

IN THE WAITANGI TRIBUNAL

**KEI MUA I TE ROOPU WHAKAMANA
I TE TIRITI O WAITANGI**

**WAI 2764
WAI 2660**

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the Marine and Coastal Area (Takutai
Moana) Act 2011 Inquiry

AND

IN THE MATTER OF a claim by the Ngātiwai Trust Board
on behalf of Ngātiwai whānau, marae
and hapū

BRIEF OF EVIDENCE OF TANIA MCPHERSON

Dated: 17 January 2019

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MAY IT PLEASE THE TRIBUNAL

- 1 My name is Tania McPherson. I am employed by the Ngātiwai Trust Board (the “**Board**”) in the position of Treaty Claims Manager. I have held this role since early 2013. I am authorised by the Board to file this Brief of Evidence in support of its claim on behalf of Ngātiwai whanau, marae and hapū.
- 2 I am of Ngātiwai descent through my mother Abigail Maria Schofield (nee Mackie) and her parents Charlie Te Ngore Mackie and Ivy Mackie (nee Reti). My principal hapū is Te Whānau ā Rangiwhakaahu located at Matapōuri, where my principal marae is also located. I also whakapapa to Te Kapotai, Te Aki Tai, Ngāti Toki ki te Moana and Ngāti Rehua. I hold a Bachelor of Science degree and the equivalent of an Honours degree from the University of Auckland.
- 3 I have worked in the area of Māori rights and interests for approximately 20 years in various roles, with a particular interest in Maori fisheries and marine policy development.
- 4 In my role as Treaty Claims Manager I was instructed to organise and file applications for Customary Marine Title and Protected Customary Rights under the Marine and Coastal Area (Takutai Moana) Act 2011 (the “**MACA Act**”) in February 2017. In addition to the work I have undertaken on behalf of the Board in relation to the MACA Act Inquiry I also manage the Board’s work in terms of:
 - a) the MACA Act applications in both the High Court process and the Crown engagement process, and
 - b) the Ngātiwai mandate for settlement negotiations and overlapping claims.¹

Background

- 5 Ngātiwai was forced to make applications by the 3 April 2017 deadline as specified in sections 95 and 100 of the MACA Act to protect Ngātiwai customary rights from being extinguished under the Act.
- 6 We filed our application in the High Court on 31 March 2017. Our application number is CIV-2017-485-283. It is currently included in groups C, D and E for case management purposes.
- 7 Concurrently we also filed an application to engage directly with the Crown for the recognition of our customary marine title and

¹ WAI 2561 Ngātiwai Mandate Inquiry; WAI 2666 the Hauraki Collective Deed of Settlement (Ngātiwai) claim

protected customary rights. In that process our number is MAC-01-01-131.

- 8 In my brief of evidence I will:
- a) set out in chronological order our experience with the procedural arrangements and resources provided by the Crown in relation to the operation of the MACA Act²; and
 - b) address the issues in the Waitangi Tribunal's Statement of Issues for stage 1 of this inquiry³.
- 9 I have read the brief of evidence of the Board Chief Executive Officer Kristan John MacDonald and support its contents which addresses question 12 (e) of the Waitangi Tribunal's Statement of Issues.

NGĀTIWAI TRUST BOARD EXPERIENCE

Funding Policy Development and Reimbursement Information

- 10 I first became aware that the Crown had been working on a proposed funding model for the MACA Act in October 2013. By this time the consultation period had already closed and the Crown were not seeking any further submissions. I was advised that the Crown were looking to finalise and publish the model. **Attached** and at pages **TM-01 to TM-05** is a copy of an e-mail I received from the Crown to this effect with a copy of the funding information.
- 11 To my knowledge the Board were never informed of any consultation hui to discuss the funding model described above or provided with any discussion documents to inform submissions on the funding model.
- 12 On 23 December 2015, the Board received a letter from the Office of Treaty Settlements ("**OTS**") advising that the closing date for applications to be filed under the MACA Act was 3 April 2017. It included a copy of the booklet "Recognising Customary Rights" ("the Blue Book")⁴ dated August 2014.
- 13 The only information about funding was at page 22 of this booklet with a brief two line statement "The government will contribute to the costs of engagement with the Crown or the High Court. Contact the Marine and Coastal Area team for more information". **Attached** at pages **TM-06 to TM-023** is a copy of that letter and the booklet.

² Wai 2660, 1.4.001, Tribunal Statement of Issues, 3 August 2018, question 9.

³ Wai 2660, 1.4.001, Tribunal Statement of Issues, 3 August 2018 questions 10-12

⁴ "Recognising customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011", Ministry of Justice (August 2014), available at <https://www.justice.govt.nz/assets/Documents/Publications/Blue-Book.pdf>

- 14 In this letter there was also a link to the Ministry of Justice website and two YouTube clips⁵. I watched the YouTube clips and there was brief mention of funding being made available “after the Minister decides to engage” or “after application to the High Court is publically notified” in the second YouTube clip called “Making an application under the MACA Act”⁶.
- 15 On 1 April 2016, the Board received a further letter from OTS dated 30 March 2016 with a reminder that the 3 April 2017 deadline was approaching and that a series of hui had been planned to take place in various locations. The hui were to provide an opportunity to gain an understanding of the MACA Act but again there was no specific information about the funding or how to access any funding. **Attached** at page numbers **TM-024 to TM-025** is a copy of that letter.
- 16 On 10 October 2016, again the Board received a letter from OTS dated 7 October 2016 with a reminder that the 3 April 2017 deadline was approaching. This letter included links to the same YouTube clips and the Ministry of Justice MACA homepage – again with no specific information on funding. **Attached** at page **TM-026** is a copy of that letter.
- 17 In February 2017, after I had been instructed to organise and file applications under the MACA Act on behalf of the Board, I contacted OTS to find out what information needed to be provided and what funding was available to assist applicants.
- 18 In response I received an e-mail from OTS dated 27 February 2017 with:
- a) an application template dated July 2015;
 - b) Guidelines for Funding: Applicant groups in the High Court dated 20 July 2016, with:
 - i. an Appendix 1: “Funding Matrix for applicant groups in the High Court”, and
 - ii. an Appendix 2: “Sample letter from applicant seeking reimbursement” version 20 September 2016, and
 - iii. an Appendix 3 “Summary of Costs form” version dated 20 September 2016;
 - c) Guidelines for Funding: Applicant groups engaged with the Crown”, with:

⁵ Ministry of Justice, “Introduction to the MACA Act” (2015) and “Making an application under the MACA Act” (2016) available from www.youtube.com/user/nzministryofjustice

⁶ Ministry of Justice, “Making an application under the MACA Act” (2016) available from www.youtube.com/user/nzministryofjustice at or around 8minutes 34seconds

- i. an Appendix 1: “Funding Matrix for applicant groups engaged with the Crown”, and
- ii. an Appendix 2: “Sample letter from applicant seeking reimbursement” version 4 October 2016, and
- iii. an Appendix 3: “Summary of Costs form” version dated 4 October 2016.

19 **Attached** at pages **TM-027 to TM-043** is a copy of this e-mail exchange and the information that I received.

Ngātiwai Approach to MACA Act Applications

20 Up until February 2017 the Board had not paid much attention to the MACA Act application process. This was in large part due to its sceptic view of the legislation and a real concern that participating in the MACA Act processes would likely lead to:

- a) diminishing our customary rights in the takutai moana,
- b) conflict within Ngātiwai, and
- c) conflict between Ngātiwai and other whanau, hapū and iwi groups.

21 However, on 22 December 2016, Justice Mallon issued her decision⁷ in relation to the first ever MACA Act application in the High Court. Our lawyer advised us that while the decision had not addressed the issue of who should be the holders of customary rights awarded under the MACA Act, a leading case from Canada called *Delgamuukw v British Columbia* upheld shared exclusivity for holders of customary rights. This was obviously of interest to the Board given the likelihood of many overlapping applications being filed in the early 2017 as the MACA Act deadline approached.

22 On 22 February 2017, we held a hui with some of our members and generally agreed to take the following approach to the MACA Act;

- a) The Board would support Ngātiwai MACA Act applicants filing their own claims particularly where they have land adjacent to the takutai moana.
- b) The Board would file “blanket” Ngātiwai-wide applications to protect Ngātiwai customary rights from being extinguished in the Ngātiwai rohe.

⁷ Re Tipene [2016] NZHC 2990

- c) The Board would participate as an interested party in the Waitangi Tribunal urgent hearing applications process related to the MACA Act (which became this current WAI 2660 Marine and Coastal Area (Takutai Moana) Act Inquiry).
- d) The Board would hold Hui-a-Iwi to inform Ngātiwai members of the MACA deadline and details of the MACA Act.

23 On 4 March 2017, the Board held a Hui-a-iwi at Otetao-Reti Marae in Whangaruru to provide information about the MACA Act deadline and other details. One of our members, Winston McCarthy volunteered to deliver the presentation and it was explained why the Board was preparing blanket applications. **Attached** at pages **TM-044 to TM-050** is a copy of the notes from this Hui-ā-Iwi published on the Board website.⁸

Crown Engagement

24 On 28 February 2017, I contacted OTS and requested written confirmation of the Crown's views on the Board making:

- a) applications under the MACA Act, and
- b) participating as an interested party in the MACA Act urgent hearings process,
- c) any synergies between direct Treaty settlement negotiations and the engagement process as opposed to the High Court process.

25 On 3 March 2017 I received written confirmation from OTS with their views on:

- a) Participating in the Waitangi Tribunal MACA Act urgent hearings process – OTS advised that whether an applicant had also applied to the Waitangi Tribunal was not a relevant consideration for the Minister in deciding whether to engage with a MACA Act applicant in direct negotiations. OTS also noted that the MACA team welcomed applications and decisions made by the Waitangi Tribunal relating to the MACA Act as such applications and decisions added to the analytical knowledge base of the MACA team.
- b) Crown engagement or High Court pathway – OTS advised that the Crown engagement process allowed an applicant group access to analysts and reports from the MACA team as part of a preliminary appraisal, as opposed to the High Court process which did not provide applicants with this support.

⁸ Ngātiwai Trust Board, "Marine and Coastal Area (Takutai Moana) Act 2011, (4 March 2017) Hui-ā-Iwi, Otetao Reti Marae, available at <http://www.ngatiwai.iwi.nz/resources.html>

OTS also noted it was “relatively easy to work with the MACA team and then transfer your application to the High Court”.

- 26 In this e-mail exchange OTS also provided me with a copy of the policy for the “Crown approach to decision to enter Terms of Engagement under section 95(3) of the MACA” and the “MACA process diagram master”. **Attached** at pages **TM-051 to TM-055** is a copy of the e-mail exchange and information that I received.
- 27 After filing our application for direct engagement with the Crown⁹, the Board received an acknowledgement letter from Minister Finlayson dated 6 April 2017. **Attached** at page **TM-056** is a copy of that letter.
- 28 There has been no further contact with the Crown in relation to the Board’s application for the Crown engagement since April 2017 and the Board has received no funding for this process.

Making an Application and Fee Waiver

- 29 On 16 March 2017, I received an e-mail from OTS again advising of the deadline for making applications under the MACA Act, providing a link to the MACA Act, suggesting that applications are made for both the High Court and the direct engagement pathways and suggesting that the Board ask for the filing fee of \$540 be waived on grounds of hardship. A template for the High Court application process and application form was attached to this e-mail. **Attached** at pages **TM-057 to TM-070** is a copy of that e-mail and the attachments.
- 30 On 31 March 2017, the Board filed its applications in both the Crown engagement and High Court processes. The Board paid \$540 to file its application in the High Court.
- 31 **Attached** at pages **TM-071 to TM-094** is a copy of the NTB MACA Act application to the High Court (CIV-2017-485-283).
- 32 **Attached** at pages **TM-095 to TM-099** is a copy of the NTB application for direct engagement with the Crown under the MACA Act (MAC-01-01-131).

Public Notice Requirements and Costs

- 33 On 13 April 2017, I received an e-mail from OTS advising MACA Act applicants:
 - a) are required to file a public notice within 20 working days after filing the application,

⁹ MAC-01-01-131

- b) outlining information requirements for public notices,
- c) advising a budget of \$1000 per public notice had been approved by Ministers, and
- d) advising that once a copy of the public notice is provided to OTS it can take a month or more before a funding “offer” will be made to applicants.

Attached at pages **TM-0100 to TM-0101** is a copy of that e-mail.

- 34 On 19 April 2017, the Board received an urgent request from several Ngātiwai High Court MACA Act applicants requesting assistance with paying their High Court filing fees and public notice costs which were to be reimbursed by the OTS funding stream. **Attached** at pages **TM-0102 to TM-0104** is a copy of that e-mail request.
- 35 On 26 April 2017, the Board’s public notice of its High Court application was published in the New Zealand Herald and the Northern Advocate. **Attached** at page **TM-0105** is a copy of these public notices. Two major daily newspapers were used to ensure that the public notice received widespread coverage throughout the Ngātiwai rohe.
- 36 The public notice in the Northern Advocate cost \$517.96. **Attached** at pages **TM-0106 to TM-0109** is a copy of this invoice.
- 37 The public notice in the New Zealand Herald cost \$889.43. **Attached** at pages **TM-0110 to TM-0112** is a copy of this invoice.
- 38 The Board spent \$1,407.39 in total on public notices for our MACA Act High Court applications.

Funding Guidelines for Groups Opposing an Application

- 39 On 9 May 2017, I contacted OTS about funding to deal with overlapping applications as there appeared to be a large number of overlapping applicants that the Board needed to identify and file Notices of Appearances in relation to these applications to protect Ngātiwai interests in the High Court process. Following that I received an e-mail from OTS with “Guidelines for Funding Groups Opposing an Application in the High Court”. **Attached** at pages **TM-0113 to TM-0120** is a copy of that e-mail and attachments.
- 40 I should say at this point that the Board was not in a position to determine if it was in opposition to any particular overlapping application. Rather it’s position on advice from our lawyer was to file Notice of Appearance’s in relation to all overlapping applications to preserve the Board’s ability to have a say about those applications at a later date. The Board had already established that

it was in support of all Ngātiwai whanau, hapū and marae applications *in principle*, with the holders of any rights won under the MACA Act to be addressed at a later date.

Overlapping Applicants - Notice of Appearance Filing Fee Costs

- 41 On 17 May 2017, I requested information from OTS about MACA applications filed in the High Court as by this time I was working with our lawyer to identify all overlapping applications so we could file Notice of Appearances with the High Court.
- 42 On 18 May 2017, I received an e-mail response and an attached spreadsheet. That e-mail noted that the High Court were keeping the list to themselves at that time, that the High Court was short staffed and that OTS would identify applicant groups in our area and send me copies of the advertisements.
- 43 **Attached** at pages **TM-0121 to TM-0123** is a copy of that e-mail exchange and an attachment with a preliminary list of MACA applications in the Ngātiwai rohe.
- 44 On 9 June 2017, I received a further e-mail from OTS with the same attachment showing MACA applications sent to me on 18 May 2017. This e-mail noted that there was no accuracy to the applications. **Attached** at pages **TM-0124 to TM-0125** is a copy of that e-mail.
- 45 Fortunately for the Board during May 2017 one of our members Ngaio McGee had taken it upon herself to go to the public library and collect public notices about MACA applications. Using the public notices that she provided we were then able to go through each of them and identify where there were overlaps with the Ngātiwai application. Once this task was completed we were then in a position to request copies of the applications from the Wellington High Court.
- 46 **Attached** and marked document **TM-0126 to TM-0144** are examples of the e-mail exchanges I had with the High Court when we were trying to identify the overlapping applications in the Ngātiwai rohe moana.
- 47 In total the cost for filing 53 Notice of Appearances for overlapping applications at \$110 each came to \$5,830 for the Ministry of Justice filing fees as per the invoices below:
 - a) Invoice 3827 dated 31 May 2017 = \$3,960.00 Ministry of Justice Filing Fees **Attached** at pages **TM-0145 to TM-0146**;
 - b) Invoice 3890 dated 31 July 2017 = \$110.00 Ministry of Justice Filing Fee **Attached** at pages **TM-0147 to TM-148**;

- c) Invoice 4104 dated 31 March 2018 = \$1,760.00 Ministry of Justice Filing Fee **Attached** at pages **TM-0149 to TM-0150**
- 48 In addition, our lawyer's time for working with me on identifying overlapping applicants and preparing the Notice of Appearance's cost \$6,210 in legal fees as per the invoices below:
- a) Invoice 3827 dated 31 March 2018 = \$4,600 Legal Fees (refer to pages **TM-0145 to TM-0146**);
 - b) Invoice 4104 dated 31 March 2018 = \$1,610.00 Legal Fees (refer to pages **TM-0149 to TM-0150**).

Request for Reimbursement of Costs

- 49 On 18 August 2017, I submitted the Board's first request for reimbursement for our MACA Act High Court application to OTS to the value of \$59,854.91. This was made up of the cost to the Board totalling \$56,599.48 and the cost of paying for some of our member's public notices and filing fees totalling \$3,255.43.
- 50 By this point the request was made for the combined Pre-notification and Notification milestones. **Attached** at pages **TM-0151 to TM-0158** is a copy of the cover letter and summary of costs described above that I sent to OTS in accordance with its funding guidelines dated 20 July 2016.
- 51 On 29 August 2017, the Board received an e-mail from OTS setting out additional information required to assess our funding request including the need to split our funding request into smaller chunks and distinct milestones; and that the funding for our members filing fees and public notices must be processed separately by the applicants. **Attached** at pages **TM-0159 to TM-0161** is a copy of that e-mail.
- 52 On 7 September 2017, I contacted OTS to clarify the funding requirements and correct steps that I needed to take to ensure its criteria were met. From this discussion it became clear to me that I needed to first supply the complexity form and await a result and then request funding once I knew the outcome of the upper limits we could request in each milestone. Upper funding limits are the maximum amount of funding claimable within each milestone.
- 53 Following this I sent a letter to OTS with the Board's self-assessment of complexity form attached. **Attached** at pages **TM-0162 to TM-0163** is a copy of that letter.
- 54 On 26 September 2017, I received an e-mail from OTS with a letter confirming that the Board's MACA Act application had been assessed as very high complexity. The letter further advised that

up to \$316,750 of funding was potentially available subject to proof of this expenditure within certain milestones and expenditure types.

- 55 This letter provided further information about funding, how to request reimbursement and contained two appendices - a complexity assessment completed by OTS and a funding band assessment completed by OTS. **Attached** at pages **TM-0164 to TM-0168** is a copy of that e-mail and attachments.
- 56 On 27 September 2017, I sent three separate funding requests to OTS for reimbursement of:
- a) Pre-Notification Appointment milestone costs for our MACA High Court application totalling \$24,296.63. **Attached** at pages **TM-0169 to TM-0170**,
 - b) Notification milestone costs for our MACA High Court application totalling \$24,040.27. (The actual costs for the Board were \$28,655.67) **Attached** at pages **TM-0171 to TM-0172**, and
 - c) Pre-Hearing and Evidence Gathering milestone costs totalling \$22,295.89. (The actual costs for the Board were \$32,680.48). **Attached** at pages **TM-0173 to TM-0174**.
- 57 I have not made any further funding request to OTS since September 2017.
- 58 The Board received the following payments in November 2017:
- a) \$45,836.63 being reimbursement of:
 - i. \$24,836.63 for the Pre-Notification Appointment milestone,
 - ii. \$21,000 for the Notification milestone (the upper funding limit for this milestone), and
 - b) \$22,295.89 being reimbursement of:
 - i. \$22,295.89 for the Pre-Hearing and Evidence Gathering milestone.
- 59 On 21 November 2017, after receipt of these payments I contacted OTS to request a letter setting out what these two payments were for so we could reconcile these payments for accounting and audit purposes.
- 60 OTS advised on 22 November that they were not providing letters once MACA payments had been made. **Attached** at pages **TM-0175 to TM-0179** is a copy of this email exchange.

- 61 On 1 February 2018, I received an e-mail from OTS advising they intended to release the Board's MACA Act application funding information as part of an OIA request to a third party. It included:
- a) the amount paid to the Board for reimbursement of our MACA High Court milestones and
 - b) a copy of our MACA application complexity assessment completed by OTS.

Attached at pages **TM-0180 to TM-0183** is a copy of that e-mail.

Funding Forum and Revised Guidelines

- 62 On 11 May 2018, OTS sent a panui to our lawyer Justine Inns from Ocean Law advising of a Funding Forum to be held in various locations including Whangarei. I made arrangements to attend the forum in Whangarei and requested additional time to discuss the Board's funding issues and in particular the number of overlapping claims that the Board needed to address. **Attached** at pages **TM-0184 to TM-0187** is a copy of this panui and e-mail exchange.
- 63 On 22 May 2018, OTS meet with myself and our Chief Financial Officer Angela Gill at the Ngātiwai Trust Board premises to discuss funding. They spoke to a power point presentation that they brought along. **Attached** at pages **TM-0188 to TM-0193** is a copy of the power point. After they finished talking to their power point I worked my way through the questions that I had sent to them ahead of the meeting. My hand written notes from this meeting record:
- a) Revised guidelines to be sent out to all applicants/lawyers and posted on the website.
 - b) New requirements to prepare budget – template to be provided.
 - c) Crown engagement process requires mandate before funds can be provided – also more funding available for Crown engagement process because more steps required.
 - d) Rhonda to look at Ngātiwai members' situation relating to filing fees and public notices.
 - e) Funding also available to appeal High Court decisions – contribution only based on actual and reasonable costs.
 - f) Notice of Appearance for overlapping applicants. OTS considering legal fees – fee waiver yet to be determined.
 - g) E-mail best form of contact and checked regularly.

- h) Mark Ormsby looking to work with Pakiri applicants for direct negotiation. Mark notified that the Board have supported all Ngātiwai whanau, hapū and marae applicants in principle.
- 64 I do not recall ever receiving any e-mails from OTS following that meeting about any of the matters that we raised with them. However, I monitored the website and on 26 June 2018 I found and printed off the new funding information. **Attached** at pages **TM-0194 to TM-0215** is a copy of the funding information I found on the Ministry of Justice MACA website.¹⁰
- 65 I prepared a draft budget in July 2018 using the OTS template. **Attached** at page **TM-0215A** is a copy of the draft budget which shows at that point we were overspent in all of the expenditure types within the Notification milestone. Within the Pre-Hearing and Evidence Gathering milestone \$17,295.88 had already been spent on legal costs that had been included in our reimbursement from OTS.
- 66 Since August 2018 we have accumulated an additional \$9,842.14 in legal costs including filing fees bringing the total to \$27,138.02. As the upper funding limit for legal fees for our Pre-Hearing and Evidence Gathering milestone is \$40,000 this leaves only \$12,861.98 remaining for us to continue with our High Court MACA Act Application.

Funding for Resource Consent Issues

- 67 Following discussion with my Chief Executive Officer Kris MacDonald about the funding meeting with OTS he requested that I organise a teleconference with OTS to discuss funding for the increase in resource consent work that had resulted from the Board's MACA application. In an e-mail exchange dated 12 September 2018, OTS confirmed that there was no funding for work related to responding to resource consent issues. **Attached** at pages **TM-0216 to TM-0217** is a copy of the e-mail exchange.

Funding for Case Management Conference

- 68 I do recall but I did not keep a note of the date when I contacted OTS to ask if there was any funding for our lawyer to attend the case management conferences. Our lawyer is based in Nelson so it is an expensive exercise to ask her to attend case management conferences in Whangarei. I did note that there was funding for an Interlocutory hearing (if arising) in the OTS funding criteria. I

¹⁰ Ministry of Justice; "Marine and Coastal Area (Takutai Moana) – Funding Information for Applicants"
<https://www.justice.govt.nz/maori-land-treaty/marine-and-coastal-area-funding/information-for-applicants> downloaded 26 June 2018 and attached at TM-030 (note that from 17 December 2018 this website was migrated to the new Office for Crown-Māori Relations website tearawhiti.govt.nz – the information is no longer available in this form)

wanted to clarify with OTS if this funding would apply to a case management conference. The answer I received from OTS however was no.

- 69 On 25 June 2018, the High Court held its case management conference in Whangarei. I attended this conference along with our acting lawyer Kiri Tahana from Kāhui Legal. While our usual lawyer for MACA High Court application work is Justine Inns from Ocean Law New Zealand in Nelson, Justine arranged for Kiri to represent our interests at this case management conference to reduce costs to the Board as Kiri was already attending on behalf of another client.
- 70 The total cost to the Board for our lawyer Justine Inns to prepare for the case management conference and for Kiri Tahana from Kahui Legal to attend the case management conference including their time at \$1,030.52 and \$954.79 respectively, rental car at \$141.67 and accommodation at \$80 came to \$2,206.98 even though Kiri's cost were shared with her other client. **Attached** at pages **TM-0218 to TM-0223** are invoices showing these costs.

Issues Arising from First Case Management Conference

- 71 The outcomes from the 25 June 2018 High Court case management conference have further cost implications for the Board including:
- a) A further case management conference has been set down for 25 June 2019 in Whangarei. At this conference the Judge has specified that counsel are required to attend hearings at the centre where their client's applications are likely to be heard¹¹.
 - b) The Court's "encouragement" that overlapping applicants engage in genuine discussions to try to resolve overlapping claims. There are currently 53 overlapping applications with the Board's application.
 - c) While the Court has endorsed the concept of a small pool of map makers be appointed and paid for by the Crown¹², no response has been received by the Crown on this suggestion. Mapping support will be essential to clarify where overlaps occur and therefore who to engage with.
 - d) The Court has also identified "Pre-trial Applications" as a further area for which I am not aware of any funding unless this would qualify as an Interlocutory Hearing. To date these matters include:

¹¹ Minute (No. 5) of Collins J [First Case Management Conference] paragraph 82.

¹² Ibid paragraph 30.

- i. A suggestion by Janet Mason of Phoenix Law to address the meaning and scope of “exclusive use” and “occupation”¹³ (see test case below), and
- ii. A Judicial Settlement Conference¹⁴ to resolve outstanding issues in respect of the role of the Attorney-General.

72 **Attached** at pages **TM-0224 to TM-0279** is a copy of Minute (no. 5) of Collins J [First Case Management Conferences] dated 18 July 2018 containing this discussion.

Test Case Proposal

73 On 24 July 2018, the High Court received a Memorandum of Counsel with several attachments from Phoenix Law in relation to a test case proposal. The test case relates to an overlapping application with the Board’s application. It is referred to as the “Ngāpuhi Title Application”. **Attached** at pages **TM-0280 to TM-0296** is a copy of this memorandum and accompanying appendices.

74 On 31 July 2018, Collins J issued a minute referring to the test case proposal and setting a date of 10 August 2018 for affected applicants to respond if they wished to. **Attached** at pages **TM-0297 to TM-0298** is a copy of that minute.

75 On 10 August 2018, our lawyer filed a memorandum of counsel in response to the minute issued by his Honour opposing the proposal for a test case. **Attached** at pages **TM-0299 to TM-0301** is a copy of our response.

76 NTB paid legal fees of \$1178.58 to put its objection to the High Court in relation to the test case. **Attached** at pages **TM-0302 to TM-0305** are copies of these invoices showing these costs.

77 On 3 December 2018, Collins J issued Minute (No 4) relating to the test case. This minute reviewed the progress that had been made on the test case decision making and determined that there would now be an urgent half day fixture in Whangarei or Auckland in the early part of 2019 to address this test case proposal. **Attached** at pages **TM-0306 to TM-0307** is a copy of this minute.

WAITANGI TRIBUNAL STATEMENT OF ISSUES

78 I will now address the issues listed under Question Two in the Waitangi Tribunal’s Statement of Issues for Stage 1 of this inquiry.

¹³ Ibid paragraph 33 to 34.

¹⁴ Ibid paragraph 35 to 36.

79 At the outset I wish to note that the OTS operational funding staff have been professional, helpful and flexible within the scope of their roles. The issues I outline below are a reflection of Crown policies and not individuals.

10. To what extent, if at all, do the High Court process and the Crown engagement process work cohesively? What impact does this have on Māori applicant groups/rights holders?

80 The Crown engagement process and the High Court process do not appear to work together at all. The Board were advised that the Crown engagement process would allow us access to analysts and reports from the MACA team as part of a preliminary appraisal, as opposed to the High Court process which did not provide applicants with this support.

81 However since submitting our application for direct engagement on 31 March 2017 we have only received an acknowledgment of receipt of our application but no further assistance or communication from the Crown. (pages **TM-095 to TM-099** refer).

82 We have had no choice but to proceed with the costly High Court application process which has meant the Board has incurred significant costs in seeking recognition of its customary rights.

11. To what extent, if at all, are the procedural arrangements and resources inconsistent with the Treaty/Te Tiriti?

83 It appears to me that the Crown policy will not provide sufficient resources to enable us to participate fully in this MACA Act High Court application process. The Board has not received any resources to be able to participate in the Crown direct engagement process.

84 The Crown's policy seems to me to be a breach of its duty to actively protect our interests. The shortfalls in the design of this MACA Act application process means we are insufficiently funded to establish, defend or protect our interests.

12. To what extent, if at all, do the procedural arrangements and resources put in place by the Crown prejudicially affect Māori, including in relation to:

a) Funding applications before the High Court and the Crown engagement process

85 Based on our experience to date, although we have been assessed in the highest complexity band under the Crown's funding policy, this funding has been insufficient to cover the necessary costs that we have been exposed to as a result of filing our MACA Act High

Court application. Future costs in this High Court application process look set to increase significantly.

86 I also acknowledge that the Trust Board has been able to be funded – whereas other claimants appear to have struggled to get funding.

87 In summary the following shortfalls of the Board's experience to date stand out:

Notification Milestone

- a) The Board paid \$9,615.40 in project management costs but only \$5,000 was available for refund leaving a shortfall of \$4,615.40,
- b) We paid \$1,407.39 for our public notices in the NZ Herald and Northern Advocate but could only be reimbursed \$1,000 leaving a shortfall of \$407.39,
- c) We paid \$17,092.88 in legal costs but only \$15,000 was available for refund leaving a shortfall of \$2,092.88.

88 After receiving our refund our shortfall amounts to \$7,115.67 within this milestone.

89 In relation to the Pre-hearing and Evidence Gathering Milestone:

- a) Our lawyer's time in working with me to identify overlapping applications and prepare Notice of Appearance's at a cost of \$6,210 (see paragraph 48) are refundable but only within upper limits.

Our lawyer's time to prepare for and attend the first case management conference of \$1,985.31 (see paragraph 69 above) was refundable but only within the upper limits.

- b) Our lawyer's travel and accommodation for attending the case management conference of \$221.67 are not refundable as part of OTS's funding policy.
- c) Our lawyer's time for filing submissions objecting to the test case proposal of \$1,178.58 are refundable but only within the upper limits of OTS's funding policy.

90 In relation to this milestone we have already spent \$27,138.02 (see paragraph 66) leaving only \$12,861.98 of funding remaining.

91 Looking ahead I can see that there will be a lot of uncontrollable costs that we will be exposed to. Those that have been indicated to date following the first case management conference include:

Pre-Hearing and Evidence Gathering Milestone (continued):

- a) A further case management conference on 25 June 2019 where our lawyer will be required to present in Whangarei. I estimate this will cost an additional \$2,500 in legal costs and disbursements based on our experience to date.
 - b) Engagement work with up to 53 overlapping applicants. At a very conservative estimate of \$200 per engagement hui for travel and catering this would amount to \$10,400
 - c) Pre-trial applications (assuming this will require our lawyer to present in person at either Whangarei or Auckland) for:
 - i. The test case estimated at \$2,500
 - ii. Judicial Settlement Conference to resolve outstanding issues in respect of the role of the Attorney-General estimated at \$2,500.
- 92 Based on my very conservative estimate, legal costs alone would amount to \$7,500 leaving only \$5,361.98 remaining within this Pre-Hearing and Evidence Gathering milestone without having advanced our MACA Act High Court application in any way.
- 93 It is clear to me that the Crown has woefully underestimated the number and complexity of MACA applications that would be filed in developing its funding policy. I have read the document provided in the Crown discovery which advised the Minister for Treaty Negotiations in 2011 that there would only be around 22 applications¹⁵. **Attached** at pages **TM-0308 to TM-0314** is a copy of this 3 May 2011 briefing to the Minister for Treaty of Waitangi Negotiations.
- 94 The 7 March 2016 briefing paper to the Minister for Treaty of Waitangi Negotiations and Minister of Finance further advised that there would only be 35 MACA applications from Iwi for direct engagement and 12 High Court applications in FY 2018/19.¹⁶ Clearly the Crown assumed that applications would only be filed by Iwi and not by whanau, hapū or marae. **Attached** at pages **TM-0TMA-0315 to TM-0353** is a copy of this briefing to the Minister.
- 95 The Ministry of Justice's website notes that "To date we have received 385 Crown engagement applications and 202 in the High

¹⁵ 3 May 2011, Marine and Coastal Area (Takutai Moana) Act 2011, Foreshore and Seabed Unit, Ministry of Justice briefing to Minister for Treaty of Waitangi Negotiation, at Crown Discovery CLO.002.0100, at paragraph 13.

¹⁶ 7 March 2016 Revised Funding Model for Marine and Coastal Area (Takutai Moana) Act 2011 briefing from Foreshore and Seabed Unit, Ministry of Justice to Minister for Treaty of Waitangi Negotiations at Crown Discovery CLO.02.0416, at paragraph 38 and Table 3

Court. There are many overlapping applications both to the Crown and in the High Court”¹⁷.

96 In Minute (no. 5) [First Case Management Conferences] at paragraph 20 Collins J noted (refer pages **TM-0224 to TM-0279**).

“Resolving overlapping applications will be a significant challenge in hearing and determining the applications that have been lodged under the Act. Some applications, particularly in the Northland areas of New Zealand, are the subject of significant numbers of overlapping claims.”

97 We have been put to the expense of filing 53 Notices of Appearance because the Crown underestimated the number of MACA Act applications when developing its funding policy and did not provide targeted resourcing for this.

98 It is clear to me that the Crown does not understand our Northland context in relation to intertribal dynamics or customary rights and interests in the takutai moana as they relate to the MACA Act and its implementation.

99 The Crown has suggested that there may be a fee waiver when we met with them on 22 May 2018 (see paragraph 63 (f) above) to discuss funding but nothing has happened to address the large number of overlapping applications that we have had to pay for because the Crown did not anticipate them in their funding policy development.

100 In summary the Crown’s funding policy and resources to date are inadequate. The Crown’s policy does not allow for the number and complexity of overlapping MACA applications. This Crown policy is prejudicial to the Trust Board in that we have to bear costs beyond the inadequate funding limits in a process not of our control or making in order to have a chance of establishing any rights in the takutai moana under the MACA Act.

b) The management of issues concerning group representation and overlapping interests;

101 I cannot see any evidence of the Crown managing group representation and overlapping interests in the Crown engagement process. I am aware that the Crown is engaging with some applicants for direct engagement in the Pakiri area as a result of a meeting we had with OTS staff in May to discuss funding (see

¹⁷ From Monday 17 December 2018 the Ministry of Justice MACA information available at <https://www.justice.govt.nz/maori-land-treaty/marine-and-coastal-area/applications/> - was migrated to the new Te Arawhiti The Office for Crown-Māori Relations website available at is www.tearawhiti.govt.nz

paragraph 63 above). However, there has been no hui organised to discuss these applications between the Board and the applicants.

- 102 The issue of managing overlapping claims was raised with the Crown in the April 2016 targeted consultation which we were not invited to participate in. The Crown only engaged with 9 specific entities (refer TM-049)¹⁸.
- 103 I was alarmed to read the advice given by OTS in their 11 May 2016 briefing to Ministers with regards to overlapping claims.
- 104 The Crown was aware that there would be issues with regards to overlapping interests but does not accept any responsibility for resolving the issues it has created:¹⁹

33. OTS or any other organisation is not required to resolve competing claims under the MACA Act. Neither do we consider it necessary in the short term. If two or more groups use and occupy the same part of the CMCA then the test for customary marine title (CMT) is not met and related rights cannot be recognised.

34. However there is the potential for overlapping groups to develop a collective approach to have their rights recognised in a "combined" application area. Resolving long-standing mandate issues is not the purpose of the MACA Act and is beyond the scope of the appropriation.

- 105 **Attached** at pages **TM-0354 to TM-0372** is a copy of this briefing dated 11 May 2016.
- 106 To me the issues are not about long standing mandate issues. Mandates only exist because of the Crown. What it is about is the imposition of legislation designed to codify our customary rights in the takutai moana into nice tidy boxes and pit us against each other while doing so for the Crown's convenience. The Crown's ideology of exclusive use as perpetuated by the MACA Act is counter to our Te Ao Māori world view and a breach of Treaty principles.
- 107 Our High Court MACA application is currently included in Group C (with 29 other applications), Group D (with 24 other applications) and Group E (with 28 other applications). At the first Case Management Conference the Collins J determined that our application will next be dealt with at another Case Management Conference in Whangarei on 25 June 2019 along with 60 other applicants.

¹⁸ page CLO.002.490 of Crown Discovery at paragraph 12 - OTS consulted with Te Uri o Hau, Tamaki Legal, Te Rūnana o Te Rarawa, Ngāti Rangitīhi Raupatu Trust, Taumata B, Tahuaroa-Watson Whānau, Ngāti Pahauwera Development Trust, Te Korowai o Ngāruahine Trust, Ngā Potiki a Tamapahore Trust - "Submissions Received from Māori groups on the Proposed Revised Funding Model for Applications under the Marine and Coastal (Takutai Moana) Act 2011" Briefing Paper from OTS to Minister for Treaty of Waitangi Negotiations and Minister of Finance dated 11 May 2016 at

¹⁹ Ibid paragraphs 33 and 34, at page CLO.002.492 of Crown Discovery

- 108 Given the number of overlapping applicants and the High Court's plans to address the priority applications first, we have no way of predicting how many more case management conferences or event's will be scheduled by the Court before our application will be heard.
- 109 This will result in increased costs for the Board to continue to protect Ngātiwai interests in the takutai moana from being extinguished in the High Court process. These costs are not likely to be refundable due to the inadequacies of the Crown funding model which did not foresee the magnitude of the overlapping claims issues, nor the potential for test cases and procedural legal points to be argued in an unconstrained way in the High Court process. As a result we are exposed to an increasing financial burden without any ability to control these costs.

c) Utilising High Court proceedings, including the Crown's role and involvement;

- 110 Aside from the filing of our application on 31 March 2017, I have appeared with our legal counsel at one case management conference on 25 June 2018. Our next case management conference is scheduled for 25 June 2019 with the test case fixture due to take place in the New Year.
- 111 The Trust Board is concerned as we have already spent a good deal of our legal advice funding for the High Court pre-hearing milestone on filing Notices of Appearance and anticipate that the case management conference and test case fixture will incur additional costs without any significant progress made towards our application.
- 112 The Trust Board is also concerned that the High Court is an adversarial process attracting legal argument and not based on tikanga Māori. It is not best suited to adjudicate on matters of tikanga in the takutai moana, irrespective of the ability to appoint pukenga or seek advice from Maori Land Court under section 99 of the MACA Act. It has already been shown that the High Court process will not only attract argument (i.e. pre-trial applications) but also that the applicants will end up footing the bill for it with no ability to constrain these costs within the upper funding limits that were designed to advance applications and provide access to justice.

d) Crown engagement procedures;

- 113 Apart from receiving an acknowledgement letter from the Minister after we filed our application for the Crown engagement process I have not had a formal response to our application for direct engagement with the Crown.

114 I did receive an e-mail in March 2017 (refer to pages **TM-051 to TM-055**) that attached a process diagram for Crown recognition of Customary Interests. In that diagram it indicates where an application is made for Crown engagement and provided the application meets a number of criteria, it will be added to the OTS website and s62(3) obligations are triggered. The Board's application has been added to the website however we have not been informed of the next steps in the process which concerns the Crown's decision to engage. According to the process diagram this decision involves the following steps:

- a) OTS undertakes preliminary appraisal of application;
- b) Applicant comments on the preliminary appraisal;
- c) OTS briefs the Minister on factors relevant to the decision to engage, and
- d) Minister decides whether to formally engage under s95(3).

115 It has been almost two years since we submitted our applications for customary title and protected customary rights under the MACA Act. As we have not been offered a preliminary appraisal of our application to comment on or a letter from the Minister suggesting that we follow the High Court process, I can only assume that the appraisal has not been undertaken or that the Crown prefers our application is best dealt with through the High Court process.

Conclusion

116 In my view, the Board has been forced to make applications under the MACA Act by a statutory deadline or otherwise risk the extinguishment of Ngātiwai customary rights in the takutai moana as a matter of law.

117 We filed applications in both pathways but the Crown has not responded to our direct engagement application. This has left us within the High Court process and exposed to all kinds of costs over which we have very little control.

118 Once our High Court application was filed we became trapped in a procedural process that does not provide sufficient funding to allow us to comply with the Court's direction so that we can protect our customary rights in the takutai moana from being extinguished.

119 The Board's major funding source is from the proceeds from the 1992 Fisheries Settlement. It cannot be right that the Board should have to use the proceeds from a past settlement related to the takutai moana to again defend its rights in the takutai moana. To me that is a claw back of compensation and is abhorrent to justice.

DATED at Whangarei this 17th day of January 2019



Tania McPherson