IN THE WAITANGI TRIBUNAL **WAI-2417**
WELLINGTON

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF The Māori Community Development Act Claim, being a claim by Cletus Maanu Paul and Sir Edward (Taihākurei) Durie co-chairs of New Zealand Māori Council ("Māori Council") and chair of Mataatua and Raukawa District Māori Councils respectively; Desma Kemp Ratima, chair of the Takitimu District Māori Council and chair of the New Zealand Māori Council's Wardens Committee; and Anthony Toro Bidois chair of the Te Arawa District Māori Council and co-claimant for Ngāti Rangiwewehi in the New Zealand Māori Council's Water Claim (Wai 2358), on behalf of the New Zealand Māori Council and Māori generally

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CLAIMANTS' CLOSING SUBMISSIONS

Dated: 28 May 2014

Presiding officer: Deputy Chief Judge Fox

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MAY IT PLEASE THE TRIBUNAL:

(A) SUMMARY OF CLAIMANTS' CASE

1 The Claimants say that the Māori Community Development Act 1962 (the "**1962 Act**") cannot be seen apart from its historical context.

2 The 1962 Act is no ordinary statute but, when seen in the context of a century old search for rangatiratanga/self-government, it is an agreement to recognise a structure that contributes to the exercise of self-government.

3 This context requires the Crown to honour the spirit and text of the agreement which is given the force of statute law by the 1962 Act. It also requires that any change to the 1962 Act today similarly requires a genuine search for an agreed position.

4 The Crown through its agent Te Puni Kōkiri ("**TPK**") has failed to approach the 1962 Act in ways that respect the Act as providing a measure of Māori self-government following an agreement between Māori and the Crown. That has given rise to breaches of the Treaty principles of the right to govern in exchange for the protection of rangatiratanga; partnership; active protection; informed decision-making; and equity. It has also resulted in Crown breaches of Arts 4, 5, 18, 19, 20, 33 and 39 of the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**"), which sets out the "just Rights" of Māori which the Treaty sought to secure.[1]

5 The Claimants accordingly seek findings that in developing and administering the Māori Warden's Project ("**MWP**") the Crown has breached Treaty principles as informed by UNDRIP rights by diminishing or excluding the authority of the New Zealand Māori Council ("**NZMC**") and District Māori Councils ("**DMCs**") to administer Māori Wardens in terms of the 1962 Act and in terms of the compact to which that Act gives effect. They seek recommendations that the Project be administered in association with the NZMC in ways which comply with the 1962 Act, which give best practical

[1] The Preamble of the Treaty of Waitangi states the Crown's purpose of securing to Māori their "just Rights". UNDRIP declares what those rights are.

effect to the principles of self-government inherent in the Act and which provides appropriate resources to the NZMC/DMCs for Wardens' administration.

6 The Claimants also seek findings that the Crown led and controlled process to reform the institutions in the 1962 Act compact, including the institution of the Wardens, was inconsistent with the principles of the Treaty and UNDRIP. The Claimants seek recommendations that any reform should generally be NZMC led and negotiated with the government.

(B) ESSENTIAL CONTEXT TO THE CLAIMS

(B1) Origins of the 1962 Act[2]

7 Dr Mare and Dr Parker address this in their joint report.[3] It is also addressed in the Statements accompanying the SOC,[4] and in databank documents.[5]

8 In summary, the 1962 Act was an end-product of over a century of Māori-led efforts to establish officially recognised rangatiratanga/self-government structures and bodies.

9 Those efforts began in the 1840s with Māori initiatives to adapt the customary Runanga (or hapū and iwi councils) to form Committees and Councils to regulate local conduct and to manage local disputes. Watene (Wardens) were developed alongside those initiatives and complemented them.[6]

10 From the 1850s national movements had developed, such as the appointment of the Māori King and the introduction of Māori Parliaments. These national movements were initially opposed by Governor Sir George Grey but following the outbreak of the first Taranaki war in 1861, he accepted a form of local self-government with the formalisation of the "Runanga system". This recognition later ceased, however the rūnanga continued to operate in these communities.

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2 This Section, **Section B4** and **Section B5** below, draw from the Tribunal's own summary of the historical context in its decision on urgency, #2.5.8.

3 Comments on the Review of the Māori Community Development Act 1962, December 2013, #A9.

4 SOC, #1.1.1, at p5 ff.

5 Including documents #B19-#B23.

6 See e.g. Augie Fleras *From Village Runanga to the New Zealand Māori Wardens' Association: A Historical Development of Māori Wardens* (July 1980), #C1, at p48.

11 In 1900 the Government eventually agreed to reinstate official recognition for local and tribal self-government. The push for this came from Sir James Carroll following a conference with Te Kotahitanga and with the support of the Young Māori Party. The result of this was the passage of the Māori Councils Act 1900, providing for local self-government through marae committees and tribal executives, with the power to appoint community officers, including Wardens. It is from that Act that the present NZMC derives its name and its role as a state-recognised form of self-government.

12 In 1902 Te Kotahitanga agreed to merge with the Māori Council general conferences.

13 Due to a lack of funding several councils ceased to operate from the 1930s, but towards the end of the decade the structures were revived to constitute the basis for the Māori War Effort Organisation and at the end of the war there was a call to revive the Māori Council structure. This revival came about through the first Labour Government, which re-established the Māori Council system under the Māori Social and Economic Advancement Act 1945.

14 The 1945 Act was seen to be "a step in the right direction in giving the Māori people the right to govern themselves".[7] It did that by laying down "the beginnings of a very good system of community organisation whereby the Māori people could look after matters of particular concern to them".[8]

15 In 1962, it was a National Government that recognised a national voice for Māori by consolidating and amending statutes that provided for the District Councils and for the national body, the NZMC. The initiative for those changes came not from the Crown but from Māori. As Prime Minister Keith Holyoake explained when addressing the NZMC in this year:[9]

> The idea, as I recall, originated with the Māori people. You wanted a body through which you could speak with one voice. And I felt strongly

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7 (9 July 1954) 303 NZPD 346 (Tapihana Paraire Paikea MP (Northern Māori District), in reply to the Governor-General's speech).

8 (5 September 1961) 327 NZPD 1969 (Hon. Ralph Hanan, Minister of Māori Affairs, in moving the committal of the Māori Social and Economic Advancement Amendment Bill 1961).

9 Minutes of the Meeting of the New Zealand Māori Council held in the Māori Affairs Committee Room, Parliament Buildings, on 26 and 27 July 1962, #C3, at p33.

> that the Government needed to hear and heed the voice of the Māori people. Your desire was our need.

16 The original name of the 1962 Act was the Māori Welfare Act 1962. It was later changed to the Māori Community Development Act.[10]

17 Māori had finally obtained in the 1962 Act an officially recognised national organisation, with powers to promote policies for Māori development.

(B2) Structure and text of the 1962 Act

18 The 1962 Act was enacted on 14 December 1962.

19 It came into force on 1 January 1963.[11]

20 According to its long title the 1962 Act was enacted:[12]

> … to provide for the constitution of Māori Associations, to define their powers and functions, and to consolidate and amend the Māori Social and Economic Advancement Act 1945.

21 Section 18 should be read alongside this long title articulation of the purposes of the Act. It identifies social and economic advancement of Māori as an overriding goal of the 1962 Act, and it defines aspects of that. They include promoting, encouraging, and assisting Māori:[13]

> To apply and maintain the **maximum possible** efficiency and **responsibility in their local self-government**

22 To that end the 1962 Act provides for a governance and management structure made up of Community Officers; Māori Wardens; Māori Committees; Māori Executive Committees; DMCs; and the NZMC.

23 The 1962 Act envisages an integrated relationship between these several tiers of self-government, with the NZMC at the apex. This was explained by the Minister of Māori Affairs, the Hon. Ralph Hanan, in 1962, who said in moving that the Bill which would become the 1962 Act be committed, that:[14]

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10 This renaming was effected by s 19 of The Māori Purposes Act 1979.
11 See s 1(2) of the 1962 Act.
12 Quoting the long title of the 1962 Act.
13 Quoting s 18(1)(c)(iv).
14 (13 December 1962) 333 NZPD 3358, #B33.

> One purpose of the Bill is to express in clearly defined terms the constitution, functions, and powers of the official Māori organisation established by the earlier legislation. In the Bill the terms "Māori Association" is used to cover four different **Māori organisations arranged on a hierarchical system. At the top is the New Zealand Māori Council, which has jurisdiction throughout New Zealand, and under it come the district Māori councils, whose jurisdiction is in the main limited to particular Māori Land Court districts. Under each district Māori council are the Māori executive committees, each operating within its own defined area within the district. Then, under each Māori executive, are Māori committees, for defined local areas**. The Bill provides that the Māori committees will be elected first in February 1964, and every three years thereafter. Each committee then meets and appoints its representatives on the Māori executive committee for which it is responsible. The newly appointed executive committees then meet and appoint their representatives to the district Māori council, and the district Māori council then appoints its representatives on the New Zealand Māori Council.

24 These comments are borne out in the structure of the 1962 Act, whereby members of each Māori Association comprise members of the Māori Association below it in the hierarchy and, thereby, they are able to represent and reflect the views of local and District communities.

25 Starting with Wardens at the level of local community through to the NZMC at the national level, that can be seen as follows:

25.1 Wardens are subject to the control and supervision and to any express directions of the relevant local DMC (s 7(5)). That DMC has "**exclusive power and authority** to control and supervise the activities of Māori Wardens carrying out duties within its district, and may assign to any such Warden any specified duties, consistent with [the 1962] Act, within the district" (s 16(5));

25.2 a Māori Committee is subject to the control of the Māori Executive Committee in whose area it operates and shall act in accordance with all directions given to it by that Māori Executive Committee (s 10(2)). A Māori Committee is also subject to supervision and direction by the relevant local DMC (s 16(3)). Māori Executive Committees comprise members appointed by Māori Committees (s 12(2));

25.3 a Māori Executive Committee is subject to the control of the DMC in whose District it operates and shall act in accordance with all directions

given to it by that DMC (s 13(2); and also s 16(3)). DMCs comprise members appointed by Māori Executives Committees (s 15(2));

25.4 a DMC is subject to control by the NZMC and shall act in accordance with all directions given to it by the national Council (s 16(2)). The NZMC comprises members appointed by the DMCs (s 17(2)).

26 Within this framework, "Māori Wardens" are defined in s 2 of the 1962 Act to mean "a person appointed a Māori Warden under this Act".

27 That appointment is provided for in s 7(1), which empowers the Minister of Māori Affairs to "from time to time appoint in respect of any Māori Council district one or more Māori Wardens to carry out duties in that district".

28 To qualify for appointment as a Warden a person must:

28.1 reside in the particular District where s/he seeks appointment (s 7(2));[15]

28.2 be nominated for appointment by the DMC for that District (s 7(2)).[16]

29 Appointment is for a 3 year term (s 7(3)), albeit a Warden may resign before their warrant expires or have his or her warrant cancelled early (s 7(4)).

30 As noted above Wardens are initially appointed by the Minister (s 7(1)). For reappointments the Chief Executive of TPK is given the power. Under the 1962 Act she may reappoint a person as a Warden if the pre-conditions noted above are satisfied (s 7(3)).

31 Wardens once (re)appointed have the powers conferred by the 1962 Act and any regulations made under it (s 7(5)). These powers are to be exercised "under the control and supervision and subject to any express directions of the District Māori Council or of any Māori Association to which the Council may delegate its powers pursuant to section 16(6) of [the 1962] Act" (s 7(5)).

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15 An emphasis upon the Māori living in a particular community deciding who will govern that community can also be seen in the requirements for elections of Māori Committees: see ss 19(3)-(4) of the 1962 Act, as well as regs 3(1)-(2) of the Māori Community Development Regulations 1963.

16 See similarly reg 11(1)-(2) of the Māori Community Development Regulations 1963.

32 The formal powers of Wardens set out in the 1962 Act include entering licensed and other premises to prevent drunkenness (ss 31-32, 33(5)); and rendering vehicles immobile or removing them to places of safety where a Warden is of the opinion that any Māori who is for the time being in charge of the vehicle is incapable of having and exercising proper control of it (s 35).

33 Exercise of these powers has the potential to bring Wardens into contact with Police. The Māori Community Development Regulations 1963 recognise this, and they relevantly provide that:[17]

> (3) Māori Wardens shall also maintain close association with the Police and traffic officers having jurisdiction in their areas so as to ensure the maximum cooperation with all such officers.
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> (4) Māori Wardens shall endeavour to promote respect amongst Māori people for the standards of the community and to take appropriate steps where possible to prevent any threatened breach of law and order.

34 The 1962 Act also provides for remuneration and allowances to be paid to Wardens (s 7(6)). It requires these to be paid by "a Māori Association" to any Warden within its area. The definition of "Māori Association" in s 2 of the Act includes "a Māori Committee, a Māori Executive Committee, a District Māori Council, and the New Zealand Māori Council".[18]

(B3) Intent of the 1962 Act

35 For the purposes of this Inquiry, four features of the 1962 Act stand out, all going to the purpose or intent of the 1962 Act.

(i) Māori to control their own self-government

36 This intent is evident in the emphasis on Māori community control and accountability woven through the 1962 Act, summarised at **Section B2** above.

37 It can also be seen in relevant legislative history materials.

38 Starting in 1961 with proposals to amend the Māori Social and Economic Advancement Act 1945 to provide for the national Council (i.e. the NZMC), the Hon. Sir Eruera Tirikatene observed in the House that the 1945 Act was

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17 Quoting regs 11(3)-(4).

18 Quoting the definition in s 2 of the 1962 Act.

designed to see Māori themselves not Crown officials in control of Māori self-government:[19]

> I know that the Māori Social and Economic Advancement Act 1945 was set up to allow matters to be referred from the tribal executive through the right channels to Cabinet, and that such matters should not be dealt with by any Government Department. Cabinet should decide the correct solution of the problems of Māori people. I object to the district council being loaded with departmental officers. **The Māori people should decide, and I do not think that departmental officers should be at conferences unless requested to give advice or assistance. Whether or not the people make mistakes, that is their business**, and it will be for those in authority to say whether or not a particular move will work. **The Māori people should be given an opportunity of examining their own problems and difficulties and then referring them to Cabinet for consideration. That is what I intended in constructing the Māori Social and Economic Advancement Act 1945.**

39 During debates in the House on the same amendments, the Minister of Māori Affairs, the Hon. Ralph Hanan, similarly stated that the proposal to establish the NZMC was "not being imposed, as it were, upon the Māori people by the Government, but has its origin in the wish of the people themselves".[20] The Minister went on to record in his speech that:[21]

> Questions have been asked as to whether there will be any departmental officers on the committee and whether it will have anything to do with the Department of Māori Affairs. The answer is no. **It is a completely independent body representing Māoridom and will be able to speak with one voice for the Māori people as a whole. It will be the two-way channel of communication between the Government and the individual Māori and Māori groups.** …

40 The Hon. Ralph Hanan would emphasise when subsequently moving the 1961 Bill for committal that the changes being proposed had come from Māori and were not being "imposed from above" by the Crown:[22]

> **I should like to stress particularly that the steps now being taken are not being imposed from above by the Government, but have their origin in the people themselves.** The initiative was taken by the people of the Waiariki district who were conscious of the impossibility of securing unified opinions and actions from the 455 tribal committees and 55 tribal executives, with no machinery for coordination or cohesion. Their requests for completion of the chain of communication

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19 (6 July 1961) 326 NZPD 312 (address in reply to Governor-General's speech) .

20 (7 July 1961) 326 NZPD 342 (debate on Māori Social and Economic Advancement Amendment Bill 1961).

21 (7 July 1961) 326 NZPD 342 (debate on Māori Social and Economic Advancement Amendment Bill 1961).

22 (5 September 1961) 327 NZPD 1970 (debate on Māori Social and Economic Advancement Amendment Bill 1961).

> had been enthusiastically supported by Māori opinion throughout New Zealand…

41 The Hon. Sir Eruera Tirikatene similarly observed that Māori were "grateful to the Minister for agreeing to the request of the Māori people that district councils and a New Zealand council should be constituted", and referred to the "concept of" the NZMC as "a Māori effort for the Māori people themselves".[23]

42 The House debates of the same day are also notable for the following comments from the Minister of Māori Affairs, the Hon. Ralph Hanan:[24]

> **The new subsection (11) [of s 4] is of particular interest because it disqualifies welfare officers of the Department of Māori Affairs from representing a tribal executive on a district council.** This does not, of course, imply any doubt as to their capacity, their ability, or their integrity to give good service to the council, but there are two reasons for it. The first is that welfare officers in their official capacity have a special and onerous responsibility to the Government and the people and should not be placed in the invidious position of having to choose between those responsibilities… The second reason is **to avoid any ground for the suggestion, either now or in the future, that the Government might be influencing the attitude and decisions of district councils.** …

43 In subsequent debates in the House in November 1962, the same Minister of Māori Affairs would similarly comment that:[25]

> Under the 1945 Act welfare officers were ex officio members of the tribal committees and the tribal executives. In most cases they organised the committees and helped to bring them into being. In the early years it may be said that they practically ran them but the continuance of that state, I am glad to say, is no longer necessary. **The Māori people are now, in their own words, able to paddle their own canoe without official association with departmental officers. It goes without saying, of course, that the welfare officers will continue to assist the Māori associations whenever requested but their role will be as advisers and not participants.**

44 Finally note the statement of the Minister of Māori Affairs in 1963 when amending the 1962 Act by repealing the Minister's statutory power to remove members of a Māori Association from office, that this change was "in

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23 (5 September 1961) 327 NZPD 1974 (debate on Māori Social and Economic Advancement Amendment Bill 1961).

24 (5 September 1961) 327 NZPD 1972 (debate on Māori Social and Economic Advancement Amendment Bill 1961).

25 (15 November 1962) 332 NZPD 2693 (debate on Māori Welfare Bill 1962).

accordance with the principle of giving as much autonomy and self-government as possible to these Māori associations".[26]

(ii) NZMC to speak for Māori to government

45 The Parliamentary debates referred to above are notable in the second place for their statements that the NZMC was intended to take the lead in advancing Māori self-government in terms of the 1962 Act.

46 Alongside the Hansard quotes above (and particularly the quote from the Minister of Māori Affairs under paragraph 39), refer to the statements of the Minister of Māori Affairs, the Hon. Ralph Hanan, in relation to the NZMC in 1961 that:[27]

> To sum up the Bill will complete the structure of Māori tribal organisations that was begun by the Māori Social and Economic Advancement Act 1945. **It will create a fully representative and democratic body, quite independent of government, free of any external control or domination and able, I sincerely hope, to speak with one voice for Māoridom as a whole; and then it will provide a two-way channel of communication between the Government and the individual Māori**, and it will introduce, I trust, a new spirit of cohesion and enthusiasm into the activities of the existing tribal committees and tribal executives.

47 The Hon. Sir Eruera Tirikatene similarly observed in relation to the proposal to provide for the NZMC in what would become the 1962 Act that:[28]

> **The greatest thing that this New Zealand council can do will be to make recommendations to a Government, and the Māoris will be able to speak with one voice** on many problems… and will be able to state what they believe the solution should be.

48 As to the relationship envisaged at that time by Parliament between the NZMC and iwi, note the observations of Harry Lapwood MP (Rotorua) in 1961:[29]

> **I believe this Bill is to assist the welfare of the Māoris as a whole regardless of tribal affiliations.** It will be a democratic set-up which will give the Māori an ideal opportunity to use our system of committees and councils for the advancement of the race. I can see

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26 (9 October 1963) 337 NZPD 2337 (Hon. Ralph Hanan, Minister of Māori Affairs, in debate on Māori Welfare Amendment Bill 1963).

27 (5 September 1961) 327 NZPD 1971-1972 (debate on Māori Social and Economic Advancement Amendment Bill 1961) .

28 (5 September 1961) 327 NZPD 1977 (debate on Māori Social and Economic Advancement Amendment Bill 1961).

29 (5 September 1961) 327 NZPD 1981 (debate on Māori Social and Economic Advancement Amendment Bill 1961).

> nothing but good coming out of this… It has met with general approval in the Rotorua district. The Māori tribal heads are very keen to see it implemented in its entirety.

(iii) Māori to develop/consent to changes to 1962 Act

49 The Tribunal will recall Titewhai Harawira's oral evidence that amendments made in 1975 to the 1962 Act were proposed by Māori not the Crown.[30]

50 The legislative history bears this out, and indeed suggests a practice that the NZMC would take the lead in proposing changes to the 1962 Act or, if changes came from the Crown, then NZMC consent was required for them.

51 This practice was common in the 1960s and 1970s, and can be seen as follows:

51.1 the Minister of Māori Affairs, the Hon. Ralph Hanan, observed in House debates on the Māori Welfare Bill in 1962 that:[31]

> The Bill has the blessing of the New Zealand Māori Council of Tribal Executives, and on that footing I hope that the House will have little difficulty in dealing with its contents.

51.2 the next year the same Minister observed in House debates on the Māori Welfare Amendment Bill that:[32]

> Many of the amendments – in fact most of them – have been requested by the New Zealand Māori Council.

The Minister went on in the same House debate to reject calls to change electoral requirements provided for at that time on the ground that the proposed changes had not come "from the Māori people themselves".[33]

51.3 also in 1963, the Minister of Māori Affairs endorsed in Parliament an amendment proposed in the Māori Purposes Bill on the ground that:[34]

> This proposal has the approval of the New Zealand Māori Council…

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30 Hearing Transcript, #4.1.1, day 2/session 1, at pp147-148 (Titewhai Harawira).
31 (16 November 1962) 332 NZPD 2693 (debate on Māori Welfare Bill 1962).
32 (9 October 1963) 337 NZPD 2337 (debate on Māori Welfare Amendment Bill 1963).
33 (9 October 1963) 337 NZPD 2340-2341 (debate on Māori Welfare Amendment Bill 1963).
34 (9 October 1963) 337 NZPD 2566 (debate on Māori Purposes Bill 1963).

The Minister went on to note in the same speech that with regard to one clause "The approval of the New Zealand Māori Council has been given to this clause",[35] and in respect of another clause "This proposal has the approval of the New Zealand Māori Council".[36] Another MP, the Hon. Rex Mason (Waitakere), observed in the same debate "I am glad to know that this policy has the support of the Māori Council".[37]

51.4 in 1970 the Minister of Māori Affairs, at that time the Hon. Duncan MacIntyre, stated in moving the Māori Purposes Bill for committal:[38]

> The Bill has been referred to the Māori Affairs Committee, where some slight amendments have been agreed to. The amendments of general application have been discussed with the lands committee of the New Zealand Māori Council, and are supported by that body.

Matiu Rata MP (Northern Māori) would note in the same debate that:[39]

> Clause 5, to which the Minister has referred, arose out of submissions and requests of the New Zealand Māori Council…

51.5 the next year the same Minister of Māori Affairs observed in House debates on the Māori Purposes Bill:[40]

> Most of the provisions are of a machinery nature and some have been framed as a result of representations made by the New Zealand Māori Council and other groups.

The Minister stated in subsequently moving the Bill's committal:[41]

> Clause 9 deals with direct representation of Māori committees on the district Māori council. This clause has been approved by the New Zealand Māori Council and enables direct contact between a district Māori council and local Māori committees in cases where the Māori executive committee which ordinarily lies between it and the hierarchy does not function. The clause has been asked for by the New Zealand Māori Council. Clause 10 allows new or extra district Māori councils to be set up. Again this has been brought into the Bill at the request of the New Zealand Māori Council.

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35 (9 October 1963) 337 NZPD 2566 (debate on Māori Purposes Bill 1963).
36 (9 October 1963) 337 NZPD 2567 (debate on Māori Purposes Bill 1963).
37 (9 October 1963) 337 NZPD 2571 (debate on Māori Purposes Bill 1963).
38 (12 November 1970) 370 NZPD 4912 (debate on Māori Purposes Bill 1970).
39 (12 November 1970) 370 NZPD 4913 (debate on Māori Purposes Bill 1970).
40 (12 November 1971) 376 NZPD 4581 (debate on Māori Purposes Bill 1971). Similar comments were made by the Minister in subsequently moving that the Bill be committed: see (15 December 1971) 377 NZPD 5343.
41 (15 December 1971) 377 NZPD 5344 (debate on Māori Purposes Bill 1971).

51.6 moving to 1974, the House debates on the Māori Purposes Bill of that year are notable for the removal of proposed amendments on the ground that Māori generally, and the NZMC in particular, had not had adequate time to discuss the proposals and reach a position on them:[42]

> A large part of the Bill has been removed; indeed, clauses 10 to 16, the greater part of Part II, have been extracted. The opposition is glad that this step has been taken, because insufficient time has been allowed for the Māori Affairs Committee to consider representations from the many people interested in the future of the New Zealand Māori Council, its structure, the way it is constituted, and the way it operates. The council is a very important part of the whole Māori community, and if changes as proposed by the Minister are to be made there is no doubt that time is required to allow those persons interested, and those who currently serve on the New Zealand Māori Council, to bring together their thoughts on the future of the council and to allow discussions and an interchange of ideas, not only between members of the council, but also among the council, the select committee, the Minister, and others.

The Minister of Māori Affairs, the Hon. Matiu Rata, said in response:[43]

> The member will recall that the president of the Māori Council sent a telegram to the Māori Affairs Committee saying that the council alone will determine changes. I am not so sure whether it will determine changes, but all the Government is trying to do is improve the voluntary work the council carries out.

(The Claimants address the back-end or residual role the Crown should play in this context at **Section F2** below. The position they advance is consistent with these observations of Matiu Rata as Minister.)

51.7 in 1974, Winston Peters MP (Hunua) observed in the House debates on the Māori Purposes Bill of that year that:[44]

> Clause 4 of the Bill was deleted because Māori people, in the form of the New Zealand Māori Council, gave evidence to the select committee, and we listened to that evidence.

Similar comments were made by the then Minister of Māori Affairs, the Hon. Ben Couch, on the Bill as it passed through the House.[45]

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42 (6 November 1974) 395 NZPD 5622 (Bill Birch MP (Franklin) in debate on Māori Purposes Bill 1974).

43 (6 November 1974) 395 NZPD 5623 (debate on Māori Purposes Bill 1974).

44 (6 December 1979) 427 NZPD 4571 (debate on Māori Purposes Bill 1979).

51.8 finally the same Minister of Māori Affairs said at the Introduction of the Māori Purposes Bill 1981 that:[46]

> I have given the New Zealand Māori Council the opportunity to draft any major changes to the Māori Affairs Act.

Third purpose: an integrated self-governing structure

52 As set out at **Section B2** above, the 1962 Act provides an integrated structure for Māori self-government. In Lady Emily Latimer's words:[47]

> The 1962 Act is like a jigsaw. Take out one section and you don't get the picture

53 DMCs are a critical piece in this jigsaw. They are given the role of controlling and supervising Wardens, subject to any national directions set by the NZMC.

54 That relationship reflects not only that the NZMC sits "At the top" of the self-government structure set out in the 1962 Act,[48] but also that the legitimacy and indeed the effectiveness of Wardens lies with the local community – it is from the local community that Wardens are drawn, and it is to that same local community that Wardens owe their effectiveness.

55 As Titewhai Harawira explained in her oral evidence:[49]

> The kaupapa is the community, the district councils, Māori committees, district councils, New Zealand Māori councils within that protected role and the Act of the Māori wardens who were put there to protect our Māori communities.

56 It follows logically from the centrality of the community to the 1962 Act that Wardens can work in different ways in different communities and Districts. Their priorities can also change in step with changes in the priorities of the

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45 See (6 December 1979) 427 NZPD 4566 (debate on Māori Purposes Bill 1979).

46 (10 September 1981) 444 NZPD 3318 (debate on Māori Purposes Bill 1981).

47 Lady Emily Latimer affidavit of 11.3.14, #B27, at [15]. See similarly Owen Lloyd affidavit of 28.2.14, #B12, at [9] ("When we take our concerns to the New Zealand Māori Council, they can put together a national strategic plan forward to solve the root cause of the problems. Districts need to focus on their communities, but it's also important that there is a cohesive structure across the country").

48 (13 December 1962) 333 NZPD 3358, #B33.

49 Hearing Transcript, #4.1.1, day 2/session 1, at p138 (Titewhai Harawira).

communities from which they are drawn.[50] This is addressed in more detail at **Section C** below on Māori Wardens Today.

57 There are three important implications of the rangatiratanga arrangements reflected in the 1962 Act in which the Councils, Community Officers and Wardens, like their antecedents of Runanga, Karere and Watene, are all part of the structure for Māori self-government in which office holders are chosen by and remain throughout accountable to their local Māori communities.[51]

58 First, any change in one tier of Māori self-government (Wardens, for instance) necessarily affects other tiers (for instance, DMCs and the NZMC).[52]

59 Hence this Tribunal's observation in granting urgency that there is an:[53]

> … inextricable link and development of the Māori Wardens under the agency of Māori communities and the District Councils.

60 The second important implication of the structure of the 1962 Act concerns the protection that the DMCs (and the NZMC) are intended to give to Wardens.

61 The subjecting of Wardens to the "exclusive power and authority" of DMCs, under the NZMC's national direction, immunises Wardens from external political pressure (and indeed from politicisation).[54] That in turn helps to ensure that the kaupapa of Wardens, and their actions, continue to recognise and reflect their purpose for being (including their relationship with Police).[55]

62 A third important implication of the structure of the 1962 Act is that (again quoting from this Tribunal's decision granting urgency):[56]

> … the NZMC and the District Councils have a real and meaningful statutory responsibility to actively be engaged with any proposals for reform and or amendment to the 1962 Act.

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50 Lady Emily Latimer affidavit of 11.3.14, #B27, at [27].

51 See Sir Edward Durie statement of 21.2.14, #B9, at [10], [19]-[20]; Titewhai Harawira affidavit of 21.2.14, #B10, at [4]-[7].

52 Sir Edward Durie statement of 21.2.14, #B9, at [21]; Diane Black affidavit of 21.2.14, #B5, at [15].

53 Tribunal decision on urgency, #2.5.8, at [103].

54 See Titewhai Harawira affidavit of 21.2.14, #B10, at [51]-[52].

55 Diane Black affidavit of 21.2.14, #B5, at [15]; and see similarly Melanie Mark-Shadbolt affidavit of 21.2.14, #B8, at [6], [9].

56 Tribunal decision on urgency, #2.5.8, at [105].

63 And relatedly that:[57]

> … the Crown's Treaty partner… in this context is the NZMC and its District Councils, and that reality is reinforced in this setting by statute.

64 It follows that the Crown needs to ensure that the community representativeness and the democratic legitimacy of the rangatiratanga/self-government institutions provided for in the 1962 Act, are recognised and respected in the actions the Crown takes in relation to those institutions.

65 This last point has relevance in relation to the Crown's dealings with Wardens as well as in relation to any processes for reform of the 1962 Act.

(B4) Post-1962 developments

66 Since its reformation in 1962, the NZMC reduced from a four tier body to a three tier body consisting of Committees, Districts, and the NZMC. This arose from the introduction of s 10A to the 1962 Act (inserted in 1971) enabling direct representation of committees on the DMCs. At the same time the number of Districts increased from eight to 16 Districts to provide for greater representation at the national level. The original Districts coincided with the Districts of the Māori Land Court but as a result of urbanisation, three urban Districts were added for Wellington, Central Auckland and South Auckland.[58]

67 The national Council meets three or four times a year with an executive that meets as required. The NZMC's primary responsibilities are to promote policy development nationally and community development locally. The underlying rationale is to perform its functions under the 1962 Act including promoting Māori self-government and maintaining law and order.

68 The NZMC's leadership declined in the 1990s with the shift of support to the National Māori Congress and later, the shift of interest from national policy to iwi development through the Treaty Settlement process.

69 The NZMC has been working through the resulting reform issues. The decline in leadership saw the collapse of some committees and the disturbing trend of

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57 Tribunal decision on urgency, #2.5.8, at [108].

58 Compare SOC, #1.1.1, at p12, [26]-[29].

some District chairs to hold onto office without conducting the elections required every three years in the manner set out in the 1962 Act.[59] The decision of the NZMC in 2012 not to admit the 'representatives' of Districts which had not conducted valid elections has meant that five DMCs currently remain inactive, being Maniapoto, Waikato, Hauraki, Tauranga Moana and Te Tau Ihu, even though there may be persons within those Districts who support the Council structure. The NZMC anticipates that there will be elections in at least some of those Districts in 2015.

70 Meanwhile, the Crown had introduced the MWP. The MWP was initiated in 2005 and became a reality in 2007.

71 The MWP is a joint venture between TPK and Police. As stated at para 1.2 of the Project Charter of July 2007 "The purpose of the project is to build the capacity and capability of Māori Wardens and to provide a viable and cohesive national governance body to co-ordinate and manage the activities of Wardens going forward".[60] Accordingly it was proposed that the governance body would be a new entity and thus, an Advisory Group was established "to consider, provide advice and make recommendations on a **new structure** for the management and governance for Māori Wardens".[61]

72 In time the New Zealand Māori Wardens Association ("**NZMWA**") emerged as the "new structure" proposed by TPK for management and governance, although not with the approval of the NZMC.

73 The intention to establish a new structure from the formal announcement of the MWP in July 2007 should be noted, in view of Crown evidence that in subsequent consultations on reform of the 1962 Act the Crown had "a completely open mind" and had "not predetermined the outcome of the review or whether or not there will be any change to the legislation at all".[62] It is submitted that the evidence before the Tribunal supports an inference being drawn of a seamless strategy on the part of the Crown to sever the Wardens

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59 See Sir Edward Durie statement of 21.2.14, #B9, at [9]-[18].
60 Charter, at p38 of exhibits to Te Rauhuia Clarke brief of 28.2.14, #B14.
61 Charter, at p15.
62 Kim Ngārimu affidavit of 1.11.13, #A2, at [5].

from the NZMC and that the option to strengthen the NZMC/DMCs and the Wardens as part of a self-governing system was not seriously considered.

74 This seamless Crown strategy can be seen in:

74.1 the Advisory Board being dissolved when the NZMC representatives did not support the establishment of a new structure or the severance of the NZMC from the Wardens,[63] or in any event when the Board failed to recommend on alternative options.[64] The matter was then referred to the Māori Affairs Select Committee in the context of a review of the 1962 Act as a whole, in which TPK was the Committee's "key adviser".[65] TPK was in fact the sole provider of advice and information and provided six reports to the Māori Affairs Select Committee;[66]

74.2 funding for the administration of Wardens not being included in the NZMC's funding since the MWP began; and

74.3 significant funding being provided to the NZMWA instead, leading the NZMWA in turn to increasingly agitate for changes to the 1962 Act in a quest to secure control of the Wardens, with the Crown's support. That supports continues. The evidence before the Tribunal is that the NZMWA has closely aligned itself with the Crown, and hence supports the Crown's view that the 1962 Act should be changed.

75 The absence of Crown funding for the NZMC/DMCs despite their statutory responsibilities, coupled with the NZMWA's Crown-sponsored and supported actions and the failure of some DMCs to conduct elections and disputes as to who was validly in office, together led to difficulties in the administration of Wardens, including in the control and supervision exercised by DMCs and the NZMC in accordance with the 1962 Act and its mechanisms.

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63 Diane Black affidavit of 21.2.14, #B5, at [35].
64 Te Rauhuia Clarke brief of 28.2.14, #B14, at [22].
65 Kim Ngārimu affidavit of 1.11.13, Exhibit 1, #A2(a), at p019.
66 Kim Ngārimu affidavit of 1.11.13, Exhibit 1, #A2(a), at p020.

(B5) A need for change?

76 In July 2009, the Māori Affairs Select Committee against this background launched its inquiry into the 1962 Act. It reported in 2010.

77 The Select Committee considered that the 1962 Act should be reviewed in light of changes in Māori communities and government policies since the 1960s.

78 The Select Committee appears not to have been informed of the customary kaupapa (policy) for the Wardens and the place of the Wardens in giving effect to community self-government. In any event, during the course of the its inquiry, the Select Committee formed the view that there was no longer a good fit between Māori Associations and Wardens.

79 While examining the 1962 Act, the Select Committee suggested that the legislated purpose and responsibilities outlined in the Act no longer aligned with the actual roles that Wardens and Māori Associations carry out today.

80 The inquiry also identified a breakdown between Wardens' need for practical everyday administrative support, coordination and leadership, and the overarching role of the NZMC in advocating for Māori.

81 The Select Committee also believed that the continual conflation of the NZMC and Wardens in one statute created a complex and dysfunctional structure that hindered rather than enhanced Māori community development. It found that a priority for government should be to separate Wardens from the structure of Māori Associations, and to provide them with simplified, streamlined, effective administrative support.

82 The Select Committee accordingly recommended that a review of the 1962 Act should be conducted "to ensure the Act is compatible with modern perspectives on Māori policy-making".[67] It went on to identify the need for

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[67] Kim Ngārimu affidavit of 1.11.13, Exhibit 1, #A2(a), at p007.

"rigorous community consultation" on the 1962 Act and community "ownership" of any new arrangements to come from that review.[68]

83 The NZMC accepted that it was appropriate to look at whether the 1962 Act remains fit for purpose in the structure it provides for rangatiratanga/self-government, however it did not agree with the process that the Crown developed to determine that.[69] The NZMC considers that it is the right of Māori to lead such a review, as is explained further at **Section F2** below.

84 The difference of opinion has given rise to the present contemporary Inquiry.

(C) MĀORI WARDENS TODAY

85 Before considering the compatibility of the MWP with Treaty principles and UNDRIP, it is helpful to address the situation of Wardens today.

86 This is important in giving a practical context to the claim in respect of Wardens,[70] the Second Claim before the Tribunal.

87 An understanding of the situation of Wardens today is also important in that it underscores that local community trust, confidence and accountability remain critical to the work of Wardens and to their effectiveness. This reinforces the focus of the 1962 Act on the accountability of Māori office-holders to their local community, a point made in more detail at **Section B3** above with reference to Parliament's intentions in enacting the 1962 Act as it is.

(C1) Wardens remain Māori not Crown institutions

88 As noted at **Section B1** above, Wardens have existed in some form since the Kingitanga movement.[71] They were first officially provided for in the Māori Social Advancement Act 1945, and subsequently in the 1962 Act.[72]

89 It is clear that Wardens are Māori not Crown institutions. That remains so today, as the Crown rightly acknowledged in its evidence.[73]

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68 Kim Ngārimu affidavit of 1.11.13, Exhibit 1, #A2(a), at p008, p017.
69 Karen Waterreus affidavit of 2.10.13, #A1, at [5]
70 The second claim in the ASOC, #1.1.1(a).
71 See also Lady Emily Latimer affidavit of 11.3.14, #B27, at [14].
72 Exhibit 2 to Titewhai Harawira affidavit of 21.2.14, #B10(a), at p20.

90 It is also clear that Wardens have had a focus from the start on protecting and supporting the communities from which they are drawn:[74]

> Māori Wardens have a long and proud history of protecting and supporting their communities, a role they are able to play because, as members of those communities, they are uniquely placed to understand whanau and the issues they face.

91 In this, Wardens were and are intended to play an important part in the wider justice system, contributing "to local law and order".[75]

92 Hence the Advisory Group's recognition of "the strong bond that continues to exist between the Māori Wardens and the wider Māori community", and the Advisory Group's celebration of "the immeasurable contributions of Māori Wardens to ongoing community safety and well-being".[76]

(C2) Widening and deepening of Warden activities

93 The formal powers of Warden are set out in the 1962 Act and associated regulations.[77] As noted at **Section B2** above, these powers include entering licensed and other premises to prevent drunkenness and rendering vehicles immobile or removing them to situations of safety.

94 Over time however, the activities of Wardens have tended to widen and deepen, adapting to meet the needs of a living community.[78]

95 As Titewhai Harawira explained:[79]

> In response to the needs of the communities they serve, Māori Wardens have moved away from their paternalistic functions to a role centred on community involvement and development. As a result, Māori Wardens have taken on a wider range of roles and functions than those directly set out in statute and regulations.

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73 Michelle Hippolite brief of 28.2.14, #B18, at [5] (the Crown agrees with and accepts this).

74 Exhibit 2 to Titewhai Harawira affidavit of 21.2.14, #B10(a), at p18.

75 Lady Emily Latimer affidavit of 11.3.14, #B27, at [26] (in so contributing they belie recent rhetoric "that the Māori leaders are doing nothing about Māori crime").

76 Exhibit 2 to Titewhai Harawira affidavit of 21.2.14, #B10(a), at p18.

77 For a helpful summary of the powers of Wardens under the 1962 Act, see Exhibit 2 to Titewhai Harawira affidavit of 21.2.14, #B10(a), at pp23-24.

78 Exhibit 2 to Titewhai Harawira affidavit of 21.2.14, #B10(a), at p20.

79 Titewhai Harawira affidavit of 21.2.14, #B10, at [14] (quoting from para 8 of the April 2008 (draft) Report of the Māori Wardens Advisory Group).

96 This has in practical terms led Wardens today (inter alia[80]) to undertake street patrols;[81] maintain order at large events (the Auckland 'Nines' being a recent example) and at Marae and Māori functions in rural areas;[82] do crowd control;[83] assist with court processes;[84] help in tangihanga;[85] assist schools;[86] help on public transport;[87] assist with agencies like WINZ and CYFS;[88] and help Police to understand actions and to exercise prosecutorial discretion.[89]

97 Across these different situations, Wardens are seen to have a distinctive way of both defusing situations and of providing support in the community.[90]

98 Indeed, a Warden's role in de-escalating a situation often will be decisive.[91]

99 Wardens tend to be successful in what they do because they take a positive approach of working with people, rather than an adversarial approach.[92]

100 The guiding philosophy of aroha ki te tangata (compassion for the people),[93] is a key to success here. To quote Lady Emily Latimer:[94]

> The distinguishing factor of the wardens… is that they know the local community, they are part of the local community, they do not presume to stand above the community, the community knows them and they have the community's trust.

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80 See Exhibit 2 to Titewhai Harawira affidavit of 21.2.14, #B10(a), at pp24-25.

81 Diane Black affidavit of 21.2.14, #B5, at [7]-[9], [11]; Millie Hawiki affidavit of 21.2.14, #B1, at [12]; Owen Lloyd affidavit of 28.2.14, #B12, at [6]; Wilma Mills affidavit of 21.2.14, #B3, at [26].

82 Sir Edward Durie statement of 21.2.14, #B9, at [23]; Titewhai Harawira affidavit of 21.2.14, #B10, at [14]; Owen Lloyd affidavit of 28.2.14, #B12, at [6].

83 Diane Black affidavit of 21.2.14, #B5, at [38]; Wilma Mills affidavit of 21.2.14, #B3, at [34].

84 Titewhai Harawira affidavit of 21.2.14, #B10, at [14], [15]-[16]; Owen Lloyd affidavit of 28.2.14, #B12, at [6].

85 Owen Lloyd affidavit of 28.2.14, #B12, at [6].

86 Titewhai Harawira affidavit of 21.2.14, #B10, at [14], [17]; Lady Emily Latimer affidavit of 11.3.14, #B27, at [27], [30]; Wilma Mills affidavit of 21.2.14, #B3, at [26], [28].

87 Titewhai Harawira affidavit of 21.2.14, #B10, at [14].

88 Diane Black affidavit of 21.2.14, #B5, at [38]; Millie Hawiki affidavit of 21.2.14, #B1, at [12]; Lady Emily Latimer affidavit of 11.3.14, #B27, at [27].

89 Lady Emily Latimer affidavit of 11.3.14, #B27, at [34]-[35].

90 Diane Black affidavit of 21.2.14, #B5, at [2]; Owen Lloyd affidavit of 28.2.14, #B12, at [20]; Lady Emily Latimer affidavit of 11.3.14, #B27, at [33]; 'Exhibit A' to Kim Ngārimu brief, #B13(a), at p5 ("Māori Wardens unique, distinct from Police").

91 Hearing Transcript, #4.1.1, day 1/session 3, at pp75, 76 (Owen Lloyd).

92 Diane Black affidavit of 21.2.14, #B5, at [9]; and similarly Owen Lloyd affidavit of 28.2.14, #B12, at [21].

93 Exhibit 2 to Titewhai Harawira affidavit of 21.2.14, #B10(a), at p21.

94 Lady Emily Latimer affidavit of 11.3.14, #B27, at [32].

101 Recognising their guiding philosophy, and in no small part due to their effectiveness, the wider community too has taken notice of Wardens.

102 Titawhai Harawira made this point in her written evidence:[95]

> Increasingly [the work of Wardens] is being recognised by the wider community, which is now approaching Māori Wardens directly to provide assistance to businesses and at events because of the trust and confidence the community is recognised to have in them.

103 Retaining that trust and confidence is very important.

(D) RELEVANT TREATY PRINCIPLES AND UNDRIP

104 In practice the principles of the Treaty tend to overlap. With that in mind, the Claimants identify below the principles most relevant to this Inquiry.

(D1) Treaty principles relevant to the Māori Wardens Project[96]

(i) Principle of partnership

105 The partnership reflected in the Treaty imposes a "duty to act reasonably and in the utmost good faith" that "is not one-sided".[97]

106 This requires not only that Māori recognise and respect laws validly enacted by Parliament, but that the Executive does too. Hence the Tribunal's finding in the *Te Roroa Report* that the Crown's failure to enforce the Criminal Code Act where koiwi had been removed from the Kohekohe caves "breached [the Crown's] Treaty obligations both to protect the actual physical remains… and to treat all its citizens equally before the law".[98] And see more generally, Joe Williams J's observation in *Port Nicholson Block* that "it would be wrong in

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95 Titewhai Harawira affidavit of 21.2.14, #B10, at [18]; and see also [19] (giving an example of this in the Auckland District).

96 i.e. the Second Claim.

97 *New Zealand Māori Council v Attorney-General [Lands]* [1987] 1 NZLR 641, 664 (CA) per Cooke P; and further per Richardson J at p681 (the Treaty obligations "were and are reciprocal") and p682 (emphasising "the core concept of the reciprocal obligations of the Treaty partners."), and per Casey J at p704 (stressing the "obligation on each side to act in good faith … [and] the need to act with reasonable regard for each side's expectations and obligations"). See similarly *New Zealand Māori Council v Attorney-General [Radio Assets]* [1996] 3 NZLR 140, 157 (CA) per Richardson P, Gault, McKay, Henry, Keith, and Blanchard JJ (Treaty imposes "reciprocal treaty obligations … on both Crown and Māori to act fairly, reasonably and in good faith to each other").

98 *Te Roroa Report* (Wai-38, 1992), at p215.

principle and dangerous in practice for the courts to leave the Crown to 'acquit itself as best it may' as the 'sole arbiter of its own justice'".[99] That is outmoded thinking in a nation that today values the rule of law.[100]

107 Note too the *Taranaki Report*, finding the government's past "refusal to respect Māori authority by treating Māori as the equals that they were",[101] as well as its unilateral policy to dominate Taranaki Māori by imposing its will,[102] and to reject or ignore Taranaki Māori requests for mutually acceptable agreements,[103] represented a failure to honour the Crown's Treaty obligations.

108 To be clear, the Claimants are not saying that any breach of statute ipso facto constitutes a breach of the principles of the Treaty. The Tribunal need not go that far in its report on this Inquiry. The Claimants' position is a narrower one. It is that the terms of the 1962 Act embody an agreement between the Crown and Māori which was meant to be honoured. It is this special nature of the 1962 Act (and, associated with it, the historical context to the Act) which the Claimants say justifies this Tribunal in equating a breach of 1962 Act requirements with a breach of the partnership principle.

(ii) Principle of active protection

109 The principle of active protection also applies to the Second Claim. It requires the Crown to provide the operational funding necessary to actively protect Māori institutions.[104] Relevantly note the Tribunal's finding in *Matua Rautia:*

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99 *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181, at [63] (contrasting and distinguishing Prendergast CJ's approach in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72, 78 (SC) in this regard). To the same effect see *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai-262, 2011), at section 4.3.2, p133.

100 See *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), at [13] per Elias CJ (describing *Wi Parata* as a "discredited authority" reflecting outmoded thinking in a nation that values the rule of law). History demonstrates the Crown makes mistakes when acting as judge of its own cause. See e.g. the preamble to the Marine and Coastal Area (Takutai Moana) Act 2011; and the Waikato Raupatu Claims Settlement Act 1995 acknowledging that the confiscation of the Waikato was "wrongful", and that the Crown acted unjustly, in breach of the Treaty and unfairly in labelling Waikato as rebels (see the apologies recorded in ss 5-6).

101 *The Taranaki Report: Kaupapa Tuatahi* (Wai-143, 1996), at p55.

102 *The Taranaki Report: Kaupapa Tuatahi* (Wai-143, 1996), at pp8-9 and 55.

103 *The Taranaki Report: Kaupapa Tuatahi* (Wai-143, 1996), at p55.

104 See e.g. *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wai-2336, 2013), at section 8.7, p185; *Wananga Capital Establishment Report* (Wai-718, 1999), at section 5.3, p45; *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand*

The Report on the Kōhanga Reo Claim that the purchasing power of Crown funding not only needs to be maintained, but that where appropriate it should be raised "to a level sufficient to perform [the Māori organisation's] core functions fully".[105] The Tribunal's earlier *Māori Electoral Option Report* contained the following findings which are to similar effect:[106]

> That **if adequate funding is not provided by the Crown** in addition to that already provided to facilitate a comprehensive kanohi ki te kanohi campaign in conjunction with an extensive and effectively targeted mass media programme, **the Māori political rights conferred under the Electoral Act 1993 will not be effectively implemented** and Māori will be seriously prejudicially affected.
>
> That **the present level of funding and services being provided by the Crown** through the agency of New Zealand Post and Te Puni Kōkiri **is substantially less than is reasonably required to meet the Crown's Treaty obligation to protect Māori citizenship rights and in particular the effective exercise of the Māori Electoral Option**, and is in breach of Treaty principles which require the Crown actively to protect Māori rights to political representation conferred under the Electoral Act 1993 and as a consequence the effective exercise of the Electoral Option by Māori will be seriously prejudicially affected by such a breach.

(iii) Principle of equity

110 Also relevant is the Crown's Treaty duty to act impartially and equally as between Māori. See for instance the *Māori Community Development Corporation Report*,[107] where the Tribunal expressed the "most serious reservations about the possibility of the MDC becoming dominated by anything other than pan-Māori interests". Note too *Te Runanga o Tuwharetoa Ki Kawerau*, where Heath J held in the High Court that the guarantee of rangatiratanga "includes an implicit guarantee that the Crown would not allow one iwi an unfair advantage over another".[108]

Law and Policy Affecting Māori Culture and Identity (Wai-262, 2011) at section 9.2.5, p706.

105 *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wai-2336, 2013), at section 8.7, pp186-187.

106 *Māori Electoral Option Report* (Wai-413, 1994), at section 5.2, pp37-38.

107 *Māori Community Development Corporation Report* (Wai-350, 1993), at section 7.4.

108 *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 (HC), at [27].

(D2) Treaty principles relevant to reform of the 1962 Act[109]

(i) Principle of the right to govern in exchange for protection of rangatiratanga

111 The Treaty guarantee of rangatiratanga can require that the Crown in developing policy must reach a negotiated agreement with Māori, rather than develop the policy itself and then legislate that policy unilaterally. That must be especially so where, as here, the context is Māori self-government. This principle can be seen in the *Foreshore and Seabed Report* reasoning that:[110]

> … the standards of honourable conduct, fair process, and recognition of each other's authority... require the Crown and Māori to try to reach a negotiated agreement

112 More recently the Tribunal reasoned in the *Ko Aotearoa Tēnei Report* that:[111]

> There will also be occasions in which the Māori Treaty interest is so central and compelling that engagement should go beyond consultation to negotiation aimed at achieving consensus, acquiescence or consent. DRIP would seem to be one such example.

(ii) Principle of partnership

113 The partnership principle is also relevant to the First Claim. It supports the empowerment and enablement of Māori "to gather together and weigh up a range of opinion, and to develop a consensus which represents the views, and enhances the rangatiratanga, of all Māori present".[112] Allowing appropriate kanohi ki te kanohi (face to face) dialogue is also important here; see further paragraph 116 below.

114 A second relevant dimension to the partnership principle is that the Crown needs to be transparent about its policies and their effectiveness (including any lack thereof). This can be seen in the *Te Whanau O Waipareira Report*:[113]

> (f) We consider that **the lack of public information on the effectiveness of Government policies and programmes in achieving social goals breaches the partnership principle** of the Treaty in that it denies Māori communities any real opportunity to monitor the Crown's

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109 i.e. the First Claim.
110 *Foreshore and Seabed Report* (Wai-1071, 2004), at section 5.4.5, p133.
111 *Ko Aotearoa Tēnei* (Wai 262, 2011), at section 8.5.1, p682.
112 *Te Whanau o Waipareira Report* (Wai-414, 1998), at section 8.3.3(2), p228.
113 *Te Whanau O Waipareira Report* (Wai-414, 1998) at section 8.4, p237.

> performance, and it denies the Government valuable information that would enable it to improve the quality of its kawanatanga.

(iii) Principle of informed decision-making

115 There are two relevant dimensions to this Treaty principle. The first is that the Crown needs to adequately inform itself of Māori rights and interests before it takes action which is or may be prejudicial to them.[114] Note in particular the *Māori Community Development Corporation Report*, where the Tribunal criticised the Crown for a policy change which lost sight of "the purpose for which" the MDC was established and the Treaty obligations that it reflected.[115]

116 Kanohi ki te kanohi dialogue can assume some significance in this context. The Tribunal has relevantly emphasised "the much greater effectiveness of kanohi ki te kanohi over conventional mail hand-outs and the distribution through other means of written material without personal contact and discussion",[116] going on in the *Māori Electoral Option* report to find that:[117]

> … if adequate funding is not provided by the Crown in addition to that already provided to facilitate a comprehensive kanohi ki te kanohi campaign in conjunction with an extensive and effectively targeted mass media programme, the Māori political rights conferred under the Electoral Act 1993 will not be effectively implemented and Māori will be seriously prejudicially affected.

117 A second dimension to the principle of informed decision-making which is relevant to the First Claim is that in addition to itself appreciating the Māori perspective, the Crown needs to convey that perspective to other affected parties – most obviously to non-Māori, but not just to them. By this means the Māori perspective will be known and understood and, thereby, actively protected and preserved by the Crown as Treaty partner.

(D3) Interface between UNDRIP and Treaty principles

118 There is also the issue in this contemporary Inquiry of the impact of UNDRIP.

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114 This was of course the basis for the Court of Appeal's intervention in the *Lands* case.

115 *Māori Community Development Corporation Report* (Wai-350, 1993), at section 7.2.2; section 7.4 is similar.

116 *Māori Electoral Option Report* (Wai-413, 1994) at section 4.6.

117 *Māori Electoral Option Report* (Wai-413, 1994) at section 5.2.

119 The Crown accepts that its actions and policies related to the 1962 Act must comply with UNDRIP.[118] The Claimants agree. As Dr Charters explains in her uncontested evidence, UNDRIP complements and reinforces the principles of the Treaty, and in particular the rangatiratanga principle:[119]

> 83 In my view, many of the principles of the Treaty of Waitangi can be found in any number of the rights and freedoms in the Declaration notwithstanding that the Declaration is generally more explicit and specific in its expression of the rights of Indigenous peoples than the Treaty principles at an abstract level.
>
> 84 **Given the breadth with which the principles of the Treaty can and should be interpreted, and the imperative to apply them in and to contemporary circumstances, in my view it would be appropriate to interpret Treaty principles consistently with the Declaration, as a recent expression at the global level of the minimum international standards to be maintained to respect Indigenous peoples' rights.** Moreover, it would be politically undesirable for New Zealand to be found to be in breach of international human rights by international human rights tribunals as a result of a failure to interpret Treaty principles consistently with internationally-recognised Indigenous peoples' rights.
>
> 85 One example of an intersection between the principles of the Treaty and the Declaration, relevant to the facts at hand, relates to the principle of rangatiratanga. Rangatiratanga has often been translated as self-determination and often connotes Māori authority. Both rangatiratanga under the Treaty and self-determination in international law, including with respect to the Declaration, are interpreted to entitle the holder/s to political and governing power or authority to determine outcomes free from outside interference, discussed in more detail below.

120 Looked at in terms of the Tribunal's jurisdiction under s 6(1) of its Act to determine the consistency of Crown actions (etc) with "the principles of the Treaty", the preamble of the Treaty, setting out the good intent of the Treaty partners, begins by recording that the Queen is "anxious to protect" the "**just Rights** and Property" of Māori. Those "just Rights and Property" are not defined in the Treaty itself. The UNDRIP is a statement of the just rights of indigenous peoples,[120] and is accepted by New Zealand as such. It can and should give content to the principles of the Treaty on this basis.[121]

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118 See e.g. Crown memorandum of 1.11.13, #3.1.003, at [34]; and see further Dr Claire Charters brief of 20.1.14, #A10, at [50].

119 Dr Claire Charters brief of 20.1.14, #A10, at [83]-[85].

120 Note UNDRIP's preamble reciting that States and indigenous peoples are "Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the **rights and freedoms** of indigenous peoples".

121 Hearing Transcript, #4.1.1, day 3/session 1, at p263 (Sir Edward Durie).

121 Lord Cooke with his characteristic foresight envisaged and endorsed the approach being advanced. This can be seen in his acceptance in *Lands* that "the Treaty is a document relating to fundamental rights" and that "it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms".[122]

122 A reliance upon UNDRIP in the manner Lord Cooke suggested is consistent with the Tribunal's past acceptance that the Treaty is a 'living' compact and that it should be interpreted so that the principles it embodies remain relevant in changing circumstances and to changing needs[123] – in this case, in light of the international human rights norms now embodied in the UNDRIP and accepted by New Zealand to codify the human rights of indigenous peoples.[124]

123 Note too that as a matter of policy, it is not desirable for the State (or the Tribunal) to be found to have acted in breach of the UNDRIP in international fora charged with assessing New Zealand for its conformity with the Declaration.[125] That risk can be avoided by moulding our Treaty jurisprudence in a UNDRIP compliant manner, as Lord Cooke endorsed in his *Lands* judgment, and by the Tribunal making clear in its Treaty principles analysis whether and if so how UNDRIP rights have been breached.

124 On that footing, the UNDRIP rights particularly relevant to this Inquiry are identified by Dr Charters as Arts 4, 5, 18, 19, 20, 33(2) and 39.

125 By way of summary in relation to those UNDRIP rights:

125.1 Arts 4 and 39 guarantee the right of indigenous peoples in exercising their right to self-determination to the right to **autonomy** or self-

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122 *NZMC v Attorney-General [Lands]* [1987] 1 NZLR 641, 655-656 (CA) per Cooke P.

123 See e.g. *Ngai Tahu Report* (Wai-27, 1991, Vol 2), at pp222-223 (the Treaty was "not intended merely to regulate relations at the time of its signing by the Crown and the Māori, but rather to operate in the indefinite future when, as the parties contemplated, the new nation would grow and develop").

124 See also Hearing Transcript, #4.1.1, day 1/session 1, at pp10-11 (Claimants' opening submissions); day 1/session 4, at pp89, 93-94, 98 (Dr Charters). The UNDRIP can also be seen to provide more concrete and specific statements as to what is meant by the partnership principle. As to this note the preamble of the Declaration, which says the UNDRIP "Solemnly proclaims the following UN declaration on the rights of indigenous peoples, as a standard of achievement [which] should be pursued in a spirit of **partnership** and mutual respect".

125 Hearing Transcript, #4.1.1, day 1/session 4, at pp106-107 (Dr Charters).

government in matters relating to their internal and local affairs as well as ways and means for **financing** their autonomous functions. The Claimants say that this must involve the Crown providing Māori with sufficient funding to allow the 1962 Act structures to work as intended and to enable Māori to determine for themselves how they are to be self-governed (including the laws to give effect to self-government);

125.2 Arts 5, 18, 19, 20 and 33(2) guarantee the right of indigenous peoples to develop, maintain and strengthen **through their representative institutions and in accordance with their own procedures**, the laws and institutions by and through which they exercise self-government. The Claimants say that this must involve Māori not the Crown determining which representative institutions will represent them, and Māori not the Crown setting the timetables, framing the questions to be asked and answered, organising and convening consultation hui, and ultimately determining the changes to the law relating to their self-government which they wish to adopt (by legislation if necessary).

126 In the present context, these rights are not diminished in any way by the parallel statements made by the Hon. Dr Pita Sharples and the Hon. Simon Power in respect of New Zealand's acceptance of UNDRIP.[126] Primarily that is because the current legislative framework within which New Zealand operates, which the Ministers were seeking to protect in making their statements on New Zealand's acceptance of UNDRIP, included the 1962 Act.[127] Also of relevance to this Inquiry is that New Zealand does not note any specific "caveats" to the articles in the UNDRIP affirming indigenous peoples' autonomy over their internal and local affairs or their institutions.[128]

127 The Crown says that the Declaration adds little to the practical balance of Treaty principles in this Inquiry and accordingly that this Tribunal need not address it.[129] The Claimants disagree. They say that findings of breach of UNDRIP should be made where relevant, because they inform the Treaty

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126 Contrast Crown closing submissions of 14.5.14, #3.3.3, at [77]-[79].
127 Hearing Transcript, #4.1.1, day 1/session 4, at pp104, 111-112, 115 (Dr Charters).
128 Dr Claire Charters Addendum of 1.4.14, #A10(a), at [19].
129 See Crown closing submissions of 14.5.14, #3.3.3, at [25].

principles analysis (see paragraph 120 above), and because they show in international fora that New Zealand has appropriately incorporated UNDRIP into its municipal law and is correctly applying it (see paragraph 123 above).

(E) THE CLAIM IN RESPECT OF THE MĀORI WARDENS PROJECT[130]

128 As discussed in the Summary at **Section A** above, the Claimants seek findings that in developing and administering the MWP the Crown has breached Treaty principles as informed by UNDRIP rights by diminishing or excluding the authority of the NZMC and DMCs to administer Māori Wardens in terms of the 1962 Act and in terms of the compact to which that Act gives effect. They seek recommendations that the Project be administered in association with the NZMC in ways which comply with the 1962 Act, which give best practical effect to the principles of self-government inherent in the 1962 Act and which provides appropriate resources for Wardens' administration.

129 There is also a subsidiary assertion that the failure to deal through the NZMC resulted in an unlawful interference in the Council's election process, and in an unauthorised process for the warranting of Wardens.

130 Against the background of the Treaty principles and UNDRIP rights noted at **Section D** above, the Claimants turn to consider the MWP.

131 Whilst the MWP is the focus of the Second Claim to this Tribunal, the Claimants say that it is helpful to address it first in time.

132 That is because the MWP forms important background to the Crown's more recent process for reform of the 1962 Act, which is the focus of the First Claim. It is also because breaches of Treaty principles and UNDRIP rights by the Crown's actions under the MWP also colour how the reform process should be analysed, and the recommendations the Tribunal should make.

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130 This is the Second Claim in the ASOC, #1.1.1(a).

(E1) Focus is on effects of the MWP not on Crown intent

133 Before analysing how the MWP breaches Treaty principles and UNDRIP, it is necessary to address the Crown's suggestion that the focus should be on whether the MWP is **intended** to replace or affect the 1962 Act.[131]

134 The Claimants say that this is too narrow a focus, as Kim Ngārimu seemed to accept in her oral evidence,[132] and that the Tribunal's inquiry should instead be into the **consequences** of the MWP and whether these have given rise to any breaches of Treaty principles and associated UNDRIP rights.

135 In other words, the question for the Tribunal is one of effect not purpose.

136 This broader approach better reflects the Tribunal's jurisdiction.

137 It also accords with the Supreme Court's recent rejection of the Crown's conceptually similar argument that Treaty principles provisions (there, s 9 of the SOE Act 1986) should be narrowly interpreted and applied.[133]

138 Finally, the Claimants' broader approach is consistent with UNDRIP, which recognises that indigenous rights can be infringed as a matter of both "the aim or **effect**" of State action. Refer to Arts 8(2)(a)-(c) of UNDRIP.

(E2) No evidence of delegation of DMC powers vis-à-vis Wardens

139 A second preliminary issue concerns s 16(5) of the 1962 Act. As noted at **Section B2** above, it gives to DMCs the "exclusive power and authority to control and supervise" Wardens.

140 Section 16(5) is important to the Claim that the MWP breaches Treaty principles and UNDRIP, as its plain meaning leaves little room for development by the Crown of a policy which has a government department (TPK) and Crown officials de facto supervising and controlling Wardens.

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131 See e.g. Michelle Hippolite brief of 28.2.14, #B18, at [13]; Te Rauhuia Clarke brief of 28.2.14, #B14, at [25]-[26], [32].

132 Hearing Transcript, #4.1.1, day 3/session 2, at pp316-317 (Kim Ngārimu).

133 See *New Zealand Māori Council v Attorney-General [MOM]* [2013] 3 NZLR 31 (SC), at [50], [59], [62]-[63] and [92] (the last paragraph citing UNDRIP in support).

141 The Claimants acknowledge that the 1962 Act allows the Districts to delegate to Māori Executives and Committees the power and authority to control and supervise specified Wardens (ss 16(5)-(7)). Crown evidence[134] and evidence from one Warden (Jordan Winiata Haines)[135] was that DMCs had delegated the powers to appoint and to manage Wardens to Wardens' associations. However, that evidence was challenged by the Claimants' witnesses.[136] No written delegations were in fact produced, despite being requested from the Crown by the Tribunal,[137] and despite the statutory requirement for any delegations to be in writing (s 16(6)). Moreover, Mr Winiata Haines acknowledged that no delegation had in fact been signed.[138] In any event, no such delegation would have been valid as there is no authority in the 1962 Act for DMCs to so delegate to a Wardens association or anyone other than a Māori Committee or Executive.

142 The conformity of the MWP with the relevant Treaty principles and UNDRIP rights needs to be approached in light of this evidence.

(E3) Ways in which the MWP is inconsistent with Treaty principles

143 The Claimants say that the existence and/or the operation of the MWP breaches Treaty principles and associated UNDRIP rights in at least ten respects. These are identified under the headings that follow.

(i) Supervision and control of Wardens outside of 1962 Act structures

144 The Crown is breaching the partnership, active protection and utmost good faith principles, as well as Arts 4, 5, 18 and 20(1) of UNDRIP, in its exercise of de facto powers of supervision and control of Wardens through the MWP, including its funding of Wardens (preferring those aligned to Wardens

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134 Te Rauhuia Clarke brief of 28.2.14, #B14, at [45]

135 Jordan Winiata Haines affidavit of 14.3.14, #B28, at [12].

136 See e.g. Hearing Transcript, #4.1.1, day 3/session 1, at p254 (Sir Edward Durie); Karen Waterreus reply affidavit of 7.3.14, #B25, at [6]; Sir Edward Durie statement in reply of 7.3.14, #B24, at [18].

137 See Hearing Transcript, #4.1.1, day 1/session 1, at pp17-18.

138 Hearing Transcript, #4.1.1, day 3/session 1, at p287 (Jordan Winiata Haines).

associations)[139] on terms and conditions imposed by TPK without reference to DMCs (or the NZMC), contrary to the 1962 Act.

145 Examples of the Crown de facto supervising and controlling Wardens through its MWP, which constitute breaches of Treaty principles and UNDRIP, are:

145.1 the provision of funding grants directly to Wardens, on conditions prescribed and overseen exclusively by TPK through contractual arrangements between TPK and the grant recipient. The consistent evidence from Claimant witnesses,[140] independent witnesses,[141] and indeed from Crown witnesses,[142] is that the NZMC is not involved nor consulted and neither are DMCs on applications for MWP funding;

145.2 the Youth at Risk Programme that TPK funds and exclusively administers. TPK has established this Programme under the auspices of the MWP and it deals with Wardens outside of DMC oversight; an approach which has built up uncertainty, resentment and division between Warden groups depending on whether they are part of the Programme, and which has in turn posed governance difficulties for the DMCs whose Wardens are affected by the Programme;[143]

145.3 the failure of TPK to consult with the NZMC (or through it, DMCs) on how MWP funding can most efficiently and effectively be spent;[144]

145.4 the provision of uniforms on condition that Wardens complete a training programme that is prescribed by TPK (and Police);[145] and

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139 See e.g. Millie Hawiki affidavit of 21.2.14, #B1, at [21], [25] (Wardens in some Districts are provided with funding and vans, but not Wardens in Wellington); and see similarly Wilma Mills affidavit of 21.2.14, #B3, at [29]-[30]; Angelia Ria affidavit of 21.2.14, #B7, at [20]; Noelene Smiler affidavit of 21.2.14, #B2, at [24]. See also Hearing Transcript, #4.1.1, day 3/session 2, at p353 (Te Rau Clarke).

140 Hearing Transcript, #4.1.1, day 1/session 3, at p79 (Owen Lloyd), day 2/session 3, at p185-186 (Karen Waterreus), and at p210 (Rihari Dargaville).

141 Hearing Transcript, #4.1.1, day 3/session 1, at pp277-278, 297 (Jordan Winiata Haines).

142 Hearing Transcript, #4.1.1, day 3/session 2, at pp363-364 (Te Rau Clarke).

143 Diane Ratahi affidavit of 21.2.14, #B6, at [15]-[17]; Rihari Teihi affidavit of 24.2.14, #B11, at [6].

144 Diane Black affidavit of 21.2.14, #B5, at [20], [29].

145.5 the TPK Regional Co-ordinators providing information directly to Wardens, rather than to DMCs, on when warrants are to expire.[146]

146 The Crown through the actions just noted is de facto supervising and controlling Wardens, as Mr Clark fairly acknowledged in his oral evidence.[147]

147 That Crown role is contrary to s 16(5) of the 1962 Act,[148] and to the nature of the office – Wardens being a Māori institution designed "by Māori for Māori",[149] whose effectiveness depends on the **perceived** independence of Wardens from the Crown and Police. The result of this is to undermine the integrated structure of the 1962 Act.[150] In practical terms, TPK's approach has also had an adverse "separating effect", influencing the cohesion and interaction of Wardens based on whether they get MWP funding.[151]

148 By virtue of the **effects** described above, the partnership, active protection and utmost good faith principles and are being infringed, even if that is not the Crown's subjective aim or intention (see **Section E3** above). The Crown is also breaching Arts 4, 5, 18 and 20(1) of UNDRIP through its MWP.

149 The Crown in directly funding Wardens through the MWP is also arguably infringing s 7(6) of the 1962 Act. It contemplates Wardens being paid remuneration or allowances for their services, not by the government, but by

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145 Diane Black affidavit of 21.2.14, #B5, at [43]; and see also Des Ratima affidavit of 21.2.14, #B4, at [3]; Angelia Ria affidavit of 21.2.14, #B7, at [19]; Hearing Transcript, #4.1.1, day 3/session 1, at p301 (Jordan Winiata Haines).

146 Diane Ratahi affidavit of 21.2.14, #B6, at [13] Ngaire Schmidt statement of 28.2.14, #B16, at [10] (TPK Regional Co-ordinator "has played a key role in tracking outstanding warrants").

147 Hearing Transcript, #4.1.1, day 3/session 2, at pp368-369 (Te Rau Clarke).

148 Note too Lady Emily Latimer affidavit of 11.3.14, #B27, at [9] (1959 DMC minutes record the dropping of a motion that Wardens be paid by government without it getting to a vote); and further Wilma Mills affidavit of 21.2.14, #B3, at [24] ("Accepting grants where there are strings attached that we don't really know about would affect the mana of the [Aotea DMC].").

149 Diane Black affidavit of 21.2.14, #B5, at [35]. Note too Sir Edward Durie statement of 21.2.14, #B9, at [26] ("A special feature is the build-up of Wardens' whakapapa. Many families have supplied Wardens for several generations so there is a wealth of experience that has been built up and a wealth of respect for certain families as a result."); and see also Wilma Mills affidavit of 21.2.14, #B3, at [1]-[7] (Wardens spanning three generations of the family).

150 Sir Edward Durie statement of 21.2.14, #B9, at [23]. See also Titewhai Harawira affidavit of 21.2.14, #B10, at [7]-[10]; Hearing Transcript, #4.1.1, day 2/session 2, at p164 (Diane Black) (both explaining how in practical terms integration works).

151 Des Ratima affidavit of 21.2.14, #B4, at [6].

"a Māori Association". The definition of "Māori Association" in s 2 indicates that the payer should be one of the institutions provided for in the 1962 Act, not the Crown, as Kim Ngārimu agreed in her oral evidence.[152] The question is whether payment of MWP funds constitutes the payment of "remuneration" or an "allowance" to Wardens.

150 The Crown answers 'no' to that question, seemingly giving to "remuneration" and "allowance" a narrow meaning.[153] The Claimants disagree. They say that a plain meaning interpretation should be given to "allowance", and that this extends to money set aside "to compensate for something or to cover special expenses".[154] This broader approach to "allowance" is supported by the evident purpose of s 7(6) (i.e. Wardens to be accountable to local communities and, thereby, subject to influence only through Māori Associations), as well as the purpose of the 1962 Act more generally (i.e. Māori to be left by the Crown to self-govern themselves). If the Tribunal accepts the Claimants' analysis, then TPK is also breaching s 7(6) in paying funds direct to Wardens and Wardens associations for uniforms, travel expenses and the like. The breach of the 1962 Act in this way constitutes a further breach of the partnership, active protection and utmost good faith principles.

(ii) Administration of Wardens by unelected/unaccountable officials

151 The Crown is also breaching the Treaty principles just noted and Arts 4, 5, 18 and 20(1) of UNDRIP, in its employment of TPK officials including a Project Manager (Te Rau Clarke) and six Regional Co-ordinators not elected by or directly accountable to Māori,[155] to fund and administer Wardens through the MWP.[156]

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152 Hearing Transcript, #4.1.1, day 3/session 2, at p317 (Kim Ngārimu).

153 See Crown closing submissions of 14.5.14, #3.3.3, at [62].

154 Quoting the definition of "allowance" in the Collins Oxford Dictionary (1979) at p39.

155 Hearing Transcript, #4.1.1, day 3/session 2, at p361 (Te Rau Clarke). Note too the survey responses of Auckland Wardens; "I don't know who Te Puni Kōkiri is because they have never been to our hui": Exhibit 1 to Titewhai Harawira affidavit of 21.2.14, #B10(a), at p4; and see similarly the response of other Wardens at p8 ("I don't know who Te Puni Kōkiri is"), p9 ("What's Te Puni Kōkiri here, never meet them or heard of them at any hui"), p12 ("Haven't seen them"), p14 ("I haven't seen them personally"). See also Lady Emily Latimer affidavit of 11.3.14, #B27, at [2] ("It is an old view that Māori exercising authority over their own people must be accountable to them. Traditionally, our leaders became leaders because the people

152 The resulting parallel 'system' for Wardens created by and through the MWP has undermined the focus on representativeness and accountability to local Māori communities which is central to the 1962 Act;[157] it has caused confusion for Wardens as to who their administrators are;[158] and it has undermined the mana and authority of unpaid volunteers carrying out DMC statutory responsibilities, causing some volunteers to leave.[159]

(iii) Failure to fund 1962 Act institutions/structures for Wardens

153 The inadequacy of the Crown's funding of the 1962 Act institutions and structures, including the NZMC, is a long-standing problem.[160]

154 Restricting our focus for now to the MWP, the Crown appears to have decided to not generally resource the NZMC and through it DMCs directly to fulfil their statutory responsibilities in relation to Wardens, as for example by appropriating or otherwise allocating money to the NZMC specifically for the administration of Wardens.[161] Whilst the NZMC receives annual funding of

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acknowledged them as such, and they ceased to be leaders if they lost popular support. The people are governed from within, not from the outside. This must also be the case with the Wardens. They become a threat to the people if their loyalty is moved away from their communities or if they become a power unto themselves."); and see also [22].

156 See Titewhai Harawira affidavit of 21.2.14, #B10, at [24], [25]-[26], [29], [46]-[48].

157 See Sir Edward Durie statement of 21.2.14, #B9, at [9] (1962 Act "is structured in such a way that it ensures accountability to the Community at all levels); Wilma Mills affidavit of 21.2.14, #B3, at [9] (Wardens to be "focused on making sure people were accountable back to their communities", and in that way helped to provide an "alternative justice system that worked very well in our communities"); Diane Ratahi affidavit of 21.2.14, #B6, at [8] (emphasising the importance of Māori Committees to ensuring accountable and effective Māori governance locally and in the Districts); 'Exhibit A' to Kim Ngārimu brief of 28.2.14, #B13(a), at p5 (consultation submitters raised connections between Wardens and the "administering [of] community justice").

158 Des Ratima affidavit of 21.2.14, #B4, at [11]; and also Te Rauhuia Clarke brief of 28.2.14, #B14, at [36].

159 Titewhai Harawira affidavit of 21.2.14, #B10, at [24]; Diane Black affidavit of 21.2.14, #B5, at [20]-[21] (DMC volunteers not funded an amount equivalent to the salaries of TPK's coordinators) and [38]-[40] (regional coordinators are collecting nominations and reappointments, which DMCs have always done).

160 See e.g. (12 November 1970) 370 NZPD 4914-4915 (Matiu Rata MP in the House debate on the Māori Purposes Bill 1970).

161 Sir Edward Durie statement in reply of 7.3.14, #B24, at [15]; Des Ratima affidavit of 21.2.14, #B4, at [2.6]; Karen Waterreus affidavit in reply of 7.3.14, #B25, at [10]; Diane Black affidavit of 21.2.14, #B5, at [28], [34]; Rihari Teihi affidavit of 24.2.14, #B11, at [10]; Hearing Transcript, #4.1.1, day 3/session 2, at p355 (Te Rau Clarke).

approximately $196k, this is largely absorbed by administrative costs.[162] Note too Diane Black's evidence that before the MWP was introduced the NZMC unsuccessfully requested a grant of $5,000 per DMC "in order to give them some administration money".[163]

155 The Crown's withholding of funds from the very bodies the 1962 Act charges with the statutory responsibility for Wardens has given rise to problems at the DMC level, which Diane Black explained in the following terms:[164]

> Now we have our ups and downs like anyone else done but you need to also to be aware that the District Councils throughout the motu get no funding whatsoever to operate themselves. Now for six years I was chair of Tamaki Ki Te Tonga District Māori Council and in that time I ran that District Māori Council out of my back pocket. And I hear some people who don't really have understanding. They don't realise why the District Māori Councils don't meet all the time. Because the District Māori Council executives can't afford to hold hui. You can't go to a marae to hold a hui and not give money for kai. You can't go to a hall and not arrange to have kai there. And you cannot ask your Māori committees can you please bring a plate. I'm sorry that's a Pakeha concept and we don't do it.

156 The Crown's decision to sidestep the NZMC and DMCs appears to be a consequence of the Crown's decision to fund Wardens directly through its MWP.[165] This has had the practical consequence that TPK not DMCs (and the NZMC) are seen to be in charge of Wardens.[166] It has also resulted in a not insignificant proportion of the money earmarked by Parliament for Wardens[167] through the MWP (52% over the four year period 2007/8 to 2010/11) being absorbed by TPK's own costs for administering the MWP.[168] This has reduced significantly the net funds available to Wardens at the grassroots.

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162 Karen Waterreus reply affidavit of 15.11.13, #A3, at [15]; Diane Black affidavit of 21.2.14, #B5, at [28].

163 Hearing Transcript, #4.1.1, day 2/session 2, at p179 (Diane Black).

164 Hearing Transcript, #4.1.1, day 2/session 2, at pp163-164 (Diane Black); and see similarly at p177 of the transcript.

165 Rihari Teihi affidavit of 24.2.14, #B11, at Annexure 1, [9] ("Fundamentally it is a funding issues managed by TPK with all the bureaucracy and the total inequities of distribution, which has caused major argument and dispute within the Wardens ranks, worse there is also division amongst some districts.").

166 Lady Emily Latimer affidavit of 11.3.14, #B27, at [14]; Melanie Mark-Shadbolt affidavit of 21.2.14, #B8, at [9] (TPK actions are "creating a perception that [TPK] are in charge of the Watene").

167 Note Kim Ngārimu's acceptance that Parliament does not in appropriating this money earmark how its administration is to be organised in a staffing sense: see Hearing Transcript, #4.1.1, day 3/session 2, at p315 (Kim Ngārimu).

168 Hearing Transcript, #4.1.1, day 2/session 4, at pp228-229 (Michelle Hippolite).

157 Somewhat surprisingly the evidence before the Tribunal also shows that TPK "underspent significantly" the MWP appropriations in at least one year of the Project, returning unspent money to Treasury in that year.[169] That was despite there being more requests for grants than MWP funds available, and despite the need of the NZMC/DMCs for funds to support the performance of their statutory responsibilities to Wardens under the 1962 Act.

158 As noted above, specific NZMC requests to the Crown (TPK) for funds to control and supervise Wardens have also been rejected[170] (in contrast to NZMWA requests, which have been accepted[171]). An example is the Māori Wardens Administration Manual developed by NZMC/DMC representatives for the benefit of Wardens.[172] The Crown's (TPK's) reasons for not supporting the Manual – that the drafting of it was outside the terms of reference of the Project in whose context it was created;[173] that its formatting had issues; that there was a need for "some redrafting"; and that there was a lack of TPK "capacity to undertake that work at that time"[174] – are underwhelming. Another example of the Crown's refusal to support attempts by the NZMC/DMCs directly to assist Wardens in terms of the Act was the refusal to support a training programme developed by a DMC for Wardens.[175]

159 The Crown has breached and is breaching the partnership, active protection and utmost good faith principles in side-lining the institutions and structures of the 1962 Act in the ways just noted. It is also breaching the equity principle in favouring in its funding decisions Māori who are aligned to Wardens associations (including the NZMWA) over Māori who are aligned to the NZMC/DMCs in terms of the 1962 Act.[176] These Crown actions also constitute breaches of Arts 4, 5, 18, 20(1), 33(2) and 39 of UNDRIP.

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169 Hearing Transcript, #4.1.1, day 3/session 2, at p358 (Te Rau Clarke).
170 Diane Black affidavit of 21.2.14, #B5, at [29].
171 Diane Black affidavit of 21.2.14, #B5, at [29].
172 Diane Black affidavit of 21.2.14, #B5, at [14]; the draft Manual is exhibited, #B5(a); Titewhai Harawira affidavit of 21.2.14, #B10, at [33].
173 Hearing Transcript, #4.1.1, day 3/session 2, at p363 (Te Rau Clarke).
174 Te Rauhuia Clarke brief of 28.2.14, #B14, at [35].
175 Diane Black affidavit of 21.2.14, #B5, at [23].
176 See also Hearing Transcript, #4.1.1, day 2/session 1, at pp123, 125, 129 (Diane Ratahi); p135 (Billie Mills); p138 (Titewhai Harawira: TPK using MWP funds to "divide and rule").

(iv) Failure to (re)appoint Wardens in a timely manner

160 The 1962 Act does not state a time within which applications for appointment need to be processed by the Minister, and applications for reappointment need to be processed by the Chief Executive. But it is a basic principle of administrative law that decisions must be made reasonably promptly.[177] This implicit statutory requirement is not being met by the Crown (TPK).

161 The evidence is that Wardens have been waiting for (re)appointment for periods ranging from months,[178] to a year,[179] to 2 years,[180] to 3 years.[181] In one case, a warrant had expired four months before its Warden received it.[182]

162 In some cases, the delay has led to the loss of Wardens who became tired of waiting to be (re)warranted.[183] Delay has also left and leaves Wardens with expired warrants legally vulnerable if they continue to act in the meantime, for without a valid warrant a Warden lacks legal authority to perform his or her duties.[184] Particularly notable on this issue was Te Rau Clark's confirmation in his oral evidence that it is TPK's view that Wardens are acting illegally when they purport to act in the absence of a valid warrant.

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177 See e.g. *Horton v Attorney-General* CA43/97, 3 December 1997, 17 per Richardson P ("While the section does not impose express time limits, it requires the chief executive to follow the statutory process and by necessary implication to do so with due expedition"); *Vea v Minister of Immigration* [2002] NZAR 171, 182 (HC) per Hugh Williams J ("it would be naturally and objectively accepted and expected in the relationship between the decision-maker and the applicant that the decision would be made within a reasonable time. … Allowing deferment of the decision beyond a reasonable time, whether that deferment be deliberate or accidental, involves the failure to perform the duty to decide").

178 Titewhai Harawira affidavit of 21.2.14, #B10, at [30]; Diane Ratahi affidavit of 21.2.14, #B6, at [23].

179 Owen Lloyd affidavit of 28.2.14, #B12, at [12]; Melanie Mark-Shadbolt affidavit of 21.2.14, #B8, at [17]; Hearing Transcript, #4.1.1, day 2/session 1, at p127 (Diane Ratahi: over a year).

180 Diane Black affidavit of 21.2.14, #B5, at [40]; Ngaire Schmidt statement of 28.2.14, #B16, at [10]; Rihari Teihi affidavit of 24.2.14, #B11, at [8] and Annexure 1, at [10]; Hearing Transcript, #4.1.1, day 2/session 2, at p155 (Noelene Smiler: Wellington warrants are outstanding "as at August 2012").

181 Diane Black affidavit of 21.2.14, #B5, at [25]; and also Des Ratima affidavit of 21.2.14, #B4, at [8] (some warrants "years overdue").

182 Hearing Transcript, #4.1.1, day 2/session 1, at p126 (Diane Ratahi: "The warrant I got before the one I have now, I got it on the 22nd of January and it had expired in September the year before").

183 Diane Black affidavit of 21.2.14, #B5, at [25].

184 Des Ratima affidavit of 21.2.14, #B4, at [7]; Diane Black affidavit of 21.2.14, #B5, at [26]; Noelene Smiler affidavit of 21.2.14, #B2, at [21]. Note that while the 1962 Act contains a statutory immunity provision for the benefit of members of a Māori Association (see s 41), it does not contain an equivalent immunity for Wardens.

163 Mr Clarke fairly accepted in his oral evidence that Crown delays in (re)warranting Wardens are "of concern" given this TPK view of the law.[185]

164 In addition to being legally vulnerable, Wardens who purport to act without valid warrants suffer in having less mana on the streets on which they perform their important responsibilities.[186]

165 The evidence further shows that problems internal to TPK and the Minister's office in processing applications for warrants and their renewal are also creating difficulties for DMCs and the NZMC. In particular, these 1962 Act institutions are unfairly being blamed (by Wardens) for the Crown's delays.[187]

166 Perhaps unsurprisingly, the perception has also arisen from this and in light of the operation of the MWP that the Crown by their warranting delays are setting the NZMC and DMCs up for a failure and, thereby, creating a problem that can be pointed to as a reason for changing the 1962 Act.[188] This is problematic in terms of the Treaty,[189] and also more generally:[190]

> It is a principle of law that no one can … take advantage of the existence of a state of things which he himself produced.

167 The Crown suggests that some (re)warranting delays are due to uncertainty as to who represents DMCs following the triennial elections of 2012, particularly in the Wellington District, and that it is acting in a cautious but good faith manner.[191]

168 The first response is that the 1962 Act does not give the Minister any power to review DMC election results. That is a function for the Courts. Reflecting

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185 Hearing Transcript, #4.1.1, day 3/session 2, at pp358-359 (Te Rau Clarke).

186 Hearing Transcript, #4.1.1, day 1/session 3, at p60 (Des Ratima). See also Owen Lloyd affidavit of 28.2.14, #B12, at [13]-[14]; and see also Te Rauhuia Clarke brief of 28.2.14, #B14, at [44] (TPK's failure to process warrants "has caused some frustration and has possibly affected access to funding"); Ngaire Schmidt statement of 28.2.14, #B16, at [10] ("The delays have stressed a number of Wardens").

187 See Diane Black affidavit of 21.2.14, #B5, at [26]-[27]; Titewhai Harawira affidavit of 21.2.14, #B10, at [30]; Noelene Smiler affidavit of 21.2.14, #B2, at [9]-[19].

188 Titewhai Harawira affidavit of 21.2.14, #B10, at [27]-[28], [31]. See also Hearing Transcript, #4.1.1, day 2/session 2, at p156 (Noelene Smiler: "it appears that the Crown provides resources because they've got their own agendas in mind").

189 See *Te Whanau o Waipareira Report* (Wai-414, 1998), at section 8.3.2(1), p225.

190 *New Zealand Shipping Co. v Société Des Ateliers et Chartiers de France* [1919] AC 1, 6 (HL) per Lord Finlay LC.

191 Michelle Hippolite brief of 28.2.14, #B18, at [20].

this, the NZMC is required only to notify the Minister of who has been appointed to office under the 1962 Act.[192] In neither the 1962 Act nor regulations made under it is there any duty for the NZMC to explain to the Minister whether and if so how elections processes have been complied with. Such issues, if disputed, are more properly the subject of a judicial review.

169 The second and related response is that the NZMC has provided to TPK all the information necessary to establish that elections were valid and that the officers of the various Districts were duly elected as required.[193] The problem is that TPK has not responded to this NZMC initiative by either accepting 2012 election results or advising exactly why they are not accepted.[194] It appears to the Council, and it is now submitted, that in presuming to oversee the electoral process, and in failing to act on the NZMC's advice as to the officers validly in office, TPK has extended its powers beyond those which the law has prescribed for the protection of the Council's independence and self-government. This is more particularly set out in the next section.

170 TPK has also continued to work with persons who are no longer District chairs, including in relation to Warden (re)appointments,[195] and it has acted without transparency in its warranting activities.[196] In addition to being contrary to the democratic processes of the 1962 Act, these Crown actions have unfairly given rise to perceptions that the current NZMC and DMCs lack stability and are not doing all they can to address (re)warranting problems.[197]

171 Finally, the Claimants draw attention to the suggestion in the Crown's evidence that some delays in renewing warrants may lie in TPK unnecessarily

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192 See reg 7(2) of the Māori Community Development Regulations 1963.

193 See Karen Waterreus reply affidavit of 7.3.14, #B25, at [4]; Sir Edward Durie statement of 21.2.14, #B9, at [16]; Des Ratima affidavit of 21.2.14, #B4, at [7]; Millie Hawiki affidavit of 21.2.14, #B1, at [19].

194 See Karen Waterreus reply affidavit of 7.3.14, #B25, at [3]; Sir Edward Durie statement in reply of 7.3.14, #B24, at [14]; Sir Edward Durie statement of 21.2.14, #B9, at [16]; Owen Lloyd affidavit of 28.2.14, #B12, at [9]; and Rihari Teihi affidavit of 24.2.14, #B11, at [9].

195 See Karen Waterreus reply affidavit of 7.3.14, #B25, at [4]; Sir Edward Durie statement of 21.2.14, #B9, at [16]; Melanie Mark-Shadbolt affidavit of 21.2.14, #B8, at [16]-[17]; Angelia Ria affidavit of 21.2.14, #B7, at [9]-[13] and Exhibit "AR1"; Sir Edward Durie statement in reply of 7.3.14, #B24, at [13]-[14].

196 Hearing Transcript, #4.1.1, day 2/session 3, at p197 (Karen Waterreus).

197 Karen Waterreus reply affidavit of 7.3.14, #B25, at [5]; Sir Edward Durie statement of 21.2.14, #B9, at [17]-[18].

providing applications to the Minister's office, notwithstanding that the statutory power to renew warrants lies with the Chief Executive alone.[198] Recognising that Crown witnesses contradicted one another on this point, so that on the evidence before the Tribunal there is ambiguity, the Claimants submit that it would be of assistance if the Tribunal could confirm in its report that such an approach is without warrant in terms of the 1962 Act, and that if it has been or is being undertaken, it is unnecessarily and unhelpfully contributing to delays in renewing Wardens' warrants. This is in turn frustrating Parliament's intent in amending s 7 of the 1962 Act in 1975 to allow the re-appointment of Wardens by the Chief Executive for the purpose of "saving the time of the Minister who appointed the original appointee".[199]

172 The Crown in its failure to process Warden (re)appointments in a timely manner; in its associated failure to address the database and data entry problems it has recognised as contributing to its delays in that regard;[200] in its failure clearly to communicate the reasons why Warden (re)appointments are not being timely processed by the Crown; and in its failure clearly to communicate that the NZMC and DMCs are not the cause of all current delays in (re)warranting Wardens (in Wellington), is breaching the partnership principle and the associated Treaty principle of utmost good faith.

(v) Warranting of Wardens through persons no longer holding elected office

173 As indicated above, the Crown (TPK) in breach of the 1962 Act has continued to work with persons who are no longer District chairs, including in relation to Warden (re)appointments.[201] In this recognition of former officers, TPK has hindered the NZMC's ongoing processes for reform.

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198 Hearing Transcript, #4.1.1, day 2/session 4, at pp235-236 (Michelle Hippolite); although compare the evidence given at p349 of the transcript (Te Rau Clarke).

199 (7 October 1975) 402 NZPD 5252-5253 (second reading debate on Māori Purposes Bill 1975).

200 Hearing Transcript, #4.1.1, day 3/session 2, at pp346-347 (Te Rau Clarke). See also at p373 of the Transcript, recognising that warranting was done more efficiently by TPK under Gayle Hohaia, and that there is room for improvement today.

201 See Karen Waterreus reply affidavit of 7.3.14, #B25, at [4]; Sir Edward Durie statement of 21.2.14, #B9, at [16]; Melanie Mark-Shadbolt affidavit of 21.2.14, #B8, at [16]-[17]; Angelia Ria affidavit of 21.2.14, #B7, at [9]-[13] and Exhibit "AR1". See also Sir Edward Durie statement in reply of 7.3.14, #B24, at [13]-[14]; Hearing Transcript, #4.1.1, day 1/session 3, at p65 (Des Ratima).

174 Formerly, some District chairs had continued in office without conducting triennial elections or without notifying the public of election venues and times. The NZMC had sought to end such practices. TPK's recognition of them undermines the NZMC's stance. The TPK decision to deal with former District chairs has also hindered the NZMC's attempts to re-establish the inactive Districts on the basis of democratic elections.

175 Dealing with the first issue of TPK effecting warrants through persons who are no longer District chairs, it is submitted that the problem arises entirely from TPK's failure to observe the terms of the statute or to consult on the matter with the NZMC as the body ultimately responsible for Wardens under the 1962 Act. This may be explained by reference to the affected Districts, of Te Tau Ihu and Wellington, and the balance of the inactive Districts, Hauraki, Waikato, Maniapoto and Tauranga-Moana. The situations are addressed in turn below.

The Te Tau Ihu District

176 Starting with the District of Te Tau Ihu, this had been chaired by Archdeacon Ruru. However, the NZMC determined at the conclusion of the triennial elections in 2012 that there was no evidence of elections in that District as required by the 1962 Act.[202] As a result Archdeacon Ruru was amongst those who had ceased to hold office as provided for by s 20(3) of the 1962 Act.

177 In the ordinary course of events the District would then have been amalgamated with an operative District pending its re-establishment.[203] Because of cultural and historical ties, Wellington would have been the obvious choice. However, no amalgamation was feasible in the circumstances since TPK had assumed the de facto administration of the Wardens in that District, and was (and is) in liaison with Archdeacon Ruru for the purpose.[204]

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202 Hearing Transcript, #4.1.1, day 2/session 3, at p182 (Melanie Mark Shadbolt).

203 Sir Edward Durie statement in reply of 7.3.14, #B24, at [10].

204 See Karen Waterreus affidavit in reply of 7.3.14, #B25, at [4]. See similarly Hearing Transcript, #4.1.1, day 2/session 3, at p182 (Angelia Ria), p183 (Melanie Mark Shadbolt); day 3/session 2, at p312 (Kim Ngārimu).

178 Michelle Hippolite informed the Tribunal at the hearing that Archdeacon Ruru is still wishing to proceed with a mediation on an issue concerning his role in Te Tau Ihu, but the NZMC has still to be informed on what the issue is and why TPK continues to deal with Archdeacon Ruru.[205] No Crown witnesses (Te Rau Clarke included) were able to clarify this in their oral evidence. Nor has it been clarified to the NZMC by TPK subsequent to the hearing.

179 The Claimants submit that TPK is acting in breach of the 1962 Act and in breach of the Treaty principles of partnership, active protection and utmost good faith in engaging with Archdeacon Ruru against the interests of the NZMC, including in relation to the administration of the Te Tau Ihu Wardens. In terms of the 1962 Act, the Claimants say that s 20(3) causes the term of office of a DMC's members to expire at the three yearly dates when DMC elections need to take place. This follows from the words used in s 20(3):

> Subject to the provisions of this Act, the term of office of every member of a District Māori Council **shall expire with 30 April** in each year when a triennial election is held.

180 The Crown's position – that the expiry of a term of office in a DMC is contingent upon a valid election being "held"[206] – is inconsistent with the purpose of the 1962 Act (i.e. ensuring those elected to office are and throughout remain accountable to their local communities).

181 The Crown's position also sits uncomfortably with s 20(1) of the 1962 Act, which ties the expiry of office of Māori Committee members to when a "successor is elected". If Parliament had intended this same approach to apply to DMCs, then s 20(3) would similarly tie terms of office to the election of successors. But it does not. Section 20(3) does not take that approach because of s 14(4), which provides for the mischief of an inactive District by allowing the NZMC to "at any time by resolution alter the boundaries of any Māori Council district or amalgamate 2 or more districts or constitute a new district over part of an existing district". Through this means the NZMC, validly elected and remaining accountable throughout to the community, can ensure

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205 Sir Edward Durie statement of 21.2.14, #B9, at [16]-[17], Sir Edward Durie statement in reply of 7.3.14, #B24, at [11]-[14], Karen Waterreus affidavit in reply of 7.3.14, #B25, at [3]-[4], Noelene Smiler affidavit of 21.2.14, exhibits, #B2(b).

206 Crown closing submissions of 14.5.14, #3.3.3, at [64]-[65].

that the functions of an inactive DMC (including in relation to Wardens) are able to be discharged. This makes sense in terms of the scheme and purpose of the 1962 Act, and also explains why s 20(3) is prefaced with the proviso that it is (i.e. "Subject to the provisions of this Act"). Finally the Claimants note the legislative history. It shows that Parliament when inserting the power of amalgamation now in s 14(4) into the 1962 Act, did so to provide for the ongoing administration of Wardens in situations where the Māori committee responsible for them was "defunct", "inactive" or "just [did] not exist".[207]

182 It follows from this analysis of the 1962 Act that Archdeacon Ruru's challenge to the NZMC's decision has either to be taken to the Courts, or referred to arbitration in terms of the process which the Council has established.[208] Archdeacon Ruru has not gone to either the Courts or the NZMC and in fact he has not communicated directly with the Council at all. The Crown (TPK) in continuing to deal with Archdeacon Ruru as if he remains validly in office for the Te Tau Ihu District is acting in breach of the 1962 Act and, thereby, the Crown is breaching the partnership, active protection and utmost good faith principles.

The Wellington District

183 Turning to the Wellington District, Sharyn Watene had been its chair. But at its meeting of June 2012 as part of the triennial election process, the NZMC determined that Rahui Katene had been elected to the Wellington chair by a publicly notified election process.[209] Ms Watene did not engage with the NZMC on this decision, did not respond to communications and did not challenge the NZMC's decision on who has been validly elected.[210] Nevertheless TPK has either continued to deal with Ms Watene, or has refused

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207 (2 October 1969) 363 NZPD 3249 (Whetu Tirikatene-Sullivan MP (Southern Māori): "Under clause 7 the facility for Māori wardens to carry on their work is extended so that where Māori committees which have jurisdiction over wardens do not exist – and there are many areas where in fact the committees are defunct, inactive, or just do not exist and therefore the Māori wardens have no supervisory committee – the wardens will still be able to function") (debate on Māori Purposes Bill 1969).

208 The process is explained in Sir Edward Durie's statement of 21.2.14, #B9, at [16] and the attached letters there referred to.

209 The events are explained in Noelene Smiler affidavit of 21.2.14, #B2, at [9]-[19].

210 Hearing Transcript, #4.1.1, day 2/session 2, at p153 (Noelene Smiler); day 3/session 2, at p368 (Te Rau Clarke).

to deal with Ms Katene, upon the ground that there is an issue of status which remains unresolved.[211] TPK has also refused to process (re)warrant applications for the Wellington District since the disputed election of 2012.[212]

184 No evidence was provided by the Crown to the Tribunal to show how TPK has satisfied itself that Ms Watene has complied with 1962 Act electoral requirements and was validly elected.[213] Indeed, Te Rau Clarke when pressed could not confirm that TPK had even investigated whether Ms Watene's claim to have been validly elected had an evidential basis.[214] Mr Clarke also indicated at one point in his oral evidence that TPK was acting on policy not legal advice in taking the position it is on the Wellington elections dispute.[215] At best then, the position presented by TPK to the Tribunal on this issue was confusing.

185 In contrast, the NZMC's evidence was clear. Ms Watene had not been validly elected in terms of the 1962 Act, Ms Katene was validly elected, and Ms Katene has been recognised as such by the NZMC in terms of the 1962 Act.[216]

186 As noted above, the Crown in its closing submissions defends TPK's position on the ground that the expiry of the term of office for persons elected to a DMC is contingent upon a valid election being held.[217] If the Crown is right in this (for the reasons set out in paragraphs 179 to 181 above, the Claimants say it is not), it must be incumbent upon the Crown (TPK) either to accept the view communicated to it by the NZMC as to who has been validly elected, or to investigate with all deliberate speed the competing claims and determine which is correct. The Crown in the case of Wellington has done neither.

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211 Hearing Transcript, #4.1.1, day 2/session 2, at pp153-154 (Noelene Smiler); day 3/session 2, at p330 (Kim Ngārimu).

212 Hearing Transcript, #4.1.1, day 2/session 2, at p155 (Noelene Smiler); day 3/session 2, at p312 (Kim Ngārimu).

213 Hearing Transcript, #4.1.1, day 2/session 2, at p157 (Jason Gough).

214 Hearing Transcript, #4.1.1, day 3/session 2, at p350 (Te Rau Clarke).

215 Hearing Transcript, #4.1.1, day 3/session 2, at p351 (Te Rau Clarke); although compare Transcript at p352 ("it isn't my responsibility, my understanding is that our legal team within Te Puni Kōkiri are dealing with that matter").

216 Hearing Transcript, #4.1.1, day 2/session 2, at pp160, 162 (Noelene Smiler).

217 See Crown closing submissions of 14.5.14, #3.3.3, at [64]-[65].

187 The evidence presented to the Tribunal by the affected Wardens is that this Crown failing is a cause of prejudice and distress. Quoting Noelene Smiler:[218]

> You know, this has been really, really tough for us, having no warrants, and I think Te Rau's statement around Wellington warrants is kind of like, I think he dismisses lightly the frustration that we've felt, but not only frustration, it goes further than that. We've been ostracised as Māori wardens in the sense that Te Puni Kōkiri and the Police, they actually support the other wardens, who are not a part of us, and those wardens are out there doing all this work with their support and we've got nothing.
>
> So it goes further than the fact that there may be possibly be two Wellington District Māori Councils, they actually support the other district council Māori wardens and not us. So, the fact that they say that that is their reason for withholding our warrants, when you really look at it, it goes further than that.

188 Absent any legal basis under the 1962 Act which justifies TPK doing what it is, the Claimants say that TPK is obliged to deal with the officers notified to it by the NZMC, unless and until the position notified to TPK is overturned by a Court or by the arbitration process provided for by the NZMC. No Court decision having been issued to the contrary, and indeed no Court proceedings having been filed,[219] the statute as it stands must be applied.

The Hauraki, Waikato, Maniapoto and Tauranga-Moana Districts

189 In relation to these Districts, the NZMC has determined that in terms of s 20(3) of the 1962 Act no one is validly in office in the Districts on account of a failure to conduct elections in the 2012 triennial elections. Again, but for the intervention of TPK these Districts would ordinarily have been amalgamated with an operative District pending their reconstitution. Again there is no authority for TPK to administer or to appoint Wardens in these Districts. The Wardens must be appointed through the officers of the Districts with which the inactive Districts have been amalgamated.

(vi) Warranting of Wardens other than through DMCs

190 The Crown accepts in its evidence that this has happened in the past, but suggests that this occurred only where the relevant DMC had delegated its

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218 Hearing Transcript, #4.1.1, day 2/session 2, at p154 (Noelene Smiler).

219 Hearing Transcript, #4.1.1, day 2/session 2, at p157 (Jason Gough).

power of nomination to a Wardens association.[220] However, and as set out at **Section E2** above, no evidence of any written delegation has been provided by the Crown to substantiate this,[221] notwithstanding that that is a requirement of the 1962 Act (see ss 16(6)-(7)), and further, s 16(6) of the 1962 Act permits of delegations only to Māori Executives and Committees.

191 Note too TPK's job description for its Regional Co-ordinators, which include amongst the job accountabilities "assist with warden warranting by assisting wardens with processing warrant applications when required".[222] Te Rau Clarke's oral evidence was that this job requirement was necessary for Regional Co-ordinators to assist Wardens in inoperative Districts.[223]

192 The Crown's warranting of Wardens other than through DMCs constitutes a further breach of the partnership, active protection and utmost good faith principles. It is also contrary to Arts 4, 5, 18 and 20(1) of UNDRIP.

(vii) Promotion of inappropriate views on who/what a Warden is

193 It is important to the kaupapa of Wardens that barriers are not erected to prevent individuals from becoming Wardens or from participating as Wardens on the grounds of age, level of health or fitness.[224] There are many things Wardens can do, and Warden-appropriate tasks can always be found. The Crown's apparent view that Wardens need to be young and fit to be effective, and its approach through the MWP of prescribing fitness and related requirements to receive funding,[225] is contrary to this kaupapa. As Sir Edward Durie emphasised in his oral evidence, it is particularly important for children to have access to "aunts and uncles" Wardens in whom they may confide.[226]

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220 Te Rauhuia Clarke brief of 28.2.14, #B14, at [45]-[46].

221 Karen Waterreus reply affidavit of 7.3.14, #B25, at [6]; Sir Edward Durie statement in reply of 7.3.14, #B24, at [18].

222 Hearing Transcript, #4.1.1, day 3/session 2, at p360 (Te Rau Clarke).

223 Hearing Transcript, #4.1.1, day 3/session 2, at pp360, 362, 372 (Te Rau Clarke).

224 Lady Emily Latimer affidavit of 11.3.14, #B27, at [28]-[29]; and see similarly Diane Ratahi affidavit of 21.2.14, #B6, at [21]; Hearing Transcript, #4.1.1, day 2/session 2, at p175 (Diane Black), and day 3/session 1, at p249 (Sir Edward Durie).

225 Diane Black affidavit of 21.2.14, #B5, at [37].

226 Hearing Transcript, #4.1.1, day 3/session 1, at p249 (Sir Edward Durie).

194 There has also developed in some areas a practice of Wardens serving as paid security guards.[227] If this development is not a direct consequence of the MWP, it has arisen since the introduction of the MWP and is consistent with the commercial/monetary focus of the MWP[228] (reflected also in TPK's employment of paid staff to administer Wardens). That philosophy does not accord with the history and kaupapa of Wardens.[229] It also raises the potential for conflict with the Private Security Personnel and Private Investigators Act 2011 (see paragraph 206.4 below). Contracts for work and event management can be maintained through statutory Māori Committees in a manner which is consistent with the 1962 Act and with the kaupapa.

195 Finally, the training programmes the Crown (TPK and Police) has developed for Wardens appear not to provide information on the kaupapa of the 1962 Act and the important thinking behind Wardens' functions.[230] This problem is addressed in more detail under the next heading.

196 At the least the Crown has passively encouraged these developments – for instance, through its decision not to adequately resource the NZMC/DMCs to ensure appropriate support for and training of Wardens consistent with the Wardens' kaupapa. This gives rise to further breaches of the partnership, active protection and utmost good faith principles. It is also contrary to Arts 4, 5, 18 and 20(1) of UNDRIP.

(viii) Encouragement of a too close Warden relationship with Police

197 Wardens work with but not within the Police.[231] This allows Wardens to deal with problems in a way that is in accordance with tikanga,[232] and also ensures their independence and principal accountability to their community.[233]

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227 Lady Emily Latimer affidavit of 11.3.14, #B27, at [31].

228 See generally Sir Edward Durie statement in reply of 7.3.14, #B24, at [26].

229 Lady Emily Latimer affidavit of 11.3.14, #B27, at [31].

230 See Sir Edward Durie statement in reply of 7.3.14, #B24, at [26]; Lady Emily Latimer affidavit of 11.3.14, #B27, at [36]; and also Melanie Mark-Shadbolt affidavit of 21.2.14, #B8, at [10].

231 Millie Hawiki affidavit of 21.2.14, #B1, at [14], [22]-[23]; and similarly Owen Lloyd affidavit of 28.2.14, #B12, at [20]; Lady Emily Latimer affidavit of 11.3.14, #B27, at [36] ("The Wardens' job is to prevent, persuade and lead, but not to arrest or prosecute. To do that job they must demonstrate they are independent of the Police, but nonetheless respectful of the Police and respected by them so that they call on

198 Structured and formal Police training for Wardens, as TPK has encouraged through the MWP, is contributing to an 'un-learning' of the non-adversarial approach that historically has made Wardens so effective.[234] Too closely aligning Wardens with Police through the training they receive and through the approaches they are consequently taking is also tending to cause people to equate Wardens with Police, and to lead some Wardens to think they are Police, undermining confidence in Wardens and thereby their effectiveness.[235]

199 Note too Jordan Winiata Haines' oral evidence on this topic:[236]

> But I think the downside of [training developed and led by Police], which I haven't heard a lot, but I think it has been discussed is, the police involvement and how much of an impact that it's had on some of the wardens, and I can say that we've had one or two, that sorta got side tracked with the training and sort of lost track of who was actually the ones to be listening to in their respective areas…

200 Again the Crown's (at the least) passive support for these developments, breaches the partnership, active protection and utmost good faith principles. It is also contrary to Arts 4, 5, 18 and 20(1) of UNDRIP.

(ix) Overarching failure to promote respect for the law

201 The Crown's establishment and administration of the MWP, contrary to the scheme of the 1962 Act and particular provisions in it (most notably s 16(5)) does not respect statute law. It is in this regard a matter of concern that officers of the State have chosen to disregard existing law, while at the same time the State more generally in the exercise of its Art 1 kawanatanga powers (and rightly) seeks to emphasise the importance of legal compliance.[237]

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them when that is necessary."); Wilma Mills affidavit of 21.2.14, #B3, at [31]; Hearing Transcript, #4.1.1, day 2/session 1, at p139 (Titewhai Harawira).

232 Millie Hawiki affidavit of 21.2.14, #B1, at [14], [24]; Wilma Mills affidavit of 21.2.14, #B3, at [8] (Wardens work "with Māori, for Māori and in accordance with Māori codes of conduct").

233 Millie Hawiki affidavit of 21.2.14, #B1, at [14].

234 Diane Black affidavit of 21.2.14, #B5, at [9]; and see similarly Wilma Mills affidavit of 21.2.14, #B3, at [18].

235 Lady Emily Latimer affidavit of 11.3.14, #B27, at [36]; Diane Black affidavit of 21.2.14, #B5, at [9]-[10]; Wilma Mills affidavit of 21.2.14, #B3, at [19], [31]-[33].

236 Hearing Transcript, #4.1.1, day 3/session 1, at p301 (Jordan Winiata Haines).

237 Lady Emily Latimer affidavit of 11.3.14, #B27, at [16].

202 As Lady Emily Latimer observes:[238]

> Our northern District Māori Council representatives have worked long and hard to promote respect for the law, as is provided for in the 1962 Act, but how can we ask our Māori Committees and Wardens to promote the same, or our young people to respect the law, when Te Puni Kōkiri itself does not deal with the Committees and District Māori Councils which have the statutory responsibility?

203 Also of concern is that TPK has been asked for financial reports for the MWP but that these have not been forthcoming,[239] TPK has paid grants to organisations different from those which applied for the money,[240] and that it has not required some Wardens associations to which TPK provides funds to be transparent about how they hold and distribute those funds to Wardens.[241] This is all contrary to the 1962 Act emphasis on accountability, and indeed good public sector practice, and it amounts to further breaches of the partnership, active protection and utmost good faith principles. It is also contrary to Arts 4, 5, 18 and 20(1) of UNDRIP.

(x) Proposals to sever the Wardens from the Council

204 The MWP is further inconsistent with the principles of the Treaty in that it proposes the establishment of an independent body to administer the Wardens, as described at **Section B4** above, without having sought the approval of the NZMC/DMCs to the consequential amendment that would be required to the 1962 Act agreement. As considered at **Section B1** to **Section B3** above, the Wardens are an integral part of the framework for Māori self-government.

205 The appropriate process for statutory reform to restructure the Wardens is considered in the next section. For the present it is submitted that the failure to properly investigate the proposal and inform the NZMC and the Wardens of the issues, has had serious impacts upon Warden morale and unity.

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238 Lady Emily Latimer affidavit of 11.3.14, #B27, at [16].

239 Diane Black affidavit of 21.2.14, #B5, at [31]-[32]; Titewhai Harawira affidavit of 21.2.14, #B10, at [23] and Exhibit 4, #B10(a), at pp55-56.

240 Diane Black affidavit of 21.2.14, #B5, at [41]-[42].

241 Melanie Mark-Shadbolt affidavit of 21.2.14, #B8, at [12]-[15]; Angelia Ria affidavit of 21.2.14, #B7, at [14]-[18].

206 As was noted in an oral response to the evidence of certain Wardens filed on the eve of the hearing, apparently supporting independence,[242] seven years have elapsed since the MWP was launched by the Crown, but the Wardens are no closer to being informed of the shape of the independent body and of the issues involved.[243] The issues include:[244]

206.1 What is to be the shape of "independence"? Is it total autonomy or operational autonomy comparable to the operational autonomy of the Police under the Police Act 2008, where the Police remain subject to Ministerial direction? In supporting the establishment of the NZMWA in the 1960s, the NZMC was initiating a form of autonomy with DMCs retaining policy oversight with which the NZMWA agreed, as is shown in the constitution of the NZMWA and in the Taitokerau DMC minute book filed on the Record of Inquiry.

206.2 To whom will the independent body be accountable and who will approve warrants for Wardens?

206.3 What form of accountability will there be given constitutional restrictions on bodies exercising or purporting to exercise constabulary powers without an appropriate accountability, and given the potential conflict with NZBORA guaranteed rights?[245]

206.4 How will prospective conflicts with private commercial interests in security services and event management and compliance with the

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242 But note Hearing Transcript, #4.1.1, day 3/session 1, at pp290-291 (Jordan Winiata Haines: beliefs on independence set out in his affidavit were personal, and the same beliefs set out in the separate affidavit of Linton Sionetali had been copied verbatim from a word version draft of Mr Winiata Haines's affidavit that Mr Winiata Haines had sent to Mr Sionetali). Note too Mr Winiata Haines's acknowledgment to Dr Phillipson that he was still "not too sure how" autonomy/independence for Wardens would work, and the interest he subsequently expressed in Sir Edward's policy/operational model: see day 3/session 1, at pp293, 298.

243 See e.g. Hearing Transcript, #4.1.1, day 2/session 1, at pp120, 128 (Diane Ratahi); day 2/session 3, at p193 (Karen Waterreus); day 3/session 1, at pp245-252, 257, 268-270 (Sir Edward Durie).

244 See also NZMWA Discussion Paper, Wharauroa Marae, Taumaranui, 7 July 1990, #C18(h), at p114 (noting issues arising if Wardens' self-determination was sought).

245 Note that TPK has recognised the risk of Wardens' activities breaching NZBORA rights, and received legal advice from Russell McVeagh on this; see TPK Handover Brief – Māori Wardens Project, 7.4.09, at p007, [19]-[20], exhibits to Te Rauhuia Clarke brief of 28.2.14, #B14(a).

Private Security Personnel and Private Investigators Act 2011 be managed?

206.5 What impact will the changes proposed have on the customary Wardens kaupapa with its focus on a close relationship between the Wardens and their Māori communities, and on "aunts and uncles" Wardens in whom children and others might confide?

206.6 How will the proposed changes align with the prospective role of Wardens as contributors to the modern concepts of community policing and restorative justice?

206.7 How will the proposed changes address the Māori crime rate and especially the abuse of children within the home?

207 These are difficult but very important questions for Wardens, and they need to be asked and answered before any large reform process is undertaken.

208 As Sir Edward Durie explained in his oral evidence:[246]

> What is the point of going through a large reform process of meeting with all these various groups, these reference groups and those whom it is suggested we should talk to if you can't do it anyhow? And that is the worry that I have.

209 The process to date, designed and led by the Crown (TPK), has lost sight of these bigger picture questions.

210 It also remains to be clearly put to Māori whether they stand more to lose than they will gain from any attempt to reform an Act whose full potential is still to be realised.[247] As Owen Lloyd explained in his oral evidence:[248]

> … I suppose the thing we need to understand, is that, 'if you walk away from the heater, you don't get the warmth', and it's the same as we say today, is that, if we walk away, as the way the Act is today, the mana

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246 Hearing Transcript, #4.1.1, day 4/session 1, at p248 (Sir Edward Durie).

247 See e.g. Hearing Transcript, #4.1.1, day 2/session 1, at p142 (Titewhai Harawira: "People say 'well, you can't go backwards', hey, that wasn't a backwards step, that was a very forward step for our kaumatua and kuia at that time. A very forward step, and we can thank them, your uncles, your aunties, and maybe your grandparents, or maybe even your parents, for being involved at that particular time."). See also Hearing Transcript, #4.1.1, day 3/session 1, at pp251-252 (Sir Edward Durie).

248 Hearing Transcript, #4.1.1, day 1/session 3, at p78 (Owen Lloyd).

> sits in with the Act, not – and that's the Act that causes us to either fall foul of the law and to be punished as a result or whatever, and therefore, if they walk away then they need to understand to 'what' and 'how' and 'how' can they do their work if they were to do so…

211 To date Wardens have been called upon to make decisions on their prospective restructuring and future direction without the necessary material and advice on which to make an informed decision with reference to the questions noted above – and without the engagement of the NZMC. It is submitted that the Wardens have suffered from division and uncertainty as a result.

212 The Crown's actions in causing this have contravened the Treaty principles of utmost good faith and active protection. They have also breached Arts 4, 5 and 20(1) of UNDRIP.

(F) CLAIM ON THE PROCESS FOR REFORMING THE 1962 ACT[249]

213 As set out in the Summary at **Section A** above, the Claimants seek findings that the Crown led and controlled process to reform the institutions in the 1962 Act, including the institution of the Wardens, has been inconsistent with the principles of the Treaty and UNDRIP. The Claimants seek recommendations that any reform should be NZMC led and negotiated with the government.

214 Subsidiary issues which arise are:

214.1 whether the consultation process for reform developed by the Crown and applied by it to date, was compliant with the Treaty; and

214.2 whether sufficient consideration has been given to the NZMC's own proposals for the Wardens and the constitutional implications of the Wardens' claim to independence.

215 The Claim relating to reform of the 1962 Act is best approached in two stages.

216 First, the consultation/reform process to date should be assessed for its consistency with Treaty principles and UNDRIP rights. The Claimants say that the Crown's immediately past actions are important in informing the Tribunal's assessment of what the Crown (TPK) is likely to do in the future,

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249 i.e. the First Claim.

including if it retains the discretion itself to ultimately decide what reform of the 1962 Act should look like, as the Crown continues to propose.[250]

217 Tribunal findings of defects in the process adopted by the Crown (TPK) to date are also necessary to 'correct for' the misperception that that process has been Treaty and UNDRIP compliant, as the Crown continued to insist in its evidence to the Tribunal.[251] Prophylactically, findings of breach of Treaty principles and associated UNDRIP rights are also likely to ensure that relevant Treaty principles and UNDRIP rights appropriately inform future consultation processes – particularly in relation to the 1962 Act.

218 Having analysed and made findings on the consultation/reform process to date, the Claimants say that the Tribunal should then address and provide forward-looking guidance on managing a Treaty compliant process for any future reform of the 1962 Act. As noted above, the Crown's actions in the process to date should inform the role that the Crown should play going forward.

(F1) Treaty/UNDRIP breaches in the reform process to date

219 The Crown in its closing submissions says that its process from 2009 to 2013 in relation to review of the 1962 Act was consistent with Treaty principles.[252]

220 The Claimants disagree. They say that the process developed and run by the Crown to date for reform of the 1962 Act is tainted by breaches of Treaty principles and UNDRIP rights in eight respects. These are set out below.

(i) Refusal to allow Māori themselves to reform the 1962 Act

221 The Crown's refusal to let Māori themselves develop the particular structure(s) they want to self-govern by at a local, regional and national level,[253] and indeed the failure of the Crown during its consultation process to identify that rangatiratanga/self-determination rights are implicated, breached the principle

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250 See Michelle Hippolite brief of 28.2.14, #B18, at [10.3]-[10.5]. Note too Karen Waterreus affidavit of 2.10.13, #A1, at [15] (Kim Ngārimu responding to hui question about what final MCDA will look like that "what steps the minister takes from there [i.e. hui] is for the minister, we cannot make those promises").

251 See e.g. Hearing Transcript, #4.1.1, day 3/session 2, at pp308-313 (Kim Ngārimu).

252 See Crown closing submissions of 14.5.14, #3.3.3, at [28].

253 Karen Waterreus affidavit of 2.10.13, #A1, at [18].

of the right to govern in exchange for protection of rangatiratanga, the partnership principle, and Arts 4, 5, 18, 19, 20(1) and 33(2) of UNDRIP.

(ii) Inadequate time provided for written submissions

222 The short notification the Crown (TPK) gave to Māori of the consultation process[254] (note too the failure of TPK's Warden Co-ordinators to give advance notice that consultation on reform of the 1962 Act was to take place[255]), and the limiting of the time available for input to 10 weeks despite the absence of any reasonable need to expedite the consultation process,[256] breached the Treaty principles of informed decision-making and partnership.

223 The process appears to have been designed by the Crown with a goal of bureaucratic efficiency rather than truly allowing the people and leadership to develop and agree upon a vision for Māori self-determination.[257]

(iii) Inadequate opportunity for kanohi ki te kanohi dialogue

224 Closely related to the inadequate time given for written input as part of the consultation process, was the failure of the Crown to give affected Māori a reasonable opportunity to formally discuss face-to-face proposed changes to legislation that uniquely and specially affects them. The holding of the consultation hui on weekdays and during working hours,[258] and for Auckland outside of the areas of the city where the majority of Māori currently live,[259] and the assigning of only two hours for face-to-face discussions at hui,[260] breached the rangatiratanga and informed decision-making principles.

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254 Titewhai Harawira affidavit of 21.2.14, #B10, at [35]; 'Exhibit A' to Kim Ngārimu brief of 28.2.14, #B13(a), at p7 (consultation submitters critical of "timing; notice given").

255 Titewhai Harawira affidavit of 21.2.14, #B10, at [48].

256 Sir Edward Durie statement of 21.2.14, #B9, at [32], [34].

257 Sir Edward Durie statement of 21.2.14, #B9, at [34].

258 Titewhai Harawira affidavit of 21.2.14, #B10, at [36]-[37]; 'Exhibit A' to Kim Ngārimu brief of 28.2.14, #B13(a), at p7 (consultation submitters critical of "insufficient hui time to discuss issues and a clash in one region with local Waitangi Tribunal hearings. There were also suggestions that all hui should have been held on marae or at a Māori venue for tikanga reasons and/or to support Māori organisations"); Sir Edward Durie statement of 21.2.14, #B9, at [34]; Karen Waterreus affidavit of 2.10.13, #A1, at [30]-[31].

259 Titewhai Harawira affidavit of 21.2.14, #B10, at [38]-[39].

260 Wilma Mills affidavit of 21.2.14, #B3, at [40].

225 Note by way of illustration the oral evidence of Diane Ratahi that in the Aotea rohe interested parties to get to the 8am weekday consultation hui in Whanganui would not only "have had to take a day off work which would interfere with that" but would in some cases have had to travel "quite some considerable time to journey there… and to travel back" – 3 to 3 ½ hour drive in the case of someone from Mokau.[261] Similarly Melanie Mark-Shadbolt said of the consultation hui held in Christchurch that:[262]

> The Māori Community Development Act Consultation Hui held in Christchurch on the 12th of September 2013 was held at a time (8-10 a.m.) that made it near impossible for people to attend. Our Watene had to take the morning off work, sort care for their children and moko and fight their way through rush hour traffic to get to the hui which was held at the ridiculous time of 8a.m.

226 The breaches of the Treaty principles of utmost good faith, informed decision-making and partnership which resulted from the inadequate opportunity for kanohi ki te kanohi dialogue appear to be explained, at least in part, by the Crown's (TPK's) failure to seek input from the NZMC/DMCs (and, indeed, from its own specialist MWP staff), on appropriate places and times to hold the consultation hui.[263] The Crown's failure to consult with the NZMC/DMCs as the relevant Māori representative bodies in terms of the 1962 Act,[264] was Treaty problematic.[265] Note in this regard the High Court's past emphasis that the Crown's duty to consult is not to be diluted where consultation:[266]

> … may have been administratively inconvenient and politically unwelcome given other considerations.

227 The timetable unilaterally set by the Crown for consultation was also Treaty problematic. See by analogy *Ko Aotearoa Tēnei*, finding that holding 14 local

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261 Hearing Transcript, #4.1.1, day 2/session 1, at p132 (Diane Ratahi).

262 Melanie Mark-Shadbolt affidavit of 21.2.14, #B8, at [18]; and see similarly Diane Ratahi affidavit of 21.2.14, #B6, at [28]-[30].

263 See Hearing Transcript, #4.1.1, day 3/session 2, at pp320-322 (Kim Ngārimu).

264 Hearing Transcript, #4.1.1, day 2/session 1, at pp140-141 (Titewhai Harawira).

265 See by analogy *Te Runanga o Muriwhenua v Treaty of Waitangi Fisheries Commission* [1996] 3 NZLR 10, 19-20 (CA) (Cooke P: natural justice "requires that as far as reasonably practicable [relevant Māori] be consulted by the Commission" that that "[t]he most practicable mode of consultation with [such Māori was] through the Urban Māori Authorities").

266 *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* HC Wellington CP237/95, 24 April 1997 at 155 per McGechan J (finding in consequence that consultation "with at least the major iwi groups with an interest in the Māori customary fishery in SNAl" did not pose "any major problem for the Minister").

consultation hui over a two-week period was inadequate engagement.[267] The Claimants note Kim Ngārimu's suggestion in her oral evidence that the Crown would subsequently provide information to the Tribunal on other recent TPK consultation processes which demonstrate that its very short timeframes in this case were reasonable.[268] The Claimants infer from the Crown's subsequent failure to adduce any information of this kind, that it does not exist.

228 Problems with the location and timing of consultation hui such as those noted above led to the predictable outcome that "the hui did not generate the level of detailed discussion of the whole Act that [the Crown] had hoped for".[269] The Claimants submit that this unfortunate outcome could have been avoided had a Treaty and UNDRIP compliant process been followed.

(iv) Dissemination of unfair, inaccurate or misleading information

229 The problem of inadequate opportunities for input, both in general and for face-to-face discussions at consultation hui, was compounded by unfair, inaccurate or misleading information the Crown disseminated in the consultation process.[270] The dissemination by the Crown of information having this quality breached the partnership and utmost good faith principles. It was also inconsistent with administrative law requirements (which should inform those Treaty principles), and in particular the obligation upon the government to publish only accurate and adequate information.[271]

230 Turning to this Inquiry and starting with the discussion paper,[272] the Claimants say that it is notable for the following deficiencies:

230.1 its simplistic display of the origins of the 1962 Act and Wardens,[273] including the Crown's failure to reflect in the discussion paper the

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267 *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai-262, 2011), at section 5.6.2, p163.

268 See Hearing Transcript, #4.1.1, day 3/session 2, at p326 (Kim Ngārimu).

269 Quoting Kim Ngārimu affidavit of 1.11.13, #A2, at [47].

270 These issues are fairly raised in this inquiry: see Sir Edward Durie statement in reply of 7.3.14, #B24, at [2].

271 See e.g. *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd [Quake Outcasts]* [2013] NZCA 588 at [88] per O'Regan P (the higher courts will not sanction dissemination by the Crown of "inaccurate or incorrect" information).

272 Kim Ngārimu affidavit of 1.11.13, exhibit 3, #A2(a), at p033 ff.

strong emphasis upon Māori determining for themselves how they should self-govern. On that, refer back to **Section B3** above, summarising the intent of the 1962 Act in this regard;

230.2 its failure to see Wardens' place in the broader justice system;[274]

230.3 its absence of any critical analysis of the MWP and the inconsistency of that Project with the history, text and purposes of the 1962 Act;

230.4 its failure to explain the Crown's complicity in problems which have arisen in the administration of Wardens,[275] including the Crown's delays in (re)warranting Wardens and in the case of the Te Tau Ihu and Wellington Districts the failure of the Crown to process Warden applications through the NZMC as the NZMC has proposed;

230.5 its failure to refer to the problems that the Māori Affairs Select Committee,[276] and TPK[277] saw (and continue to see) with the NZMWA, which were and are relevant to the ability of that entity to exercise any effective governance role in relation to Wardens;

230.6 its failure to refer to internal reforms to and then the resurgence of the NZMC and DMCs following the June 2012 triennial elections, leading

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273 Sir Edward Durie statement of 21.2.14, #B9, at [21], [39]-[44]; Diane Black affidavit of 21.2.14, #B5, at [48]-[49]; SOC, 27.9.13, #1.1.1, Summary, at [7]-[8]; Statement, at [6]-[21]; Karen Waterreus affidavit of 2.10.13, #A1, at [24]-[26].

274 Sir Edward Durie statement of 21.2.14, #B9, at [50].

275 Karen Waterreus reply affidavit of 15.11.13, #A3, exhibit "KW-3" ("Mismanagement of Wardens" heading); Sir Edward Durie statement in reply of 7.3.14, #B24, at [15] ("I consider the current distortions, the unlawful actions, and the complaints of some Wardens about the New Zealand Māori Council as described in the evidence of Ms Schmidt, is to a significant degree, a consequence of the decision by TPK to support the Wardens and not the District Māori Councils (and also it appears, to fund some Wardens but not others)").

276 Kim Ngārimu affidavit of 1.11.13, exhibit 1, #A2(a), at p010 and p011.

277 Des Ratima affidavit of 21.2.14, #B4, at [11]; and see similarly Te Rauhuia Clark brief of 28.2.14, #B14, at [10] (noting the NZMWAs "more recent organisational issues", and that it "has not received any annual appropriation since 2010/2011, as it has not provided TPK with satisfactory financial information"); Ngaire Schmidt statement of 28.2.14, #B16, at [6] (noting in respect of the NZMWA "Executive unrest causing fractured Warden support after a Special Meeting in Turangi in August 2012").

to a number of issues with the NZMC identified by the Select Committee in 2010, including Wardens issues, being addressed;[278] and

230.7 its failure to record the NZMC's position which was communicated clearly to the Crown on 11 June 2013 that UNDRIP was relevant to any reform of the 1962 Act (as the Māori Affairs Select Committee had also recognised in its 2010 report[279]) and that the NZMC's position relying on UNDRIP was that there should be no consultation on reform of the 1962 Act "until the new Council is properly bedded in".[280]

231 In addition to publishing a discussion paper having these defects, the Crown disseminated information in consultation hui which was unfair, inaccurate or misleading. For instance, a TPK official stated at one of the Auckland consultation hui that the NZMC was not working properly and that this was a reason to change the 1962 Act.[281] The failure of that official to identify the MWP and a lack of Crown funding as important factors inhibiting the NZMC's performance of its statutory responsibilities under the 1962 Act, meant that the statement was not a fair one.[282] Similarly, the evidence is that the Whanganui and Taranaki consultation hui were "government oriented" and "negative to" the NZMC in tone.[283] The evidence also shows that Crown officials made misleading statements about the NZMC's history,[284] and inaccurately summed up hui discussions.[285] Again this was not the fair dissemination of information by a good faith Treaty partner.

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278 SOC, #1.1.1, Statements, at [46]-[49]; Karen Waterreus affidavit of 2.10.13, #A1, at [20]. This change was also acknowledged by the Crown in its evidence: see Hearing Transcript, #4.1.1, day 3/session 2, at p366 (Te Rau Clarke).

279 Kim Ngārimu affidavit of 1.11.13, exhibit 1, #A2(a), at p007.

280 See Hearing Transcript, #4.1.1, day 3/session 2, at pp319-320 (Kim Ngārimu)

281 Titewhai Harawira affidavit of 21.2.14, #B10, at [41]. Note that Titewhai Harawira's evidence on this (indeed all her evidence) was not contested by the Crown.

282 Titewhai Harawira affidavit of 21.2.14, #B10, at [41].

283 Wilma Mills affidavit of 21.2.14, #B3, at [38].

284 Karen Waterreus affidavit of 2.10.13, #A1, at [9.6]; Karen Waterreus reply affidavit of 15.11.13, exhibit "KW-3", #A3(a) ("TPK's Opening Presentation" heading).

285 Karen Waterreus affidavit of 2.10.13, #A1, at [9.6] and "Exhibit 1", #A1(a) (4.9.13 hui notes, and 17.9.13 hui notes).

(v) No opportunity for Council to air its proposals

232 The Crown's approach of consulting on reform of the 1962 Act over the opposition of the NZMC elected in the June 2012 triennial elections, meant that the new NZMC had no opportunity to prepare its own reform proposals, or to seek a mandate for those proposals from the Māori community. As the evidence of Sir Edward Durie demonstrates, the NZMC has a broad vision for the future role of the Wardens. It also has a number of concerns such as the constitutional implications of an independent Wardens body. These concerns are summarised in paragraph 206 above.

233 The Crown's decision to proceed to consultation in the manner it did, including the timeframes unilaterally set by the Crown for the consultation processes, has prevented the NZMC from airing these views in a Māori-centric manner, and precipitated the need for the present Inquiry. This has breached the Treaty principles of partnership, good faith and informed decision-making. It is also contrary to Arts 4, 5, 18 and 20(1) of UNDRIP.

(vi) Failure of the Minister personally to attend hui

234 Where a matter uniquely affects Māori and a Minister is critically responsible for it, the principle of informed decision-making can require the Minister himself or herself to engage "kanohi ki te kanohi (face-to-face) with the representatives for the [affected Māori]… at the least", rather than merely relying upon third parties to do that for and on behalf of the Minister.[286]

235 In circumstances where the Minister of Māori Affairs is responsible for the 1962 Act (see s 3); where that Act is a critical part of the Minister's portfolio; where the accountability of Māori appointees to Māori communities is central to the text and scheme of the Act; and where the Minister was proposing the most significant changes to the Act in 50 years (including at that time, the abolition of the NZMC), the Claimants say that it was incumbent upon the Minister to be seen to closely engage with reform of the 1962 Act by personally attending at national consultation hui considering reform

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[286] See *Trustees of Tuhua Trust Board v Minister of Local Government* [2012] NZEnvC 202, [35]-[36] per Judge Smith.

proposals.[287] The Minister's failure to attend any of the consultation hui in these unique circumstances was unfortunate, and breached the rangatiratanga and partnership principles of the Treaty.

(vii) Failure to allow NZMC to co-chair hui

236 The rangatiratanga principle requires the Crown to facilitate cooperative governance. In light of the history of the NZMC and its special status and mandates under the 1962 Act, the exclusion of a NZMC representative from a co-chairing role at the consultation hui TPK organised in September 2013 was a breach of this Treaty principle (and in practical terms prevented a more balanced view of the 1962 Act and its reform being presented at the consultation hui[288]). It also breached Arts 18 and 19 of UNDRIP, signalling to hui attendees as it did that the Crown does not value the institutions and structures that Māori developed for themselves under the 1962 Act.[289]

(viii) Failure to fund NZMC in this Inquiry

237 Finally the Crown is breaching the partnership principle and Arts 4 and 39 of UNDRIP in its failure to fund the NZMC in this Inquiry. As noted earlier, the NZMC's annual funding of $196k is absorbed by administrative costs.[290] It does not stretch to cover costs associated with this Inquiry that are not met by legal aid, such as catering costs for Pipitea Marae and assistance to the DMC representatives to travel to Wellington for the three day hearing.[291]

(F2) The future: appropriate roles for Māori/Crown in any reform

238 Having identified the respects in which the Crown's consultation/reform process has not to date accorded with relevant Treaty principles and UNDRIP guarantees, the Claimants turn to consider where to from here. As explained above, the Claimants say that the past should inform parameters set for future Crown-Māori engagement in relation to the 1962 Act.

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287 Titewhai Harawira affidavit of 21.2.14, #B10, at [40] (noting too that the Minister did not attend Auckland consultation hui despite living close by).

288 Titewhai Harawira affidavit of 21.2.14, #B10, at [41].

289 Karen Waterreus affidavit of 2.10.13, #A1, at [28]-[29].

290 See e.g. Karen Waterreus reply affidavit of 15.11.13, #A3, at [15]; Diane Black affidavit of 21.2.14, #B5, at [28].

291 Hearing Transcript, #4.1.1, day 2/session 3, at p185 (Karen Waterreus).

239 By way of summary, the Claimants say that the process for reform of the 1962 Act should be paused until the Crown (TPK) complies with the Act. Only then should Māori consider whether the 1962 Act does not work, and if so how it should be changed to better reflect today's environment.

240 The Claimants have set out their proposed way forward in more detail below.

241 They have done this in light of the confirmation given by the Crown both at the hearing[292] and in the Crown's closing submissions,[293] that there is now no timeframe for the introduction of any legislation changing the 1962 Act.

(i) Pause consultation until the 1962 Act is complied with

242 First, the Claimants say that the 1962 Act should be allowed to operate as intended before any further action is taken towards reforming it.[294]

243 As Sir Edward Durie put it:[295]

> 6. It is now for the Crown to comply with the 1962 Act before proposing reform. In Treaty terms there is an issue of good faith and it is a matter of public policy (and indeed constitutional law) … that all must comply with the law and must be seen as complying with the law.
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> 7. To put it simply, the Crown must work through the New Zealand Māori Council for the administration of the Wardens, it must do so now, and it must do so before considering the appropriate process for reform. The Crown cannot bring about reforms on the basis of anomalies which the Crown itself has created.

244 Titewhai Harawira made the same point:[296]

> … the 1962 Act should be given a chance by TPK to work as it was intended to work, with the New Zealand Māori Council, District Māori

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292 See Hearing Transcript, #4.1.1, day 1/session 1, at p17 (Jason Gough); and day 2/session 4, at p219 (Michelle Hippolite).

293 See Crown closing submissions of 14.5.14, #3.3.3, at [33].

294 Sir Edward Durie statement in reply of 7.3.14, #B24, at [3].

295 Sir Edward Durie statement in reply of 7.3.14, #B24, at [6]-[7].

296 Titewhai Harawira affidavit of 21.2.14, #B10, at [42]; and further at [43] (explaining how and why this can be achieved without any great difficulty) and [44]-[45] (identifying problems with the counterfactual, being changes to the 1962 Act). See to similar effect Owen Lloyd affidavit of 28.2.14, #B12, at [25] ("we need clarity about the roles of Te Puni Kōkiri and the New Zealand Māori Council. Once that is cleared up, then one can plan to go forward"); Hearing Transcript, #4.1.1, day 1/session 3, at p57 (Des Ratima: "the Act is quite clear, in my head 'is I'm a soldier, here's the order, follow it', and that's just the way it is, and so, until the Act changes, that's the rule"), and further at p58 (stressing the need for "consistency").

> Councils and Māori Wardens being funded to do what the statute sets out for them, independent of government control.

245 And see by analogy the *Māori Development Corporation Report*, which provides a precedent for findings and recommendations of the kind sought:[297]

> We also consider that the proposed sale of the Crown's MDC shares must be deferred until such time as the company is refocused upon its original mission. The very Treaty obligations which the Crown sought to honour in sponsoring and investing in the MDC require this; the combined influence of the Crown and the Poutama Trust within the company can ensure its achievement.

246 Consistently with the findings of the Tribunal in that earlier report, Kim Ngārimu fairly accepted in her oral evidence that the MWP would need to change if it was not being operated by TPK in accordance with the law.[298]

247 In practical terms there are a number of steps that need to be taken to that end, to allow the 1962 Act to operate as intended. These are what the Tribunal (Mr Crosby) referred to at the hearing as the "interim measures" which need to happen in the short term.[299] It appears from the Crown's evidence that TPK has not internally discussed what measures of this kind are required,[300] so it can be assumed that it will be open to the Tribunal's recommendations.

248 Starting with the NZMC, the Claimants recognise and accept that it needs to:

248.1 'regularise' the situation of the remaining inoperative Districts, so that warrants for Wardens in those Districts can be processed.[301] Section 14(4) of the 1962 Act provides the NZMC with the power to "amalgamate 2 or more districts", and it can be used to this end;[302] and

248.2 at the same time the NZMC needs to actively assist the inoperative Districts to build up the capacity they need to become operative once

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297 *Māori Development Corporation Report* (Wai-350, 1993), at section 8.1, p49.
298 Hearing Transcript, #4.1.1, day 3/session 2, at pp315-316 (Kim Ngārimu).
299 See Hearing Transcript, #4.1.1, day 3/session 1, at pp264-265 (Ron Crosby).
300 Hearing Transcript, #4.1.1, day 3/session 2, at pp368-369, 372 (Te Rau Clarke).
301 See Hearing Transcript, #4.1.1, day 3/session 1, at p265 (Sir Edward Durie).
302 See Hearing Transcript, #4.1.1, day 1/session 3, at p54 (Des Ratima); day 3/session 1, at pp265-266 (Sir Edward Durie); day 3/session 2, at pp366-367 (Te Rau Clarke).

more in their own right. The 'Takitimu model' that Des Ratima spoke of in his oral evidence, may be of some assistance in these efforts.[303]

249 The Crown for its part must at the same time:

249.1 recognise the authority of the NZMC to take the proactive steps just noted, and actively encourage and assist the NZMC to do that;

249.2 appropriately fund the 1962 Act structures, through the NZMC, so that the DMCs and the NZMC are able to carry out the duties reposed in them by Māori and accepted by the Crown in the 1962 Act agreement.[304] Practically this might involve TPK (Te Rau Clarke, as Project Manager) working with the NZMC (Des Ratima, as Chair of the NZMC Wardens Committee) to transition from TPK financial autonomy/control of the Wardens and their putea to NZMC financial autonomy/control. This could be assisted by TPK seconding staff to work alongside DMCs through the NZMC, or by TPK contracting somebody to work alongside the NZMC to provide services through the DMCs.[305] Reinforced by accounting/audit requirements, either option for transitioning to a 1962 Act-compliant approach to the control and supervision of Wardens (including through funding) can meet the concerns the Crown refers to as being particularly relevant to it.[306] Michelle Hippolite's indication at the hearing that the budget of the NZMC/DMCs is not "off the table for discussion",[307] coupled with the assurance given by the Crown in its closing submissions that the MWP is open to alternate structures for future administration and management of its funds,[308] suggests that these discussions can be had with the urgency they require; and

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303 See Hearing Transcript, #4.1.1, day 1/session 3, at pp55-57, 64-66, 68-70 (Des Ratima).

304 Hearing Transcript, #4.1.1, day 2/session 1, at pp140, 141, 142, 144 (Titewhai Harawira); day 2/session 2, at p155 (Noelene Smiler); day 3/session 1, at p268 (Sir Edward Durie); day 3/session 2, at p323 (Kim Ngārimu: the need to ensure adequate funding for the NZMC "was a very common theme across the consultation] hui").

305 Hearing Transcript, #4.1.1, day 3/session 2, at pp31-332 (Kim Ngārimu).

306 See Crown closing submissions of 14.5.14, #3.3.3, at [13].

307 Hearing Transcript, #4.1.1, day 2/session 4, at p239 (Michelle Hippolite).

308 See Crown closing submissions of 14.5.14, #3.3.3, at [14.4].

249.3 recognise that the next triennial NZMC/DMC elections are in 2015, and allow these upcoming elections to be factored into the NZMC's consultation/reform process, and in particular timeframes for it.[309]

250 It would be helpful if the Tribunal in endorsing interim measures of the kind suggested above, could also confirm that the Crown will not be acting as a good faith Treaty partner, mindful of the functions conferred on the NZMC under s 18 of the 1962 Act, if the Crown refuses to engage with the NZMC on account of the fact that the NZMC is litigating against the Crown (and particularly in litigation unconnected to the 1962 Act and its reform).

(ii) Once legality is attained, Māori are to lead reform

251 After the 1962 Act institutions are adequately funded (see also Arts 4 and 39 of UNDRIP),[310] and the structures of the 1962 Act are thereby allowed to work as intended (i.e. with the power to supervise and control Wardens being returned to the institutions given that power by the 1962 Act), Māori should be given the opportunity, and necessary resources, to determine the process, and timeframe, for Māori to consult amongst themselves on reform of the Act and to reach agreement on what, if any,[311] reforms to the 1962 Act are needed.[312]

252 The Select Committee endorsed this approach in its 2010 report.[313]

253 The suggested approach also reflects the history to and the kaupapa of the 1962 Act (refer to **Section B2** and **Section B3** above).[314]

254 In this regard recall the observation of the Minister of Māori Affairs, the Hon. Ralph Hanan, in moving for committal the Bill which became the 1962 Act:[315]

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309 See Hearing Transcript, #4.1.1, day 2/session 3, at p186 (Karen Waterreus); day 3/session 1, at p258 (Sir Edward Durie).

310 See also Sir Edward Durie statement in reply of 7.3.14, #B24, at [16].

311 See Hearing Transcript, #4.1.1, day 3/session 1, at p257 (Sir Edward Durie: a large consultation process may not be required).

312 Titewhai Harawira affidavit of 21.2.14, #B10, at [49] ("Māori participation toward their own destiny of self-determination"); Hearing Transcript, #4.1.1, day 1/session 3, at p59 (Des Ratima), p81 (Owen Lloyd).

313 Kim Ngārimu affidavit of 1.11.13, exhibit 1, #A2(a), at p008 ("We think that any amendments to the Act must ensure that Māori communities can make their own decisions, and exercise their own cultural identity").

314 See Sir Edward Durie statement of 21.2.14, #B9, at [29]; Titewhai Harawira affidavit of 21.2.14, #B10, at [49]-[50].

> The member for Southern Māori made the constructive suggestion during one of the stages of the Bill that elections to tribal committees, district committees, or the national council should be by way of postal ballot. **The Government is unwilling to express an opinion on that. It considers that the suggestion should come from the Māori people…**

255 The Tribunal in recognising that the unique statutory regime in the 1962 Act compels the Crown to give the 'drafting pen' to someone else will not be breaking new ground in terms of the law of consultation, or indeed constitutional law more generally. The High Court in *Retirement Villages Ass'n* held that the statute there in issue required that a Code to be considered by the Minister for Building and Construction needed first to be drafted by the Association rather than by Crown officials.[316] The statutory contexts there and here are far apart. But the principle which was applied by the High Court – that Parliament can expressly or by necessarily implication provide for someone other than the Crown to be the drafter of law – has a broader reach.

256 The Claimants' position that any reforms to the 1962 Act should be developed and drafted by Māori and not by the Crown is also consistent with – indeed mandated by – UNDRIP.[317] See in particular Arts 4, 5, 18, 19, 20 and 33(2), and Dr Charters' uncontested analysis of these UNDRIP rights.[318] Note in particular Dr Charters' oral evidence that:[319]

> I think this state has an interest in – obviously if legislation is involved in doing some form of due diligence – right, so making sure potentially that this is a valid reflection of Māori views and that the processes could get to that point, but I don't think they should use the fact that it's – there's a legislative process that might have to implement the outcome, is anyway to review the substance perhaps of that decision.

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315 (13 December 1962) 333 NZPD 3357, #B33.

316 See *Retirement Villages Association of New Zealand Inc v Minister for Building and Construction* HC Wellington CIV-2007-485-2139, 19 December 2007, at [59]-[70] per Simon France J.

317 Hearing Transcript, #4.1.1, day 1/session 4, at pp109, 111 (Dr Charters).

318 Dr Claire Charters brief of 20.1.14, #A10, particularly at [111] (noting that a "consistent theme in the articles of the Declaration related to Indigenous peoples' right to self-determination is not to have outcomes imposed upon them by non-Indigenous governments"), and [133]-[141]. See similarly Owen Lloyd affidavit of 28.2.14, #B12, at [24]; Karen Waterreus reply affidavit of 15.11.13, #A3, paras 9 and 12; exhibit "KW-3", #A3(a), "No confidence in Crown processes", "Any changes to the Act must be led by Council and the Wardens" and "The Failure of the Select Committee Report and TPK Presentation to represent the impact that the Crown's takeover has had on the Wardens" headings).

319 Hearing Transcript, #4.1.1, day 1/session 4, at p111 (Dr Charters).

> So I'm not sure where a negotiation could come into or should come into it…

(iii) What a Māori designed and led process might look like

257 To avoid these issues returning to the Tribunal, it may be helpful to indicate what a Treaty and UNDRIP compliant process might look like.

The NZMC should lead the process

258 The starting point is that ordinarily the NZMC should assume responsibility to propose the reform of its own Act and so to lead the process.[320] After all, restructuring should ordinarily come from the body itself based on its own experience and accumulated understandings of how it might be more effective.

259 The Claimants in proposing that the NZMC should lead the process to consider whether and if so how to reform the 1962 Act, and that it should be given time to develop a tikanga consistent approach,[321] do not elevate the NZMC to an inappropriate status vis-à-vis other (national) Māori organisations.[322] As Diane Black explained in her oral evidence, the fact of being a Māori organisation does not mean that the members of that organisation will know about the structure and purposes of the NZMC; her experience on the Advisory Group was otherwise.[323] She continued:[324]

> And when I had a discussion with Iritana I said to him well how would you feel if I came along to your Trust and said no, I think you should run the Kohanga Reo this way. She said I'd tell you to get lost. I said well, what do you know about the New Zealand Māori Council and she said point taken.

260 Note too the Claimants' uncontested evidence that the NZMC has significantly reformed itself since the June 2012 triennial elections and that it is now in a

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320 Note Hearing Transcript, #4.1.1, day 3/session 1, at pp253-254 (Sir Edward Durie: need to be clear that the NZMC's role is not to purport to represent all Māori, but rather to put forward to government a position it considers to be of benefit of Māori people generally. Hence the NZMC complements iwi, and is not displaced by them).

321 See Hearing Transcript, #4.1.1, day 3/session 1, at pp259-260 (Sir Edward Durie).

322 Compare Crown closing submissions of 14.5.14, #3.3.3, at [23].

323 Hearing Transcript, #4.1.1, day 2/session 2, at pp172-173 (Diane Black).

324 Hearing Transcript, #4.1.1, day 2/session 2, at p173 (Diane Black). See similarly day 2/session 3, at p192 (Karen Waterreus: "we're talking about legislation which is about Māori communities not iwi organisation and those Māori committees forming district councils for Māori based in terms of where they reside, not their tribal affiliations"); day 2/session 4, at pp232-233 (Michelle Hippolite); and day 3/session 1, at p260 (Sir Edward Durie).

position to assume the responsibilities that the 1962 Act gives to it in this regard.[325] As Karen Waterreus explained in her oral evidence:[326]

> So I think the renewal of the New Zealand Māori Council is providing a voice for Māori communities who do not affiliate to iwi or are living away from home. And we've heard a lot of that evidence…
>
> I think people didn't know a lot about what New Zealand Māori Council's role – they'd forgotten what the Council was about and I think as people become more and more aware we're seeing the growth of Māori communities wanting to join back into New Zealand Māori Council.

261 Hence the support of many Warden witnesses at the hearing for the NZMC/DMCs to take the lead in any process for reform of the 1962 Act.[327]

262 Finally, the Claimants note Dr Charters' uncontested evidence in the context of UNDRIP that the NZMC's unique status and its history as a representative organisation are relevant to determining the proper role to be accorded to this institution for a consultation/reform process to be Declaration compliant.[328]

263 Notwithstanding the evidence referred to above, the Crown persists in suggesting that the NZMC cannot design and lead a process for possible reform of the 1962 Act because the NZMC has a conflict of interests and it lacks the necessary independence given that it and its structures will be amongst the subject matter of any review.[329] But that cannot be right.[330]

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325 See Hearing Transcript, #4.1.1, day 1/session 3, at p59 (Des Ratima); and also at pp71-72 (Des Ratima explaining the successful 'block basis' initiative developed by the NZMC's Warranting Committee to speed up the processing of warrant applications), p84 (Owen Lloyd: NZMC Warranting Committee has led to turnaround on warrants being "a lot quicker"); and day 2/session 4, pp241-242 (Michelle Hippolite: accepting that renewal of the NZMC post 2012 is relevant).

326 Hearing Transcript, #4.1.1, day 2/session 3, at p190 (Karen Waterreus).

327 See e.g. Hearing Transcript, #4.1.1, day 1/session 3, at p83 (Owen Lloyd); day 2/session 1, at pp128, 130 (Diane Ratahi: noting at the latter page that "the New Zealand Māori Council has been a family-oriented body with good sound principles and the conversation should be in-house"); pp134-135 (Billie Mills); day 2/session 3, at p181 (Melanie Mark Shadbolt); day 3/session 1, at p254 (Sir Edward Durie: not fair to criticise DMCs for not reporting to Wardens, as the structure of the 1962 Act is the other way round – Wardens should report to DMCs); and at p288 (Jordan Winiata Haines: proper relationship is between Wardens and DMCs not between Wardens and the NZMC skipping out the District level).

328 Hearing Transcript, #4.1.1, day 1/session 4, at p96 (Dr Charters).

329 See e.g. Hearing Transcript, #4.1.1, day 2/session 3, at pp195-196 (Virginia Hardy cross-examining Karen Waterreus on this).

330 See also Tribunal decision on urgency, #2.5.8, at [110].

264 The principle that to protect beneficiaries decision-makers should stand down from decisions where they have interests distinct from their beneficiaries does not apply here, as the Council does not serve any interests other than the interests of Māori generally. The Crown is more likely to have a wider set of interests, some of which will be pulling in different and opposed directions.

265 Further, the assertion of a conflict ignores the history of the NZMC, its development, its statutory mandates under s 18 of the 1962 Act, and its democratic legitimacy. Refer to the Parliamentary materials on the intent of the 1962 Act at **Section B3** above, and note Diane Black's oral evidence:[331]

> [Y]ou can't disconnect the Wardens from the District Māori Council, from the community, from the New Zealand Māori Council. They're all one. All one organisation and whether they start from here or not and go up, they're all one organisation and they talk about, oh the people from the grass roots. Let me tell you the people sitting up there in the New Zealand Māori Council are predominantly, predominantly, from the grass roots. We have some very austere people sitting behind me here, but they were elected by their communities.

266 Second, and following the *Te Wananga o Aotearoa Report*,[332] the Crown's position ignores the 'triangular' relationship between the Crown, the NZMC, and iwi/hapu, which does not lend itself to an oversimplified application of conflict of interests principles. In any event, even if the NZMC has independence issues (which is denied) these can be addressed by information disclosure – for instance, by the NZMC disclosing to those it engages with and in materials it disseminates that it has a 'special' interest in Wardens under the 1962 Act.[333]

267 The fact that there has been some dysfunction in the NZMC and in terms of DMCs is also not good grounds for side-lining these institutions from playing the role given to them in the 1962 Act.[334] That dysfunction has been and is being addressed, and significant reforms have been undertaken.[335] The

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331 Hearing Transcript, #4.1.1, day 2/session 2, at p165 (Diane Black).

332 *Te Wananga o Aotearoa Report* (Wai-1298, 2005), at section 4.6, p40 (quoted in Claimants' reply submissions of 15.11.13, #3.1.005, at [18]).

333 Karen Waterreus reply affidavit of 15.11.13, #A3, at [6].

334 Sir Edward Durie statement of 21.2.14, #B9, at [33].

335 See Sir Edward Durie statement of 21.2.14, #B9, at [33]; Sir Edward Durie statement in reply of 7.3.14, #B24, at [5], [10], [22]; Karen Waterreus reply affidavit of 7.3.14, #B25, at [8].

evidence is that reforms of the NZMC executive following the triennial June 2012 elections have led to more cohesive and effective representation.[336]

268 There is also an important point of principle involved, namely:[337]

> … that internal issues cannot justify proceeding at the pace being contemplated by the Crown, as it will effectively mean that the Crown will determine for at least the Māori communities in those six Districts Councils, who have not complied with the Māori Community Development Act 1962, how they should administer their Wardens.

Other significant Māori leadership bodies to also be involved

269 As earlier stated, where reform of the 1962 Act has implications for other Māori organisations which contribute to the exercise of Māori self-government, it is appropriate for them to be involved.[338] (Note that there is no evidence to suggest that the Crown has meaningfully involved such bodies in the reform process that it has followed to date[339]).

270 These other significant Māori leadership bodies should be consulted by the NZMC at the outset, to the end of reaching agreement on how proposals for any reform of the 1962 Act should be developed locally, regionally and nationally. As explained below, the extent of the engagement required will depend upon the nature of the changes proposed to the 1962 Act as it currently stands. In this way, different rangatiratanga interests are recognised and accommodated for in a manner consistent with the 1962 Act.

271 The Claimants in advancing this proposal disagree with Kim Ngārimu's suggestion that changes to the 'representational landscape' in the post Treaty settlement world mean that iwi have displaced the NZMC.[340] In the first place this ignores the responsibilities the 1962 Act, which remains the operative law, give to DMCs and the NZMC. This Crown position also over-simplifies the representational landscape. The reality of the world of today is that DMCs (and the NZMC) complement the role of iwi and other forms of leadership in

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336 Owen Lloyd affidavit of 28.2.14, #B12, at [11], [15]; and see also Wilma Mills affidavit of 21.2.14, #B3, at [37].

337 Quoting from Tribunal decision on urgency, #2.5.8, at [109].

338 Sir Edward Durie statement of 21.2.14, #B9, at [31].

339 Sir Edward Durie statement of 21.2.14, #B9, at [31].

340 See e.g. Hearing Transcript, #4.1.1, day 3/session 2, at p311 (Kim Ngārimu).

the District, as many witnesses explained to the Tribunal,[341] and as some iwi recognised in their submissions on TPK's consultation paper.[342] It should also not be forgotten that Parliament in providing for the NZMC at the national level did so with the intent "to assist Māoris as a whole regardless of tribal affiliations" (see paragraph 48 above, quoting Harry Lapwood MP).

272 Following on from this, the Claimants also say that, contrary to Michelle Hippolite's proposal, there is no justification for having a separate body represent Wardens in any reform process. This point has been touched on already. Sir Edward Durie's written evidence should be noted:[343]

> Under the current law, the New Zealand Māori Council is the democratic body appointed to advise the Crown on issues affecting Māori, not the Wardens. The Wardens are an arm of the New Zealand Māori Council, each of its members are bound to the structures of the 1962 Act and through that they are subject ultimately to the New Zealand Māori Council's direction. Having regard to their statutory relationship with the New Zealand Māori Council, they cannot stand as an independent reference group. Of course they may make submissions, and some may collectivise for that purpose, but Ms Hippolite's proposal cannot give the Wardens a status or role which they do not have in terms of the legislation and which is inconsistent with the legislation.

273 The Advisory Group's (draft) report of April 2008 is also relevant:[344]

> The New Zealand Māori Council and District Māori Councils are accountable to communities and through their appointment processes. **The structure is wholly independent from government.**

274 There is in any event, no need for Wardens to be represented by a separate body in the form of the NZMWA, because the NZMWA is bound by its constitution to fidelity to the 1962 Act, and to working in "close cooperation" with the NZMC.[345] To give the NZMWA a separate and distinct status to that

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341 Hearing Transcript, #4.1.1, day 1/session 3, at p85 (Owen Lloyd: "most of the iwi are more inward looking in terms of their own development, and where they wanna go as an individual iwi"); day 2/session 1, pp139, 142 (Titewhai Harawira); day 2/session 3, at pp190, 192-19, 1943 (Karen Waterreus); day 3/session 1, at pp252-253 (Sir Edward Durie).

342 Hearing Transcript, #4.1.1, day 3/session 2, at p324 (Kim Ngārimu).

343 Sir Edward Durie statement in reply of 7.3.14, #B24, at [8]; and note further at [9] ("It seems the first discussion which needs to be had is between the New Zealand Māori Council and the Māori Wardens to ensure that we are working in sympathy with one another."). See also Hearing Transcript, #4.1.1, day 3/session 1, at p261 (Sir Edward Durie).

344 Exhibit 2 to Titewhai Harawira affidavit of 21.2.14, #B10(a), at p35 (para 33).

345 Hearing Transcript, #4.1.1, day 3/session 1, at pp281-282, 283-284, 298-299 (Jordan Winiata Haines). See also Augie Fleras *From Village Runanga to the New Zealand*

of the NZMC in any consultations on the 1962 Act, as Michelle Hippolite proposes, would be inconsistent with these requirements of the NZMWA's own constitution – requirements which reflect already the policy/operational division that Sir Edward Durie spoke of in his oral evidence.[346]

275 To give the NZMWA a separate and distinct status to that of the NZMC would also go against the views expressed by a majority of Wardens in 1986, which was the last time all Wardens were formally and individually asked to vote on whether they wanted to stay under the NZMC's umbrella or to become the responsibility of the NZMWA.[347] Note too the more recent trend of Wardens coming closer or coming back to the NZMC/DMCs since the 2012 triennial elections and the resulting rejuvenation of the NZMC and DMCs. As Karen Waterreus explained in her oral evidence:[348]

> So I think we're seeing over time more and more of the wardens are coming closer or coming back to Council. And from my understanding that doesn't affect their membership of the Māori Wardens Association which is a membership body and incorporated society. **It's not either or, I think they've existed together.**

276 The reality then is that Wardens can consult within the 1962 Act,[349] as Owen Lloyd indicated to the Tribunal (Dr Phillipson) in his oral evidence:[350]

> **GP:** So do you see ways in which the autonomy of wardens and their, their aspirations and their need to have a say in how they operate, how do you see that working with the District Māori Councils and the New Zealand Māori Council, I mean it must be possible, mustn't it?
>
> **OL:** I'm a firm believer that all things are possible. It's just how much sweat that you're prepared to let go, to actually achieve the goal. …

277 Titewhai Harawira[351] and Diane Black[352] expressed similar opinions.

Māori Wardens' Association: A Historical Development of Māori Wardens (July 1980), #C1, at p32.

346 See Hearing Transcript, #4.1.1, day 4/session 1, at pp249, 270 (Sir Edward Durie).

347 See the summary of returns and associated correspondence in #C18(k), at pp28-32.

348 Hearing Transcript, #4.1.1, day 2/session 3, at p198 (Karen Waterreus).

349 See e.g. Hearing Transcript, #4.1.1, day 3/session 1, at p286 (Jordan Winiata Haines). See also at pp275-276 of the Transcript (expressing support for the NZMC and the DMCs, and accepting that the Raukawa DMC is active and engaged with Wardens in the Raukawa District).

350 Hearing Transcript, #4.1.1, day 1/session 3, at p78 (Owen Lloyd)

351 Hearing Transcript, #4.1.1, day 2/session 1, at pp146-147 (Titewhai Harawira).

352 Hearing Transcript, #4.1.1, day 2/session 2, at p177 (Diane Black).

278 If the Tribunal is not persuaded that the history[353] and the constitutional position of the NZMWA point clearly to Wardens and the NZMWA not being accorded a separate and distinct status to the NZMC in 1962 Act consultations, then it will need to address the governance and financial problems which currently beset the NZMWA.[354] The Tribunal in that event will also need to consider how representative the NZMWA actually is of Wardens views writ large (informed by how many Warden members the NZMWA has).[355]

279 The Claimants note that there is no indication in the evidence before the Tribunal to suggest that the Crown has engaged with these difficult issues in the process it has followed to date.

Extent of engagement required

280 The extent of engagement by the NZMC with other bodies outside of the NZMC will depend upon the nature of the proposed changes. For example, if the changes affect Wardens then government would no doubt expect consultation with Wardens and wish to be informed of the level of consensus. If it is intended merely to modernise the 1962 Act while maintaining the basic kaupapa then a major engagement with others may be unnecessary.

281 The primary concern is when the proposed changes would impact on other bodies which contribute to the exercise of self-governing rights, such as the Māori Women's Welfare League, the Iwi Leaders Chairs Forum or Māori Professional organisations. The proposals may arise from the Council's own initiatives or from the initiatives of other Māori groups, but the important point is that they should arise from amongst Māori. Who might then lead will depend upon the circumstances, but again the starting point is that the NZMC is uniquely placed to take the lead[356] – it is the only representative Māori body

353 Note too Hearing Transcript, #4.1.1, day 3/session 1, at p304 (Jordan Winiata Haines: "my understanding is the Association was never set up to be a national governing organisation of Māori wardens").

354 As to which, see Hearing Transcript, #4.1.1, day 1/session 3, at p67 (Des Ratima); day 3/session 1, at pp278-279, 282-283 (Jordan Winiata Haines); day 3/session 2, at pp356-358 (Te Rau Clarke).

355 As to which, refer Hearing Transcript, #4.1.1, day 3/session 1, at pp303-304 (Jordan Winiata Haines); and day 3/session 2, at pp354-355 (Te Rau Clarke); and see also Responses to written questions from Ngaire Schmidt of 15.4.14, #C16.

356 See Sir Edward Durie statement in reply of 7.3.14, #B24, at [23]-[24].

formally recognised by statute;[357] democratically elected by Māori;[358] accountable to all Māori in matters pan-Māori such as this;[359] widely experienced in representing pan-Māori interests at the level of national policy-making;[360] and charged both historically and officially through the 1962 Act with administering the Wardens.[361]

282 Note too the Tribunal's reasoning in support of granting urgency that:[362]

> Given ss 16 and 18 of the 1962 Act, the NZMC and the District Councils have a real and meaningful statutory responsibility to actively be engaged with any proposals for reform and or amendment to the 1962 Act.

283 It follows that any third party proposals to reform the 1962 Act, be it by another Māori organisation or by the Crown, should first consult with the NZMC and seek an agreement with the NZMC. This has been the position in relation to past changes to the 1962 Act, as is shown at **Section B3** above.

284 This position applies to Wardens too. In the event that groups of Wardens seek an independent structure of some kind with which the NZMC does not agree, then their right to engage with the Crown on that matter comes at the later stage of responding to the Council's proposals. But first they must work with the NZMC. In the same way, a government decides how its Police are reformed, not the Police.

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357 Titewhai Harawira affidavit of 21.2.14, #B10, at [12]-[13]. Note too the Environment Court's recent acceptance of the NZMC's (and DMCs) unique status under the 1962 Act; see *Motiti Rohe Moana Trust v Bay of Plenty RC* [2013] NZEnvC 162, [17]-[18] per Judge Smith (copy of decision annexed to Sir Edward Durie statement of 21.2.14, #B9(a), "Attachment 1", at p5).

358 See s 17(3) of the 1962 Act; reg 3(9) Māori Community Development Regulations 1963; Sir Edward Durie statement of 21.2.14, #B9, at [27], [31] (the democratic structures of the 1962 Act make the NZMC particularly well placed to understand the needs of Māori communities).

359 See Titewhai Harawira affidavit of 21.2.14, #B10, at [11] (stressing the NZMC's representation of urban Māori who tend not to be as closely represented by iwi and their post-settlement initiatives).

360 See e.g. SOC, #1.1.1, Statements, at [51].

361 Sir Edward Durie statement of 21.2.14, #B9, at [8], [22], [25], [27], [35]-[51]; Sir Edward Durie statement in reply of 7.3.14, #B24, at [27].

362 Tribunal decision on urgency, #2.5.8, at [105]; and see also at [108] ("the Crown's Treaty partner … in this context is the NZMC and its District Councils, and that reality is reinforced in this setting by statute"). See similarly Hearing Transcript, #4.1.1, day 2/session 4, at pp241-242 (Michelle Hippolite: acknowledging need to recognise rangatiratanga of DMCs, who are the community).

Crown (TPK) input should be back-end and minimal

285 As indicated above, the Crown should not be involved in the Māori process of developing proposals for possible reform of the 1962 Act.

286 The discussions which the NZMC seeks with "wider Māori interests" such as iwi, the Iwi Leaders Chairs Forum, the Māori Women's Welfare League, Māori Authorities and Te Kohanga Reo Trust, must start with the NZMC respecting the independent mana, as custom requires, then to consider the separate role of each, the relationship that each would seek with the other, the areas for co-operation or merger, and the spaces where it would not be appropriate to compete. For the Crown to engage in the shape of the discussions at this time would wrongly interfere in the conduct of Māori business, and risks avoidable problems of fragmentation and division.

287 The approach the Claimants contend for is consistent with the partnership principle, the principle of the right to govern in exchange for protection of rangatiratanga, UNDRIP,[363] and with TPK's recognition back in 2008 that it would have had a conflict of interest in acting both as Secretariat to the Advisory Group on Wardens and as advisor to the Minister of Māori Affairs.[364]

288 It also recognises and reflects the fact that the Crown has not in the past played the 'neutral facilitator' role it should have played in a context like this.[365] Refer back to **Section E3** and **Section F1** above. And note too:

288.1 the Crown's 1997/98 support for change to the Wardens regime;[366]

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363 See in particular Arts 19 and 33(2) of UNDRIP; and Hearing Transcript, #4.1.1, day 1/session 4, at p91 (Dr Charters).

364 Hearing Transcript, #4.1.1, day 2/session 4, at pp221-222 (Michelle Hippolite).

365 See Tribunal decision on urgency, #2.5.8, at [111]. See also Des Ratima affidavit of 21.2.14, #B4, at [9]; Hearing Transcript, #4.1.1, day 2/session 1, at p142 (Titewhai Harawira).

366 Diane Black affidavit of 21.2.14, #B5, at [15], [18]-[19], [36]; Titewhai Harawira affidavit of 21.2.14, #B10, at [32]; Hearing Transcript, #4.1.1, day 1/session 2, at p33 (Dr Parker).

288.2 the April 2008 Advisory Group (draft) report recording "the stated preference of Ministers that a new [Wardens] entity be proposed, towards which government funding would be directed";[367] and

288.3 the Crown's more recent actions in establishing a parallel system to administer Wardens through the MWP. Seen in light of its stated intentions in 1997/98 and 2008, these more recent Crown actions support an inference that the Crown is working towards realising a long held goal of changing the 1962 Act status quo[368] to a government structure that is familiar to the Crown and agreeable to it.[369] Note Lady Emily Latimer's evidence on this:[370]

> 20. … I do not understand how Te Puni Kōkiri can be promoting what they think is right for the Wardens without reference to the elected community representatives on the District Māori Council. Nor do I know how they can be organising the Wardens to influence the Tribunal hearings when they have a personal interest in keeping the jobs which were created for them.
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> 21. I also do not understand their disrespect for our own Māori law which requires that they talk first with the elders who have led the struggle for community autonomy for 50 years or so and who learnt the kaupapa from the elders before us.

289 The Advisory Group is significant for a second reason. It was disbanded by the Crown for its failure to agree to the position that the Crown favoured for Wardens and their governance.[371] The Claimants say that an important lesson to be learnt from this last Crown attempt at setting up stakeholder groups to inform a decision ultimately to be made by Ministers, is that the Crown not Māori control the process, and that it is the Crown (in real terms, Ministers

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367 Exhibit 2 to Titewhai Harawira affidavit of 21.2.14, #B10(a), at p30. See also Sir Edward Durie statement in reply of 7.3.14, #B24, at [20]-[21].

368 Diane Black affidavit of 21.2.14, #B5, at [33], [35]; Rihari Teihi affidavit of 24.2.14, #B11, at [16] (NZMWA is "a proxy to promote Crown policies in denial of Tino Rangatiratanga. It is perpetuation of divide and conquers policy of the Crown").

369 Diane Black affidavit of 21.2.14, #B5, at [48]; Sir Edward Durie statement of 21.2.14, #B9, at [30] (TPK "appears to prioritise bureaucratic efficiency over recognising the mana of the structures in the [1962] Act. For instance, Te Puni Kōkiri appears to have created only one regional coordinator to assist Wardens across Auckland in its entirety").

370 Lady Emily Latimer affidavit of 11.3.14, #B27, at [20]-[21].

371 See Hearing Transcript, #4.1.1, day 2/session 1, at pp139-140, 145 (Titewhai Harawira); day 2/session 2, at p172 (Diane Black); day 3/session 2, at p309 (Kim Ngārimu).

acting politically)[372] not Māori who decide on what the future should be. That is not consistent with the history and intent of the 1962 Act, with Treaty principles or with UNDRIP, and the Claimants do not want to see a repeat.

290 Four further considerations confirm that the Crown (TPK) should not be involved in developing proposals for reform of the 1962 Act:

290.1 the Crown has shown itself to have little understanding of the intrinsic culture of Wardens, how and why they exist, and how and why the governance structures for Wardens are and must continue to be directly accountable to the community and independent of government;[373]

290.2 associated with that, there has been an apparent loss of memory and cohesion within government as between different phases of Māori civil service administration.[374] That has been a cause for confusion within DMCs and amongst Wardens, and it has led to a loss of volunteers through disenchantment with the system,[375] and to a failure to recognise and respect the kaupapa of Wardens and of the 1962 Act;

290.3 the Crown has only become actively involved in the administration of Wardens after funding was specifically appropriated to TPK through the MWP. This suggests the Crown is "coming at Māori Wardens from a 'money' perspective, in contrast to the District Māori Councils (and the New Zealand Māori Council) which have from the start come at Māori Wardens from a 'Māori' perspective";[376]

290.4 the Crown has indicated that on its own proposals for future consultation/reform, it cannot guarantee that it will share with the NZMC the advice and views the Crown independently seeks and receives,[377] and further that there is a risk inherent in Michelle Hippolite's proposed process that the Crown will have to 'pick the

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372 Hearing Transcript, #4.1.1, day 2/session 4, at p219 (Michelle Hippolite); day 3/session 2, at p333 (Kim Ngārimu).
373 Diane Black affidavit of 21.2.14, #B5, at [45], and also [36]-[37].
374 Diane Ratahi affidavit of 21.2.14, #B6, at [6]; Rihari Teihi affidavit of 24.2.14, #B11, at [4].
375 Diane Ratahi affidavit of 21.2.14, #B6, at [6]-[7], [45].
376 Titewhai Harawira affidavit of 21.2.14, #B10, at [25].
377 Hearing Transcript, #4.1.1, day 2/session 4, at p220 (Michelle Hippolite).

winner' rather than Māori doing that for themselves.[378] The Claimants say that a process leading to such an outcome is not consistent with Treaty principles or UNDRIP, particularly where the Crown has not identified what criteria it will apply in choosing between any competing proposals that emerge from the two stakeholder groups it suggests be set up (or which, for that matter, emanate from the Crown and its parallel process of seeking advice and views on reform which it may not even disclose to Māori).

291 Nonetheless, if the Crown is to give statutory effect to the proposed changes the Crown will need to be satisfied as to the reasonableness of the proposals, of any fiscal elements and of the extent of consultation and the level of Māori support.[379] This is an 'audit' role for the Crown consistent with its Art 1 kawanatanga duties under the Treaty. But it does not arise to be exercised unless and until Māori have developed a proposal for reform of the 1962 Act (including a proposal that on reflection the Act needs no reform at all).[380]

292 At that stage, but only then, should the Crown be looking to 'audit' the Māori-developed proposal for reform. As Dr Charters explained in the Addendum to her brief of evidence with reference to UNDRIP:[381]

> [I]n the interest of clarity, in my view, based on the Declaration, the state has a role, albeit very limited, to play in relation to the constitution/review of or change to Māori organisations where, as is the case here, the Māori organisation is supported by legislation (in addition to financial and technical assistance to enable Māori to enjoy their right to autonomy in internal matters). However, **the state's role should be confined to ensuring there is adequate support by relevant Māori for the chosen organisational structure or change to that structure before moving to implement the proposed change into legislation.**

293 In this back-end 'audit' role, it will be important for the Crown to bear in mind that a lack of unanimity in itself is not problematic.[382] The Crown in the exercise of its Art 1 kawanatanga duties not infrequently makes decisions on a

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378 Hearing Transcript, #4.1.1, day 2/session 4, at pp220-222, 238 (Michelle Hippolite).
379 Hearing Transcript, #4.1.1, day 3/session 1, at pp262-263 (Sir Edward Durie).
380 See Hearing Transcript, #4.1.1, day 2/session 4, at p240 (Michelle Hippolite).
381 See Dr Claire Charters Addendum of 1.4.14, #A10(a), at [12]; and see similarly at [11.2] of this Addendum.
382 See e.g. Hearing Transcript, #4.1.1, day 3/session 1, at p261 (Sir Edward Durie).

majority basis. There is no principled reason for why Māori should be held to a quite different standard to the Crown in this regard.

(G) PREJUDICE AND RELIEF

(G1) Prejudice to the Claimants

294 Every day TPK continues to administer Wardens through the MWP, despite the NZMC and the DMCs not TPK (or Wardens Associations or the NZMWA) having the statutory rights and responsibilities under the 1962 Act, undermines the NZMC and the structures and institutions it supports under the 1962 Act. This constitutes material prejudice to the Claimants.

295 There has also been prejudice to the Claimants by the Crown's undermining of its 1962 Act mandate and its status through the Crown's conduct to date of the reform process (as set out at **Section F1** above), and through the Crown's commencement of a process for potentially significant reform of the NZMC structure at a time which was and is prejudicial to the NZMC's business, for the benefit of all Māori, including in relation to the Water Claim (Wai-2358).[383]

(G2) Summary of findings and recommendations sought

296 Reflecting the analysis above, and by way of summary, the Claimants seek the following findings and recommendations from the Tribunal:[384]

(i) Self-determination/reform of the 1962 Act

296.1 a finding that the process proposed for the reform of the 1962 Act is inconsistent with the Treaty and UNDRIP:

(a) this is because the 1962 Act represents an agreement to give effect to Māori proposals for self-government. It follows that the process for the reform of those proposals should be self-determining and not government led;

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383 See SOC, #1.1.1, Statements, at [93]-[98]; Karen Waterreus affidavit of 2.10.13, exhibit 1, #A1(a), at p8 (3.9.13 hui, 8.30-11.30am, comment 13 (Hilda Harawira)).

384 Drawing from Sir Edward Durie statement of 21.2.14, #B9, at [52]-[53].

(b) it is therefore for Māori to propose and government to respond;

296.2 a recommendation that the Crown fund the reasonable costs of any reasonable reform process proposed by the NZMC.

(ii) Māori Wardens

296.3 a finding that in terms of the agreement, and in terms of the 1962 Act, DMCs and the NZMC have responsibility for Wardens;

296.4 a finding that the Crown should provide adequate resources for the administration and operation of the Wardens in terms of the 1962 Act;

296.5 a finding that the policies and practices of the Crown under the MWP are inconsistent with the 1962 Act because they usurp the administration of the Wardens by other than the DMCs and the NZMC or diminish the capacity of the DMCs and the NZMC to perform their statutory responsibilities;

296.6 a finding that the same is inconsistent with the principles of the Treaty and UNDRIP because the Wardens are an integral part of the historic arrangement for Māori self-determination through Runanga, Karere and Watene and are in effect agents for Māori autonomy with accountability to their communities;

296.7 a finding that the failure to deal reasonably through the NZMC led or substantially contributed to an unlawful interference in the Council's election processes and to the warranting of Wardens by unauthorised personnel;

296.8 a recommendation that the Crown, including TPK and Police, wishing to treat with the Wardens, must do so through the NZMC and upon such terms and conditions as may be agreed with the NZMC;

296.9 a further recommendation that the Crown and the NZMC explore training for DMCs, community officers and Wardens on the maintenance of local law and order;

(iii) Costs of pursuing these Claims

296.10 a recommendation that the Crown enter into discussions in good faith with the NZMC for reimbursement of costs incurred by the NZMC in advancing its Claims and not covered by legal aid;[385] and

(iv) Leave reserved

296.11 leave should be reserved to the parties to apply on 7 days notice for guidance on the implementation of the Tribunal's recommendations.[386]

Dated: 28 May 2014

M S Smith
Counsel for the Claimants

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385 As in *The Napier Hospital and Health Services Report* (Wai-692, 2001), at section 10.9, p388.

386 See by analogy *Te Runanga o Muriwhenua Inc v Attorney-General [Fisheries]* [1990] 2 NZLR 641, 657 (CA) per Cooke P ("Leave is reserved to apply in case anything unforeseen should arise or there remains any point arising on the appeals that has not been sufficiently dealt with by the present judgment").