This is despite here there being a complete lack of evidence of what “good faith” was exercised by the Executives in making the decisions that it did. The Crown here is hiding behind “Cabinet confidentiality”. It refuses to tell the Tribunal what rationale lay behind the refusal to fund the 2024/25 financial assistance
15 scheme to a level that would have ensured applicants' actual and reasonable costs would be covered.

20 Now, even if the Crown's decision was constitutionally available to it, which the claimants do not accept, the claimants and interested parties collectively submit that the Crown has not here acted reasonably and in good faith. It has ignored its obligations under te Tiriti o Waitangi. The Crown created a situation in which counsel, historians, mappers, and most importantly of all the applicants were left with untenable choices: proceed underfunded, absorb personal or organisational cost, or withdraw and suffer even more prejudice.

25

The 2024/25 settings were not based on any principled assessment of actual need or demand. They were arbitrary ceilings, imposed without relationship to the real cost of satisfying the Crown's legislative tests. At the moment, right now, the Scheme settings reduce applicants to effectively bidding against one
30 another for what little resources are available.

And while we are approaching the end of the 2024/25 year and evidence was filed some time ago, I do think that it's important to reflect that this prejudice and these decisions are ongoing and there are decisions being made right now

this week about funding for work that has been carried out. It's probably not appropriate for me to stand here and give that evidence today. But we're not talking about events that have happened purely in the past. This is ongoing and that's the point that I wish to make here.

5

So I wish to move to paragraph 25.

A Recognition Regime Without Means to Access It

Without funding for actual and reasonable expenses, the claimants say that
10 while the MACA regime exists in form (it is still there, it hasn't been dismantled),
it collapses in function. Access to the High Court without or with limited funding,
is just prohibitively expensive. Applicant groups either can't afford it or struggle
to justify why valuable iwi, hapū, whānau funds ought to be redirected away
from other pressing concerns to address a Crown system that the Crown ought
15 to be funding itself. We also have the situation now where applicants are
constrained for future preparations, so the pipeline of future hearings is going
to be cut off. These hearings aren't just set down overnight with little or no
planning. There's a multiyear sometimes process before those orders setting
down hearings can be achieved, and without access to enable that to be
20 happening now, if we forecast out into the future those hearings just won't be
happening. What momentum there was in the High Court pathway at least is
under threat. And for direct engagement—if there ever was any momentum—
the claimants say that has stalled entirely.

25 The Crown has filed a table showing the, what I understand to be the active
engagement applications that are being addressed at the moment and I would
like to ask if that could please be brought up. It is document #3.4.49(b). I am
sure my learned friends from the Crown will assist the Tribunal with interpreting
this table, it's part of their closings, but the claimants' understanding is that this
30 represents all of the direct engagement applications. So, I think it's the last
page of that document please, Registrar.

MR LYALL ADDRESSES REGISTRAR – DOCUMENT #3.3.49(b) (09:38:41)

The first point that we wish to make is the very short list of Crown engagement pathway applications set out there. Second point is that two of the applications at the top are under the Ngā Hapū o Ngāti Porou stages. And the third point I wish to make is that Ngāti Porou ki Hauraki is listed there, and the Tribunal is well aware of that iwi's view of their position, and I can also represent that, counsel represents Mana Ahuriri Trust and while they are very keen to work with the Crown, the budgeted workplan was only approved just after 5 pm on Friday, so it's difficult to see that that's a particularly good example of progress being made. Given the hundreds of applications that need to be progressed, this list just does not do.

So moving back to my submissions at paragraph 26.

The Crown's refusal to fund actual and reasonable costs doesn't mean that those costs just disappear. They're transferred on to applicants, their legal representatives and the experts who support them.

a. Project managers and applicants, the evidence shows, have seen their mana undercut, reimbursements delayed or part paid with little or no explanation. And something that we wish to emphasise is the level of stress that the Tribunal has seen in the evidence that this has caused applicants. This isn't the only battle that they're fighting, and to require so much time, resource, stress and management makes things incredibly difficult, not just challenging, for applicants. I won't take the Tribunal to specific examples, but simply to say that there's a big gap between the way in which the claimants describe the events in real time and the way in which they were made to feel, the stress that they suffered, the impact it had on them, and then the relatively smooth narrative of a policy process or change from the Crown.

b. The Tribunal has also heard evidence from professional historians who have been doing this sort of mahi for years. Anthony Pātete, Peter McBurney and others, who were put in a position of continuing under significant financial and emotional strain or walking away entirely, leaving work halted midstream or incomplete.

c. Finally, your Honour, on this point, the effects on counsel, and this is something that I want to be careful about because our view is that the applicants come first here, it's not about the counsel. But the Crown does take the view that the fact that there wasn't a mass exodus of counsel from the process by way of withdrawal seems to somehow reflect the legitimacy of the changes that were made. The Crown's view appears to be that the market will solve the issue and that if counsel won't work for the fees that they offer other counsel will come and fill the gap. Your Honour, that's a frankly insulting position to take in the circumstances. At the time, the Crown left counsel with no choice, either absorb the cost and the risk or walk away from their clients, many of whom we have decade long relationships with, and it's those types of relationships that are required to work in this space. In effect, the claimants say that counsel who took their responsibility seriously are being criticised for doing more for applicants than the Crown was willing to do. That was not consent to work at slashed rates. That was coercion through underfunding.

The broader point here is that the Crown hasn't disputed that the costs, apart from a few select examples that it's been able to find trawling through the documents, it hasn't disputed that the costs were reasonable. It simply refuses to pay them. This is not careful stewardship of public money. It's outsourcing of costs properly owed by the Crown to applicants, those that are least able to meet them.

Now, by way of conclusion from my paragraph 28.

The Crown resists the inference that it has used control of funding to slow this process down while pursuing amendments to the Act. The claimants that inference remains a reasonable one as is the inference that slowing the progress of applications to delay recognition of customary rights and interests in much of the takutai moana around the motu is politically more palatable to the wider, non-Māori, population. The Crown says that there is no evidence of this. But of course there is no evidence because the Crown won't tell this Tribunal what the true rationales were for implementing the 2024/25 Scheme.

The claimants say this isn't extraordinarily complex. The number of applicants is known, it's finite, the costs are calculable. It's within an infinite amount of public money that's required here, and really delaying things is likely to cost more in the long-term. The Crown had capacity to fund the process, and for
5 years, it did. What's changed is that willingness, not the availability of funding.

While the impacts on individual applicants vary, all applicants are now forced to operate within a regime that provides neither adequate reimbursement nor future certainty of support. In many cases, delays threaten the viability of
10 applications altogether. And that's through effects including the loss of kaumātua and other key witnesses, and the claimants wish to make the point as strongly as possible that videotaping kaumātua, putting evidence down on paper does not mitigate that. Other factors include the impending retirement of
15 judges who have presided over early stages, however that's not insurmountable, that institutional knowledge is hugely beneficial for progression of those applications. Justices aren't having to relearn or come to terms with evidence once again. Resource consents are continuing to be granted without
20 applicant input, beyond the "here's our view but we don't have that veto right yet". Wāhi tapu protections are unable to be granted and opportunity costs continue to accumulate for Māori while they are unable to benefit from the orders that they ought rightfully to hold.

Instead of securing additional funding or working in partnership with the applicants, the Crown cut limited financial support without consultation and in
25 the full knowledge of what the consequences would be. It's the applicants that are left to carry the financial and emotional burden without the proper resources to advance their applications—and that's a constraint that the Crown is not subject to.

30 To make I think the – well, certainly what my claimants and some of the other claimants have been very strong about, final point is that the Supreme Court was clear that these proceedings raise issues of "deep, enduring importance, with the potential for perceived injustice to fester across generations." And that's over and above the injustice that's seen through the Marine and Coastal

Area Act and the Crown's assertion that customary rights weren't available in the areas in the first place. The point here is that applicants do not want to be carrying these applications, they don't want to be carrying these grievances, for another generation. They want recognition—and closure—now.

5

If the Crown is sincere in its commitment to resolution and reconciliation, as the Supreme Court has said informs the entire Act in this scheme, it must take immediate steps to uphold its te Tiriti obligations, revert back to the financial assistance scheme settings existing prior to 1 July 2024, and reimburse applicants for the costs that they have suffered as a result of those changes.

10

Your Honour and members, those are the generic closing submissions for claimants and interested parties. I am happy to answer any questions that you may have, acknowledging that others may have a view and may wish to address the Tribunal on that. If there aren't any questions at this point I can cover off the few points that I have concerning the specific claimants that I represent here.

15

JUDGE ARMSTRONG:

Perhaps if you proceed with those submissions, Mr Lyall, and we will ask our questions at the end.

20

(09:48) MR LYALL: (#3.3.070)

So, your Honour, you have my closing submission #3.3.70. The first part of those submissions is made on behalf of all of the claimants that we represent. You have those submissions, and I don't intend to work through it. Much of it has been replicated in the joint closing today.

25

From page 22 I address claimant specific submissions and I am simply going to raise the key points for each of the claimants by way of closing. So, for Te Upokorehe Iwi, this is a group that has been through the High Court, it's been through the Court of Appeal, it was in the Supreme Court, and the evidence that they have raised for this part of the inquiry at least addresses the

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Supreme Court fixture and the lengths that they had to go through to secure funding there.

5 The key point they say is that the Supreme Court hearing, which was held over eight days, really shows the caps are – well, a magnitude or an order of magnitude too low, and the Supreme Court agreed through its prospective costs order that was granted for applicants there.

10 Even with the costs order that was granted and with the capped funding, Te Upokorehe Iwi was still short of what would have been required for that eight day hearing for senior counsel and their representatives at that hearing, and they dipped into their own funding in order to enable their attendance for Te Upokorehe.

15 Ms Kahukore Baker's evidence also covers off issues associated with workplans and shows that while this Tribunal has heard evidence from the Crown that there's been a lot of time and effort put into development of those and assistance provided, that may be so for some but for others they were left with no information, no feedback, and impending hearings that they were
20 concerned that without that workplan they wouldn't be able to access the capped funding.

For Te Rae Ahu Whenua Trust and the Panoho Whānau, these were applicants in the Whangārei Harbour hearing, and the decision of his Honour
25 Justice Harvey is still reserved, but closings took place over a year ago now for that.

Dr Panoho's evidence shows what it was like, we say, for applicants that were in a complex hearing at the time that this was unfolding. It was in the
30 Whangārei Harbour hearing where his Honour Justice Harvey was issuing minutes, requesting information from the Crown. There were delays to the hearing, there were case management conferences, there were requests for stays due to funding. These are all of the impacts that were caused. This is

the prejudice that was caused to those applicants as they tried to manage their way through this unfolding change and situation.

5 The Panoho Whānau applicants also filed evidence from those outside of their application. So, they approached, well, they had Ms van Alphen Fyfe who acted for them in Whangārei Harbour, but who was also able to provide an insight into the Kāpiti hearing from a barrister's point of view.

10 Mr Pātete provided evidence for them in both the High Court and here even though it was filed through the office of Tāmaki Legal. Mr Pātete addressed the Panoho application as well. And as a way of corroborating that they approached and filed evidence through Peter McBurney and Sue Taylor.

15 Your Honour, the approach of the Panoho Whānau Te Rae Ahu Whenua Trust was to try to show this Tribunal that not only what the situation was as these changes unfolded as people struggled to get information about whether there was going to be enough funding and the appropriation for the scheme to continue at all, but also that it wasn't just confined to Whangārei Harbour, it was happening in all hearings that were going on at the time, and that it wasn't just
20 confined to counsel but it was applied to applicants and to historians and to mappers, and that's why there was a broad approach to evidence from them.

Now, my page 27.

Ngā Whānau Hapū o Te Aitanga a Hauiti Takutai Moana

25 The key point I'm instructed to raise there is that Ms Lant, the named applicant, was to participate in the Tokomaru Ākau High Court hearing that was held, and had they done so they would now have a decision on their application. But in the lead in to that hearing Ms Lant was approached by the Crown and asked if the group would be open to engaging directly rather than going to the
30 High Court, and that's an offer that was accepted because, as this Tribunal is aware, engagement is the preferred pathway rather than going down the litigation pathway.

The consequence for the group now, given that there has been no progress made in the engagement pathway, and now that they don't have access to funding because they're not considered close to ministerial determination, is that other groups, their bordering groups, have been through the court, and while subject to appeals have orders granted, while this group is left in stasis effectively.

Like the application I've just spoken to, Ngāti Porou ki Hauraki was not listed as a group close to ministerial determination even though we've now seen that they were listed on the Crown's groups that they are actively working with.

Your Honour, you have heard the evidence and read the more recent evidence of Mr Tamihere there. Suffice to say that that is a group that has been seeking to have these issues resolved since the Foreshore and Seabed Act was in place, and they proactively wrote to the Minister then, they wrote to the Prime Minister then. It's been a generation and they're still carrying this with them. They want it resolved as soon as possible. And while the Crown's said through evidence that they will approach Ngāti Porou ki Hauraki, my instructions are it's difficult to take that at face value given the extent of the – given past history. The proof will be in the Crown's actions.

For Te Roroa Iwi, again, not listed as being close to ministerial determination, but we or Te Roroa say they should be a textbook case of a group that should sail through the Crown engagement pathway process. They are a post-settlement governance entity, they have a remote coastline, they are the kaitiaki of their ngahere, they are the kaitiaki of their takutai moana, they have unchallenged, unassailable rights, and they're waiting. They want to work with the Crown, they have approached the Crown, as Sharon Murray's evidence show, but they don't have a realistic prospect of advancing that application without Crown willingness and Crown funding, and as a group that was involved in Crown negotiations they didn't bring a High Court application because they were comfortable in that negotiation space and considered that the Crown would continue in good faith to work with them towards resolution of these issues.

Now, your Honour, members, those are the submissions that I wished to make considering the specific claimants that I represent. If you have questions I am more than happy to answer them, otherwise those are the submissions for the claimants and interested parties.

(09:57) RON CROSBY TO MR LYALL:

- Q. Thank you, Mr Lyall. Just a few matters of clarification if I can. Just help me with the first two quotations at paragraphs 5, and then I think you've made reference again, yes, and there's a quote at the end of paragraph 6.
- 10 Those two documents, what were they?
- A. The first document which is the footnote 3, that is a document prepared by Te Arawhiti, it's in the Common Bundle at Tab 40, and that was one of the documents that the Crown relies on to show that the risks had been well articulated and known and put to Cabinet.
- 15 Q. So, was that the document prepared for the Minister's decisions that were made in February 2022?
- A. This was a May 2024 document, so this was the one that went to ministers I understand to inform them of the changes –
- Q. Right.
- 20 A. – that were required and the risks to that.
- Q. Okay, thank you.
- A. And we've taken that quote from one of the...
- Q. And the one at paragraph 6?
- A. The one at paragraph 6 –
- 25 Q. Was that a memorandum by counsel?
- A. That was a memorandum of counsel from the Crown, which is referenced by his Honour Justice Churchman, and given the lack of crossover between High Court proceedings and this inquiry, the minute's public so we've referred to that rather than the Crown memorandum itself.
- 30 Q. Right, thank you.
- A. But that was a memorandum of the Crown which was issued seeking a national case management conference to discuss the effects that this

would have on all applicants which, in and of itself, was ultimately an extraordinary measure to take.

Q. Right. At paragraph 11 you've said there is no evidence that the Crown has ever undertaken any analysis what these costs might be. What about the November, or I'm not sure if I've got the month right, but the 2021 modelling that was done. Do you accept that that was an attempt, albeit on different rates?

A. Yes, I think possibly we've tried to summarise a little too far there and it may not make the point in a nuanced way. The point there that we are seeking to make is that we're not aware of any analysis that shows now that there have been applications gone through the Court, what a reasonable cost ought to be or what the baseline should be for those. A lot of the 2021 or previous calculations that were done were based on supposition or court projections or best guesses. There'd only been *Pāhauwera, Edwards* through the court at that point.

Q. Right.

A. Really, I think the broader point is there now ought to be sufficient examples for Te Arawhiti to show almost down to the dollar what they think things will cost.

Q. That decision at footnote 7, *Attorney-General v IDEA Services Ltd*, just remind me what were the issues involved in that case??

A. I think the IDEA Services case was the over – yes, so the IDEA Service is for people with intellectual disabilities up to the age of 65.

Q. Right.

A. Really, it's an affirmation of the decision of the High Court in *Atkinson* which concerned the Parents as Carers Funding. I did file a very short bundle this morning, which just has the title page and then the paragraphs that we are referring to, if that would be of assistance, I can hand those up.

Q. Right. Just, you moved over or moved past really, your paragraphs 23 and 24. Paragraph 23, is your assertion in that paragraph that the Crown's actions in terms of meeting the Perspective Costs Order, reduced the overall fund available for applicants to pursue other applications?

A. Yes, the claimants thought that it was extraordinary that having gone to the lengths of seeking a Perspective Costs Order in the Supreme Court and having it granted in no uncertain terms by the Supreme Court. That rather than then finding that funding from somewhere else. The Crown applied funding that would otherwise have gone to other applicants, to effectively raise the caps for a select few. Really, that's what points to – not every applicant is able to seek a Perspective Costs Award given the criteria. But they would be meritorious, we think, given the approach.

5

Q. Can I just jump to your claimants' specific submissions and at paragraphs 110, 111, you refer to Upokorehe receiving an additional funding at \$52,500. Do I take it from paragraph 111, that the total payment for Upokorehe for that Supreme Court process was \$82,500?

10

A. That's right.

Q. Then you say at paragraph 112, you say that they received the same funding as a one day appeal would. Now, why do you say that?

15

A. Without the Perspective Costs Award, the 30,000 cap would apply. So there's no ability for applicants to approach Te Arawhiti and say, we have a half day Court of Appeal fixture. We are not going to need 30,000 in funding for that, are we. Or we have an eight day hearing in the Supreme Court, which is contested and has almost a dozen parties, \$30,000 isn't going to cut it. So there, well, we don't consider that the Perspective Costs Award can be countered as part of the capped funding. Even though it was reached by settlement with the Crown.

20

Q. So your proposition at 112 is really that the 30,000 is just not recognising the complexity and duration of the actual appeal hearing that was involved?

25

A. Not by any extent, and the Supreme Court said that in graphic terms. It's far short of its costs that would be granted and that's far short of what actual and reasonable costs would be.

30

Q. I take it, you just moved past paragraph 24 because it probably addresses issues that have been emphasised elsewhere in the submission?

A. Yes. I felt the point had been made by that point.

Q. Just on the overall submission, at paragraph 30, just the last sentence, that phraseology, opportunity cost to continue to accumulate for Māori

while they are unable to benefit from orders. What are you meaning by opportunity cost in that sense?

5 A. In that sense, part of holding a Customary Marine Title is you are able to derive a financial commercial benefit from it. So those are lost costs and effect while they are unable to benefit from holding a Customary Marine Title. I should add that there's also a kaitiaki cost, might be a way of putting it, but certainly, the claimants that I represent are less focussed on the financial, and more focussed on protection. So whenever there's a resource consent granted. Whenever they are unable to reference their protected customary right in order to challenge a decision or simply to negotiate better outcomes with those seeking consents for the group and for their environment. Then we say that that's an opportunity lost.

10 Q. Right. Just finally, remind me, and I'm sure we can check it anyway, through the evidence. But it would possibly save time in my thought process. Ngāti Porou Ki Hauraki, and in Te Roroa's case, no High Court application obviously.

A. That's right.

15 Q. Ngāti Porou ki Hauraki, I just couldn't recall.

20 A. Yes, so they have dual pathway applications. But the issue for them there is that they were involved in engagement at the time, so their engagement application is much broader in terms of scope than their High Court application. Which was lodged to protect the position that they were engaging at the time of the deadlines. So their High Court is a smaller area than their broader engagement application is.

25 Q. And whānau, hapū o Te Aitanga a Hauiti, do they have High Court –

A. They have both.

Q. They do.

30 A. So they were participating in arrangements for the Tokomaru Ākau hearing, and were to have their application heard as a part of that fixture. But withdrew and participated as an interested party because the Crown had represented that it would engage with the group in a timely way.

Q. Did they have overlapping interests with some of the successful applicants in that proceeding?

A. The participation was around the shared boundary. Which has a slight overlap –

Q. At the northern end?

5 A. So, at the southern end of the Tokomaru Ākau applications. They reached a memorandum of understanding with the applicants and were able to provide evidence of that and evidence of their interests to the High Court. But not to have the High Court make a decision on their application.

(10:09) JUDGE ARMSTRONG TO MR LYALL:

10 Q. Kia ora, Mr Lyall.

A. Kia ora, Sir.

15 Q. I just have some questions for you around the question of prejudice, as a result of the 2024, 2025 settings, and in particular, those hearings that were scheduled to be heard over that period. You have referred to the *Edwards* appeal, and we have the finding there of the Supreme Court, about the cap, and the Perspective Costs Award. What about in relation to the other fixtures that proceeded? We have Whangārei Coast, Ruapuke Island, and follow up hearings, Tokomaru Bay, Kāpiti Manawatū, and Wairarapa Wāhi Tapu. Is there evidence of
20 prejudice as a result of the caps in relation to those proceedings?

A. Those specific ones, or more generally?

Q. Well, I am happy to hear either submission. But what do you say is the prejudice arising for those groups as a result of these settings?

25 A. I think, where the caps have been, particularly for the shorter hearings, where the caps have been sufficient to meet the overall cost. Then that goes some way to mitigate any prejudice because there is obviously not sunk costs or costs being imposed on groups. But we can't move past the limitation to both applicant project management and an ability to access activity costs in a timely way and limitations on counsel fees. So,
30 throughout all of those hearings, there are still costs which ought to be met by the Crown if they were going to be paying actual and reasonable costs. Which are being passed on to the professionals involved, and in a way, the legal professionals, the math is those groups are almost more

bound to participate in those follow on hearings. Because, well, walking away from a group when they're so close to the finish line would be disastrous for the process. That would be aping words of High Court Justices, rather than something that I've – I think

5 his Honour Justice Harvey said almost exactly those words.

Q. I agree, that would be a disaster. But is there evidence that that occurred? That's what I'm seeking your assistance with.

A. Beyond the two hearings which were adjourned because applicants didn't feel that they were able proceed given the funding concerns and the

10 concerns around the amendments. I'm not aware that any other applications were adjourned. I'm aware that some, like the Kāpiti hearing, Whangārei Harbour, were significantly constrained in the way that they were approached. I'm aware that lots of witnesses and some counsel were required to present by AVL, which has the, I guess, effect of trying

15 to save time but actually takes longer. But that was a way to avoid travel costs and incurring further costs in that way. So while the, I think, the system was bending to the point of breaking. It was through the efforts of applicants, counsel, mappers, historians, and the Courts that it didn't break. Not through the efforts of the Crown. So we say that it's the

20 prejudice there, is the Crown has walked away from its obligations, its responsibilities, it's passed the costs on to applicants and their counsel. We don't have decisions on those applications as yet, and it may be that some groups don't meet tests because they weren't able to provide evidence where they would have otherwise. One example is,

25 Mr McBurney was unable to provide reply evidence for applicants in the Kāpiti hearings, in the middle part of last year. Because there was no funding and he was owed, invoices dating back into 2023 at the time.

Q. Was that evidence required for the Kāpiti Manawatū pūkenga evidence hearing?

30 A. No, that was required for the stage before, in danger of giving evidence from the bar, but this is an inquiry after. But I mean, in practical terms, counsel preparation for cross examination of a pūkenga report, working with applicants, bringing them up to speed and receiving instructions on what were technical issues of tikanga. In Kāpiti, where there's a real

contest there as between groups, and having closings bundled into the same hearing as that. But having a \$25,000 cap, it constrains the way in which applicants and counsel are able to prepare for and participate in the hearings.

5 Q. Yes –

A. I mean we can't say that was a – and this goes to part of the Crown's submission. We can't say there was a wholesale withdraw of counsel, we can't say that applicants were left in the lures. But we can say that that's through no action of the Crown. That's through the good faith of
10 the parties involved.

Q. Yes, because you have made the submission that the settings cause delay and uncertainty. There is certainly an arguable case that the capped amounts would not have been sufficient to meet the actual costs. But there doesn't seem to be direct evidence that those groups were
15 unable to prosecute their applications in a way that they would have liked. That they weren't able to present the evidence or arguments that they would have liked. But I am also not aware of an assessment of, this is the actual cost, this is the number that it actually costs to participate, this is the cap, and this is the difference.

20 A. No, I think the example that we have just worked through for the Supreme Court is good evidence of that. The evidence from Upokorehe is that, even with 52,000 additional to the 30,000, it still didn't meet the costs at a legal aid rate for counsel.

25 Q. Yes. Well, the Supreme Court, I suppose, seems to be the clearest example of the cap being insufficient to meet actual costs. I'm just not clear if there is similar evidence in relation to those other proceedings.

A. I think we could almost just do it in, well, it's almost arithmetic if we look at the capped allowances for counsel during a week, under the old settings. I thin kit was 90 hours, with 50 and 40, and they had that
30 backwards. Even if two thirds of that was being use at 350 and 175 an hour, there's a substantial difference between that and how ever long you need to go at 167 an hour to hit the \$25,000 cap. On top of that of course, and this is where the AVL appearances came in. Travel, disbursements, hotels, meals, flights, all of that comes out of your \$25,000 cap. So those

costs were met as actual and reasonable costs under the previous scheme settings for applicants who have counsel or happily have counsel based down the road from where hearings were met. Have effectively had access to more funding than applicants who had counsel based
5 wherever they may be based, by happenstance. I mean, I accept there is not evidence of a mass withdraw of counsel. There's not evidence that a group had to withdraw and couldn't proceed. And as I say, that's because of the extraordinary efforts of applicants and the time, and their own funds that they were going to present to chase these rights. Which
10 ultimately, I think shows the real importance that they place on these constitutional rights. And had the Crown put that same importance on those rights, then, you know, we wouldn't have this bargain basement approach to funding.

Q. Thank you, Mr Lyall.

15 **(10:19) MR NADEN: (#3.3.071)**

Tēnā anō koutou. These are the closing submissions of the claimants referred to earlier. The oral presentation thereof, the document I'm speaking to is document #3.3.71.

20 Just some brief introductory remarks, your Honour, the joint closing submissions set out by my learned friend, Mr Lyall, on behalf of the claimants, are wholly supported, and adopted.

We endeavour with these oral closing submissions and with our closing
25 submissions in general, to be supplementary to the joint closing submissions to the closing submissions and the cases of other claimants and interested parties in this inquiry.

We endeavour to be supplementary, non-repetitive in relation to the topics
30 covered. But in occasion, there is overlap and we acknowledge that.

The Crown's case that it is blameless with regard to the funding debacle and the difficulties faced by the applicants, and their counsel, is rejected, in its entirety.

5 Sir, we raise for consideration, a new policy is about to be brought upon us in a month or so. We note that with the Chief Judge's inquiry into the Treaty Principles Bill, there is a hangover issue, if I could call it that, it's not really an appropriate description. In relation to the Treaty clause review that's going on, as part of a government legislative initiative. Subsequent to that main
10 hearing about the Treaty Principles Bill, and in the same vein perhaps, it's just raised for consideration. Your Honour, that the upcoming policy may well be an epilogue to this hearing, but we shall see its content. I just merely put that on the table, your Honour, as prospect.

15 To the submissions at hand.

BEGINS SPEAKING TO CLOSING SUBMISSIONS #3.3.71

We looked closely at process implementation. The manner in which the interim scheme, as we refer to it, was brought about and whether it's bringing about was consistent with Treaty principle.

20

I'm at paragraphs 24 to 28 of the closing submissions.

These submissions on process implementation address issues four and six of the Tribunal's statement of issues. Essentially, we state that the process used
25 to implement the interim scheme was not Treaty compliant. We focus quite a bit on the 2021 modelling, that that, at paragraphs 30 to 68 of the closing submissions, this modelling, in accordance with Mr Kent's own evidence.

At paragraph 18.6 of the Crown closing, this modelling served as the basis for,
30 these are the words, "served as the basis for." That's in Mr Kent's brief of evidence, it's in the Crown's closing, or the 23/24 funding appropriation, and the appropriation that is the particular subject of examination for this inquiry. So, we took a close look at that modelling, to evaluate its utility.

We say paragraph 25, that by financial year 23/24, Te Tari Whakatau was aware of, or ought to have been aware of, its 2021 modelling assumptions having deviated significantly from actual practice. We say that
5 Te Tari Whakatau was aware of these significant deviations, but nothing was done.

From paragraphs 30 to 32, we analyse some assumptions that were made with regards to the 2021 modelling. They are flawed assumptions, but nevertheless,
10 they were maintained throughout, and have been up until this day. For instance, 25 High Court applications were to be determined each year, and yet, in 23/24, there were 39 applications. We'll come to it later, your Honour.

In a minute by or from Justice Churchman, dated August of 2022, five High
15 Court hearings were set down. This is August 2022. Five High Court hearings, three of them were large, and that large reference is to Te Tari Whakatau's own definition of the types of hearings that can be heard. There's a large hearing, a medium hearing, and a small hearing.

20 There was notice as early as August 2022 that things were about to ramp up, but no notice was taken of that clear message, from the Court, that this was about to occur. So we ended up with a funding debacle.

At paragraph 31, one of the assumptions, again, flawed. Is that there are only
25 four court hearings per year. We understand that when you are modelling, there are going to be obvious difficulties with being accurate about the future. But nevertheless, the four court hearings assumption has been maintained throughout, and in particular, through 23/24, and into the current year.

30 Of those four court hearings, there was one large hearing, up to eight weeks and no more. Three interested parties and up to 10 applicants.

Two medium hearings, four weeks long. One interested party, up to 10 applicants.

One small hearing, two weeks. No interested parties and five applicants.

5 Just making some observations about this assumption, which was integral to
the forecasting that took place. In relation to the small hearing weeks, there
are no interested parties. That means that Te Tari Whakatau had failed to take
into account that the Attorney-General would be present as an interested party.
Your Honour, the Attorney-General as an interested party, is highly active
before the High Court, Court of Appeal and elsewhere. So, as an interested
10 party, this active party creates and adds to a lot of the work that's required. A
small hearing, five applicants, your Honour, to be done in two weeks. That's
ambitious, counsels' submission.

As stated, the four court hearings assumption has remained unchanged since
15 2021. These glaring, planning errors, were made, in counsel's submission, is
because applicant counsel were not at the table. We seek a recommendation
in this respect. That, Te Tari Whakatau, take on board, close liaising with
applicant counsel going forward, as to how these hearings unfold. The reality
on the ground, will then be properly taken into account.

20

There's another assumption, your Honour, that caused error, and that's that no
applicant would appear in more than one hearing. This is in Mr Kent's brief, at
paragraph 33, and in some discovery, document TA.005.0003, at
paragraph 15. This was a key assumption.

25

This assumption means that according to Te Tari Whakatau, all applicants
within a hearing area must have the same boundary. This is a gross
misunderstanding of tikanga as it applies to the boundaries of whānau, hapū,
and iwi, along our coastal shores. Those boundaries range, in relation to the
30 kōrero of those applicant groups, and they are not standardised into a certain
length. Which the, no applicant, or the one hearing assumption is premised
upon. A huge missing of the mark, that's been maintained throughout.

On top of that, Sir, members of the panel, on top of that most glaring error, the Crown was aware that the one hearing assumption was wrong when it was made. We know this because minister little made this observation about varied hearing areas, thus, there will be participation in more than one hearing by
5 applicant groups. He made that observation on the 16th of March in 2020.

So, here is the 2021 modelling, the (inaudible 10:30:21) Trust, putting its effort into how this will go down in the future. Not taking into account, that able minister's observation of summing months previous. Also, by this time, we
10 had the *Edwards* judgment, it came out 7 March 2021. If Te Tari Whakatau had read through that judgment and noted the complexities of a hearing of that nature, the 2021 modelling would have been a lot more accurate in this submission.

15 There were these assumptions that were made, our case is that they were entirely flawed, and the real problem is, they were maintained. On the other hand, members of the panel, there were reasonably foreseeable assumptions that were not made. One of these is that the number of High Court hearings would increase across the years. That seems to be a reasonably foreseeable
20 assumption. As it turns out, those are the facts of the matters, as recorded in a table, in Mr Kent's brief. At paragraph 14, he shows increasing number of High Court hearings across the period. That assumption was not made.

By the time of the modelling, September 2021, five High Court hearings had
25 been held. The judgments were available to Te Tari Whakatau to develop its understanding of the complexities of these cases. Those complexities are significant. Paragraph 40, sub paragraphs a to i of our closing submissions. We have tried to exemplify the complexities with a break down of some of the issues that were before the High Court in the Ngāti Pāhauwera hearing,
30 your Honour. Paragraphs a to i set out some, perhaps most of the issues, it's certainly not all, and Te Tari Whakatau, with its modelling, failed to take this information into account in this submission.

At paragraph 41 we set out a series of extra work consequences, due to the complexities. There is more effort required when there are overlapping applicants for instances, Sir. To address overlapping evidence. I'm minded not to give evidence from the bar. I'll just say that, addressing overlaps can be involved and I'll just leave that there. But the work consequences from the complexities, some of them are listed at paragraph 41.

We say that the filing of the *Edwards* appeal, 4 November 2021, also illustrates complexities and that they are growing. Could have been taken into account. Perhaps it was taken into account when the modelling was carried out or should have been because that filing, the appeal, was post the production of the modelling. And we come to monitoring shortly. But the base submission in relation to monitoring of the modelling is that little to none was carried out.

HOUSEKEEPING – TIMING (10:34:14)

HEARING ADJOURNS: 10.34 AM

HEARING RESUMES: 11.03 AM

MR NADEN: (CONTINUES #3.3.71, PARA 42)

It was about reasonably foreseeable developments not being seen, Sir. That's where we left off and I was at around paragraph 42, 43.

20

Paragraph 42 being about the *Edwards* appeal, 4 November 2021, just after the modelling had been carried out. Illustrating that the complexities were growing and that should have been on Te Tari's radar. It's not clear that it was.

25 At 43 we are talking about how the increased complexities, so we are trying to tie in here, the increased complexities meant that the funding was always too conservative. There are some footnotes in support of that, and these footnotes go to some Crown documentation in support of that submission.

Mr Kent acknowledged in his brief of evidence that there were modelling deficiencies, and that's at paragraph 37.

5 In wrapping up here, on this particular point about what was not foreseen, the yearly appropriations were deficient. As a result of those deficiencies, there has been a failure to actively protect the claimants, and a failure to provide good government. So, the Crown's case that there were no Treaty breaches falls away.

10 In addition to assumptions that were flawed, reasonably foreseeable events not being foreseen. There was also a failure to adequately monitor the modelling. Yet, at paragraph 46, we make it clear that Te Tari was aware in 2021 of the need to monitor. There was awareness, but it was not done. So, as a result of that, there was a failure to provide accurate funding advice to ministers and a
15 consequent failure of protection and good government.

There was a Cabinet paper prior to Budget 2022. Sir, there is an extract from that Cabinet paper that I do wish to read out. That document is at footnote 80 of the closing submission. I will refer to there, this extract reads as follows:

20

“Current levels of High Court and appellate court funding are largely based on assumptions about the number, duration and complexity of hearings made when the scheme was established as well as an assumption that applicants will only be involved in one substantive
25 hearing over the course of their application. **Those assumptions have proven to be incorrect.**”

This is 2022:

30

“Hearing duration is longer than anticipated and may be extended by the Court, even during the hearing itself. Hearings are also being held in stages, and each stage must be fully prepared for and participated in, as a separate hearing. The complexity of issues to be determined are more significant than originally assumed, both because of the novel questions

of law being raised and because of the number of applicants participating in each hearing.”

Thus, Te Tari Whakatau are aware, soon after the 2021 modelling, that its
5 assumptions were insufficient by the time of Budget 2022, and yet, those assumptions were continued with. There were no changes to the annual appropriations, they remained at about the \$12 million dollar level, and even for financial year 25/26, at \$13.04 odd million. Your Honour, it's still within the \$12 million dollar vicinity.

10

There is this legacy of the modelling of some years ago now being applied and even into the near future. Again, because of those kinds of – well, your Honour, this is incompetency. This is professional negligence and other areas of the law, and in other instances of Crown conduct, acts, and emission. They are
15 also principles of te Tiriti being breached as a result of the failure to monitor.

Lastly on this, we turn to the Churchman minute of 2022. When Justice Churchman set down five High Court hearing fixtures, and I alluded to this earlier. The 2021 modelling deviated very significantly, from the reality on
20 the ground as it was going to be for 23/24, clearly signalled in the Churchman minute. Five hearings were set down as opposed to the four that were forecasted. Thirty nine applicants as opposed to 25, 11 tangata whenua interested parties as opposed to four. Four large hearings as opposed to one. Three hearings at 10 plus weeks, as opposed to eight. Also, Whangārei Coast
25 was scheduled to begin early July 2024.

So it can be really assumed in this submission that much of the work for that court hearing beginning in July 2024 would have been done in the earlier financial year. As a result of the Churchman minute, Te Tari ought to have
30 predicted substantial change to the manner in which these hearings were unfolding.

In addition to the earlier submissions, and I sound like a broken record, I won't go there, but hopefully reference to the earlier submissions is clear enough.

There was a failure to make the changes and as this submission that day, continued to the next financial year.

At paragraph 51, now, under cross examination, Mr Kent accepted that it should
5 have been evident in August 2022 that the modelling was incorrect. He
acknowledged that. But his evidence was that at earliest, the deviations from
the modelling were identified was as a result of the 2023 emergency
forecasting, which took place around September 2023. This was a whole year
10 after the fixtures had been set out of the Churchman minute. The changes were
coming, but they were not seen. The 23/24 appropriation was therefore too
conservative, and the claimants have been, or were, wholly prejudiced, and
continue to be, because, as stated earlier, the 2021 modelling served as the
basis for financial year 24/25, and in this submission, for the coming financial
year after that.

15

We have displayed the weaknesses of that modelling. Clearly, then, the 25/25
appropriation is wrong.

And Sir, moving to the lack of consultation, submissions set out at paragraphs
20 69-100 of the closing submissions, it's anticipated that other counsel will
perhaps more ably cover this particular topic, so we're not going to expound on
this matter here at this point, your Honour.

Therefore, that leads me to the section on fiduciary duties and legitimate
25 expectations at paragraphs 101-158 of closing. Again, very briefly here, your
Honour, if I may, I just choose to read through paragraph 101 of the closing
submission, which sets out the idea behind these submissions that, on its face,
goes outside this Tribunal's jurisdiction when we are talking fiduciary duties and
legitimate expectations, legal doctrine of that matter, but in the submissions
30 made, we seek to tie these particular doctrines of fiduciary duties breaches,
legitimate expectation, to – to this jurisdiction, and this jurisdiction is, in this
submission, your Honour, has a customary rights component, given that Treaty
rights are customary rights. The Treaty is declarative of customary rights. It
didn't create rights, it merely stood up for them, as they were common law in

the form of customary rights. And if that is the case, then it's this submission that customary rights becomes an appropriate matter for this Tribunal to consider, as long as whatever is being examined before the Tribunal raised in terms of claims is sheeted back to breaches of the Treaty principles ultimately.

5

But if that is the case, then legal doctrine that can apply to the, say, extinguishment of customary rights becomes, at most, guidance for the Tribunal when it is looking to measure Crown conduct. And that is what we have done with these fiduciary du – well, attempted to do with these fiduciary duty and legitimate expectation submissions, Sir, and that is that in light of the Crown's ultimate stance that it is blameless, there are no Treaty breaches, we thought that if we can measure Crown conduct against this age-old equitable doctrine, that may assist the Tribunal with determining whether or not there's cogency in the position taken by the Crown. That's the idea, your Honour.

15

As I was saying, I intended to be brief about the submissions filed in that respect, fiduciary duties and legitimate expectation. In relation to paragraph 101, what was said, the interim scheme engages the Crown's Treaty-based duties to Māori, and I am paraphrasing, your Honour. It has long since been considered that those Treaty-based duties are analogous to a fiduciary relationship. We are referring there to some of the dicta of judges who heard the *Lands* case in the Court of Appeal.

And out of that analysis by that court, in counsel's submission, came some of the Treaty principles, in particular, the Treaty principle of active protection, analogous to the fiduciary obligations on the Crown, which brings to mind that – so if the Crown is saying there are no Treaty breaches here, perhaps it can be determined that there are by measuring Crown conduct against what appeared to be synergistic, wholly inter-related doctrines of application of jurisprudential principle – what synergistic, in this submission, your Honour, fiduciary obligations and the principle of active protection.

And lastly, out of paragraph 101, the presence of this fiduciary relationship means changes to the interim scheme ultimately constitute a breach of the

principle of active protection, and that is how those submissions, from paragraph 101 to 158, ultimately should lead to that applying; equitable doctrine applying, administrative law-based legitimate expectation. There's a breach of the principle of the active protection as a result of the changes to the interim
5 scheme.

So I leave that there, if I may. I now go to the closing section entitled **INTERIM SCHEME OPERATIONAL ISSUES**. These are at paragraphs 159 to 231, closing. The initial topic is entitled **Outer years funding denied**. This is
10 funding sought, not in the current financial year, not even in the next financial year, but years thereafter, and your Honour, you may recall questioning Mr Kent on this topic, and that from the hearing transcript, Sir, your question was that an applicant, and I quote, "could still undertake research and prepare evidence accessing the activity funding, even though their sittings were scheduled
15 beyond 25/26", and Mr Kent's answer was, "100%".

Sir, with respect to Mr Kent, that answer is not accepted. Only the prioritised applicants get hearing funding. Who are they? They are defined in our paragraph 161, where we simply take the information from – the relevant
20 information from Te Tari policy that describes who prioritised applicants are, and they are those – they are those participating in scheduled substantive hearings, follow-up High Court hearings, appeals in 24/25, 25/26 financial years. They also see applicants Crown engagement close to Ministerial determination. Those are the prioritised applicants. If you are not one of them,
25 you do not get any funding this year. There appears to be no funding either next year and years after. And so –

JUDGE ARMSTRONG:

Just on that, Mr Naden, I understood Mr Kent's evidence was that those who were listed as having the scheduled sittings for the 2024/2025 year, only they
30 were eligible for the funding for the court costs settings, and the activity funding, which was a separate stream of funding which wasn't subject to the cap, was available for other groups who didn't have sittings scheduled in that period.

MR NADEN: (CONTINUES #3.3.071)

Yes, your Honour. That is correct. That was what was discussed in particular, activity funding. However, there is evidence on this record that establishes that even activity funding has been available, and I – I do wish to go through that,
5 Sir.

For instance, there is the Te Tari policy. It says in their *Frequently Asked Questions* document, last updated 18 February this year, and I am at paragraph 160 of our closing submissions now, where we set out these – a Frequently
10 Asked Question, question 12, and it reads as follows, Sir:

I put a budget up in July 2024, but it has not been approved yet. Does this mean I cannot access funding during this financial year (i.e. July 2024 to June 2025)?

15 The answer:

In our pānui issued on 5 July 2024, we set out Cabinet's criteria for groups being prioritised for funding in 2024/2025, based upon the status of their application. Due to the limitations on funding available for the 2024/2025 financial year...minimal or no funding is available for groups
20 outside the criteria.

And so even activity funding, from my reading, your Honour, is not available, because the prioritised groups get all the funding. Your Honour, at paragraph 161, we also refer to question 14 in the *Frequently Asked Questions* document.

25 Question 14 is:

If my application is intending to participate in a High Court hearing, but no hearing date is set, does this mean funding is not available to me yet?

And then there's – and the answer, a repetition of the 5 July pānui kōrero just
30 set out, your Honour, and – but it has also said:

Due to the limited funding available for 2024/2025...minimal or no funding is available for groups that fall outside...

So at best, you might get minimal. But then, confusingly, it says “or no funding”. Maybe it’s no funding, your Honour. Then – then that discussion in the FAQ document goes on to state:

5 If your application does not yet have a scheduled hearing date, funding may not currently be available.

10 So more confusion, Sir. We’ve got “minimal”, “no”, or “may”. But your Honour, this is the purpose of Leslie Te Maiharoa-Sykes’ evidence. Leslie is the applicant for Waitaha of Te Wai Pounamu. On her behalf, we wrote to Te Tari, seeking historian funding. This is set out at paragraph – what happened, Sir, the events of relevance, are set out paragraph 162 of the closing submission. Her evidence makes it clear that is a hard “No” for historian funding, activity funding. She was told, “No”, in the following terms:

15 “As noted in our July pānui” – we are hearing the same message again – “to be able to manage our 2024/25 financial year appropriation we are funding applicants that are either involved in scheduled High Court hearings, or nearing a ministerial determination, with complete research and public consultation progress, and an agreed approach to
20 overlapping applicant groups.

 Unfortunately, the Te Maiharoa Whānau funding application does not meet the Scheme’s funding criteria. At present, we are not able to approve...”

25 And so this is the evidence that was presented to the Tribunal in this important respect. If they are not prioritised, you will not get funding.

30 The consequences of this funding reality are severe, and we elaborate in this respect in this oral closing. Interestingly, Ms Dagg, at a hearing, provided multiple contradictions to Mr Kent’s evidence – and these are set out at paragraph 165, in full, from the hearing transcript – in response to questions from Mr Crosby, Mr Fletcher, Mr Lyall and Ms Cole, all pretty much on the same topic, asking Ms Dagg about funding if you’re not prioritised. She, Ms Dagg, agreed there is no funding in outer years. At paragraphs 165, 166.

Mr Lyall asked Mr Kent some questions about the fate of funding from two cancelled or vacated hearings. One would think that that sounds like there could be a substantial amount of funding available for non-prioritised applicants, hearing – High Court applicants, but it's clear from Mr Dagg's – sorry, Mr Kent's response that all the funding from those vacated hearings was used elsewhere, and in particular, for – to cover the prospective costs order, and then some indemnity that Mr Kent refers to, and some other item of cost I couldn't get my head around, your Honour. And so even if there is spare funding and you would think perhaps there could be some activities that are now able to get underway, that did not happen either.

Sir, if there is no funding for case management conferences, this is the death knell for High Court hearings that are to be set down. If you have a High Court hearing now, you have a fixture date, you are one of the fortunate ones. Try getting one of those now, when there's no case management conference funding.

Ms Naden evidenced that there is quite a lot of work to do for hearing proposals. Hearing proposals are how we term the effort that goes into kicking off a High Court hearing, your Honour. I cannot give evidence from the bar as to what is involved with one of these proposals. All I can refer to is that Ms Naden said there is quite a lot of work to do. If that is the case, and it was uncontested in terms of evidence and evidence challenged, none of that lot of work to do is funded, because case management conference work is not prioritised work.

And so this is the death knell for future hearings. If case management conferences are not funded, new hearings are curtailed. Rights recognition in the takutai moana is curtailed.

And as stated earlier, this prioritised approach to funding appears to be the same for the 25/26 financial year coming up. Ms Dagg tried to evidence that case management funding is available, but she could not evidence that.

Those are our submissions at paragraph 172 to 173.

And so in summing up, there is no case management conference funding. You need that to get a hearing proposal going, and a lot of funding. So there are no new hearings. There is no customary rights recognition for those without a hearing fixture date. The Crown is wholly in breach of its Treaty obligations. The same goes for Crown engagement applicants. If they are not wholly progressed sufficiently down the track, it's "Good luck", members of the panel, "with getting yourself funded", as Ms Te Maiharoa-Sykes' evidence clearly shows.

And your Honour, there are memoranda of counsel on the High Court registry record prepared by Tamaki Legal in response to a funding request, essentially, to Te Tari. That was refused because we did not have fixture dates. We had hearing indications from the High Court, but not the dates themselves. So those memoranda were filed with the High Court, and two hearing dates came our way, one in 2027 and one in 2028. Those memoranda can be produced to this Tribunal to establish how important it is to have a fixture date if you want to get funding for work to be done in the outer years. And those memoranda drive home the point that those folk without a fixture date are, in counsel's colloquial submission, dead in the water. There is insufficient funding.

These are paragraphs 174 to 177 of the closings. The legal aid rates are inequitable. They disincentivise lawyers. This was an important part of Ms Inns' evidence, and I quote, "[...] it is not financially feasible to carry out work in the MACA jurisdiction[...]". You will recall this evidence, panel members.

Her evidence was 12 to 14-week hearings are not feasible for her firm, beleaguered as it was by the failure to get paid on time, with partners taking out loans. I think that was Ms Inns' evidence.

And so she culminated that evidence with that her beloved clients, she may well have to refer them on, because – because her experienced law firm cannot do the job.

5 Ms Dagg’s evidence at paragraph 176, her evidence was that legal aid rates are unfair. Mr Kent claimed to justify legal aid rates because the, and I quote, “currently align with what is available in comparable disciplines”, unquote. And that’s out of the hearing transcript at page 310. And Ms Cole asked Ms Dagg to differentiate between the comparable disciplines, such as the Māori Land
10 Court and the Waitangi Tribunal, and in her questions, Ms Cole suggested that the MACA Act complexities differentiate those other two jurisdictions from the MACA Act jurisdiction, and Ms Dagg agreed. She understands that the comparable disciplines justification for legal aid rates doesn’t hold water. Does not hold water.

15

There’s some submissions here now about a “hard cap”, as it is called. Paragraphs 178 to 181. The funding caps are absolutely immutable. They will not be changed, no matter what. There is evidence in Ms Naden’s brief about legal aid services allowing for funding increases, there were questions from the
20 Tribunal in this respect, but when it comes to Te Tari, there is no leeway in this respect, even though applicants are expected to predict six months into the future, with exactitude, about which there is no leeway, all of the activities that are to occur in that period, and if you miss any or you underestimated whatsoever, howsoever, there is no change to the approved grant.

25

We – Ms Naden gave evidence about the Tokomaru Stage 2 funding experience, and she highlights how it was Justice Cull of the High Court who directed counsel to carry out certain work, and by that time, the funding cap was near exhausted, and so – and this is in her evidence – a subsequent budgeted
30 work plan was filed with Te Tari on the 4th of September 2024. The extra funding sought was denied, the \$25,000 maximum was adhered to, and so another budgeted workplan had to be put in, and then there was significant delay, and so from the date when the first budgeted workplan went in on the

8th of August to when there was the first payment as a result of that budgeted workplan, there was some 28 weeks, over six months.

5 And it is acknowledged that there was delay on the part of the applicants with turning around some of the work requirements to get this budgeted workplan over the line, but at the end of the day, these were also a set of prioritised applicants, supposed to be expedited. That is actually in Te Tari policy. If you're prioritised, you get expedited. There was reliance placed on that holding out. And even though there was contribution by the applicant to delay, not to 10 the level of 28 weeks, in circumstance where you are supposed to be expedited.

At paragraph 84 of the Crown closings, which I would choose to read through, the following is stated. Paragraph 84. "There is further evidence that the scheme settings did not interfere with proceedings in a way that detrimentally 15 affected applicants' ability to present their case. Ms Pewhairangi confirmed that her applicant group were able to present all of the evidence in submissions they sought to put forward at the Tokomaru Bay Stage 2 hearing."

20 Sir, our clients were at that hearing. Our clients presented all of their evidence in submissions as well. But much of the work that was done went unpaid, and we know this, because in Ms Naden's brief of evidence, she refers to the 4 September subsequent filing of another budgeted workplan in the hope that that funding sought in the amended workplan would cover the extra work that Judge Cull had – Justice Cull had dished out to counsel on behalf of the 25 applicants.

30 So – so that amended budgeted workplan is evidenced, and it is referred to in Ms Naden's brief. There is evidence of – that more was sought than the \$25,000 maximum, but it is clear from her evidence that that funding sought was denied, and therefore, it can be stated in this submission that work done went unpaid.

At paragraph 95 of the Crown closing, it is stated that delays with processing budgeted workplans was – well, it was heaped on the applicant, who sought

costs outside the scheme, which is what I have just been talking about. But the Crown's submission is incomplete. Those extra funds were sought at the court's direction. What were the applicants to do? What were their counsel supposed to do? Work for free?

5

And your Honour, you asked Ms Naden about amending budgeted workplans, and her evidence was that we do not – actually, the – Te Tari's evidence is that there are no timeframes for budgeted workplans. They are not on the 45-day invoice turnaround process that – that's available there for invoices. They are done when – well, howsoever they are done. And on top of that, if an amended budgeted workplan goes in, it apparently – apparently, they are delayed even further.

We discussed the deficiency of the funding caps at 1852 to 190 in the closing, and by design, rights recognition is prevented. In her evidence, Ms Naden, at paragraph 182 now, she stated, "no way is \$140,000 enough". Does she have the basis to say that? Well, she should, because she refers to the five High Court hearings that she has administered the funding in relation to – High Court hearings from which there are judgements for each. So this submission actually is qualified to say that \$140,000 is not enough.

Mr Kent was questioned, I think it was by Ms Cole – I'm at paragraph 183 – about putting fiscal restraint over treaty rights. Mr Kent's response, that was denied. Rather, he starts to try and explain that Te Tari sought to have Cabinet change their mind about not funding in a manner then sought by Te Tari. So as opposed to rejecting Ms Cole's – the thesis of the question outright, he tends to deflect away from what probably should have been his answer, and attempts to explain how – what Cabinet was doing, Te Tari sought to head Cabinet off. That can be equated with agreement on Mr Kent's part with the thesis in Ms Cole's question.

Ms Dagg's evidence – I'm at paragraph 184, 185 – she stated legal aid rates were imposed to stay within the appropriation, as opposed to the provision of

sufficient funding. A senior Te Tari Crown official's evidence should be given its due weight in terms of the adequacy or not of these legal aid rates.

Paragraph 186 and – I would like to read paragraph 186 out, Sir.

5 “Ms Dagg also gave evidence at hearing in response to a question from Mr Fletcher that the funding regime was not designed to provide for actual and reasonable costs, but rather that the available funding was simply capped. The witness also agreed with claimant counsel that the consequence of ‘a cap’ is that the ‘money’ will ‘only go so far’.

10 Ms Dagg also agreed with...” yourself, Sir, “...that it's the same level of funding, even though the number of hearing days may be higher in some court hearings than in other court hearings, which is prejudicial to those applicant groups with longer hearing periods such as 10-12 hearing weeks.”

15

You rightly raised that concern, if I may, your Honour, with Ms Dagg, and her answer set out the concern. Eight hearing weeks is what the modelling was based on at \$140,000, so those with 9, 10, 11, 12 hearing weeks, they are in trouble.

20

Mr – I am at paragraph 187 – Mr Kent gave further evidence of insufficiency.

And we refer to the Supreme Court's prospective costs award in 2024 as evidence that the legal aid rates, the funding caps are insufficient. That insufficiency adversely effects hearing preparation. Adversely effected hearing preparation, as a result of this funding regime, culminates in a failure by the Crown to adhere to its Treaty obligation.

25

Turning to budgeted work plans, paragraphs 191 to 201 of the closings.

30

The need for budgeted work plans can be understood, but in these closings' submissions, there administration is heavily criticised. The evidence from Ms Naden is they are difficult to complete, as far as budgets and estimates go. Her evidence was that Te Tari provided no guidance at a critical moment.

This is July/August of 2024, when hearings were being conducted by counsel on behalf of the applicants. No guidance. There was some emails adhering, your Honour, that were furnished by Te Tari in support of that guidance
5 evidence. But those emails were not received. That might sound like a dodge, but they have been searched for and I'll leave that there. Ms Naden's evidence is maintained, they were not received.

But, your Honour, it came to light during hearing that Whangārei Coast counsel
10 was video conferencing with Mr Kent, on budgeted work plans. I think there were some dates involved with this video conferencing effort. I don't know why, but there was no video conferencing with counsel for Tokomaru Bay applicants. There was no video conferencing on guidance in relation to budgeted work plans for Wairarapa 1(a) applicant counsel.

15 The fact that there was video conferencing in this respect, should illustrate to this Tribunal that there were difficulties with filling these documents in. So much so that Mr Kent had to, as it's understood, assist counsel in that respect. But it's not only that, during this period, unfortunately, Te Tari's policy was that, if
20 you don't have a budgeted work plan filed, not necessarily approved, but filed, don't do any work. We cite to this particular policy. I've absolutely broken it down in that submission.

But that was particularly troubling at the time, and because we were working
25 and not knowing if there was going to be payment. In fact, the policy stated that there wouldn't be, but I think it was Mr Lyall referred to, long standing relationship with our clients. Our fiduciary duties to our clients. Our own professional will to get the job done meant that despite this policy and what it meant, we carried on. That is not to say that we acquiesce in it, that is to say
30 that we wanted to honour our obligations to our clients, essentially.

With regards to budgeted work plans, it's understood we had the same staffing levels and an increased workload as a result of these budgeted work plans. It's difficult to see how there have already been delays with payment and invoice,

and so on and so forth. On top of that, a new job that is, were contentive, and the same staffing level.

5 I'm at paragraphs 202 to 208 and I'm talking funding advances. The office of Te Tari Whakatau, in fact, Mr Kent's evidence was that this is a done deal, it's been predetermined, there will be funding advances to the applicants. On its face it sounds appealing. But it's just the way that Mr Kent explained the basis for this development.

10 At paragraph 202 and I quote, he says:

“the procurement of historians, for example, mappers, all of the legal work, all of the things, the funding decisions, what bill gets incurred and who pays it, is all made in-house by a legal firm”

15

That is not right according to Mr Kent because, and these are his words, the “applicant is more or less disconnected” and that creates risk, in his words, of which, and he says, “small amounts” have “materialised”. Which on its face means that this isn't a big problem, but it's the basis for funding advances.

20 Lawyers get nobly involved in funding administration, apparently.

Then he stated, hundreds of thousands in expended activity funding for which the applicants may potentially become liable with no ability to pay those costs. That was at hearing. No ability to pay those costs. It's understood that the
25 Crown position is that if there is a short fall, the applicants can pick up the extra cost. And yet, here is Mr Kent's evidence, understanding that there's no ability to pay costs. If that's the Crown's position, the applicants can pick up the short fall. If not, their key witness accedes to an inability to pay costs. As the basis for advance funding, the Crown's submission is unmeritorious.

30

So, fundings been advanced, the applicants because counsel have commandeered the funding. Te Tari needs to be reminded that any funding released, payment of legal fees to historians, to mappers, so on and so forth, is authorised by the appropriate applicant. Those amounts aren't, as appears to

the case in Mr Kent's mind, solely at the discretion of counsel. But it's that view or perspective taken by Mr Kent that appears to have driven his advanced funding.

5 In this submission, advanced fundings is appealing but there should be close administration of that funding. It's Ms Naden's evidence at paragraphs 52 and 54 – 52, 254 – and I urge the Tribunal to take a look at this. It's about how dependent the applicants on counsel for case administration. If we have this funding advance, if has been suggested, strenuously, by Te Tari, this is in
10 Ms Naden's evidence. That the applicants do budget work plans, become more involved in case administration consistent with the rationale for this advanced funding approach. That efforts to be ameliorated by Ms Naden's evidence at 52 to 54, where she talks about it.

15 In the experience of Tāmaki Legal, the applicants are comfortable with the level of administration. That the where with all to do, that kind of mahi, run a High Court case, is not with the applicants.

Just, your Honour, I'll get through the rest of this quickly.

20

There is no dispute resolution mechanism, that's external, Ms Cole established that, cross examination. Legal aid services have a reconsideration process, the Legal Aid Tribunal, the High Court. This leads to the ultimate submission here and that is that legal aid services should be administering court funding.

25 This was, the Stage One, 2660 Tribunal, it was wholly alive to that administration option. It's to be maintained in this submission, given what has been set out in this closing submission and no doubt in the submission of others. That the level of ball dropping here, the sheer incompetencies in this submission. That is exhibited year after year, by Te Tari. Warrants that that
30 group take over, at least court funding.

Te Tari remains understaffed, paragraph 213 to 222. There are some Tāmaki Legal specific issues. I'll just quickly roll through those, Sir, if I may, and then I'll wrap it up.

Mr Kent was adamant that all Tāmaki Legal bills were paid by May 2024 in his evidence. I cannot give evidence from the bar, but I understand I can say that that evidence is not accepted. Balance updates, these are not regularly
5 provided, so the applicants don't know how much activity funding remains, how much High Court funding remains. They have to be requested and even then, your request may not be.

There are inadequate remittances, so payments are made, but, and this is Ms
10 Naden's evidence, we don't know to which invoice that payment should be attributed to. So, it's highly inconvenient and again, it goes to this legal aid services, they should administer, that's just second nature to that government agency. That is the provision of information of their nature.

15 Sir, just quickly, some reply submissions.

There was also a question you put to Mr Lyall that I may be able to assist with.

HOUSEKEEPING – TIMING (11:51:20)

QUESTIONS FROM THE PANEL – NIL

20 **(11:52) MS COLE: (#3.3.63)**

Kia ora anō. I'll try and make up some time, I think.

BEGINS SPEAKING TO CLOSING SUBMISSIONS #3.3.63

I want to start by noting that this inquiry, it's not an inquiry into what Te Tari
officials did or didn't do. It's not about advice they did or didn't give to the
25 Crown, to the ministers, to Cabinet. It's not about whether one firm bills for wine and vitamins. It's not about Te Tari Whakatau officials working really hard to catch up on backlogs that their lack of resourcing within their own office created. It's not about them failing to pay invoices in a timely manner.

This inquiry is about the FAS settings, and I'll call it the FAS settings for brevity. Set by the Crown, the executive, the Cabinet, not Te Tari Whakataua, in April of 2024, which were imposed without any prior consultation with Māori who are participating in the MACA schemes. And it's about the consequences of those settings.

This is an inquiry which raises so very obviously, that the Crown's decision is to prioritise the prudent management of public funds, to use their words, above its obligations to its Treaty partners, and it's as simple as that, in our submission.

10 What we see from the Crown's submissions, both opening and closing, and indeed, from the Crown's own evidence. Is that sadly, the Crown doesn't actually even get that. Why are they participating in an inquiry which focusses on these very issues and yet fails to deal with it.

15 There are 45 pages of closing submissions from the Crown that is full of defensiveness and justification. But does not actually address the key issues. In quiet reflection, my clients and I wonder, with despair, what has become of the Treaty relationship.

20 The Crown's defence of its actions to maintain that it has not acted inconsistently with its Treaty obligations comes down to seven words, which are found in paragraph 59 of their closing submissions, "It is unlawful to breach an appropriation.". Not breaching a self-imposed fiscal appropriation. This is despite officials apparently having advised ministers, and therefore Cabinet,

25 that the appropriation for 24/25 was not going to be sufficient.

Apparently, we have no true evidence of this, but apparently the ministers for Treaty of Waitangi negotiations and finance recommended increasing the appropriation for 24/25, to meet the forecast short fall. But instead of adjusting the short fall, the Crown, through its executive, chose not to do so. Instead, it's easier, and probably a lot cheaper, to breach its Treaty obligations.

30

The Crown, at paragraph 65 of their closing submissions, and I want to take the Tribunal to this. Because they do place a lot of reliance on this. So paragraph

65 of their closing submissions, second part of the paragraph, and they're talking about the Crown needing to act to avoid breaching the scheme appropriation. This point is fundamental:

5 “—the Government must always have authority from Parliament to
spend public money before expenditure is incurred. This is made clear
in the Constitution Act 1986 and is the reason why a detailed legislative
framework for Parliamentary authorisation and scrutiny of the
Government’s expenditure proposals is set out in the Public Finance Act
10 1989.”

That’s talking about the whole of the budget. That is not talking about a \$19 million dollars adjustment to an appropriation, \$19 million dollars put in the scheme of things, of the finance, of the government, of this country, is not even
15 coffee money.

At paragraph 98 of their closing submissions, the Crown says that it's” “position is that the Scheme settings for the current financial year are not inconsistent with Treaty principles.” And they maintain that: “the Crown is required to strike
20 a reasonable balance between ensuring access to justice for applicants and the prudent management of public funds.” The prudent management of public funds. It's just the same way of saying, it's unlawful to breach an appropriation. Well, hello, we all know that no one is suggesting anything other.

25 The Crown is under an obligation to prudently manage public funds, and the Public Finance Act does make it unlawful to breach an appropriation. But for the measly \$19 million dollars that we are talking about here, which Cabinet could have approved in a heartbeat. With no legislative consequences or requirements whatsoever, the Crown chose to prioritise money over its Treaty
30 obligations.

Why did they make that decision? That’s the question for this inquiry. We don’t know.

We say that that balancing by the Crown is not an appropriate balancing at all. That is a gross example of the Crown's ongoing assertion of power and control over its Treaty partner, in any way it can.

5 Your Honour, members of the Tribunal, in our closing submissions, we discuss the consequences of the 24/25 scheme. And we know from its closing submissions that the Crown does not consider there to be any evidence of Treaty breach or bad faith on its part.

10 In our submissions, at our paragraph 20, we refer to Mr Kent, but as Mr Naden has just pointed out. Ms Dagg also confirmed that the sole reason for the change to the FAS was to ensure the scheme remained within its appropriation. There can be no doubt that the Crown sees its responsibilities to remain within its self-imposed, fiscal, appropriations above its Treaty obligation.

15

Now, our question for the Tribunal is, where is the good faith in that? Where is the demonstration of good faith on the part of the Crown as a Treaty partner. How is that not breaching multiple principles of te Tiriti. Partnership, equity, tino rangatiratanga, good government.

20

At paragraph 23 of our closing submissions, we drew an analogy with a consumer, telling its electricity supplier that she wasn't going to pay full rates anymore, because she just can't afford it.

25 Here, in this instance, the Crown holds all of the cards: it is (for all intents and purposes) the sole source of funding for MACA proceedings for applicants. In order to have their customary marine rights and interests recognised under the only available legislative avenue, applicants must participate either in a Crown engagement pathway or through specialised and complex High Court proceedings. If they cannot fund their participation, rights, and interests in their precious taonga will never be recognised.

30

Now, as we have shown in the Stage One inquiry, the goal of the current minister for Treaty of Waitangi negotiations and by implication, the Crown. Is

to, and I quote: “*reduce the 100% of the coastline subject to CMT to 5%*”. By refusing to fully fund applicants forced to participate in the MACA regime, the Crown will by default achieve its objective.

5 No need to amend section 58.

While the Crown officials who gave evidence to the Tribunal in this stage of the inquiry denied the funding cuts were intended to achieve the goal of reducing the amount of CMT recognised around the motu, there can be absolutely no doubt that even if not an admitted conscious outcome, desired by the Crown, it is most undoubtedly a certain outcome. If applicants cannot fund their participation in proceedings, the proceedings will grind to a halt. Inevitably, the High Court will ultimately dismiss the applications for want of prosecution.

15 The evidence of the Crown witnesses confirms that despite advice having been provided to the relevant Crown Ministers as to applicable Treaty principles and what compliance thereof would entail, the Crown elected to impose a funding assistance scheme for the 2024/25 year which resulted in significant and far-reaching prejudice to applicants seeking to pursue Customary Marine Title and Protected Customary Rights orders through either the Crown engagement or High Court pathways.

Just as this Tribunal found in its Stage One report concerning the policy development process for amendments to the statutory test, when it came to the process development for the 2024/25 financial assistance scheme, “*it appears the Minister turned the policy development process into a foregone conclusion*”.

We submit that the Crown’s process in setting an appropriation for the 24/25 financial assistance scheme makes a mockery of any policy design process undertaken by its agency, Te Tari Whakatau. This is the equivalent to what this Tribunal found in Stage One of this inquiry.

It is clear from the Crown’s own evidence that Te Arawhiti officials, Te Tari Whakatau later, gave updates and advice to the Ministers of

Treaty of Waitangi Negotiations and Finance as early as March 2024 about the impending breach of the 23/24, previous years, appropriation unless a large amount of additional funding was injected into the scheme.

- 5 The Crown adjusted the appropriation for that financial year as recommended by officials. It declined to approve any additional funding for the 24/25 financial year and years after that.

Why? We don't know.

10

As found by this Tribunal in its Stage One report:

15

“[t]hat the Crown knows its policies will cause harm to applicants and their wider communities, but resolves to continue nonetheless, finding itself having to ask how it can mitigate that harm, is also a breach of the principle of good government”.

20

In its closing submissions at paragraph 99, the Crown identifies claimant submissions to the effect that we don't know about what process the Crown followed. They say that it's not relevant.

25

At 100 to 101, they fall back on the confidentiality of Cabinet discussions. We asked, well if the Crown is unwilling to waive that confidentiality, this Tribunal and all participants are completely in the dark as to the reasons for Cabinet refusing to approve the short fall needed. As identified by officials, to meet the actual and reasonable costs of applicants.

30

The Crown submissions says that there's no evidence that Cabinet's 15 April 2024 decisions were in breach of the Treaty. But of course, there's no evidence, because they won't waive their confidentiality and tell us what was said, or how the decisions were made. Ms Dagg, astonishingly, told you in her evidence, in cross examination, that she didn't think that the relevant ministers had even been briefed on the nature of the evidence in this inquiry. From either claimants

or from the Crown witness. Her recollection was, or her belief was that the last time they had been briefed about this inquiry was at the end of last year.

5 I want to move to discuss the process the Crown followed. We address this in our submissions from paragraphs 93 to 97.

We say it is entirely unclear from the evidence before the Tribunal, as to what Cabinet considerations were given to ultimately settling on the revised funding scheme.

10

It is clear that officials sought funding to cover what was anticipated to be a significant short fall in available funding to cover the actual and reasonable costs of participants. This was declined by Cabinet, and that is all we know. Both Crown witnesses gave evidence to the effect that: "they do not know" the reasons for the decisions made by Cabinet, as they were not told.

15

We submit that the Tribunal is entitled to and should draw adverse inferences from the fact that the Crown's evidence does not address this pivotal issue of what process the Crown followed in settling on the scheme settings for the 24/25 financial year. I hate Latin, but *res ipsa loquitur*. We know the consequences.

20

Issue 7 in this inquiry questions whether the scheme settings for the 24/25 year and the effects of the Scheme were consistent with the Treaty of Waitangi.

25

We address that very question from paragraphs 112 of our written submission, and we say that, in short, the answer is no.

30

Are the Scheme settings and the effects of the Scheme settings consistent with the principles of *te Tiriti*?

In short: No.

In June 2020 the Waitangi Tribunal found that only partially funding costs breached the Crown's duty of active protection under the Treaty of Waitangi. It found that full, flexible, and timely Crown funding of all reasonable claimant costs is an essential prerequisite for a Treaty-compliant regime.

5

Despite this adverse finding of Treaty breach only four years prior to the imposition of the 24/25 FAS, once again the Crown imposed a funding scheme which only partially funds applicants' costs of participation.

10 Moreover, the Crown has defended its process and decision making and argued there is no Treaty breach.

In our submission, none of this is the actions of a respectful and honourable Treaty partner.

15

My others of my learned friends are going to address the issue of consultation or complete lack thereof. We tautoko these reply submissions of others on that point, but simply to make the point that having an intention to consult is very different from consulting.

20

The Crown has asserted that there is limited evidence or no evidence of prejudice and indeed, your Honour has asked Mr Lyall about that. What is the evidence before this Tribunal of prejudice suffered by claimants as a consequence of the 24/25 FAS.

25

I'll take you to the evidence of Monique van Alphen Fyfe, which is #B033 on the record of inquiry. Just as an example. At paragraph 28, and she's here talking about the, I'm going to say Kāpiti inquiry, but I'm sure I will be corrected if I'm wrong. Whangārei looks like:

30

“In the event, counsel, including me, generally began to appear as much as possible by VMR, which resulted in delays to the Court's programme. It became difficult for counsel to continue to commit funds and time to travel, where they could not be promptly reimbursed. A significant

amount of the Court's time was also spent in case management conferences discussing the issues with funding. It was an unwelcomed distraction which wasted time and resources when the focus should have been on hearing the merits of the applicant's proceedings."

5

She goes on, paragraph 30:

"Funding issues hung over this hearing until an application for adjournment, due to funding issues, was made by several applicants. The commencement of the Kāpiti hearing was delayed by one week because applicants had not been able to complete some tasks in the absence of funding. This is reflected in the minute of Justice Grice, dated the 24th of April 2024, and resulted in a reduction in hearing time available to all parties."

10

15

We all know, as practitioners, in this space, just how valuable hearing time is for parties to get their full kōrero across, be it in the Tribunal, or be it in the High Court.

20 Paragraph 36, Ms van Alphine Fyfe says:

"As a practitioner, my view is that changes have been made since the beginning of 2024 are targeted toward reducing expenditure. The amended Scheme will have the inevitable effect of slowing down the carriage of applications and reducing the time counsel can spend on them."

25

There is also, of course, the increase in administrative burden, which has been discussed by Mr Naden, and was spoken about by a number of witnesses, or is referred to in a number of the witnesses briefs of evidence who didn't necessarily give oral evidence at the hearing week.

30

So, it's all well and good for officials from Te Tari Whakatau to offer to help applicant groups with preparing a work plan. But with all due respect, there is

no evidence that the people who work in Te Tari Whakatau funding team have any experience, whatsoever, in conducting litigation. How can they even know how long it takes to do these tasks? What are they basing their assistance to groups on?

5

Mr Crosby made the very important observation during the hearing week, that as a practitioner for so many years himself, there is no way he's going to go along to a High Court hearing thoroughly briefed his own witnesses. Just can't be done by project managers to work out how long these things are going to take. What's going to be involved. Whether you need to go and see these people face to face. Whether you can do it over telephone. There's just so many things that need to be factored in, and yet, people sitting up in the justice centre think that they can work out the work plans for groups participating in this complex litigation.

15

Ms van Alphine Fyfe also gives evidence of prejudice which is caused by the caps. This is at paragraphs 43 to 45 of her brief of evidence, where she says:

20

“Capped funding may produce prejudice or unfairness to applicants who, through no fault of their own, find themselves in complex procedural pathways or lengthy multi-party hearings. Applicants cannot control the actions of other parties in litigation, which can significantly impact the duration and complexity of hearings.

25

An example is the Panoho Whanau, whose application is for a discrete area of the takutai moana adjacent to their tupuna whenua in Whangārei Harbour. If considered in isolation, their case might require only a single day's hearing. However, due to the inclusion of overlapping applicants that extend well beyond the Panoho application area (and meritorious or not), the required hearing time extends to many weeks. The Panoho Whanau, and us as their counsel, must be present throughout to ensure their application is adequately protected, incurring substantial additional costs.

30

Capped funding also fails to account for unanticipated developments that arise mid-hearing. A notable instance occurred during the Whangārei Harbour hearing when Fletcher Concrete (representing Golden Bay Cement) sought to participate as an interested party on 5 28th of March 2024--- over a month after the hearing commenced and well outside of the statutory deadline. Despite opposition from my clients (and others), the Court allowed their participation. This unexpected development necessitated additional case management conferences, review of Golden Bay Cement's evidence, preparation of reply evidence, 10 cross-examination of their new witnesses, and an increase of at least half a day to the overall hearing. All of that added to the costs for applicants.”

Your Honour and Tribunal members, you'll also be familiar with the evidence 15 from Ms Inns, Mr Naden spoke this briefly. Ms Inns brief of evidence is #B034 of the record of inquiry. She says at paragraphs 7, we, being her firm, presumably:

“We worked with Ngāti Wai Trust Board to prepare a budget for the Coast 20 hearing that would minimise legal costs as far as possible.”

This is after they had found out that there were going to be cap. These are decisions that were made. She says:

25 “In particular:

a. I would appear at the hearing alone without the support of the co-counsel that had appeared with me in the Harbour hearing. Given the scale of the hearing, including the 13 separate witnesses who gave evidence for 30 the NTB, this was a significant challenge.

b. In order to minimise travel time and costs between Whakatū/Nelson and Whangārei, I would stay in Whangārei over at least some weekends in

order to minimise travel costs. Being away from home for extended periods obviously imposes personal cost.”

5 There are some examples from the evidence before the Tribunal as to the nature of the prejudice that was suffered directly as a consequence of these 24/25 settings.

10 There is also a High Court minute of Justice Powell from the Central Bay of Plenty hearing of the 19th of December 2024. Which I don't believe is on the record of inquiry, but of course, is on the public record. In the Central Bay of Plenty hearing the applications had been set down for a nine week hearing, commencing, coincidentally, last week, the 5th of May 2025. Nine weeks as from the 5th of May 2025.

15 Ngāti Awa filed a memo on the 3rd of December last year, seeking that the hearing be adjourned. At paragraph 3 of the minute, it is quite clear that the stated grounds for adjourning the main fixture was where that time and preparation for the hearing and in particular the deadline for filing evidence have been and continue to be seriously affected by the proposed amendments to the 20 MACA. But then it goes on:

25 “In addition, the Ngāti Awa applicants also identified ongoing issues with funding as a result of amendment to the funding assistance Scheme and the resulting impact on the ability of the applicants to prepare for hearing. As a result, Ngāti Awa applicants sought that the May 2025 hearing be adjourned.”

The timetable vacated, et cetera.

30 Ultimately, paragraph 16, his Honour, has said that it was not possible to accommodate a nine week hearing in 2026 and on the contrary, a hearing in 2028 or 2029 at the earliest would be more likely. Rather than having a hearing starting last week, those participants are now looking at waiting until at least 2028, 2029. In part, because of the FAS.

I also wish to make the submission that the Crown having decided to have the High Court determine applications through the MACA legislative regime. The Crown chose a high cost, high complexity pathway, with a high degree of independence from the Crown. The High Court doesn't take direction from the Crown as to the nature of the evidence it requires for its hearings. How it's going to conduct its proceedings, and more importantly, when it's going to set matters down.

10 The where, the when's, and the how's of all of these hearings are outside the control of the Crown. It played, and I'm using the past tense, because it does appear, we heard in evidence that there is an increased focus of involvement by the Crown in some of the Marine and Coastal Area proceedings now. But it had been the intention, quite clearly, that the Crown was to play an entirely secondary role in the Court proceedings.

In the High Court, as we all know from the High Court Rules, applicants are entitled to have their applications heard in a timely manner. But the evidence before this Tribunal is clear that hearings have been cancelled, due to funding constraints. We know the consequences of that, they've been talked about in terms of things sought, for example, kaumātua passing away. Values cannot be put. Monetary value cannot be put on the cost of that loss.

25 It's our submission that the constraints that were ultimately realised by the Crown, through the high cost, high complexity, High Court pathway that it put in place, has not worked for them. It has caused political concern, we saw that in evidence in Stage One, and I refer here for example, to the conversations with the Seafood Industry.

30 It's our submission that the Crown is clearly throttling this process because it has discovered that the process that it put in place, it has no control over, and it wants to change that position.

In our closing submissions, we discuss the Lawyers and Conveyances Act (Lawyers: Conduct and Client Care) Rules. That might have seemed a little bit random. But we did that purposely because we wanted to draw attention to the fact that there are factors such as that which are binding on all counsel
5 of course. That do not appear to have been taken into account or factored in, in any way, shape, or form, by the Crown's officials in determining that legal aid rates should be imposed on counsels acting for applicants in the MACA space.

In my submission there is actually a complete absence of evidence of just what
10 was taken into account in deciding to fix legal costs at legal aid rates.

In our submission, all that the Crown officials were concerned about, in terms of, how they formulated their advice on rates, which went up to ministers was finding a way to ensure that costs were kept within the appropriations.
15

In relation to legal aid rates more generally, my simple submission is that this is an equity issue above any else. Limiting your opponent's ability to fully fund the fight, well, that's just not cricket, is it.

20 The *Little Sister's Bookshop*, Canadian case, that was referred to in the Crown's submissions, seriously, not a case that involves constitutional considerations such as the Treaty. Ms Dagg, when I put it to her, conceded, that the inequality caused by the funding rates is not fair, and that's because it's not fair. It's an equity issue.

25 Finally, I wish to end with how our closing submissions actually started, and that is with the quotes from various judgments or Tribunal reports. In my submission it is conspicuous in its absence, the fact that the Crown has not, at any time in those 45 pages, addressed any of these things. These quotes go directly to
30 the 24/35 funding scheme or are directly relevant to it.

The Supreme Court:

5 ***“The importance of the issues may be measured by the Crown’s recognition hitherto of an obligation to fund the participants’ legal costs on an indemnity basis. That might reflect a recognition of the Crown’s responsibilities to give active protection to rights of Māori under the Treaty “in the use of their lands and waters to the fullest extent practicable”. ”***

What did the Crown do with the information that it had from the Supreme Court?

10 In *Edwards* the Justice’s quoted from Justice Anderson in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* decision from 1997, it appears:

15 ***“Nothing cuts deeper than the lash of injustice or the perception of it, and the Courts are well aware, and society is generally that an abiding grievance is carried by those who feel they have not been properly heard.”***

20 How is one not properly heard? By not being able to participate fully in the litigation.

Again, from *Edwards*:

25 ***“...the Crown has, because of the level of appropriations allowed to it by Parliament, altered the basis on which it will fund those opposing its appeal.”***

This is in relation to, of course, the *Edwards* appeal:

30 ***“This alteration represents a substantial disadvantage in effect now imposed by one litigant upon another”.***

My submission, that quote is far more relevant to the issues that this Tribunal is dealing with than the Canadian case of *Little Sisters Bookshop*.

“...active protection also required the Crown to ensure ‘access to the courts in appropriate cases’”

5 This Tribunal held in 2660 in its 2020 report:

“Without such access, the danger is that Māori interests will become, as they have before, overly susceptible to political convenience or administrative preference.”

10

In our submission, in omitting to respond to any of that, is the Crown just putting on its blinkers, charging ahead with what it wants to do, without due regard to Treaty principles or its Treaty obligations.

15 Finally, I just want to draw attention to something that was in the Wai 3060 inquiry that we refer to at paragraph 15 of our closing submissions. This is something that was cited with approval in the 3060 report, from Professor Jane Kelsey in relation to equity. This is on page 8, Sir, of my closing submissions:

20

“Equity: in the third article of Te Tiriti, the principle of equity supplements the rights guaranteed to Māori under the second article and ensures Māori rights to equal citizenship in a substantive sense. That includes recognising the inherent inequalities Māori face in the Crown’s common law system, including at the Waitangi Tribunal. [T]he Crown has a monopoly over decisions, including resources, that can deny Māori access to substantive justice. That prejudice is especially profound with the Waitangi Tribunal where the Crown has a conflict of interest in minimising the risks and costs of adverse findings and recommendations.”

30

Those are our submissions.

(12:28) RON CROSBY TO MS COLE:

Q. I just wanted to clarify one matter. It was very near the start of your submissions, and I had a note that you said that there was no evidence you could point to. But that the ministers, you suspected, had recommended the payment of the short fall. Did you mean to say there was no evidence? Because I thought that there was a Cabinet paper that contained that recommendation.

A. There's a Cabinet paper. So when I say apparently, we don't know what was spoken about in Cabinet, so that was in the Cabinet paper. I don't know what the Cabinet ministers actually said to their Cabinet colleagues.

Q. So your comment about no evidence is about the no evidence of what happened in Cabinet, subsequent to that paper?

A. That's exactly right, Sir.

Q. Right, thank you.

15 JUDGE ARMSTRONG:

I do not have any questions, Ms Cole, but I do want to thank you for your submissions, they have been very helpful this morning.

HOUSEKEEPING – TIMING (12:29:53)**20 MR NADEN ADDRESSES THE COURT – SEEKS LEAVE TO WITHDRAW (12:31:17)****HEARING ADJOURNS: 12.31 PM****HEARING RESUMES: 1.03 PM****MR LYALL ADDRESSES JUDGE ARMSTRONG – SCHEDULING (13:04:27)****25 (13:04) MR CLATWORTHY: (#3.3.062)**

Tēnā koe, e te Kaiwhakawā, e te tēpu. Sir, I am presenting today the joint closing submissions of Wai 1505/2612 and Wai 1857, which is appellation

#3.3.062. We will have those taken as read, Sir, and I will just provide a brief overview, just really wanting to focus on the prejudice suffered by our claimants due to the funding settings.

5 Kia tīmata, māku e kōrero anō, ko te whāinga o te ture nei ko te whakatinana i te mana o te iwi Māori i roto i te moana. E whakaaetia te mana moana i roto i te Tiriti. Nā te whakariterite o te Karauna, he mahi uaua, he mahi pōrarurau. Ahakoa tērā, mō ngā kaikerēme, mahia te mahi tonu. **...what we have found is the integrity of the legislation, and it's certainly reflective in the laws**
 10 **pertaining to the moana. It certainly has been an arduous task for myself and clients, but we still endeavour to find a way forward.**

Sir, the claims of Ngāti Te Wehi and Ngāti Korokoro are each unique, and they have encountered separate issues in their own journeys as MACA applicants
 15 in the High Court and Crown engagement pathways respectively. However, the central theme of each claim is the same, that being that the funding scheme has slowed, delayed and prejudiced their MACA applications and therefore the recognition of their customary rights in the moana.

20 To prejudice in any way the ability of Māori to recognise their customary rights in the moana is a takahi on the tino rangatiratanga of the applicants guaranteed to them in te Tiriti. Meanwhile, as the applicants are forced through this long enticement process, they watch the health of their moana degrade.

25 We have seen throughout this inquiry and the Wai 2660 inquiry, as well as the earlier foreshore and seabed inquiry, a desire from the Crown to minimise the rights of Māori in the moana. Currently, it appears to be realising that goal through the strangling of funding for MACA applicants.

30 So I will first quickly address the Wai 1857 claim. This is the claim of Sheena Ross, whose evidence is #E010, and that is a Crown engagement application from Ngāti Korokoro in the Hokianga.

It has become general practice to commission a historical report for MACA applications. Ngāti Korokoro had spent years searching for an available researcher to do the historical report in order to progress the application. In 2024, they were finally able to secure historian Tony Walzl to draft a report for them. Following the funding scheme changes in 2024, all work on the application and the report was forced to stop. A budget was sent to Te Arawhiti to ask for work on the report to continue, and this budget was declined. That report was due to be completed in February 2025, and it is now unclear if the report will ever be completed. If funding is made available, it is unclear if Mr Walzl will be free to work on it again. Without a suitable historical report, the claimants cannot progress their application, and this has caused significant prejudice on the claimants, who felt they had secured a historian, and then now to lose that has caused significant māharahara for them.

I will next turn to the claim of Ngāti Te Wehi, Wai 1501/2612, and this was also discussed in the evidence of matua Ronald Miki Apiti at #B009.

Ngāti Te Wehi have gone through a unique wheako as an applicant that has been progressing through High Court hearings throughout the last year. Ngāti Te Wehi had their Stage 1 High Court hearing for Aotea Harbour in July 2024, and are now awaiting a Stage 2 hearing in November 2025.

Both before and during the Stage 1 hearing, Ngāti Te Wehi faced issues with extremely delayed payment of invoices. They also faced issues regarding which funding pool the resourcing from their hearing was being drawn from. This meant that many hui had to be held between lawyers and Te Arawhiti to prevent the applicants essentially using up all their activity funding, and a lot of this was later changed to court funding. This caused significant stress for the claimants, many of whom are elderly kaumātua, veterans, matua Miki included, and it required counsel to front-foot costs for months on end as applicants awaited payment for invoices. In the end, the invoices were paid, but with thousands of dollars slashed off those invoices.

Following the completion of their Stage 1 hearing, the new funding scheme was implemented. Ngāti Te Wehi were told that no funding would be available until new budgets were submitted and approved. The prior issues with late payment of invoices and budgets resulted in a complete stop to all Ngāti Te Wehi MACA work in 2024.

When Ngāti Te Wehi received their judgement – successful judgement granting them customary marine title and protected customary rights in Aotea Harbour in November 2024, they did not even have approved funding to meet with their lawyers or with their people to discuss what was said by the judge in their own judgement. Ngāti Te Wehi were shocked. Auē, taukuri ē. After being forced through an arduous court process, they could not even talk to their own lawyers.

Ngāti Te Wehi subsequently submitted an urgent budget on the 4th of December 2024 in order to review their judgement and begin work on preparation for a Stage 2 hearing. They did not receive a reply until two months later on 17th February 2025. The reply informed them that that budget was rejected and work to prepare for Stage 2 was not yet funded, as there was no scheduled Stage 2 hearing date set, although there was some work there that was eligible for activity funding, which further discussions could be had with Te Arawhiti about.

The judge had originally indicated that a Stage 2 hearing should be set down in early 2025. He said that during the Stage 1 hearing. Because of a lack of a funding, this would inevitably be delayed. At this point, it was a catch-22 for Ngāti Te Wehi. They did not want to ask for a hearing to be scheduled, as they did not feel they could be prepared in only a matter of months, but they were not able to begin preparing until that hearing was scheduled. Eventually, Ngāti Te Wehi asked for the Stage 2 hearing to be delayed until the end of 2025 or early 2026. Subsequently, it was set down for November 2025.

Following the Stage 2 scheduling, a new budget was submitted by Ngāti Te Wehi for Stage 2 preparation work, and on 27th March 2025, counsel received confirmation of a partial budget for a limited range of activities. They

were informed that court funding was not available if the hearing was not scheduled for that financial year, and it was only then, in March, four months after the hearing had been released in November, that Ngāti Te Wehi and counsel could meet to discuss their judgement.

5

Although some limited activities were approved in that 27th March budget, Ngāti Te Wehi were not, and to this day, have still not been approved funding for the preparation and drafting of evidence for Stage 2. Confusing funding guidelines and the declining of budgets has resulted in this situation, and this is elaborated on in the reply closing submissions filed by ourselves on the 9th of May. In the meantime, Ngāti Te Wehi and the quality of their Stage 2 evidence, which requires a lot of work, as it is wāhi tapu evidence, is prejudiced by lack of funding, as the deadline of 11th August 2025 draws ever closer.

10 And what the future of the funding scheme beyond 30th June 2025 looks like remains unclear. Additionally, with the August deadline falling only six weeks after the new financial year, a new financial scheme may have to be navigated and organised.

15 Sir, in conclusion here, it was the Crown that created the convoluted funding scheme and its arbitrary settings. This has caused significant prejudice to the applicants. A funding scheme which is clear, fair, robust and covers all work to progress an application is needed, whether that be court funding or activity funding or fall within a certain financial year. In the meantime, the claimants remain prejudiced under the previous and current funding settings.

20 For Ngāti Korokoro, they have lost the assistance of a skilled historian and possibly been set back years in their application. For Ngāti Te Wehi, a successful applicant in a relatively uncontested area with little substantial interruption and only three overlapping parties, all of whom recognise each other's interests, which we would think would be a straightforward MACA hearing, have been put through a bureaucratic nightmare in order to recognise their customary rights in their moana.

30

Ngā mihi nui, Sir. That concludes my submissions.

(13:16) JUDGE ARMSTRONG TO MR CLATWORTHY:

Q. Thank you, Mr Clatworthy. Just one question of clarification. What is the date for evidence to be lodged and exchanged in the Stage 2 hearing?

5 A. 11th of – for Ngāti Te Wehi?

Q. Yes.

A. 11th of August.

Q. 11th of August. Right. Thank you.

QUESTIONS FROM MR RON CROSBY – NIL

10 **MR HIRSCHFELD:**

Sir, I will address next.

JUDGE ARMSTRONG:

Yes, Mr Hirschfeld.

(13:17) MR HIRSCHFELD: (#3.3.061)

15 May it please the Tribunal, at the heart of the matter lies the Crown's failure to adequately fund MACA groups in their High Court litigation, thereby consequently undermining the ability of the applicants to prosecute their applications responsibly through statutory process. An executive point in my submissions is that the current funding for MACA needs to be replaced by a
20 hybrid system of funding divided between Te Tari Whakatau and Legal Aid under the Legal Services Act 2011.

My following submissions will be brief. The record of inquiry reference, as I indicated earlier this morning, is #3.3.061, being closing submissions on behalf
25 of Wai 420, 475, 100, 2767, 2797, 2809, 2832, all of which is dated the 29th of April 2025.

My submissions are consequently on behalf of multiple Māori claimant groups, who are pursuing recognition of their rights under the MACA legislation. They

are located all around the motu, including in northern Wairarapa, eastern Coromandel, the Chatham Islands, Te Rohe Pōtae, and in the Far North at Hokianga Harbour.

- 5 For the avoidance of doubt, I adopt unreservedly the submissions presented today by my learned friend Mr Lyall as generic closing submissions.

The three key points: The submissions I advance on behalf of the claimants centre on these three points:

10

Firstly, that the applicant groups must be sufficiently resourced to enable them to prosecute their applications.

Secondly, that Te Tari Whakatau should prioritise funding for the applicant's activities including project management, collection of evidence, the development of the historical reports, hui with overlapping applicants and the like. Thirdly, that the funding of the lawyers activities can be achieved through a different channel, namely, Legal Aid, Modest changes to the Legal Services Act 2011 would enable this. The necessity of sufficiency with the resourced applicants is not in dispute and is indeed alimentary.

15
20

The Crown case, and that is at paragraph 114 of the Crown closing by contrast and is simply put as this, follows, "Significant financial stresses from 2024 had transformed the Crown commitment to MACA funding." And the Crown had done its best in restrained circumstances with the financial assist scheme. The Crown's policy conduct had been, therefore, in any event so says the Crown, "Treaty compliant."

25

The plain reality is that the changes to the financial assistance scheme since the change of government in 2023 have rendered the scheme not only unreliable but also difficult to access.

30

The new funding caps are whole inadequate, and many applicant groups have not had access to any funding at all since the new regime was implemented in

July 2024. Indeed, the Crown has admitted that the funding is sufficient and that costs may fall on the applicants. This is a breach of the Crown's duty to actively protect Māori interests.

5 The dire impact that this failure of funding has had on the applications, has been
amply testified to by all of the claimant witnesses who have given evidence on
behalf of the claimants that I represent. Collectively, their evidence paints an
unflattering picture, impacts that the claimants describe include being in breach
of contract with their historians, the inability to progress evidence collection
10 resulting in loss or potential loss of the evidence on elderly witnesses. Hui with
overlapping applicants having been put on hold and the overall stalling of
applications when no court fixture was yet set or alternatively, the burden of
preparing for hearing dates without certainty of funding.

15 The claimants raised issues related not only the policy settings of the scheme
but also to the administration and implementation of it by Te Tari Whakatau,
including poor communication, lack of consultation around change, inconsistent
changing funding rules, the retrospective application of - application of changes
and untenable delays in the reimbursement of invoices.

20

The claimants report that the effects of these issues are both wide and deep,
including a loss of trust in the Crown and in their relationship with the Crown
ongoing, into the future. This needn't be so. The Waitangi Tribunal,
Wai 2660 Inquiry suggested that the Crown shouldn't consider Legal Aid
25 Service to administer the funding for MACA cases. The Crown, itself, in its
review of the financial assistance scheme conducted in 2020 concluded that:
"Legal Aid is likely to be the most suitable and sustainable place to provide for
applicants." The applicants I represent urge the Crown to heed the Tribunal's
original recommendations and the findings of its own in the 2020 review.

30

This is my main point. I propose a hybrid funding model with Te Tari Whakatau
maintaining responsibility for administering funding for activities work and the
Ministry of Justice under the Legal Services Act 2011, taking over the funding
or the lawyers, or their work.

The Waitangi Tribunal Wai 2660 Inquiry made an overarching recommendation that the Crown should fund all reasonable costs to enable complaints to pursue their applications under either pathway. Funding administered by the
5 Te Tari Whakataua has powers to do that. My submission, on behalf of claimants herein is that the proposed hybrid approach is the best way to achieve MACA outcomes.

I am going to conclude on two possible questions. So these possible questions
10 are rhetorical with answers in hand for the purposes of concluding, indeed, my submissions today.

So the first question surmised here is this, it's under the heading of interagency coordination. The possible question is, is it realistically achievable that two
15 distinct bureaucracies might be reasonably in sync with one another in providing for MACA cases? The answer to this is this, so it's a single question ultimately. Is it, therefore, necessary for there to be a special arrangement between the two bureaucracies? So, my rhetorical answer in that regard is undoubtedly. Clear guidelines will need to be developed to demarcate the
20 responsibilities of the two agencies, however, as mentioned in my written closing submissions, this is not an issue unique to the hybrid system as the current lack of clarity around the activities and lawyers work has been an issue when all the funding has been administered by Te Arawhiti or had been administered by Te Arawhiti.

25

Second question. Were the Tribunal to recommend the Hybrid Funding System advanced in my submissions, is it appropriate that a special rate apply in MACA for lawyers' work that is under the Legal Services Act 2011?

30 My answer is this. Yes, special rates should reflect the expertise of counsel undertaking MACA High Court cases as they are most usually complex, of lengthy duration, and involve cooperative if not a collaborative approach amongst applicant groups, these trials are heard together.

May it please your Honour, those are my submissions.

QUESTIONS FROM THE PANEL – NIL

JUDGE ARMSTRONG:

Thank you, Mr Hirschfeld, we don't have questions for you but thank you for
5 your submission.

MR HIRSCHFELD:

Thank you, Sir. Ms Talamaivao.

(13:31) MS TALAMAIVAO: (RE GENERIC CLOSING STATEMENT)

Tēnā koe, Sir, otirā te Rōpū Whakamana i te Tiriti. Sir, we represent two
10 claimants and filed joint closing submissions on behalf of those claimants. We
ask that those be taken as read. For the record, it's document #3.3.64. And
also, that our reply submissions that we filed on Friday 9 May be taken as read
as well. We also tautoko the joint submissions given by Mr Lyall this morning
and just have three brief points that we wish to touch on today and then happy
15 to answer any questions that the Tribunal might have.

The first point concerns the principle of partnership, and this is addressed in
our submissions at page 4 from paragraph 10. In summary, we say that the
Crown failed to act in partnership with Māori in developing and implementing
20 the 24/25 regime, and in doing so breached its obligations under Te Tiriti.

The Crown responds in its submission that while it intended in good faith to
consult, time pressures meant that this wasn't possible. It argues that in the
circumstances it acted reasonably and responsibly, but the claimants disagree.
25 Mr Lyall and Ms Cole have already addressed this, but we just wish to add that
this is not a case where consultation could reasonably be set aside.

In the Wai 2660 Stage One Inquiry, this Tribunal already acknowledged that the
duty to consult is not formless or unlimited. It is not required in every situation.
30 However, the Tribunal was clear, consultation is essential when matters of

significant importance to Māori are at stake, particularly where taonga or key resources are involved.

5 So, when considering what is reasonable in the context of partnership, the test is not simply whether consultation was practical under time pressure, but rather whether it was necessary given the significance of the issue to Māori.

10 Here, the Crown was making decisions that would directly affect a taonga of fundamental importance. This should have triggered a clear obligation to consult. The fact that timeframes were tight, timeframes as Mr Lyall has pointed out are of the Crown's own making, does not excuse the failure to uphold the principle of partnership. Choosing not to consult in these circumstances was not a consequence of urgency, it was a conscious decision and consistent with Tiriti obligations.

15

Secondly, I'd like to address the issue of prejudice and legal representation. This is covered in our reply submissions from paragraph 9, and I just briefly would like to elaborate.

20 The Crown says in their submissions that there is no evidence of applicants being left without legal representation and that even if counsel were to withdraw this reflects an element of choice and wouldn't necessarily prevent applications from progressing or finding new representation.

25 With respect, we say that this overlooks the reality faced by the applicants. The MACA jurisdiction is unique. Counsel here have built long relationships, accumulated specialised knowledge and understand their clients' tikanga and history. This knowledge is essential for presenting applications fairly and effectively. For the Whangārei applicants, this is especially critical.

30

Sir, in response to your question to Mr Lyall, while the Whangārei Coast hearing did go ahead, prejudice was still suffered due to the funding regime. Like Ms Cole has already stated and brought to the Tribunal's attention, Ngātiwai had to reduce from two counsel to one because of funding. This is significant

considering the scale of the Whangārei Coast hearing, 16 parties, eight weeks long, many Ngātiwai witnesses. There were also added pressures during that hearing such as having to respond to late evidence from other parties, and travel costs meant that counsel stayed in Whangārei over weekends to keep costs down. This is all explored in Ms Justine Inns' evidence and she spoke to this briefly as well when she gave evidence in the hearing.

Another point is that the first four weeks of the Whangārei Coast hearing were adjourned due to funding uncertainties, and that decision was only made a month before the hearing was supposed to begin. This created major disruption and uncertainty for the claimants. Tania McPherson speaks to this in her evidence which, for the record, is #A070. She says that the constant changes in timing made preparation difficult, especially for kaumātua who are unfamiliar with the hearing processes. Angeline Waetford, the CFO of Ngātiwai Trust Board, also talks about this in her evidence saying that the uncertainty made it difficult to prepare annual forecasts and to do her job adequately. Her evidence is at #B008.

So, we do say that the prejudice was and is real, and that's evidenced through reduced legal support, disruptive preparations, and serious uncertainty that affected both claimants and counsel.

This continues as claimants anticipate that the Wāhi Tapu hearing for the Whangārei area will commence in the next financial year. The idea of replacing counsel during hearing stages arguably during a stage involving sensitive and important kōrero is simply not realistic and would be incredibly disruptive and prejudicial.

As it already outlined, part of the reason counsel had not withdrawn is their commitment to avoid serious prejudice for their clients, not because the funding scheme is working. To reduce that to a matter of personal choice ignores the strain evidenced by counsel and the harm that would result if they were to set down.

To suggest that applicants could simply carry on with new lawyers under the current scheme is unrealistic and detached from the practical and cultural realities of this jurisdiction.

- 5 The claimants' final point is a respectful reminder to the Tribunal about the broader context of this hearing. The Marine and Coastal Area (Takutai Moana) Act was passed in 2011 to replace the deeply problematic Foreshore and Seabed Act. Ngātiwai participated in a coalition iwi group as part of the Wai 1071 Inquiry into the Foreshore and Seabed regime. The MACA Act was
10 intended to be an improvement, but as the Tribunal found in Wai 2660, an inquiry that the claimants were also participants in, it brought its own significant issues.

- 15 Despite those concerns, the claimants filed the applications in 2017, which was eight years ago, they finally had a hearing last year, only now to face the threat of a rehearing if the law changes. And once again find themselves back before the Tribunal to challenge that law change and now to inquire into the issue of funding.

- 20 This situation is unacceptable. At every stage, the claimants' progress towards having their customary rights has been delayed whether by flawed legislation or the Crown's failure to ensure timely and fair resourcing. The claimants are deeply frustrated and disheartened.

- 25 It is also telling that the Crown in its submissions states 11 times that it has not acted inconsistently with Treaty principles. Yet, not once does it say that it has acted consistently with them. The claimants submit that this is not good enough. Treaty compliance requires more than just avoiding inconsistency. It requires an active and ongoing commitment to uphold Tiriti principles in
30 practice.

The claimants urge the Tribunal to recommend that the Crown acknowledge the seriousness of the situation and commit to doing its part so that these issues are not still being reheard in years to come.

Sir, those are my submissions, and I will just check whether there are any questions from the Tribunal.

(13:40) RON CROSBY TO MS TALAMAIVAO:

- 5 Q. Just one question from me or they're possibly related. In relation to the Whangārei Stage Two, how long was that hearing set down for?
- A. The Wāhi Tapu stage?
- Q. Yes. I assume that's stage two?
- A. Yes, you're correct. I believe that has been set down for either four or six
- 10 weeks.
- Q. Right.
- A. I can't quite remember off the top of my head but it's something like that.
- Q. Thank you, and is there a timetable fixed for exchange of evidence – lodging and exchange of evidence for that?
- 15 A. No, Sir, not yet.
- Q. Right, thank you.

JUDGE ARMSTRONG:

Thank you, Ms Talamaivao, I don't have questions for you but thank you for your submission. Ms Brayne?

20 **MS BRAYNE:**

- Tēnā koe, Sir. I am ready to proceed with brief 10 minute submissions, however, your Honour, in the interest of time I am also willing to reserve our time for the claimant reply section as the points that I wanted to emphasise were mostly directed and clarified in reply to the Crown's closings. So, I will
- 25 seek your further directions on that, your Honour.

JUDGE ARMSTRONG:

Well, Ms Brayne, if you would prefer to focus your oral submissions on those points in reply you can do that now if you would like.

(13:41) MS BRAYNE: (#3.3.065)

Okay. As your Honour pleases.

5 Our closing submissions for Wai 3380 emphasise how access to justice in the context of Te Tiriti is framed by ko te tuatoru.

10 These submissions concerning Article 3 in access to justice still stand true for this claimant, however, having read the Crown's closing submissions on the balancing exercise between access to justice and the prudent management of public funds, it has become necessary for counsel to emphasise that at the heart of this claim is Te Waiariki, Ngāti Korora me Ngāti Takapari's tino rangatiratanga o ō rātou whenua, ō rātou kāinga me ō rātou taonga katoa **their lands, their homes, and all holdings.**

15 Ko te tuarua encapsulates the takutai moana and asserts that it is to be held and protected by this claimant's tino rangatiratanga.

20 As stated in Pereri Mahanga's affidavit from 11 March 2027 at (7), their relationship with the moana, with the takutai moana, shapes who they are as a hapū. The Crown's underfunding of the FAS therefore in their eyes is an undermining of the very essence of who they are as hapū.

25 The reason why Te Waiariki, Ngāti Korora me Ngāti Takapari had to participate in the MACA regime established by the Marine and Coastal Areas Act was to defend their tino rangatiratanga over the takutai moana, and therefore the takutai moana itself from further derogation. This regime was not set up with the hapū's consultation, consideration and interest in mind. And as Mr Mahanga states in his affidavit, was to an extent forced upon them.

30 As hapū that did not have a settlement or pūtea in place, they were at a financial disadvantage to engage in MACA proceedings from the beginning, rendering their reliance on pūtea made available to them via the FAS even more crucial. Their continued participation is evidence of their relationship to the takutai

moana and the necessity to defend it, opposed to moving in any agreement with how this MACA regime has been implemented and since developed.

5 However, their participation has been wrought with continued difficulties. A prejudiced, arguably worst manifested in the FAS 2024/2025 financial year changes that tampered with their proceedings mid-trial and left this hapū in a state of financial distress and uncertainty as to how they can realistically participate in MACA proceedings moving forward.

10 The key dispute concerning the FAS 2024/2025 is the \$12 million appropriation determined by Cabinet which was not increased to cover the growing costs of a MACA regime that this Crown imposed and effectively forced participation in. The Crown suggests that the intention for this was the fiscal disciplining of the FAS and therefore the applicants and their counsel who rely upon this pūtea.

15

At the beginning of our closing submissions, historical parallel was drawn to the experience of our First Nations relatives in Canada where section 141 of the Indian Act created an offence for anyone who without government consent received or requested payment to raise a fund or provide money for the prosecution of any claim for an indigenous First Nation.

20

While the statutory mechanism in Canada's history, you know, was harsher, much harsher than the circumstances of this particular claim, the restriction was similarly placed against the pūtea to pay for legal representation in the advancement of claims, and is raised in recent cases brought by First Nations in the Special Claims Tribunal such as the *Okanagan Indian Band v King*, section 141 has been noted as placing a ban on tribes bringing claims within the 24 years that this section was in effect. It operated as an outright denial of their access to justice, which operated as a denial of their land rights and their ability to protect their whenua.

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30

So, we raise this example to demonstrate that these tactics are not new. We submit that the Crown in the circumstances that have led to this inquiry in the evidence they have presented have utilised similar tactics. Restrict of the pūtea

for these claimants' legal representation and participation in court based proceedings with the effect of stifling their access to justice. But when we speak of access to justice in this context, we are not simply talking about the principles of general litigation and the public purse that the Crown has relied upon in their
5 submissions. We are talking about this hapū's resources and ability to defend and protect their tino rangatiratanga o ō rātou whenua, kāinga me ō rātou taonga. In a statutory scheme and colonised reality where this has already been greatly limited.

10 The FAS changes have amounted to yet another prejudicial attack on this hapū's tino rangatiratanga in relation to the takutai moana. Therefore, when the Crown in their closings refers to its metaphorical scales of reasonable and prudent financial management, a balancing test between the interests of access to justice and the stewarding of public monies, we say in reply that this misses
15 the entire context and point of this claim.

It usurps the role of the kāwanatanga over this claimant's tino rangatiratanga. It unilaterally imposes a climate of fiscal uncertainty and further distress for these hapū, undermining their already strained efforts to defend their takutai
20 moana. The appropriation which empowers the FAS should not be determined unilaterally by the Crown.

As filed in our reply submissions at 11, the MACA appropriation in the FAS must ensure their tino rangatiratanga o ō rātou whenua, kāinga, me ō rātou taonga,
25 are sufficiently and adequately protected and defended and not further diminished or usurped. This is the test that must be applied as counsel submits.

Therefore, it is the hapū and iwi themselves who know what their tino rangatiratanga is and what it takes to put in place their protections and defences
30 of their whenua, kāinga, taonga. Only their knowledge can inform the application of this test. It cannot be determined unilaterally particularly by a Crown which, as this Tribunal is familiar, holds a hostile view of Te Tiriti.

Now, counsel noted at the beginning of their submissions the saying that history repeats itself first in tragedy and second in farce. It is impossible to know what a third repetition of a MACA regime inquiry may mean for this Tribunal, and obviously hope that never happens. So, the Crown cannot be allowed to further worsen and restrict its management of a scheme that this Crown imposed upon Māori and has already been found to be in breach of Te Tiriti with previous inquiries.

It cannot keep usurping kāwanatanga over tino rangatiratanga in the context of this regime, and counsel submits that the Crown has a bare minimum duty to make the MACA Act established in 2011 workable, and the only way it can do so is through the lens of Te Tiriti.

Does your Honour or the Tribunal have any pātai regarding these submissions?

15 QUESTIONS FROM THE PANEL – NIL

JUDGE ARMSTRONG:

We don't have any questions for you, Ms Brayne, but thank you for your submission.

MS BRAYNE:

20 As your Honour pleases. That concludes my submissions.

JUDGE ARMSTRONG:

Ms Soriano.

(13:50) MS SORIANO: (CLOSINGS TAKEN AS READ)

Sir, we propose to have our closing submissions taken as read, and actually I would – our claimants whakaiti **humble** themselves to those people – to those claimant groups who do have active funding proceedings that are more useful for the Tribunal in terms of its deliberations, and so at this junction, Sir, I seek leave to just file some very short reply submissions that are specific to the claimants' issues.

JUDGE ARMSTRONG:

Thank you, Ms Soriano. Yes, I will probably deal with the issue of any further replies at the conclusion of the hearing today.

MS SORIANO:

5 Thank you, Sir.

JUDGE ARMSTRONG:

Ms Herewini?

(13:51) MS IHIPERA PETERS: (#3.3.072)

10 Tēnā koe e te Kaiwhakawā. Ko Ihipera Peters tēnei. E noho mai ana māua ko Ms Herewini i konei i Tāmaki i tēnei wā. Hei tīmatanga, kua rēhitatia tā mātou tāpaetanga whakakapi, ko te nama #3.3.72, ā, koinā ngā tāpaetanga whakakapi tukutahi mā Ngāti Rēhia nō Te Tii, Te Tai Tokerau, ā, mā Ngāti Tamainupō nō Whāingaroa me Ngāruawāhia, ā, me Ngāi Te Hapū nō te Moutere o Motiti i Tauranga Moana. **I am Ms Peters. Myself and Ms Herewini present. We bring our concluding submissions, and of course we represent Ngāti Rēhia interests, and Whaingaroa communities.**

15

Ka kore au e pānui te katoa engari māku e tuku atu ētahi tāpaetanga e hāngai pū ana ki ā mātou kiritaki kāre anō kia kōrerohia ētahi atu o āku hoa rōia.

20 **Certainly, we invite questions of others at the conclusion of my submissions.**

To begin with, Sir, we do endorse the Generic Closing Statement for the claimants that was presented by my friend Mr Lyall. My submissions are focussed on key aspects that are relevant to our claimants in this stage of the inquiry, or to elaborate further on some of the points that have been raised by my friends from our client's perspective.

25

In answer to Issue 1 of the Tribunal Statement of Issues, we set out at paragraph 6-33 of our written submissions ngā mātāpono o te Tiriti e hāngai ana ki te rukutātari nei **the principles in relation to this inquiry**, that is the

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principles of te Tiriti that we say are relevant and engaged in this inquiry. I won't read all those out, however, I do wish to note for the record that we do submit there are more than just the two principles of partnership and active protection that the Crown refers to in their submissions. Other principles which they are engaged include rangatiratanga, kāwanatanga with government, principles of equity/equal treatment/whanaungatanga, options and redress.

Moving to paragraphs 56 of our written closing submissions under the heading ***Summary of Funding Scheme Deficiencies and Inadequacies***.

10

That in my submission captures the essence of our claimants' position where we say the Crown has created a structure that forces Māori to prove rights under an Act it imposed upon Māori, within pathways and arrangements it designed, and then by implementing the 2024/25 Funding Scheme changes, now seeks to deprive Māori of the funding necessary to participate in those pathways. In this regard, the Claimants say that the prejudices they faced as a result of the Funding Scheme changes has been by Crown choice, a choice that was not constitutionally open to the Crown to make.

15

Fundamental to the flawed process and Funding Scheme changes is the Crown's overlapping, vested and conflicting roles in the Takutai Moana framework and proceedings. Not only is the Crown the sole creator and arbiter of the Funding Scheme, but also an interested party in High Court proceedings and the sole decision-maker of Crown engagement applications. This web of conflict is the product of Crown decisions that serve its own interests, agendas and policies, including its decision to unilaterally and arbitrarily alter the Funding Scheme, at the expense of Māori.

20

Moving to paragraph 69 of our written submissions. I pick up on this point as to prejudice in particular to our Motiti clients in response to Issue 5.1 of the Tribunal's Statement of Issues relating to the impacts on the groups that may have to revisit or amend their pleadings of evidence in order to meet the new threshold if the proposed amendments to the MACA Act are enacted.

25

So, at paragraph 69, we say that Ngāi Te Hapū would be directly prejudiced to a significant extent if they are forced back into the High Court to relitigate their case, in the event that the proposed amendments to the MACA Act are enacted.

5 I submit that this is a likely reality where the Crown's Justice Select Committee has proceeded with introducing the Bill and produced its report following its consideration of submissions on the proposed amendments. And relevantly for Ngāi Te Hapū and all the Claimants, the report recommends the Bill to Parliament, without removal of the retrospectivity clause.

10

At paragraph 71 we've referred to the evidence in cross-examination of Ms Dagg for the Crown where she was asked directly about this Issue 5.1, and whether any increased costs that result from groups having to revisit their pleadings and evidence in order to meet the new statutory tests would be covered under the new Scheme settings, her answer was: *"I don't know. The decisions about any cost because of an amendment bill will be made by the Ministers...until a decision has been made we cannot know"*. We submit that this demonstrates the reality for Ngāi Te Hapū has not been considered in any current or future funding matters and that the Crown is still not prepared to adhere to its te Tiriti obligations and is putting political expediency, fiscal restrictions and its coalition agreements ahead of its te Tiriti obligations and a proper funding policy development process.

At paragraph 72 of our written submissions we've also referred to the answer of Mr Kent to the same question in relation to Issue 5.1 of where his answer was essentially: *"I can't imagine providing advice that recommended that those costs were met out of the FAS...but all I can say is the advice I provide would be not to do that."* So in essence, this lack of certainty as to what funding might be available after 1 July 2025, causes great concern to the Claimants where the Funding Manager of Takutai Moana at Te Tari Whakatau cannot confirm what the Funding Scheme will be less than 2 months out from the next financial year.

Mr Sayers, for Ngāi Te hapū, put the prejudicial situation aptly in our view when he stated in his brief of evidence #B035: *“The fact that we are likely to be forced back into litigation, at no fault of our own, to go through another arduous adversarial process, is incomprehensible. To be expected to do that without any certainty of funding support, simply adds salt to the wound! In my view, this is a clear breach of te Tiriti.*

In appreciating the gravity of mistreatment that is happening to Motiti hapū in the takutai moana space, Mr Sayers went on to say:

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I am positive that this kind of mistreatment would not be handed out to other consultants who are engaged by government departments for their expertise and advice...we are forced to participate in the High Court process under the MACA Act, we have to engage legal counsel for their expertise and guidance in this often intimidating space, and yet the funding made available to applicants is peanuts compared to the value put on consultants engaged in other areas in the public sector.

15

20

More infuriating than that is, our own people who are considered tohunga or experts with their lived experience of our tikanga and mātauranga, especially our kuia and kaumātua who are now in their 70s, 80s and 90s, are not considered ‘experts’ eligible for funding purposes.

25

For Ngāi Te Hapū who have already been through a seven-week hearing in 2021. Should the MACA Amendment Bill in its current form become law, we submit that to require Ngāi Te Hapū to return to re-present their case, to meet a higher statutory threshold test, with no certainty of funding, is unconstitutional and highly prejudicial to Motiti hapū.

30

At paragraph 76 under the heading **Summary of Crown breaches of te Tiriti and its principles**, we addressed and **(inaudible 14:00:48)** on the submissions there which I also think addressed replies to part of the Crown submissions. The Claimants say that their case is clearly made out – the Crown has acted inconsistently with te Tiriti me ōna mātāpono through the

changes it made to the Funding Scheme, and the process carried out to develop and implement those changes, in particular, those are set out at subparagraphs (a)-(g), and I just wish to highlight a few of those.

5 At (b): By implementing changes to the Funding Scheme with little consideration or regard for its te Tiriti obligations, the Crown continues to overstep its right of kāwanatanga and undermine and diminish the Claimants' rangatiratanga over their taonga, te takutai moana, by drawing out the sole process it unilaterally imposed on the Claimants to have their rights to a limited
10 extent in te takutai moana recognised.

At (d), relevant for our Ngāti Rēhia claimants: The significant limitations placed on funding have deprioritised funding of Crown engagement applications. This has and will result in further delays to the progression of Crown engagement
15 applications, denying Crown engagement applicants their right to seek recognition of their customary rights in a timely manner.

And at (g): The lack of certainty and provision in funding for applicants, such as Ngāi Te Hapū of Motiti who have had their applications heard in full but may
20 have to relitigate matters due to the pending amendments to the Act, and Ngāti Tamainupō who have a hearing scheduled in the next financial year, is a breach of the principles of active protection, partnership and good government.

I would like to reply to another point raised in Crown submissions at
25 paragraph 85-86 where they say there is no evidence of applicants being left with no counsel and that withdrawing representation is a choice by counsel, therefore, in the Crown's view there is no prejudice demonstrated.

It is our submission that this argument is disingenuous and mischaracterises
30 and diminishes the reality of what our claimants have experienced and will continue to experience under the current scheme.

As others have submitted before me, not only are our professional obligations as counsel and the long-standing relationships we have with clients important

in terms of navigating this complex area of law, but in speaking for our firm at least, we do have whakapapa connections to some of the applicant groups that we represent. That is not a matter of choice for us, that is an obligation and a responsibility, and in fact a privilege that we do not take lightly.

5

Therefore, despite the unacceptable limitations placed on applicants by the Crown, and its unilateral decision to change the funding scheme, the claimants must navigate this new prejudicial unilaterally implemented funding scheme which ultimately compromises their ability to meaningfully participate in their chosen pathways.

10

The Crown in this instance has made its choice. It has chosen to develop and implement and make the decision to do so, to change the funding scheme without consultation of its Tiriti partner, and in breach of its obligations under te Tiriti. That, in our submission, is prejudicial and to a very significant extent.

15

In closing, the fact is, is that the claimants have been forced to participate in a statutory process imposed on them or risk missing out. And the imposition of an arbitrary funding scheme on all applicants prevents due access to justice for Māori. Not the Crown who is involved as an interested party in High Court process, not other interested parties such as territorial authorities or the fishing industry, just Māori.

20

In terms of the Crown engagement applicants relevant for our Ngāti Rēhia clients, from paragraph 77 of our written submissions we address some of the other prejudicial impacts for our clients. And for Ngāti Rēhia in terms of their Crown engagement application that has not had any progress since 2017, they will inimitably be pushed to the bottom of the priority list in terms of funding.

25

The Crown's own evidence suggests that to be considered close to ministerial approval Crown engagement applicants have had to prepare evidence themselves at their own cost, or at least having done that applicants would have a better chance of being considered close to ministerial approval, and therefore worthy of progressing the engagement.

30

That is not, in our submission, consistent with Te Tiriti or its principles as set out in our written submissions.

- 5 Just to close in terms of our conclusion, our recommendations and relief sought are set out in paragraphs 80-81 of our written submissions.

And at 82: Given the Claimants' experience of funding failures over the years in this context, the severity of the Crown's te Tiriti breaches in the context of the
10 Claimants' customary rights to their takutai moana, and the manner upon which harm has knowingly been caused to the Claimants, we seek the Tribunal's strong intervention in making the findings and recommendations sought.

E te Kaiwhakawā, mehemea he pātai ā koutou kei konei au hei whakautu,
15 engari koinā ngā tāpaetanga whakakapi mā ā mātou kerēme. **Those are our submissions. We are available for questions.**

QUESTIONS FROM THE PANEL – NIL

JUDGE ARMSTRONG:

Thank you, Ms Peters. We don't have questions for you but thank you for your
20 submissions. Tēnā koe. Ms Jamieson.

(14:08) MS JAMIESON: (#3.3.69 TAKEN AS READ)

Tēnā koe, Sir. I don't have anything to add to the Joint Generic Closing Statement presented by Mr Lyall this morning and we support and adopt that. We seek to have our closing submissions which is document #3.3.69 taken as
25 read, but happy to take any questions, Sir.

QUESTIONS FROM THE PANEL – NIL

JUDGE ARMSTRONG:

Thank you, Ms Jamieson. We don't have questions for you but thank you for the written submissions that you have filed. Tēnā koe. Ms Thornton.

(14:08) MS THORNTON: (REPLY SUBMISSION)

Tēnā koe, Sir, thank you very much. At the risk of I'm not going to repeat all of the things that have been said that I agree with, I support and adopt the Generic Submissions and many comments made by the parties who have
5 come before me.

I very briefly want to mention a couple of things and one of them is the issue of prejudice. In that regard, I am going to refer to the evidence of Hone Heke Taniwha at #B14, he talks about what's happened as a result of
10 the, you know, the imposition of this new programme, and the point of this is that it's not the kind of prejudice that the Crown seems to think has to be seen. People don't have to withdraw from representation and claims don't have to be dismissed, but what has happened as a result of this is that the claim, the Taniwha claim, was in line to be set for a hearing for 2025/26 with the big
15 changes that came along that stalled, and we found that we weren't going to get anywhere unless we had a hearing date.

So, I and several other counsel including Mr Naden who described one of his claims this morning, which is now set for 1 May 2028, we went in and got a
20 hearing set for that date, and so now we've got a hearing. While no longer – that's no longer the criteria, the goalpost (**inaudible 14:10:17**), so now we have to have it set within a year before we can expect to get any funding. And so, that's not within a year.

25 But meanwhile, we have gotten two thirds of the way through our research. We're probably through preparation of evidence and now we're stalled, we're just stalled. We can't finish our research. Our researcher Mr Walzl can't be paid because we don't have the resources to do that.

30 So, when we get to a point where we're nearly within a year and we can expect to get some funding again, we will be expected to file our evidence six months before the time the hearing starts. So, we'll find ourselves with roughly a period of time of approximately six months long within which to prepare for a hearing of this magnitude. If that's not prejudice, it'll do until prejudice comes along.

The other issue I wanted to raise which I haven't heard anybody else talk about except Ms Cole did talk about the concepts, and that is litigating with the Crown as though it were an ordinary person. This is supposed to be protected by
5 section 27 of the New Zealand Bill of Rights Act 1990 and I believe what the Crown has done here has completely violated that provision and the intention, what that was meant to protect. And those are my submissions, Sir.

QUESTIONS FROM THE PANEL – NIL

JUDGE ARMSTRONG:

10 Thank you, Ms Thornton. We don't have questions for you but thank you for your submissions. Mr Ratapu.

(14:12) MR CREE RATAPU: (#3.3.066)

Tēnā koe, Sir. E te Kaiwhakawā, e te Rōpū Whakamana i te Tiriti o Waitangi, tēnā koutou, otirā tēnā rā tātou katoa. Sir, conscious of the time and
15 understanding that the Tribunal have read through the submissions including our joint submissions, happy to have those taken as read. For the record, our joint closing submissions, appellation #3.3.66. I do wish to acknowledge the Generic Closing Submissions for the Claimants and Interested Parties presented by my learned friend Mr Lyall. We particularly recognise the
20 long-standing relationships that counsel and clients alike have cultivated with each other having worked with some for many years and counsel's commitment to continue representing them.

Sir, I understand that Ms Mataira has one reply point regarding the Crown's
25 closing submissions to address, which I will hand over. Following this, Ms Mataira and I are available for any pātai that your Honour and the panel may have.

JUDGE ARMSTRONG:

Yes, thank you, Mr Ratapu. Ms Mataira.

(14:13) MS MATAIRA: (REPLY SUBMISSION)

Kia ora anō tātou katoa. Your Honour, just a couple of points from me in relation to the Crown's submissions. First of all, just at paragraphs 81.2 in relation to the three follow-up hearings that the Crown mentions, I just wanted to make the
5 correction there that what is stated there as the Wairarapa 1(a) Wāhi Tapu hearing held from 28-29 April 2025, was in fact the Wairarapa Stage 2(a) hearing, Final Orders hearing. Perhaps that's just a mistake on behalf of the Crown, but just wanted to note for the record those were two completely different hearings, and the 1(a) Wāhi Tapu hearing, the substantive Wāhi Tapu
10 hearing was held in April last year. The hearing we had a couple of weeks ago was the Final Orders hearing, the maps, the CMT, the PCR, following the Wāhi Tapu judgement from her Honour Justice Gwynne. So, just wanted to note that there.

15 And to my second point, your Honour, that I wanted to respond to, that was at paragraph 84 of the Crown's submissions. The Crown has mentioned Ms Karen Pewhairangi in this paragraph and they've used Ms Pewhairangi's evidence to support their argument that it's not correct for the claimants to say that the changes to the scheme resulted in the cancellation of hearings or that
20 the scheme changes didn't interfere with proceedings in a way that detrimentally affected the applicants' ability to present their case.

Our submission, your Honour, is that while the statement is factually true, it is unfair for the Crown to use it in this way, and it misses the wider point. We just
25 wanted to note for the record that although Te Whānau a Ruataupare were able to present all their evidence and submissions at the hearing, the preparation beforehand was extremely difficult and stressful as the Tribunal has already heard. The ability to continue to this hearing was not due to a lack of interference by the Crown. The applicants were able to proceed to the
30 Stage Two hearing because of the effort and hard work together with their counsel to get there, and of course with funding being approved at a later time.

The submissions, your Honour, is just because ultimately we proceeded to a stage two hearing, it does not take away the immense pressure and stress and

all the uncertainty that was faced leading up to the hearing where funding was uncertainty. The point of Ms Pewhairangi's evidence was that there was many unnecessary roadblocks and hurdles that they had to navigate to the stage two hearing with no help from Te Arawhiti at that time because of the Crown's actions.

And in fact, it was actually the opposite, your Honour, where the changes did cause a detrimental effect on their ability to present their case to the point where they were trying to work out how to pay for it themselves, as we heard from Ms Pewhairangi.

And this is the case for Te Whānau a Ruataupare. It is improper for the Crown to suggest that simply being able to proceed to the stage two hearing meant that there was no prejudice or little prejudice suffered or that the scheme didn't interfere with proceedings in a way that detrimentally affected the applicant's ability to present their case.

That may be how the Crown views it from the outside, but for the applicants and counsel who were intimately involved in these proceedings, your Honour, and were living the reality of these real life effects, that's not the case. Those are my submissions in response, your Honour, and we're happy to take any pātai.

(14:17) RON CROSBY TO MS MATAIRA:

Q. Can you just clarify your responses to that paragraph 81.2 again for me a bit more slowly if you can?

A. Yes, I can.

Q. Yes.

A. Kia ora. So, the submission overall is that it's unfair for the Crown to have used Ms Pewhairangi's –

Q. Para 81.2.

A. Para 81.2. The Wairarapa hearing was the Stage 2(a) Final Orders hearing. On the paper it says it was the 1(a) Wāhi Tapu hearing.

Q. So it was the Wairarapa 2 –

A. Stage 2A Final Orders hearing.

Q. 2A. So, how many hearings were there in Wairarapa in the High Court in total?

A. Yes, so I have just had this conversation with one of my friends and there are a lot of moving parts on the Wairarapa Coastline, and to be honest we all as counsel get a bit lost in which hearings are what and where we're at with, you know, 1(a), 1(b). But to my understanding and involvement we had the Stage 1(a) substantive in 2023. We then had the Wāhi Tapu 1(a) last year in April with subsequent Pūkenga and cross-examination of Pūkenga for 1(a). We've also had the 1(b) substantive last year in March. We haven't yet had the Wāhi Tapu 1(b) that's set for July of this year. So, those are the substantive hearings for 1(a) and 1(b), but on top of those we have appeals for each of the 1(a) substantive hearing, the 1(a) Wāhi Tapu hearing, and then there's a separate 1(b) Ngāti Kere appeal as well. So there's about, I think there's about six different proceedings on the Wairarapa Coastline at the moment.

Q. Thank you.

JUDGE ARMSTRONG:

Thank you, Ms Mataira, I don't have questions for you but thank you to you and Mr Ratapu for the submissions you have presented. Tēnā kōrua. I think that completes submissions for the claimants. Mr Stephens?

MS STEPHENS:

Thank you, Sir. I just need a couple of minutes to set up if that is okay.

MS MATAIRA:

Your Honour, aroha mai, just one more point from me before my friend starts. Would it be easier if I was to provide a list of the different hearings that are going on in the Wairarapa and the subsequent appeals to those? Would that be of any assistance?

JUDGE ARMSTRONG:

Thank you, Ms Mataira. I think we have that information on the record already so we should be able to locate that. Thank you.

MS MATAIRA:

5 Ka pai, kia ora.

MR HUNT:

I think it might've been clear that Mr Stephens will be back in a minute. Thank you, Sir.

(14:22) MR STEPHENS: (#3.3.73)

10 Thank you. So, if your Honour pleases and the Tribunal, you will have the Crown's written submissions which I am going to speak to. I won't read them all out. I am going to focus on the key points from the Crown's perspective.

By way of introduction, I just want to begin by saying something about scope.

15 The Stage Two of this inquiry concerns the settings of the scheme for the current financial year which ends on 30 June 2025, and the Tribunal's focus is on whether the Crown has acted consistently with Treaty principles on both process and outcomes when determining the funding available for the 2024/2025 financial year, and that is apparent from the paragraph which begins
20 the Statement of Issues, which is document #1.4.004(a), and that's the basis on which the Tribunal has granted an urgent inquiry in the Tribunal's decision of 26 July 2024, and that's document #2.5.004.

And importantly, the Tribunal did not grant, considered but did not grant urgency
25 into questions as to whether there have been unreasonable delays by what was then Te Arawhiti, in processing and paying funding requests, and that is at paragraphs 32-38 of the Tribunal's reasons. And similarly, the Tribunal did not grant urgency, an urgent inquiry into the funding scheme for the 25/26 financial year and beyond, and that's paragraph 60 and 61.

30

So, with that reminder about the scope of this inquiry, the Crown does acknowledge that applicants are or will be seeking certainty regarding the funding position for the coming financial year. That was raised in the recent hearing, and it's been raised again today.

5

So at the outset, Te Tari Whakatau does want to confirm that it's currently preparing advice to ministers for the 25/26 scheme settings, and I am instructed to confirm that the advice will include analysis of funding pressures and potential options to recalibrate the existing 24/25 financial year scheme settings, including relevant considerations of access to justice. And that advice is being informed by feedback that was provided during the consultation process that occurred at the beginning of this year and at the end of last, and by submissions made by claimants during this inquiry.

10

And I am instructed that the Minister was briefed about the evidence in this inquiry in the week prior to the hearing and the advice that will be going up from officials for the forthcoming financial year will also be informed by submissions made by claimants in this inquiry, and all decisions are ultimately those made by ministers.

20

So, with that, in terms of my written submissions, at paragraph 6, we go on to address the issues for stage two which are contained in the joint statement, and I've just reiterated the basis on which the Tribunal granted urgency in the inquiry, and the relevant paragraph of the urgency decision is replicated at the start of the statement of issues, and so all of the issues are necessarily issues in that context.

25

So, in our written submissions we have grouped the issues together.

Issue 1 is the principles of the Treaty/te Tiriti engaged in this stage.

30

Issues 2, 3 and 4 are factual questions regarding the Scheme settings prior to this financial year for this financial year itself, and then what process the Crown followed in developing and settling on the 2024/25 settings.

Issue 5 is about the way in which the current settings prejudice applicants, and then there was a stand-alone issue 5.1, whether increased costs resulting from groups having to meet the new statutory test, which is the statutory test in the Bill, the proposed legislation which is still under consideration by the house, will be covered by the Scheme.

Then, Issues 6 and 7 is the Treaty-consistency of the Scheme settings and the process by which, the Treaty-consistency of the process by which the Crown determined and implemented those settings.

And so, the Crown's closing is organised according to that approach to the issues.

So, starting with the context for the 24/25 scheme settings, in order to understand the scheme settings for this financial year and the process by which they were arrived at, it's necessary to understand the context in which they arose in the Crown's submission.

And the first point to note which, or the first point the Crown wants to make is that prior to the 23/24 financial year, the scheme appropriation was underspent by an average of \$3 million per annum, and the scheme had returned a total of approximately \$32 million in unspent appropriation since it was established. And that is the evidence of Mr Kent at paragraph 13.

And so, that context in the Crown's submission is important upfront to show the fact that the appropriation breach that was in prospect was exceptional, and the scheme had not been placed under the type of financial or fiscal pressure that arose in this case previously. So, it was an exceptional and unusual situation that officials found themselves in at the end of 2023 and at the start of 2024, and that point is made by Mr Kent in his evidence.

At paragraph 14, he goes on to set out the amount of spending in each of the financial years going back to 2015, '16, alongside the appropriation amount.

And it is clear there the amount of underspend in many of those years and that supports the point that he makes in his evidence that it is an average of \$3 million per annum and that a total of \$32 million in unspent appropriation had been returned. So, as I say, the point of that is to provide the context that as at
5 the start of the financial year, '23/'24, the scheme had not been under fiscal stress in the way that arose in the financial year from '24/'25.

At paragraph 18, the submissions summarise the process by which the '24/'25 scheme settings were developed. And so, the comprehensive review is
10 initiated in September 2019. That takes two years to complete. It involves an independent review by Deloitte. There are two consultation rounds of applicants between February and October 2020 and then June/July 2021 on proposed changes. And then financial modelling is carried out in September 2021 of the proposed scheme changes and then there is an internal
15 paper, *Quantitative Modelling: A Summary* which is referenced by Mr Kent and is in the Crown's common bundle.

As I will come to, Mr Kent goes on to explain how some of the assumptions in that modelling didn't hold when it came to actually what happened and in
20 particular, the modelling did not account for applicant groups participating as interested parties in substantive hearing other than the hearing or area in which they had made an application. So there is a key variance in the assumptions from what was assumed in the modelling and what actually transpired. But Mr Kent's evidence was that the modelling was of a high standard generally.
25 He explained that no assumption used in modelling of this nature will be a 100 percent predictor of the future but that doesn't mean that the modelling undertaken at the time wasn't robust, it is just the nature of modelling which is an attempt to predict the world in the future.

30 While the assumptions didn't prove true in all respects, in my submission, there was no meaningful challenge to Mr Kent's evidence that the modelling as carried out at the time was of a high standard. So, that was September 2021 for the modelling on which the appropriations are based.

February 2022, Cabinet agrees to proposed changes to the setting and funding for the changes are provided for in Budget 2022. And then appropriations set through Budget 2022 covering the '23/'24 and '24/'25 financial years and out years are based on – the appropriations for those years are based on the
5 modelling that was completed in September 2021. And then March – 1 March 2023, changes to the scheme settings were implemented in full. So that, in short, in summary, which is obviously canvased in more detail with references to the evidence, is how the scheme settings that were implemented as at 1 March 2023, were developed.

10

So then, paragraph 19 of the written submissions I come to the factors leading to cost pressures on the scheme in late '23, early '24. And it is clear from the evidence that from – certainly by the fourth quarter of 2023 there were urgent and significant cost pressures developing in the scheme and they arose from
15 several compounding factors.

First to note, that after the revised settings went live there were four hearings scheduled to take place and complete in the '23/'24 financial year and that is consistent with the modelling assumptions and that started with the
20 Wairarapa Stage 1(a) Hearing in September 2023. And so, that hearing, which was the only one to take place in the first six months of the relevant financial year, began on the 4th of September and ran through to 27 October. There were six applicant groups, ran for eight weeks, six applicant groups, two interested parties. So, that is the first substantive hearing that takes place with
25 the new settings in place.

Also in the 3rd and 4th quarter of 2023, Te Tari Whakatau funding team was receiving and processing invoices for two more hearing that were to start in February '24 and they are Whangārei Harbour Hearing that ran for 12 weeks
30 and Wairarapa Stage 1(b) Northern which was a 10 week hearing.

Whangārei Harbour involved 16 applicant groups and Wairarapa Stage 1(b), seven applicant groups. And then what was in the pipeline on the 6th of May was Wellington/Porirua/Kāpiti/Manawatū Stage 1(a), and also a fifth hearing

that started in the financial year but completed – it began on the 17th of June but ran into the following financial year and that is Aotea Harbour.

5 So, in substance, four hearings, four significant hearings and four hearings is consistent with the 2021 modelling. Also just to note, Te Tari Whakatau also, during this period, received regular requests for funding for both pathways, that's High Court and Crown engagement, and reimbursement requests for hearings starting later in 2024 and schedule or anticipated to start in 2025 and '26 and Ms Dagg explains that in her affidavit of the 8th of July '24 and I am at
10 paragraph 19.

So that is the first point, is that there are a number of reimbursement requests for future years, hearings in the future and engagement and also the Crown engagement pathway.

15

Another point to note at this juncture is that scheme settings didn't require applicants to submit reimbursement requests within a certain timeframe, so it is open as to time, and that lack of time limit led to build up and demand on the scheme due to some applicant groups submitting requests well after the work
20 had been completed. With the funding team regularly receiving requests for cost going back to 2017, and that is Mr Kent's evidence at paragraph 29 of his main brief.

25 So, I've mentioned already that a key variance from the modelling is that applicant groups were participating as interested parties and substantive hearings other than the hearing or area for which they had made an application. That assumption was not present in the modelling. In addition to that, there was also a significant increase in legal costs built by the applicant's lawyers which markedly, exceeding estimates. That trend began with the Wairarapa
30 hearing in September '23 and became standard by the time of the Whangārei Harbour and East Coast Wairarapa hearings that began in February 24.

Mr Kent addresses this in his evidence, which I'll just pick up. Starting at paragraph 59 of Mr Kent's evidence, he explains that:

5 “The East Coast Wairarapa 1(a) hearing ran for eight weeks in September and October 2023, commencing on 4 September 2023. It involved six applicant groups and a further two applicant groups as interested parties.”

10 And that the estimate from Te Tari Whakatau, based on its modelling was that “average legal costs for applicant groups participating in this hearing would be up to \$78,000 pre-hearing costs per group, and average costs of approximately \$22,000 for each hearing week per group.” And that forecasting held for half of the applicant groups, so half of the eight. But it didn’t hold the other groups, and Mr Kent addresses this at paragraph 60 and following.

15 So, as I say, four of the eight applicant group costs were within the range that had been anticipated. And actually, as he says, this is at paragraph 60.1, “pre-hearing costs were on average \$44,300, with a range of \$30,000 to \$70,000 each.” The average of \$44,300, that’s as against Te Tari Whakatau’s estimate of up to \$78,000. So, those four applicant groups, well under, in terms of the range that had been anticipated and hearing costs were \$15,000 per week for
20 each group, and that’s as against the \$22,000 estimated.

25 Then there was a fifth group, which had total costs of \$202,000. Pre-hearing costs at \$58,000, again, that’s as against \$78,000, so well under. Then the balance, \$145,000 for the hearing costs. That’s an average of \$18,000 per week, as against the \$22,000 estimated. Again, well under. The thing to note about that fifth group is that there were no reimbursement requests received for those costs until June 2024, so they weren’t included in assessing cost pressures or forecasts in the end of 23.

30 So, in any event, five of the eight groups are well under the estimates. But there are two applicant groups which had significantly higher legal costs. Their pre-hearing costs were \$300,000 each, as against the \$78,000 estimate. Their hearing week costs were \$42,000 per week, each, on average, as against the \$22,000 average. Two applicant groups, \$300,000 each, as against the

\$78,000 estimate. So unlike the other five, you know, considerably over and similarly, their hearing week costs double what had been estimated. Those applicant groups are represented by the legal firm.

- 5 Then the final group, the eighth group had pre-hearing costs of \$189,000, as against the \$78,000 estimate, and weekly hearing costs of about \$40,000 on average. So, you have in particular, two applicant groups whose pre-hearing costs are more than \$250,000 more, or higher, than the \$45,000 average for other applicants. And their weekly hearing costs are twice the amount of the
10 other groups.

Mr Kent explains the reasons that were given to Te Tari Whakatau for the higher number of hours worked, and claimed, and the significantly elevated legal costs, at paragraph 62. But just to note that there's significant outliers in terms
15 other legal costs being incurred and claimed at the time. But also, well outside what had been anticipated and estimated in modelling.

Then, the trend then continues for the Whangārei Harbour hearing starting in 2024 and the East Wairarapa Stage 1(b) hearing, also starting in
20 February 2024. Then by this time, one sees a significant change in terms of legal costs incurred that is well outside the estimating that have been carried out in Te Tari Whakatau's modelling.

Then by the time of the Inner Aotea Harbour hearing in June/July, Mr Kent
25 explains in his evidence, that this hearing serves to show how the Scheme settings, where they lacked limits in certain categories. One then sees costs balloon in those categories. So the settings place no restriction on when applicant groups can start to incur pre-hearing costs. Or any restriction on the maximum number of hours the applicants could incur, aside from 80 hours of
30 Court preparation time.

Based on Te Arawhiti's, Te Tari Whakatau's estimates, the total cost of that hearing, based on their modelling, would have been \$518,000 and as it turned out or as it transpired, a legal firm for one of the applicant groups consumed

that entire amount. Incurring, 1,800 hours of pre-hearing work from September 2023 through to the hearing in June 2024. At a total cost of \$500,000. That amount for pre-hearing costs consumes the entire estimate.

5 So, there are a number of compounding factors that are contributing to the cost pressures on the scheme. One of them is the fact that, and a key one that's not accounted for in the modelling, is the fact that applicant groups are participating in hearings other than ones in which they have made an application.

10

But also, legal costs are being incurred at significantly higher amounts than had been anticipated. That starts off with one or two applicant groups in September of 2023, and then by the following year, that's true of all applicant groups. That is a factor that contributes very significantly to the ultimate cost pressures on the Scheme. So, this is how, or these are the factors that are contributing to unexpected and very significant cost pressures on a Scheme, that previously had not experience, or hadn't experienced fiscal stress previously.

20 Finally, the other contributor is the absence of budgeted work plans. There was no mechanism at this time in the nature of the current budgeted work plans. That meant that Te Tari Whakatau, that impacted on their ability to forecast and manage costs because of the time unlimited reimbursement model, and it meant that there was insufficient visibility over the volume and time in the applicant costs. So it impacts the management of costs forecasting and of course, there's an absence of discipline that budgeting and work plans brings to the management of legal costs, which was absent at this time.

30 That is the narrative or the story of how the Scheme starts to blow out in terms of the fiscal pressure and the costs that are being claimed in terms of reimbursement officials had.

So now, in the section of my written submissions, at paragraph 27 that address the identification and tracking of these cost pressures.

Just to summarise the written submissions in this regard, there is a monthly reporting process that Te Tari Whakatau has and from August/September 2023 Te Tari Whakatau begins identifying through monthly reporting that the actual workstream costs are exceeding the estimates.

5

Each month there are emergency re-forecasting of expenditure processes being carried out. Updated in October/November 23, and by about October 23, the forecasting identifies that the appropriation for the financial year would likely be exceeded by approximately three to \$5 million by the end of the financial year. That's Mr Kent's evidence at paragraph 56.

10

The plan at that time was to cover the excess through what's called a fiscally neutral adjustment between appropriations. That's something that officials could do or Te Tari Whakatau could do without taking the matter further, without elevating it. So, three to \$5 million is within the scope of what Te Tari Whakatau can handle by undertaking a process in relation to the appropriation to move money, essentially, between years. And that wouldn't impact the Crown's overall operating balance or its debt.

15

In October 23, the funding team starts to manually track pre-hearing and hearing costs for individual applicant groups to be able to monitor them better.

20

January 2024, a review of the Scheme settings begins, and originally, that review was due to start later in the year. But it was brought forward because of the cost pressures that had been identified.

25

Then, Mr Kent has joined the team by the time of February 2024, to help with all of this. Updated forecasting based on actual costs, data collected to that point for the financial year. It is carried out and it's at that point that officials forecast an appropriation breach. With the appropriation being fully expended by 22 March, breached by 30 April and a \$19 million funding shortfall for the financial year, and \$19 million. As against, obviously, the \$12 million that is the amount of the appropriation, so well more than double.

30

From March 24, officials then take steps to advise ministers in options to address the cost pressures facing the scheme, and 11 March 2024 is a key date. It's on that date, officials advise ministers, so that is the Minister for Treaty of Waitangi negotiations, and the Minister of Finance. That the
5 appropriation is going to be fully expended by the end of March, the end of that month, and overspent by approximately \$19 million by the end of the financial year.

So, if I could just ask the Tribunal to turn to tab 29 of the Crown's common
10 bundle if you have that handy.

BEGINS SPEAKING TO COMMON BUNDLE, #B048, TAB 29

This is, once the problem or the size and significance of the problem is understood and needs to be elevated, this is the first key document in the narrative, and this is a paper from officials to the joint ministers. One can see
15 the date and the action sought.

On the first page, it's noted that the appropriation is currently forecast to be overspent by up to \$18.777 million, by the end of the financial year.

20 The actions sought is to agree to a fiscally neutral adjustment of \$1.5 million, which can be taken from Treaty settlements Claimant Funding appropriation. Which is consistently underspent. To help address the immediate cost pressure.

25 So, that's something they can do themselves, and then they were also asked to take a paper to Cabinet and there are options.

The first option is, seek approval for a fiscally neutral adjustment of \$17.3 million for 23/24, and \$19 million or 24/25. What that means essentially, is that there
30 is an appropriation that has a whole of life through to the end of the Scheme. The idea of the fiscally neutral adjustment is to take money from future years and put it into these years, so the whole of life appropriation stays the same,

but money is transferred from future years into these years where the urgency arises.

5 Then b, importantly is, seek approval to change the settings of the Scheme to reduce and cap future contributions to applicant costs.

That's option one, which is the fiscally neutral adjustment or option two is seek approval for a Between-Budget Contingency of \$36 million for the financial years.

10

That's different from the fiscally neutral adjustments, in that that's essentially new money for the Scheme, so you are not borrowing from future years, taking from future years. You are introducing new money, that's what c is.

15 Then d is the same as b, which is change the settings to reduce and cap future contributions.

Just draw your attention to some other important paragraphs in this document.

20 Paragraph 7 relays what I've just traversed in my submissions about the change in charging behaviour from September/October 23. A significant change in ow legal counsel were billing applicants. Reference to the Wairarapa Stage 1 hearing. And how that behaviour is now going to impact all future hearings. So there's a trend that has been identified. The current funding settings therefore
25 require urgent attention, given the unintended consequences and to stop further exploitation of the system.

Paragraph 8 refers to the overspend being the culmination of multiple factors. Then 9 explains how the 22 changes to forecast court costs approved by
30 Cabinet were based on actual costs from previous years. Ten sets out an increase in actual and forecast costs.

Paragraphs 20 and 21 explain the difference between the fiscally neutral adjustment and the between budget contingency, so there's just a helpful explanation there in terms of what the two different mechanisms involve.

- 5 Then what's recommended in this paper is moving some money from Treaty Claimant Funding, from that appropriation and then seeking Cabinet approval for a fiscally neutral adjustment, or a Between-Budget contingency. That's 11 March, and that's the first significant document that goes from officials to ministers to explain what to do about the funding pressure.

10 **HOUSEKEEPING – TIMING (15:01:21)**

HEARING ADJOURNS: 3.01 PM

HEARING RESUMES: 3.26 PM

MR STEPHENS: (CONTINUES #3.3.073)

CONTINUES SPEAKING TO COMMON BUNDLE, #B048, TAB 29

- 15 We were at tab 29 of the common bundle and I had just been taking the Tribunal through this 11 March paper, and showing what was recommended with two options.

- 20 In terms of where to find the money, the last aspect of this paper is, that I would like to refer the Tribunal to, is paragraph 22 and 23. Because this is the origin of budgeted work plans, and it is the origin of legal aid rates. So, not only is advice being given about where to find money to alleviate the cost pressures for the relevant financial year and the following one.

- 25 But also, paragraph 22 recommends going to Cabinet, seeking approval to change current settings so that applicants are required to provide a funding work plan to enable management of funding going forward. Also, b, reduce Court Funding pressures by adjusting the current funding levels for pre-hearing

and hearing costs to legal aid rates. That's anticipated to create a saving of between \$6.5 million - \$7.8 million annually.

5 Treasury give advice on this proposal on the 20th of March, and so that's another important document in the narrative, and that's at tab 31. This is in email, and this is from Matt Curzon at treasury to the private secretary of the Minister of Finance.

10 This sets out treasuries on how to approach these matters and the important to highlight is on page 308, the second bullet point, where treasury say "we don't like the fiscally neutral adjustment" and that's the one where expenditure is taken form future years. Treasury say:

15 "Our view is that front-loading of expenditure is not common practice and should only be agreed in circumstances where there is certainty that costs in future years can be managed within reduced baselines."

And treasury say:

20 "We don't think there is sufficient certainty that expenditure can be managed. Without seeing more detailed analysis of potential options, it is too premature to say how any changes will flow through to costs in future years. There is also uncertainty around the consultation process."

25 So, treasuries recommendation is, don't use the fiscally neutral adjustment. Instead, or they recommend, that the Between-Budget contingency is used to fund the immediate cost pressure of \$17.3 million, so that's new money, essentially. What treasury say is, "**\$17.3 million in 2023/24 only.**" So that's treasury's view.

30

They go on to say, there's a risk of further significant costs in 24/25. But if we only provide for a Between-Budget contingency for 23/24:

“This option will provide Te Arawhiti with a stronger incentive to implement policy changes quickly and will provide more certainty around the specific quantum of funding required. If higher forecast expenditure creates another risk of unappropriated expenditure in 2024/25, Te Arawhiti can seek further additional funding or propose front-loading of spending.”

And things will be clearer at that time.

10 That is the treasury view, and that’s the advice given to the Minister of Finance.

What then happens on the following day, the joint ministers having considered the advice from their respective departments. The joint ministers agree to the recommendation to seek additional Scheme funding for 2023/24 and 24/25 of \$36.3 million split across those years, both years. Do so in line with the preference for a Between-Budget contingency, so new money. Treasuries proposal that only 23/24 is alleviate is not accepted by joint ministers. So, if one looks at the dates, on the 11 March paper and the decisions made, it's clear what joint ministers proposed to do at that point.

20

That then tracks through to tab 69, page 550 of the common bundle. This is the Cabinet paper of the Minister for Treaty of Waitangi Negotiations, setting out three options to address the short fall in the appropriation. In short, after setting out the options, it is proposed to do exactly what I just described. Which is to use a Between-Budget contingency to obtain \$36.3 million of essentially new money for two financial years, 23/24 and 24/25. That is the proposal that is taken to Cabinet by the joint ministers. As we know, after that paper is put before Cabinet, on the 15th of April, Cabinet makes a decision.

30 One leads back then to, tab 33, page 368. This is the minute of Cabinets decision which notes a series of things in terms of the background and the options, financial implications.

At paragraph 8, Cabinet agrees to address the funding shortfall in the Scheme through an allocation of \$17.300 million from the Between-Budget Contingency across the 2023/24 financial year. Paragraph 9, one can then see the change to appropriations to give effect to that decision in paragraph 8.

5

What's not said, but what is implicit is that the request or the proposal in the Cabinet paper to obtain \$36 million for two financial years, is not taken up and so, only \$17.3 million is taken up for 23/24, and the \$36 million sum is not available to be split across both financial years. Such that there's no additional funding for 24/25.

10

That is the story, the chronology, around how Cabinet ultimately makes its decision to alleviate the very immediate problem, but not to provide funding for the following year. Then, also what's taken up is the proposal to change the settings to the Scheme, and that's budgeted work plans, legal aid rates, and at this point, it's important to note that those proposals are still subject to consultation at that point.

15

Then one turns to the narrative about what happens when officials are presented with Cabinet's decision, from the 15th of April, and what they do to develop and implement new Scheme settings for 24/25. I'll come to those when we come to those in issue 4 of our submissions.

20

BEGINS SPEAKING TO #3.3.078, PARA 31

I'm now at paragraph 31 of the Crown's written submissions, and this is applicable Treaty principles.

25

I say there that in the Crown's submission, the primary Treaty principles engaged here are the principles of partnership and of active protection.

Paragraphs 32, 33, and 34 set out the Crown's submissions on the principles of partnership and cites the various authorities in relation to that principle. The key point is, an ongoing relationship between Treaty partners who are bound to act reasonably, honourably, in good faith towards each other.

30

“Reasonably” is used in its ordinary meaning and the standard has to be realistic, it's not a standard of perfection and something far from perfect can pass the reasonableness test. The Crown has the discretion to select from various policy options, so a particular funding arrangement or the provision or absence of a resource isn't inconsistent with Treaty principles simply because there are other viable options.

The second principle is the principle of active protection. That principle obviously, is also well-established and requires the Crown to take reasonable steps to protect Māori rights and interests which includes Māori interests in the takutai moana and their ability to seek recognition of those rights.

I have circulated one case that I am keen to go to that is cited at footnote 76 of our written submissions, and that's the *Broadcasting Assets* case from 1994, in the Privy Council.

This case will obviously be well familiar to everybody. But in Lord Woolf's speech, he says at page 517, it's at line 20, his lordship says:

“Both the 1975 Act,”

And that's the Treaty of Waitangi Act 1975:

“...and the SOE Act refer to the "principles" of the Treaty. In Their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty.) With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.

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

That is Lord Woolf in the Privy Council in the *Broadcasting Assets* case.

Issue 2, the Scheme settings prior to the 2024/25 financial year. I think they are well understood and not disputed, so I won't say more about them.

Issue 3, the Scheme settings themselves, there doesn't seem to be any dispute about the central aspects of the current Scheme settings.

30

The total appropriation or funding available for this financial year is \$12.023 million. The changes implemented from 1 July 2024. They were approved by Cabinet in late June.

They require a budgeted work plan, agreed to by Te Tari Whakatau before funding is provided.

The introduction of legal aid rates for pre-hearing and hearing costs.

5

A cap on the Crown's contribution to Court costs: \$140,000 per applicant for substantive hearings, \$25,000 per applicant for follow up hearings, and \$30,000 per applicant for appeals.

10 Those changes were detailed in a pānui, updated funding guidance has been provided. Also, the pānui advised that to manage the Scheme within the appropriation Te Tari Whakatau would prioritise working with certain applicant groups, according to prioritisation criteria: Applicant groups participating in scheduled substantive hearings, in 2024/25 and 2025/26 are prioritised. As are
15 applicant groups close to seeking Ministerial determination in the Crown engagement pathway. The evidence for the Crown confirms or explains that the policy basis for that was to be able to manage the Scheme within the appropriation.

20 Mr Kent also did explain however, that where applicants have required immediate funding to meet urgent costs, then requests are being considered and they have been accommodated and he gave examples of funding that was approved to secure kaumātua evidence off the funding team. To address the concern that was raised again today, that elderly/kaumātua who possess
25 important evidence that might be lost if they were to pass. That funding is available to address that situation to ensure that the evidence may be obtained and considered, and he gives examples of that.

Ms Dagg explained what "close to seeking Ministerial determination" meant.

30 That was applicants currently on the work programme. Where their evidence had been received, it was being assessed and Te Tari Whakatau was starting to draft assessment reports for the minister.

I move to issue 4 and this concerns the process by which the Crown developed and settled on the Scheme settings for this financial year.

5 So we have just been to the Cabinet decision of 15 April, where Cabinet also approved the introduction of budgeted work plans and hourly rates aligned with legal aid, at that point, subject to consultation. At that point, caps on funding for court hearings were not an intended feature of the new settings.

10 We saw that in the 11 March paper from officials to the minister, these additional settings, budgeted work plans, and legal aid rates. It was anticipated that that would create cost savings, both in terms of the budgeted work plans and also from legal aid rates, in particular, of between 6.5 million and 7.8 million annually. That, accordingly, finds its way into the Cabinet paper.

15 In the Cabinet paper, the minister does emphasise that those proposed changes would have immediate results due to a transition period that would be needed in order to implement the changes. Also, the Cabinet paper states at paragraph 12 that the changes are subject to a consultation period. Those changes, budgeted work plans, and legal aid rates, were not contemplated to
20 be introduced until 1 January 2025. And so, at that point, officials had intended to engage with applicants on the changes as part of the Scheme review process that was underway.

25 But then, what happens with Cabinet's decision of 15 April is that there is not additional funding available that had been sought for the 24/25 year. And so, emergency funding provided for 23/24, emergency funding not provided for 24/25, and so the proposal of joint ministers is not accepted.

30 Then Te Arawhiti or Te Tari Whakataurua's forecasting in May then shows that without urgent changes to the Scheme, the appropriation for 24/25 is expected to be fully expended, or fully committed by September. And to exceed the appropriation by up to \$22.8 million by the end of the financial year. That clearly presents a new appropriation breach problem, and so, on the 20th of May, officials present the minister with four options to bring spending within the

existing appropriation. The key aspects of that are the acceleration of legal aid rates and budgeted work plans. In addition, the introduction of caps, to cap funding for all scheduled hearings.

5 Mr Kent, in response to questions from your Honour, explained how they were developed, and it was essentially that the annual appropriations taken and deducted from it was what was needed for forecasted total activity funding costs. So that's research, preparing evidence and so on, so that sat outside the caps. Then the amount remaining, plus the \$2.1 million in principle,
10 expense transfer, was then used to calculate the total amount available for scheduled court hearings. Then that was divided equally between the applicant groups who had scheduled sittings for the year.

That is how the caps were arrived at. Officials provided their advice to joint
15 ministers on the options, and then a paper is taken to Cabinet seeking approval to those changes. That is the 18th of June, it's tab 40 of the common bundle.

Ministers accept officials' recommendations to seek Cabinet approval to bring forward the introduction of budgeted workplans and legal aid rates, and the
20 additional measure of funding scheduled hearings at capped levels.

On 19 June, Cabinet approval sought for that. Then on 26 June Cabinet approves those urgent changes to the scheme. And so, that is how the scheme settings were arrived at, and the evidence references are in our submissions.
25 Then on 5 July 2024, with that decision having been reached, Te Tari Whakatau then communicates that in a pānui on 5 July.

So, Issue 6 is the question of the consistency of the Crown's process in developing and settling on the scheme settings for this financial year.
30

And so, the first point that the Crown makes is that the process by which Te Tari Whakatau developed and settled on the current Scheme settings was not an ordinary policy development process. And Crown's submission is that the consistency of the process with Treaty principles has to be assessed in its

context. The need to address urgent and significant cost pressures on the Scheme that hadn't been anticipated or forecast in order to avoid breaching the appropriation. And so, when seen in context, the Crown's submission is that the actions that the Crown has taken have been reasonable in the
5 circumstances and not inconsistent with the Crown's Treaty obligations. And Crown has the following points in order to support its position.

The first point is that the current settings were a response to Scheme pressures that were identified as soon as reasonably possible. And I've taken the Tribunal
10 through the way in which the risk to the appropriation was identified earlier on in the piece. Initially, it was thought that it could be managed, and then it was, as more information and more data became available, more personnel including Mr Kent were introduced to managing the problem, it was appreciated that the appropriation could not be managed by Te Tari Whakatau and so the
15 matter needed to be elevated.

And so, by the start of 2024, the option of a fiscally neutral transfer wasn't going to address the issue, and then it was necessary to take the matter higher to ministers and to Cabinet.
20

And show, the short point is that when one reviews the evidence, it's an unfolding problem, it is identified early more or less as soon as the financial year starts, and as the problem unfolds, escalating steps are required in order to address it. And it's important to put oneself in the position of officials at the
25 time in terms of the circumstances that they were confronted with rather than reviewing the matter with hindsight having seen how matters played out.

So, by the start of 2024 the Crown needed to take steps to avoid breaching the appropriation for the Scheme.
30

And the short point is appropriations and the need for authority from Parliament to spend public money is a fundamental part of the way in which our country is set up, and it's made clear in the Constitution Act that there is a detailed legislative framework for Parliamentary authorisation and scrutiny of

expenditure for very good fundamental reasons that are well established. And it's not simply a question of being able to breach an appropriation whenever an issue of this kind arises. There, for good reason, is there are clear processes involved by which the Crown assess whether further money is available to
5 address this particular issue, bearing in mind all of the issues that the Crown deals with across the full spectrum of public expenditure in modern day New Zealand.

The second point is that it's not the case that the Crown set about introducing
10 the changes to the Scheme with no intention of consulting with Māori and with the applicants. Now, that's not to say that they did consult or that the information provided is somehow some kind of substitute for consultation, but it is to say that it's not a scenario where from the outset there's a lack of good faith in terms of providing information to applicants.

15 The situation is unfolding in real time, there is an intention to consult, and that intention was held in good faith. In the end, the way in which matters unfolded, consultation was not feasible in the time available and it's for that reason that consultation did not occur for the introduction of the settings.

20 So, that's not to say that the way in which matters unfolded were satisfactory for applicants, but it does seek to explain that the way in which the information was provided and how the settings were introduced was not the result of the absence of good faith. I will put it that way.

25 And so, corollary to that is that the Crown did take steps to inform applicants of the issues with the Scheme.

Counsel for the Attorney-General relayed matters to the Court and to applicants
30 in memoranda of 22 July and 7 May. There was a pānui on 24 May explaining to all applicants that there was work underway on ways to manage the Scheme within the appropriation and that there would be an update in late June.

And as I say, the Crown does not say that that's consultation or engagement. But it does show, in our submission, that the Crown was acting reasonably in the circumstances. Endeavouring to explain what could be explained at the time given the circumstances as they were unfolding.

5

So, there were submissions that the Crown chose not to consult with Māori or there's no explanation for the absence of consultation, and the Crown doesn't accept those submissions.

10 The reason for the lack of consultation or proper consultation was due to the need to implement the current Scheme settings urgently following the reforecasting that was carried out in May 2024. Prior to that, the Crown was planning on consultation, and so it's not the case that the Crown "chose" not to consult with Māori or there is no explanation for the absence of it.

15

And the circumstances that led up to that point weren't entirely of the Crown's making, as is submitted by the claimants. The cost pressures that arose on the Scheme arose through the factors that I've addressed earlier on, and they include the unanticipated and sustained higher rates of legal hours billed and
20 the submission of complex reimbursement requests and so on.

25

And so, submissions say no criticism is intended of applicants or their counsel, but it is important to understand those matters in terms of how they materially impacted the Scheme's operation, and they can't be sheeted home fairly to the Crown, in our submission.

Issue 5 is about prejudice, and it's important to, in our submission, evaluate the claims of prejudice closely.

30

Claimant submissions concerning prejudice include that the Crown has limited funding in order to slow applications until proposed amendments to the Act are enacted or that the Crown is "using funding as a gatekeeping device" in order to prevent applicants from seeking hearings, and that the implementation of

Scheme settings has interfered with live proceeding or “resulted in wholesale cancellation of hearings”.

5 It's of course accepted that there has been significant impact on applicants and their legal team as a result of the changes, but the evidence does not go nearly as far as the submissions that have been put forward by claimants in this inquiry in terms of some kind of deliberate strategy on behalf of the Crown. That evidence is not present.

10 The submissions been made again earlier today that there are third party contracts that have been breached as a result of the settings, and the Crown's submission is that there has not been evidence presented of any third party contracts that have been breached as a result of a lack of funding, and no reference to the evidence that was provided today. And similarly with kaumātua
15 whose evidence is at risk, again, the evidence from Te Tari Whakatau is that that type of scenario has been engaged with specifically by officials and there's been no specific evidence of kaumātua whose evidence is potentially lost as a result of the Scheme settings on the contrary.

20 So, in terms of the impact on hearings, it's not correct in our submission to say that Scheme changes have resulted in wholesale cancellation of hearings. There were eight scheduled hearings listed in the Court workstream guidelines.

25 So, two substantive hearings: the Whangārei Coast hearing and the Ruapuke Island hearing both took place, 1 August to October 24, and the other March to April 25.

There have been three follow-up hearings: Tokomaru Bay; Kāpiti-Manawatū pūkenga evidence; and Wairarapa 1(a) on 28-29 April 25.

30

Two substantive hearings were vacated by the High Court for this financial year, and the reason for the vacation appears to be twofold, or certainly the reason sought for the adjournment put forward by applicants was uncertainty about amendments to the Act and whether the status of the proposed bill was a key

feature put forward by applicants, which is obviously another issue that applicants have brought to the Tribunal. But funding was at most only part of the reason put forward for the adjournment of those proceedings, and Crown's submission is that is really the uncertainty about whether the Act would be amended that led to the vacation of those hearings.

In terms of legal aid rates and access to legal representation, the Crown respectfully submits that there's no evidence of applicants being left without legal representation or of counsel making applications to withdraw. And so, the evidence that legal counsel be disincentivised from acting for applicants has not been made good by specific evidence showing specific issues in that regard.

And when assessing the question of prejudice, it is submitted that there are other features of the Scheme that need to be taken into account to assess the Scheme in the round.

So, first of all, there's no restriction on the number of applicants that are eligible to receive funding per iwi, hapū or whānau group. And one can contrast that to Treaty settlement negotiations where a mandate is required. And similarly for legal in the Tribunal, the Tribunal must first provide legal services with a report detailing information, the extent to which the claim relates to other claims before the Tribunal and so on, and statutory criteria obviously for legal aid too.

The Scheme does not contain requirements to access funding that are present for civil legal aid. So, it does not require applicants to meet financial eligibility thresholds. There is no requirement for applicants to demonstrate that their application has sufficient prospects of success.

And ultimately, the Crown does not accept that Treaty principles obligate it to provide nothing short of full funding to applicant groups at all times and in all circumstances. It is submitted that under Treaty principles, the Crown is able to choose between a range of possible policy options so long as the Crown is acting reasonably and in good faith. In other words, it is submitted that a

particular funding arrangement or the provision (or absence) of a resource is not inconsistent with Treaty principles simply because there are other viable options. And so, on this basis, the Crown submits that funding applicants at legal aid rates is not inconsistent with Treaty principles.

5

Budgeted workplans

I will only dwell on this very shortly. The Crown submits that it's not unreasonable for applicants to be required to submit budgeted workplans and there is no question of Treaty breach in this particular area. That is, budgeted
10 workplans are a normal requirement for the prudent management of legal costs, particularly where public funds are involved.

And we would also add that Te Tari Whakatau has taken proactive steps to minimise the impact of the requirements for a workplan. Providing a template,
15 helping with queries, even filling them out in some circumstances.

So, in no sense would the Crown accept that requiring budgeted workplans is anything other than a normal and usual requirement of managing legal costs either in a public setting or in the private sphere where they are also a standard
20 feature of legal cost management.

Connected with prejudice. Issue 5.1 relates to the proposed amendments to the Bill which remain proposed and have been or consideration was deferred as a consequence of the Supreme Court's decision in *Edwards*. And so, there's
25 still a Bill before the House. It's is not known whether it will be enacted in its current form, and that's a decision for Parliament. And so, the Amendment Bill is currently at large and undecided.

And similarly, questions about how costs which stem from the Amendment Bill,
30 Ms Dagg explained that – are also undecided. So, there's no decision at this point about how additional costs will be dealt with. And it, you know, really depends of course on whether the Amendment Bill is enacted or not, and if so, in what form. And so that's just a question that is an unknown at this point.

We have dealt with process and in particular, the question of the lack of consultation, and the reason for it.

5 Issue 7 is about the consistency of the settings themselves. Again, the submission is, from the Crown, that the Scheme settings aren't inconsistent with Treaty principles.

10 Just pausing there to address the point that was made earlier today from one of my learned friends, the phrase not inconsistent with Treaty principles is a phrase that is taken directly from section 6 of the Treaty of Waitangi Act 1975. So, the Tribunal's jurisdiction is to inquire into whether Crown actions, et cetera are inconsistent with the principles of the Treaty.

15 That is the matter that the Tribunal inquires into, and that is the statutory question that the Crown responds to. The expression, not inconsistent with principles of the Treaty is a phrasing that is taken directly from the legislation. As the standard that is being examined in this context and no more than that. That's the reason for the Crown's use of that expression. In any event the Crown says, the Scheme settings were a reasonable and necessary response
20 to the issues facing the Scheme in the financial year.

25 What the Crown is required to do is strike a reasonable balance between ensuring access to justice for applicants, and the prudent management of public funds. The submission that the Crown makes here is that it's struck an appropriate balance in this context.

30 Claimant closing submissions on Treaty consistency referred to a series of matters, starting with the Cabinet decision not to approve additional funding for 24/25.

It's true that no reasons document is supplied in relation to Cabinet's decision and because Cabinet decisions are confidential. And so we are left with making inferences about the reason for, the reason why Cabinet took the step that it

did. One can readily make those inferences in light of the surrounding circumstances. But it is true to say that Cabinet doesn't issue reasons.

5 One can see a process by which material, you know, a paper was taken to Cabinet and how that paper was put together. And that actually, what the proposal was, was a proposal for a Between-Budget contingency funding of \$36 million across two years. I mean, that was contrary to what treasury and its advice had said, which was, Between-Budget contingency, but only for one year.

10

In the end, Cabinet decides what is essentially in the treasury email, now that's not to say that the treasury email represents Cabinet's reasons. That's not the case, that's just advice from officials to the Minister of Finance. The Minister of Finance did not take that advice up, that is not the basis on which the
15 Minister of Finance, and the Minister for Treaty of Waitangi Negotiations went to Cabinet.

But clearly, Cabinet decided to approve funding for one year and not two, and there are inferences that can be drawn about that. But the obvious one is that,
20 in a time where public funds are under pressure, not only in this scenario, but in all scenarios across government. In an environment following the COVID-19 pandemic, and the impact that that's had on our economy and on the world economy, and the response that the current government is taking to the consequences of that.

25

One can see that the government is being cautious, if I can put it that way, or limited in terms of public expenditure. Not only in this context, but in all contexts and that's well known. So simply, the inference in my submission is that cabinets declined to fund for a second year, and it is at approved emergency
30 funding for the 23/24 year.

So that's why we say the inference is that Cabinet's decisions were intended to bring fiscal discipline back into the Scheme sooner than that which had been proposed by joint ministers. Noting that when one goes to the papers, the joint

minister's proposal was \$36 million split across two years of emergency funding. Then from 25/26 onwards, the appropriation of \$13 million continues to be the appropriation, and so there's no emergency funding for years beyond that. Cabinet's decision is clearly to accelerate the position of bringing the
5 Scheme back to the \$13 million appropriation.

For that reason, joint ministers had also proposed, in accordance with advice from officials, they had also proposed the introduction of work plans and legal aid rates, subject to consultation. That those changes had been proposed by
10 officials on the 11th of March to bring down Scheme spending and back in line with the appropriation.

Our submission is that those a legitimate policy objectives, not everybody will agree with the decisions that were taken. But the Crown has a responsibility o
15 use public funds responsibly. In our submission, it was open to the Crown in the exercise of its Kāwanatanga responsibilities to introduce mechanisms to bring fiscal discipline to the Scheme. That is consistent with what Lord Woolf had to say in the *Broadcasting Assets* case. Which is, in situations where the economy is under stress and it's a time of particular economic challenge, then
20 the Crown can make decisions reasonably, that it might not make in times where the economy is buoyant.

Similarly, budgeted work plans, as I have submitted, is an entirely normal and reasonable process for the management of legal costs. Legal aid rates,
25 similarly, the Crown doesn't accept that anything less than full funding of legal costs, at all times, is inconsistent with Treaty principles. The Crown submission is that it's entitled to introduce legal aid rates in the context of MACA applications. Just as civil legal aid rates apply for litigation in the High Court and all other scenarios.

30

In terms of funding caps, again, the funding caps were introduced late in the peace in order to be able to manage the Scheme within the appropriation for the 24/25 year. The Crown rejects the submission that they imposed that an arbitrary or inequitable level. Mr Kent's evidence explained how they were

arrived at and the reason for arriving at them, which was to ensure equal access of all applicants to the limited funds that were available. He has provided that explanation and it's submitted that it clearly shows that the level is not arbitrary or inequitable. It's determined by the availability of funding and the need to
5 ensure that applicants have access to equal amounts of funding in an equitable way.

Ultimately, it's submitted on behalf of the Crown that its concern was to adhere to fiscal constraints. The reality of spending public funds is that it must be done
10 with Parliamentary authorisation and the Crown was concerned to ensure that that happened here. It was an unprecedented situation for the Scheme, in terms of fiscal stress. It was a rapidly unfolding scenario where the facts on the ground changed over time and officials were responding to that set of new and challenging information over the months as they unfolded as more information
15 became available.

Ultimately, Cabinet's decision to provide emergency funding of more than double the relevant appropriation for 24/25. To ensure that the immediate and urgent situation was addressed, and that applicant's costs were met, but at the
20 same time, sought to introduce fiscal discipline, sooner than that which had been proposed by officials and joint ministers. And that in the Crown submission is a legitimate policy decision for the Crown, even though not all will agree with it.

25 So, your Honour, and the Tribunal, I'm sure have questions. But those are the Crown's submissions, thank you.

(16:21) RON CROSBY TO MR STEPHENS:

Q. Mr Stephens, possibly going to jump around a little bit, between major issues and some detail and possibly, that arises out the packet. I will start
30 with the general issues then wade through my notes as I had read your submissions at home. If there are particular extra matters, I will raise those. But before we start, can I just turn to one very minor matter. At page 31 of your submissions, your footnote is referring to the

Public Finance Act, and it just seems to be incomplete. It just says the authority and there's a sentence (inaudible 16:22:14)?

A. Is it page 31?

5 Q. Hold on a moment, sorry. It may depend on the – Sorry if I take you to the paragraph number. The paragraph number will be 65 and the footnote is number 133.

A. Yes.

Q. And just on the copy that I have, but it may be just a printing thing on what I have, it seems incomplete, is it, or not?

10 A. My footnote 133 says “Cabinet Office *Cabinet Manual...*” –

Q. The sentence commencing “The authority”.

A. I see, paragraph 133. So, footnote 135, which is the very last footnote on that page. The word, “The authority” and then goes over the next page and reads “given by Parliament to Ministers is by way of appropriations (which are set out in Appropriation Acts).”

15

Q. Thank you, for some reason, the copy that I have, that doesn't appear. That's all right, I just needed to sort that out. If we just go back to some of the major issues. You explained what you say are, and I just want to be clear in my own mind that I have it right from you, that you say that it is possible to, and in fact, I've noted you as saying one can readily take inferences from the materials that surround the Cabinet decision. So those materials are the ministers handwritten note, the Cabinet paper on which that was written, the email from treasury. Are there any other documents that you can draw our attention to in that regard?

20

25 A. The email from treasury would not have been before Cabinet. That's an email from treasury to the Minister of Finance.

Q. No, indeed, but the Minister of Finance was aware of it and had read it presumably and one can reasonably assume that that would have been an issue raised or discussed at Cabinet?

30 A. I suppose, what we know is that that email with that advice would have gone to the Minister of Finance. There is then a Cabinet paper that goes up to cabinet which is supported by the Minister of Finance, as well as is presented by the Minister of Treaty of Waitangi Negotiations. And we

know the Minister of Finance would have been at the Cabinet meeting, and so the –

Q. Well, you have drawn our attention to that email today. What was your purpose in doing so?

5 A. Because it is part of the narrative that starts with the 11 March – what I was endeavouring to do, was take the Tribunal through the chronology of events that leads to the Cabinet decision of 15 April.

10 Q. Right, well look, I will just go back a step and ask you, in that case. What circumstances and what documents do you say we can take into account to readily take inferences to correct yourself as to what prior underlaying the Cabinet decision?

15 A. Well, as I say, there is the advice from officials to the Minister of Treaty of Waitangi Negotiations. Then there's the advice to the Minister of Finance, so that's the advice that they have. They then put up a paper to Cabinet with their proposals, and they carry the information that has been provided to them by officials when they go into the Cabinet meeting. We know that Cabinet then made a decision. The inference that we say in our submission, is that clearly, Cabinet took a decision not to accept the proposal of \$36 million across two years and
20 only provide funding for one. As such, the natural inference is that Cabinet decided to be more stringent in terms of new money in that which had been proposed and sought by the joint ministers. That's about as all I can say on the matter. But it is part of the background that the two ministers received advice and they then went to the Cabinet meeting. But
25 I can't speculate about what Cabinet discussed, or the nature of the Cabinet discussions. I think all we can see is the result and the result is, only emergency funding for one year and not two. That just must be because Cabinet was deciding to be more stringent in terms of making available emergency funding than had been sort.

30 Q. Correct me if I'm wrong, but from memory, the joint ministers Cabinet paper referred to the obligations under the Treaty?

A. Yes.

Q. So the only, out of those other background circumstances, the advice from treasury. The only indicator that one can draw from those is to why

the Cabinet might have reached a different conclusion than that recommended to it by the two responsibility ministers. Presumably, was a fiscal one?

A. Yes.

5 Q. And it related to a proposal to try and control the level of expenditure in future years?

A. Well, in future years, the appropriation from 25/26 onwards is \$13 million, or 12 to \$13 million. That is the level of appropriation for 23/24, 24/25, and onwards, 12 to \$13 million. That's the level of the appropriation.

10 What's being considered is emergency funding, essentially. The introduction of, you know, more than, well, for 24/25, the introduction of more than double of the appropriation as extra emergency funding. What's implicitly not accepted by Cabinet is to provide that level of funding for 24/25. But the appropriation beyond that is 12 to \$13 million over all
15 years and as such, what's then – that's the amount of money that has been made available for the Scheme, and emergency funding is sought. But that's also on the basis that changes will be made to manage the Scheme so that's it's brought back within the original appropriation. So that's why one sees budgeted work plans and legal aid rates, and then
20 late in the piece, funding caps as well. Undoubtedly, that's a long answer to your question, which is, you know, it's clearly fiscal discipline that's being sought and a desire to return to the level of spending that accords with the appropriation.

25 Q. The Cabinet paper that referred to that, referred to methods in which that reduction in costs could occur into the future. Treasuries recommendation was that the approval for one year meant that there would be a stronger incentive to implement policy changes that had been, presumably where those being referred to by the officials and Te Tari Whakatau. Those included some of the costs be taken out of the
30 Scheme completely through reducing duplication which would lead to reductions in the number of hearings. And the figures given on that paper were 2.8 million for reducing duplication, and the number of applicants per hearing, and the number of hearings per year, 8.3 million I think it is. So the total saving there is 11.1 million –

A. I'm sorry, can I just ask where you are reading from, is that the Cabinet –

Q. That was the advice that was given to the ministers. But what I'm really getting at is, not so much the figures, don't want to get bound up in the figures. What I want to know is, how do you think officials were
5 contemplating reducing duplication in the number of applicants, or reducing the number of hearings? Because in both of those cases, aren't they issues where questions of the avoidance of conflict arise in terms of representation. In terms of number of hearings, that's in the High Court's control, not officials.

10 A. From memory, the short answer to that is that budgeted work plans were expected to have that kind of impact. I would need to find out where that reference is. But that's sort of part of management of funding –

Q. Sorry, can I assist you by taking you to paragraph 52.1 of your own submission. It doesn't have the figures, but I'm not too troubled about the
15 figures.

A. Yes, so its page 289 of the common bundle. This is the 11 March paper form Te Arawhiti. This is the first item one sees the idea of changing the settings, so this is in addition to solving the money problem.
Paragraph 22:

20

“Other recommendations to Cabinet would include approval to change the current settings for the FAS appropriation including:

25

a. Requirement for all applicants to provide a funding workplan to receive funding.

30

This change would allow Te Arawhiti to manage our annual funding spend more closely, and shift some of that cost out of the scheme completely through reducing duplication. Coordinating the development of all funding workplans will also reduce the:

- number of applicants per hearing saving approximately \$2.8 million annually

- number of hearings per year saving approximately \$8.3 million annually”.

5 But that’s the evidence that we on the point, but I think the – that’s the evidence that we have on the point.

Q. But how do you say, as counsel for the Crown, that the Crown could somehow reduced the number of applicants and reduce the number of hearings?

10 A. Yes, I'm hesitant about providing evidence to fill out the thinking or reasoning in that paragraph. But it will be about, if there are budgeted work plans and there is a clearer idea of what applicants are doing in relation to particular hearings and why. Then there is the scope for the reduction of duplication essentially. That the same material might be canvased by one applicant group across, for many, and so on. And that’s, 15 you know, in terms of High Court litigation, it's often the case that there will be many parties with different interests, and you know, lawyers representing different clients. But in terms of some matters, you know, there is common ground, and that it's astute to ensuring that there is no duplication in terms of what lawyers are putting in front of the Court and 20 that people aren’t saying the same thing twice, or three times, or four times, or whatever. And that there is an ability to – you know, the Court manages that. I suppose, what I take from that is that, through budgeted work plans and understanding what it is that applicants are looking to present, there is the ability to manage the hearing process at that stage as well. Rather than just leaving it in the hands of a High Court Judge. 25

Q. Did you say, rather than leaving it in the hands of the High Court Judge, that’s what one of their functions is to do, isn't it? To ensure that people are properly represented and that there aren’t conflicts of interest, and that there may be separate representation. Shouldn’t that be a decision 30 for the Court, rather than for the opposition in the litigation, to make that decision on what is the litigation strategy?

A. Yes, and well it is a decision for the Court, so the Court will certainly manage it. I'm not sure I characterised the Crown’s position as the opposition.

- Q. Well, it's filed notices of opposition, that's what they are called, and we have heard evidence that the Crown has been taking a very active part. That may or may not be by way of opposition in the general, normal sense, where one has tried to get something that somebody else has got.
- 5 But it may be opposition in terms of challenging and putting someone to proof. And my understanding on the evidence we have been hearing is that that's the process that the Crown says, and as its self-perceived as the guardian of the public interest in the foreshore and seabed. That it puts people to proof. Now, how reasonable, against that position, is it for
- 10 that entity, that litigant, in the litigation, to look at who is involved in that litigation and say, we are going to limit the number of people that are involved, and we are going to limit the number of hearings or going to suggest that to the Court. Because we say, you should all be in the same waka.
- 15 A. In my submission, it's not as stark as that and I don't think I can really go beyond what one sees in the paragraph. I think that, you know, in terms of evidence about specifics, in terms of what was contemplated. That's really a question for officials and needed to be asked of them in terms of what was being contemplated around work plans and budgets for this
- 20 purpose in terms of what's contemplated. You know, the answer really lays in evidence from them. Which, at this stage, could still be sought.
- Q. Yes, the difficulty is that. I'm not suggesting that Crown officials would act improperly in any way. But there's a perception issue, is there not? Perception from the claimants involved in litigation, that here is the Crown,
- 25 who they are having to face up to. Who is putting to proof in the High Court. The Crown deciding what their litigation strategy is to be through the work plan process.
- A. Yes, I understand the point that you are making to me as a matter of principle. I'm just not sure that there is evidence in relation to the
- 30 specifics. I would be more comfortable responding to that question with evidence in terms of what was contemplated and how work plans and budgets can be used to manage litigation to avoid duplication. Which also, in principle, you know, is a good idea, surely, and I think it's a matter

that would require specific evidence. In terms of what was contemplated to say too much more on the subject.

5 Q. Just turning to the actual decision made to apply the emergency funding for the 23/24 year. The very fact of doing that against the background of fiscal tension as you've been describing or emphasising to us generally is indicative, isn't it, or it has to be, that there is a recognition that there was a Treaty obligation that needed to be met. It had to be the factor, didn't it, because otherwise why wouldn't you just, if it was fiscally driven only, why wouldn't you just stick to the \$12 million?

10 A. Well, I think that is a recognition of the settings that were in place for the 23/24 year, and the expectations and the system that the Crown had set up and communicated. And then the results of that which had the unintended consequences that arose. And so, the Crown is responsibly identifying what has resulted from the settings that have been put in place and is meeting its obligation to make good on the settings that were established on 1 March 2023. And so, the obligation that the Crown is meeting is to make good on the settings that were in place for that year, and that's a different point to the settings that it's then going to put in place for 24/25.

20 Q. Well, is it, because the Treaty obligation hasn't changed, has it?

A. Well, it has, in our submission, and that's the point that's being made by Lord Woolf is that the obligation is constant, but the content varies according to the circumstances. And so, it's true that the Crown always has the obligation, but what the Crown is specifically required to do varies according to the circumstances, and the Crown is – varies according to the economic, political, social circumstances at the time. The Crown can, you know, change its mind or take a step back. Certainly, you know, more extreme circumstances in this, one can contemplate that happening. So, in short, the obligation endures but the content of the obligation changes, and different governments can legitimately make different choices in the context of that overriding obligation, if I can put it that way. The obligation doesn't dictate one outcome in all circumstances. There are a range of things that the Crown might do.

Q. Can I just take you to paragraph 91 of your submission, and in the second sentence you say the Crown, respectfully, does not accept this recommendation, which was the recommendation that the Crown –

A. Yes.

5 Q. – should fund all reasonable costs of applicants in progressing their applications. Now, just in terms of the Crown's actions in '23 and early part of '24 –

A. Yes.

10 Q. – it's just incontrovertible, isn't it, that the Crown accepted the Tribunal's recommendations and that's – and it's given effect to those.

A. Yes.

Q. So, would you like to recast that sentence?

15 A. I would, I would. Yes, I think that's not quite right in terms of the way in which it's expressed there. Clearly the Crown did act consequent upon the Tribunal's recommendations and fund a system based on actual and reasonable costs.

Q. Right.

20 A. And the Crown did do that. I suppose it's the characterisation that the Crown therefore accepts as a consequence of making that decision that the Crown is obliged full time to continue to fund the scheme in that way. And so the Crown, you know, did take up that recommendation and the question is, that that sentence is trying to resist, is the notion that that's an admission that the Crown must do that, that the Crown is obliged as a matter of Treaty consistency to fund at actual and reasonable costs.

25 Q. Right. If one looks at the prioritisation and looks for that matter through most of your submission, and I am not meaning that personally to you, it's just the outcome, and looks then at the number of applications that the Crown has received, 175 seeking dual pathways, 27 High Court only, 212 Crown engagement. Where is it in terms of the 24/25 year, where was their provision for the Crown engagement pathway to move ahead?

30 A. So, that's a – yes, that's obviously a difficult question for me to answer and respectfully beyond the scope of the inquiry that the Tribunal is involved in here. It is – and I think, and so any evidence is not being directed specifically at that question I suppose.

Q. Right.

A. Difficult for me to answer.

Q. Yes. Because the Crown's response to the Tribunal question as to whether there were assessors appointed, there are none as I understand the response. So, the ability to even put up a case to the Minister from the officials which, in those one or two that did advance to the previous Minister, to Minister Finlayson, the Pāhauwera one, where there was an outside assessor appointed, ex-High Court Judge. The Crown, in the Crown engagement pathway, as at the year 24/25, does not seem to have even had that in place.

A. Doesn't have an independent assessor, that's correct, for 24/25, yes. But I mean, the Crown has not brought evidence and has not directed its response in this inquiry to how matters will proceed over the course – over the lifetime of the Scheme. And that's a different and much bigger question.

Q. We're looking at this year.

A. Yes.

Q. But if you're an applicant or a claimant in the Crown engagement pathway only of whom there were 212, 14 years now after the Act has passed, no progress. This year, no real progress. Crown lists in a work programme which it says is close to determination, Ngāti Porou ki Hauraki, and we have a witness standing before us who vehemently says that they don't feel that they're close to determination at all.

A. So, that is – yes. One second. So, it is important to understand what the document that was provided – I will just get the exact wording – “represents”. I mean, the evidence from Mr Tamihere is not accepted.

Q. No, no, I'm –

A. It was provided very late in the day.

Q. And no, it's why I said to you “a witness standing before us giving that evidence”. So, even if we don't look at the reply, and we will, but even putting that aside, I can remember him standing where you're standing giving evidence and strongly expressing frustration if I put it no stronger than that, it was actually stronger than that, that they did not feel they

were getting anywhere because they had been essentially told that they had to have an agreement between overlapping parties.

A. Yes.

Q. And we don't need to decide that.

5 A. Yes.

Q. But plainly, there just has not been any advancement, and the Crown has put forward but redacted all the background to it, put forward a list of names, and it's very small, and Ngāti Porou ki Hauraki happen to be on that list. Rangitoto ki te Tonga, which I think is the D'Urville Island area.
10 Ngāti Koata presumably are on the list.

A. Yes. So –

Q. It's, 14 years afterwards, it's so tiny that it's unimaginable that it could be conceived to be reasonably Treaty compliant, is it?

A. Well, so two things I suppose. First of all, the work programme that was
15 supplied shows all of the active or upcoming applications that Te Tari Whakataua is working on, is working on, and they use – and that document is used to determine who is close to determination. So, the list is not intended to represent everybody who is close to determination.

Q. Right. But all that does it makes the list small.

20 A. Makes the list small, yes. To take the example of Mr Tamihere and his group, I mean, the short point is that the area over which the claim has been made is large. There are a lot of other groups who have overlapping interests. And to go down the Crown engagement pathway, those matters need to be resolved by Ngāti Porou ki Hauraki. And so, the
25 question is, what – you know, where is that at in terms of resolving those overlapping claims and where is the agreement, and until there is agreement, the Crown engagement pathway doesn't admit of it being taken further.

Q. But that is just an absolute full stop to any progress on any of the Crown
30 engagement pathway applicants because they're all going to have overlapping claims.

A. Yes, but the –

Q. How can they get funding when they're not close to determination?

A. Because some of them are resolving the overlapping claims by agreement.

Q. Right.

5 A. And that is how one gets – that’s how one proceeds along and obtains ministerial determination, otherwise the Court’s got to sort it out.

Q. All right.

**JUDGE ARMSTRONG ADDRESSES MR STEPHENS – TIME PRESSURES
(16:52:13)**

RON CROSBY TO MR STEPHENS: (CONTINUES)

10 Q. I’ll just very quickly – I think probably our exchanges have covered most of my points, but I will just quickly check. Just on the modelling. I don’t want to spend too much time on it or get into too much detail, but the problem which seemed to me with the modelling and your proposition that the Crown was taken by surprise because of what then occurred later in
15 2023, has to be a combination, doesn’t it, really of the fact that even the Minister Little was identifying back in March 2020 that there were more than one hearing for each party. So there’s one flaw. We then get the Cabinet Paper acknowledging the flaws. And we then have Mr Kent detailing what those flaws are. And we also have, but most importantly,
20 we have the minute of Justice Churchman in August of 2022 setting down a volume of cases which had not previously been before the Court. Weren’t they warning flags to the Crown back that far?

A. So, Mr Kent accepts that the – Mr Kent I think accepts in evidence that, you have the minute of Justice Churchman, that is not then fed in to or
25 the modelling is not recast. But of the same time he maintains that the modelling, the overall modelling, is robust, and he maintains that, you know, no model is a 100% predictor and not all assumptions are present. It’s a model. While, still acknowledging that some of the assumptions didn’t hold, and key factors were not wired into it. But that’s not to change
30 the fact that in the first half or the second half of 2023, the modelling is the information on which officials are working and they update matters

pretty quickly, and it is a situation of urgency or surprise when they come to deal with the reality and how matters unfold. But they –

Q. And the model –

5 A. Sorry. I was just going to say, so the modelling – yes. The evidence from Mr Kent was that it was robust and as good as or is better than he's seen elsewhere, but he also accepted that there are assumptions that didn't hold and that there were factors that weren't present that could and should have been.

10 Q. And when you look at the problems that he identified or the Crown officials identified at the time, there a number of options, weren't there. One was a fiscal one where you just cut the rates, the legal aid, to the legal aid rates, you put caps on. And you physically in that way control the fiscal outpouring. The other option is to say, well, we've got problems here where we're not quite sure whether these levels of cost that we're starting
15 to see are reasonable or not and whether they can be controlled in some way. You can either do that, it would seem to me, in two ways. You can either, if you think that you've got rogue players, you institute some form of review process either through the Registrar of the High Court or whatever, and I'm not sure if you're old enough to remember the taxing
20 of bills that used to occur on winding up (inaudible 16:56:46) –

A. I practiced the language so I'm aware of how those work.

Q. Yes, indeed. So, there was that sort of opportunity as one option. Or another option was to possibly have a combination of that and budgeted workplans so that you're controlling the future. Rather than the draconian:
25 "We're going to cut everybody because we suspect that there might be some rogues."

A. Yes. There are different ways to manage it, that's true, and it's quite stark, it's stark how – the ultimate response is quite stark to bring it all back down to, you know, bring it to legal aid rates, and there are different ways
30 of managing the issues.

Q. Right. Most of these have been covered, Mr Stephens. Yes, thank you very much, Mr Stephens.

A. Thank you.

JUDGE ARMSTRONG:

Thank you, Mr Stephens. We are at 5 o'clock. I do have some questions for you as well. Mr Crosby has covered a lot of them so that will reduce the questions I have, but perhaps we will just take a very quick 10 minute break for the convenience of those present and then we will reconvene, and I will ask my questions of you.

HEARING ADJOURNS: 4.59 PM**HEARING RESUMES: 5.11 PM****(17:11) JUDGE ARMSTRONG TO MR STEPHENS:**

10 Q. So, Mr Stephens. Now, as I mentioned earlier, Mr Crosby has covered a number of issues that I was going to address with you. I am going to have to recover some of that just because it provides context for some additional questions I was wanting to put to you on those issues.

A. Yes, of course.

15 Q. So bear with me on that. So, just going through, and I am very much looking at the broad picture in terms of the Crown position, but we have our Stage One Report where we recommended that the Crown fund all reasonable costs, and we then have the changes to the settings in 2023 where the Crown attempted to do that. Following those settings being implemented, we know that the costs escalated, it created the cost pressure that you've referred to in your submissions. But I do note in your submission and in the Crown evidence you have said that the Crown doesn't say that the lawyers' costs were unreasonable.

20 A. That's not – no. That is not the way that is put in the evidence of in the submissions.

25 Q. Yes.

A. What is said is that they were unexpected.

30 Q. Yes. And so, we have the increased volume of hearings, the resulting increase in costs, and also some gaps in the, what was at that time the existing funding policy that saw the forecast of costs exceed the appropriation for the 2024/2025 financial year.

A. Mhm.

Q. We then have the joint ministers who took a proposal to Cabinet to seek extra funding for that 2024/2025 financial year, and that was the additional \$19 million, and that was declined. And you have already indicated in response to Mr Crosby that we don't have evidence of Cabinet's reasons for that decision, although you agreed with Mr Crosby that the inference that can be drawn is that it was a fiscal decision.

A. Mmm.

Q. Okay. So, what I would like to explore with you now is one of the overall submissions that you have made is that setting that appropriation was part of the Crown undertaking a balancing exercise, and as you've indicated and you referred to one of the State-owned enterprises cases where the Crown owes obligations to Māori but it also owes obligations to the wider public, and at times where those may conflict it may have to weigh or balance those interests when making decisions. And I agree with you that the Crown has to be prudent with the management of public funds, I don't think there's any dispute about that. But in this case, not only do we not have evidence of reasons behind the decision to approve the additional funding, we don't have any evidence of that balancing exercise being carried out either, do we. And if I just give you an example, we don't have evidence of Cabinet saying this is the fiscal impact of approving the addition \$19 million, this is the impact on access to justice of not approving the \$19 million, and we are weighing these competing interests for these reasons in coming to our decision.

A. We don't have any direct evidence of Cabinet's thinking or reasons. All we're left with, because of the way Cabinet approaches matters, is what we can deduce from inferences about what Cabinet did.

Q. Yes.

A. In the context, yes.

Q. Isn't that the assessment required though when the Crown is undertaking a legitimate balancing exercise?

A. So, yes. Yes, the Crown makes an assessment, and it is carrying out the type of exercise that your Honour has talked about. What I suppose can be said is there is no direct evidence of that exercise, but clearly there

was a discussion at Cabinet with information about the Scheme. There's the Cabinet Paper that's in front of Cabinet. And so, the material is there in front of Cabinet in terms of what was being considered and discussed. What we don't have is direct evidence of the assessment in the same way

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that we might do, for example, of the reasons judgement was delivered by Tribunal or Court. We don't have that. So, there is no direct evidence of that type of exercise being carried out. But there is material put before Cabinet and clearly it's discussed at Cabinet, and the decision follows. But yes, we're left drawing inferences about why Cabinet did what it did.

10

Q. Just on that in terms of drawing inferences, because as I said earlier you agreed with Mr Crosby that the inference that can be drawn is it was a fiscal decision, and I am just wanting to try and look at the evidence we do have and what inference we can draw. So, we know there was advice that the \$12 million appropriation for 2024-2025 wasn't enough to meet projected costs.

15

A. Yes. Well, we know for 24/25?

Q. Yes.

A. Projected costs on the basis of Scheme settings as they stood at 1 March '23, yes.

20

Q. Yes. And the additional funding of \$19 million was to cover those projected additional costs?

A. Yes, assuming that the Scheme settings stay –

Q. Remain the same, yes. So, if we add those, so, the 12 plus 19 is 31.

A. Yes.

25

Q. Approving 12 million, and if my maths is correct, there is a 38% of actual projected costs based on the Scheme settings at that time, is that an inference that can be drawn from those numbers?

A. So, I think the numbers – yes, so the numbers are 17.3 million for 24/25 and 19 million for 25/26. So, it's a total of 36 million over two years.

30

Q. I thought the 17 million was for the 23/24 year and 19 million –

A. Yes, these numbers are – yes, correct. And it's just a typo in the paper, yes, correct.

Q. Okay. And so, if those maths are right, does that mean that by refusing to increase the appropriation, keeping it at 12 million, it was a contribution of 38% of actual projected costs based on the 2023 settings?

5 A. I think your maths is right. But in essence, there's an appropriation of 12-13 million. No emergency funding is provided for the 24/25 year. That's right.

Q. Yes.

A. And then the percentages are the maths.

10 Q. Okay. So we then have that appropriation, and as you've indicated Te Arawhiti now Te Tari Whakataua has to keep within that appropriation. And so, the changes to the settings to do that were to align the lawyers rates to legal aid rates, budgeted workplans and capping the funding.

A. Yes. But important to note that two of those were in train anyway.

Q. Yes.

15 A. So there's consultation. What happened was they were accelerated. So, the plan was to do that by 1 January '25 subject to consultation and not caps.

Q. Yes.

20 A. And then given Cabinet's decision, that's accelerated to 1 July '24, and caps were introduced too, yes.

25 Q. So, just going through each of those. So, budgeted workplan, that's not necessarily a bad thing. As I've indicated, the Crown has to be responsible with public funds, and it's similar to a process for seeking estimates and amendments to grant under the Legal Aid Scheme. Now, we've heard evidence about issues with the way that has been implemented. But, and you weren't here when we went through the Stage One and Stage Two inquiry earlier, but we did refer to that and suggested that the Crown consider that in our Stage One Report all the way back in 2020. So, we indicated at the time that it would provide both
30 certainty to the Crown for Crown expenditure and also certainty for claimants because their costs could be approved before they were incurred. So that part of the plan to some extent is consistent with what we had recommended earlier. We then come to aligning with legal aid rates, and we've heard from some of the counsel involved that the legal

aid rates don't reflect market rates. That probably goes to the wider issue of the legal aid scheme itself. But again in Stage One we did suggest to the Crown to consider using the Legal Aid Scheme as a fore funding under the MACA regime, and that would have involved applying the legal aid rates. And you've also referred to other parts of the Legal Aid Scheme that weren't adopted here, so it's not means tested and don't have to demonstrate an arguable case, and you will see that those are steps that are required for civil legal aid.

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A. Yes.

10

Q. But then not required for legal aid in the Waitangi Tribunal?

A. Yes.

Q. And also, those two tests go to eligibility, not the level of funding once legal aid is approved.

A. Yes.

15

Q. Because one of the significant factors here is the caps.

A. Yes.

Q. And are you able to assist, is there a funding cap for civil legal aid?

A. Yes – oh, so I'm not completely sure off the top of my head, but yes in relation to particular hearings there are – I should give you a proper answer rather than one off the...

20

Q. Because I think I'm aware there are caps for Criminal legal aid –

A. Yes.

Q. – where up to a certain standard where there are funding caps for certain steps, but civil legal aid I understood was time spent at the hourly rate and it's managed through the estimates and amendments rather than a specific funding cap.

25

A. So, the last time I did a civil legal aid case was a couple of years ago. I recall there being caps, but I would prefer to give you a proper answer and supply that information to you.

30

Q. Okay.

A. You may be right that it was actually the estimating process that functioned as a cap, and if it's helpful, I mean, the scheme is what it is.

Q. Yes.

A. So, perhaps after, as a follow-up matter after the hearing, can put in a memorandum with chapter and verse on how civil legal aid works.

Q. I think that would be helpful. Now, just on that also, if I could just ask you to go to paragraph 106 of your submission, and this may be something that you, well, you may be able to answer it now. So, paragraph 106 you have made the submission there that by way of comparison, the civil legal aid system is built on the principle that it involves a contribution to litigant's costs. Are you aware of what that statement is based on? Because, again, I wasn't aware that it was a contribution, I thought it was – there was a fixed hourly rate managed through an estimate and amendment to grant system.

A. Yes. I think it is a – well, the way the Scheme works is that costs are funded up front and then have to be repaid depending on success, and cost recovery and indeed out of any monetary sum that's recovered. So, but it doesn't – certainly it doesn't function – again, I can answer this properly, but it doesn't function as Sche – that is not to say that litigants pay some money and legal aid pays –

Q. Yes, it's not based on a percentage of cost.

A. It's not a top up – That's right, yes, that's right.

Q. Okay. So, coming then to the cap, and Mr Kent, as you indicated, clarified that the way the caps were set is they took the appropriation, deducted expected activity costs, and then effectively divided the rest equally between applicant groups based on the type of hearing that they had.

A. Yes.

Q. It wasn't based on an assessment of actual costs and a reasonable contribution to those costs.

A. No, it is as he described, and it's no more complex than that.

Q. Okay. And because you have also made the submission that in this inquiry we need to consider the context that led to the financial pressures, and I agree with that, but I also think we have to consider it in the wider context of the MACA regime as a whole. And so, I was just going to put some propositions to you and invite your comment, and a lot of these issues we already considered in our Stage Two Report on the Act and the operation of the Act itself. But I will put them to you so that you can

comment if you would like. So, the Crown chose to implement the MACA regime by legislating the recognition of customary rights in the takutai moana.

A. It did. Again, the context for that obviously is the Ngāti Apa decision.

5 Q. Yes.

A. And where the Court finds that Māori customary title had never been extinguished and so was something that can be established through the Māori Land Court.

Q. Yes.

10 A. And so, that is the counterfactual that if one claimed Māori customary title one would have to establish that through the Māori Land Court process.

Q. Yes.

A. And instead, the Crown for all of the reasons that it did establishes a different regime –

15 Q. Yes.

A. – that has, you know, has the trade-offs that the Crown is endeavouring to make.

Q. Yes.

20 A. So, that is the Crown Scheme to that extent. But the counterfactual is not – I think this is an important point respectfully. Counterfactual is not Māori customary title is clear and obvious to everybody and recognised. There would also have been a process of establishing that in the context of the Māori Land Court.

Q. Yes. But we are dealing with a Crown Scheme under the MACA Act.

25 A. Yes.

Q. And as part of that Scheme, the Crown included a statutory deadline which meant that Māori had to apply before that deadline if they wanted to seek recognition of their rights.

A. True.

30 Q. And the Act says that the rights can't be recognised in any other way, so if you don't apply before the deadline you are out effectively.

A. Yes.

Q. That resulted in a flood of applications immediately prior to the deadline. And we've heard in all of these inquiries about delays in the Crown

engagement pathway, but in the High Court pathway the High Court has progressed hearing and determining the applications perhaps at a pace faster than the Crown expected, but that is just the High Court fulfilling its judicial function in terms of determining and considering the applications before it.

5

A. Yes. Once the – I’m not sure I can comment on whether that is faster than the Crown expected or not, I’m not sure. But certainly, the Court once ceased will manage the applications as the Court sees fit. I mean, one would expect the Court to be sensitive to readiness.

10

Q. Yes.

A. But at the same time it’s got applications, and it wants to manage them.

Q. Recognition of customary rights on its own is a difficult and complex issue?

A. It certainly can be depending on where you are in the country.

15

Q. Yes. It can involve complex questions of fact and law.

A. So, yes, I mean depending on the number of – depending on where you are in the country, the questions of fact can be, you know, you can have a number of different applicant groups, and then, yes, well the law is not – I mean, it’s gone to Supreme Court obviously in *Edwards* – not easy.

20

Q. And the MACA Act itself is a complex piece of legislation.

A. I mean, in a sense I agree, I certainly agree that the test and understanding what the test requires can prove to be complicated depending on where you are, yes.

25

Q. And as part of establishing the Scheme the Crown chose or decided that only the High Court could determine these applications.

A. The Crown did – that is the legislation. Your Honour will know that, I mean, that the 2011 piece of legislation is the consequence obviously of the Māori response and community response to the Foreshore and Seabed Act, and then a compromise that is supported by Te Pāti Māori, and part of that involves, I think under the Foreshore and Seabed Act it was essentially an administrative process which was unacceptable to Māori who wanted it to be a court process, and I think that is part of the, you know, backdrop to it all. I mean, it’s the Crown’s legislation, the Crown decided to have the High Court, have the

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process, I agree with that. I think the reasons behind that are complicated.

Q. Yes. Because participating in the High Court can be expensive anyway, particularly if it involves complex questions of fact and law.

5 A. It is a process that is more formal and structured than other forums, that's true.

Q. Because when I look in that context, it could be said that the Crown has created this regime, it's an expensive regime. That expense is not the fault of the applicants participating in the proceeding. The Crown doesn't
10 say that the costs from the lawyers are unreasonable, and the Crown has now capped the funding because the costs of the regime that it created are too high.

A. Well, I suppose the Crown perspective is that – I think the submission is that the Crown had an appropriation that had been determined for a
15 number of years that appeared sufficient to be able to fund the Scheme according to the 1 March '23 settings on an actual and reasonable basis, and that's the \$12-13 million. And on the basis of the Crown's modelling at the time, the Crown expected that the appropriation would be sufficient to meet actual and reasonable costs, and that also coincided with the
20 Tribunal's recommendations. And it transpires that that appropriation at that level of money is not sufficient to meet actual and reasonable costs based on the amounts and the guidelines and the expectations of the Crown in terms of what would be, you know, what claims ultimately would be made on the Scheme, and so the Crown subsequently has taken steps
25 to amend the settings so that, well, one, budgeted workplans to introduce and discipline, and two, to have civil legal aid rates as well, and that was what was contemplated in March. And then you have the issue of, for this year anyway, caps being introduced as well because the appropriation is insufficient, even with those other settings, and officials
30 had directed to meet appropriation. So – but the submission is made by the Crown that it is not – that the Treaty principles do not necessarily demand that the Crown fully fund the cost of participating in the regime, and that's the Crown's submission, and I know that that differs from the Tribunal's conclusions in the Stage One Report. And can I also say, the

context is different as well in terms of the drive towards fiscal discipline and the perspective that that's needed, you know, that's the current Government's view I think is the other submission to be made on behalf of the Crown that there is an appropriation of \$12 million and there's a
5 desire to return to it. And how that's achieved is budgets and workplans which I, you know, my submission can be put to one side, I think that is a sensible and reasonable step to take, and then the question is really should the Crown be funding beyond civil legal aid rates, and then for our, you know, whether the caps are an appropriate response. But the Crown
10 doesn't accept that the Crown must necessarily fully fund according to what lawyers wish to charge, the costs of participating on the Scheme for applicants.

Q. But it must act reasonably and in good faith.

A. Yes.

15 Q. And here we have a Crown regime where Māori have applied in good faith because they are required to do so because of the statutory deadline. They are participating in that proceeding in good faith?

A. Yes.

20 Q. The Crown is not saying that their costs are unreasonable, it's just saying overall the costs are too high and therefore we are going to cap the funding without any assessment of the impact that that is going to have on those groups who have been participating in good faith?

A. Yes. So there's two things I suppose in that. The first is the evidence in
25 the submission is not made in this inquiry that the legal costs were unreasonable, just that they were unexpected, so that is the Crown position. And nonetheless though, given that the Crown now sees the level of cost that it's potentially up for, it wishes to manage the Scheme so that the costs that the Crown will meet are brought down to civil legal aid rates. That's the first point. And what the Crown had intended to do
30 was introduce that over time so that it was – and consult on it I suppose so that there was time available for applicants to be able to manage that particular policy choice. And then the second question is, you know, the haste at which they were introduced. And so – and that's the fact that they were introduced quickly on 1 July '24 because the funding was not

made available to meet actual and reasonable costs for 24/25, which is a separate question.

Q. Thank you, Mr Stephens. Thank you for the submissions that you have presented. I do appreciate the time that you have put into that and also
5 the time that you have offered to answer the questions from both Mr Crosby and myself. Just the last you have indicated that you may be able to provide something further on the civil legal aid scheme. Do you know how long you might need to provide that?

A. I will say three days.

10 Q. Three days?

A. I think that would be enough. By the end of this week certainly.

Q. Okay.

JUDGE ARMSTRONG:

Because one of the other issues that I was also going to raise, perhaps now is
15 the appropriate time, is there may need to be a response to that. But there is also the question of submissions in reply. So, initially, those were meant to be filed on Friday. The Crown submission came in late for good reason, and I indicated that counsel would be able to do that orally today. I don't think we are going to be able to do that today, so I was going to suggest that there be also
20 a date for the filing of any further submissions in reply. I know we have received some. That will also give counsel the opportunity to respond to what the Crown is going to say about the Civil Legal Aid Scheme.

LEGAL DISCUSSION – TIMETABLING/ FILING SUBMISSIONS (17:40:28)

JUDGE ARMSTRONG:

25 Ka nui te mihi ki a koutou katoa. I know we have had reduced numbers here today, but I am also aware that that does not reflect in the importance of this issue. I thank you all for your assistance.

KARAKIA WHAKAMUTUNGA (MIKAERE PAKI)

HEARING CONCLUDES: 5.43 PM

Notes of Evidence Legend

National Transcription Service

Indicator	Explanation
Long dash –	<p>Indicates interruption:</p> <p>Q. I think you were – <i>(Interrupted by A.)</i></p> <p>A. I was – <i>(Interrupted by Q.)</i></p> <p>Q. – just saying that – <i>(First dash indicates continuation of counsel's question.)</i></p> <p>A. – about to say <i>(First dash indicates continuation of witness' answer.)</i></p> <p>This format could also indicate talking over by one or both parties.</p>
Long dash (within text)	<p>Long dash within text indicates a change of direction, either in Q or A:</p> <p>Q. Did you use the same tools – well first, did you see him in the car?</p> <p>A. I saw him through – I went over to the window and noticed him.</p>
Long dash (part spoken word)	<p>Long dash can indicate a part spoken word by witness:</p> <p>A. Yes I definitely saw a blu – red car go past.</p>
Ellipses ... (in evidence)	<p>Indicates speaker has trailed off:</p> <p>A. I suppose I was just... <i>(Generally witness has trailed off during the sentence and does not finish.)</i></p> <p>Q. Okay well let's go back to the 11th.</p>
Ellipses ... (in reading of briefs)	<p>Indicates the witness has been asked to pause in the reading of the brief:</p> <p>A. "...went back home."</p> <p>The resumption of reading is noted by the next three words, with the ellipses repeated to signify reading continues until the end of the brief when the last three words are noted.</p> <p>A. "At the time...called me over."</p>
Bold text (in evidence)	<p>If an interpreter is present and answering for a witness, text in bold refers on all occasions to the interpreter speaking:</p> <p>Q. How many were in the car?</p> <p>A. There were six.</p> <p>Q. So six altogether?</p> <p>A. Yes six – no only five – sorry, only five. <i>(Interpreter speaking – witness speaking – interpreter speaking.)</i></p>
Bold text in square brackets (in evidence)	<p>If an interpreter is present and answering for a witness, to distinguish between the interpreter's translation and the interpreter's "aside" comments, bold text is contained within square brackets:</p> <p>Q. So you say you were having an argument?</p> <p>A. Not argue, I think it is negotiation, ah, re – sorry. Negotiation, bartering. [I think that's what he meant] Yeah not argue.</p>