

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2025-485-000697
[2026] NZHC 3244**

UNDER THE	Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules 2016
IN THE MATTER OF	an application for judicial review
BETWEEN	NEW ZEALAND MĀORI COUNCIL Applicant
AND	MINISTER FOR MĀORI DEVELOPMENT First Respondent
	SECRETARY FOR MĀORI DEVELOPMENT Second Respondent
	NGĀ WĀTENE MĀORI O AOTEAROA CHARITABLE TRUST Third Respondent

Hearing:	24 June 2026; further submissions received 16 July 2026
Counsel:	F E Geiringer, P V Cornegé and M R Baxter for Applicant R K Douglas and J B Y Cheng for First and Second Respondents J P Ferguson and M A Hori Te Pa for Third Respondent
Judgment:	22 October 2026
Reissued:	23 October 2026 (correcting slips)

JUDGMENT OF LA HOOD J

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Introduction and summary

[1] The New Zealand Māori Council (NZMC) challenges a decision of the first and second respondents (the Crown) to enter an agreement with the third respondent, Ngā Wātene Māori o Aotearoa Charitable Trust (the Trust), to provide funding to Māori Wardens (the Funding Agreement).

[2] The NZMC says that the Funding Agreement was unlawful because it encroaches on the NZMC’s exclusive control and supervision of Māori Wardens under the Maori Community Development Act 1962 (the Act) and the Maori Community Development Regulations 1963 (the Regulations).¹ The NZMC says the legislation does not permit the Crown to enter into a funding agreement with a body outside of the Act, such as the Trust, that has the effect of usurping the NZMC’s and its subordinate District Māori Councils’ (DMCs) exclusive power and authority to control and supervise the activities of Māori Wardens carrying out duties under the legislation.

¹ I note that the Act and the Regulations do not use macrons for the word “Māori” due to their age. Thus, the judgment uses “Māori” where grammatically appropriate and “Maori” when referring to the Act or the Regulations.

[3] The respondents submit that the Act does not prevent the Crown from providing funding to Māori Wardens directly through the Trust. The Funding Agreement was entered into under the Crown's prerogative or residual power to make contracts (including to fund organisations). The respondents argue that the Act and Regulations do not constitute a comprehensive or exhaustive scheme for funding Māori Wardens, nor do they confer on the NZMC (and DMCs) exclusive control over all Māori Wardens' activities. They say that the NZMC/DMCs' exclusive control is limited to the exercise of specific statutory powers conferred on Māori Wardens under the Act. The respondents submit that, as the Funding Agreement does not interfere with the NZMC's ability to control and supervise these specific statutory powers, it is lawful.

[4] For the reasons set out below, I conclude that:

- (a) The proper interpretation of the legislation is that DMCs, and by extension the NZMC, have exclusive power and authority to control and supervise Māori Wardens' general community support and welfare promotion activities. This power and authority is not confined to controlling and supervising the exercise of powers conferred on Māori Wardens under ss 31 to 35 of the Act to manage disorder and alcohol consumption.
- (b) The Funding Agreement is contrary to the Act as it encroaches on the NZMC and DMCs' exclusive power and authority to control and supervise Māori Wardens carrying out their functions and duties under the legislation. Through the Funding Agreement, the Crown is providing funding to enable the Trust to develop the capability and capacity of its members in relation to statutory activities that fall within the exclusive control of the NZMC and DMCs. The Trust is exercising control over Māori Wardens by governing, managing and delivering the statutory activities of its Māori Warden members without any involvement of the NZMC/DMCs. The Crown is in turn exercising a degree of control over the Trust's activities by providing the funding required to undertake them and imposing obligations on how they must

be performed as a condition of that funding. The Funding Agreement therefore unlawfully encroaches on the statutory powers and responsibilities conferred exclusively on the NZMC and DMCs.

Background

The Waitangi Tribunal Report

[5] There is an extensive historical background to these proceedings, much of which was addressed by the Waitangi Tribunal in its report *Whaia Te Mana Motuhake In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417 report).² The Wai 2417 report was the result of the NZMC and several DMCs bringing a claim regarding the Crown's review of the Maori Community Development Act 1962, and the administration of the Māori Wardens Project. I will return to the Tribunal's findings later, but it is convenient at this point to address the parties' submission that I should be cautious about placing weight on the Tribunal's findings given the evidence that has been filed in these proceedings and the different issues I am required to determine.

[6] I agree that caution is required and that I must come to my own view on the issues in this case. However, it is well established that the courts can give evidential weight to Waitangi Tribunal reports.³ The Wai 2417 report sets out in detail the historical background to the creation and development of Māori Wardens after conducting a full inquiry that included hearing oral evidence. In light of the Tribunal's advantages in conducting such an inquiry and its undoubted expertise, I consider it is appropriate to give substantial weight to the Tribunal's findings on the history of Māori Wardens and their relationship with the NZMC and its subordinate entities. I have therefore drawn on both the Tribunal's report and the affidavit evidence filed in these proceedings in respect of that history. However, it is for me to determine the legal issues that arise in this case.

² Waitangi Tribunal *Whaia Te Mana Motuhake In the Pursuit of Mana Motuhake: Report on the Māori Community Development Act* (Wai 2417, 2014).

³ *Re Papa* [2024] NZHC 3610 at [80] citing *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 653.

Māori Wardens and their history

[7] Māori Wardens are volunteers who play an important and wide-ranging role in their communities. They provide health and safety support, event management, welfare assistance, food distribution, civil defence support, education and youth assistance. They work closely with whānau, hapū, hāpori,⁴ Māori organisations, community groups and government agencies. They also work closely with police, including assisting with crowd management, community safety and cohesion, and tikanga. There are currently approximately 550 warranted Māori Wardens throughout the country.

[8] The origins of Māori Wardens traces back to the Kīngitanga Movement in the 1860s. During this time self-governing bodies, known as “village rūnanga” emerged, exercising control at the local level. The rūnanga in turn appointed their own “wātene” or wardens. Wātene were given the responsibility for maintaining law and order and controlling liquor consumption in their communities. In the 1900s, the role evolved into Komiti marae (marae committee) “constables” who assisted with community control and enforcement of bylaws within Māori settlements. These Komiti marae constables were the direct precursors to Māori Wardens.

[9] Māori Wardens were first given statutory recognition in the 1945 Maori Social and Economic Advancement Act (1945 Act). The 1945 Act gave the Minister the power to appoint and remove Māori Wardens and for Tribal Executives (a local Māori institution) to pay any Māori Warden remuneration or allowances for their services. Māori Wardens were also given statutory powers to control alcohol consumption and disorderly behaviour in their communities.

[10] There is some dispute between the parties about whether the Waitangi Tribunal correctly recorded that Māori Wardens remained under the control of Tribal Executives under the 1945 Act. However, I accept the NZMC’s submission that whatever the legislative structure (any regulations and bylaws have not been located), the practical reality is described in a 1980 report from Dr Augie Fleras, relied on by

⁴ “Hāpori” is a section of a kinship group, family, society and community.

the Waitangi Tribunal,⁵ and by the parties in this case. Her report states that, “[a]lthough Wardens were regarded as an extension of the [Department of Māori Affairs’] welfare division, the Tribal Executives were responsible for nominating them, exercised control over their activities and reimbursed any expenses”.⁶

[11] The current legislative framework is the Maori Community Development Act 1962 (the Act) and the Maori Community Development Regulations 1963 (the Regulations). The Act established a statutory hierarchy of Māori Associations, namely Māori Committees, Māori Executive Committees, DMCs and, at the apex, the NZMC.⁷ Members of Māori Committees are elected on a three year cycle.⁸ On the same three year cycle, Māori Committees appoint members to Māori Executive Committees, who in turn appoint members to District Māori Councils, who then appoint members to the NZMC.⁹ At each step in the hierarchy, each Association is “subject in all things to the control of” the next association in the hierarchy.¹⁰ They each have the functions of the NZMC in the local areas where they operate. Section 18 sets out those functions, which include promoting, encouraging and assisting Māori to, among other things, improve and maintain their physical, economic, industrial, educational, social, moral and spiritual well-being. Essentially, their overall function is to promote the welfare of Māori.

[12] Notably, the 1962 Act initially removed control of Māori Wardens from Māori. This was contentious and in 1963 the NZMC successfully proposed an amendment to return control to Māori. When speaking on the Amendment Bill, the then Minister of Māori Affairs admitted that the 1962 Act had not defined “the lines of responsibility for [the wardens’] duties”, and that it was necessary to make the Wardens responsible to “the Māori committees exercising control of the areas in which the wardens are carrying out their duties”.¹¹

⁵ Waitangi Tribunal, above n 2, at 194, n 7, citing Augie Fleras “From Village Rūnanga to the New Zealand Māori Wardens’ Association: A Historical Development of Māori Wardens” (paper presented to the Māori Wardens, Victoria University of Wellington, 1980) at 20.

⁶ Augie Fleras, above n 5, at 20.

⁷ Maori Community Development Act 1962, s 2, definition of “Māori Association”.

⁸ Sections 19.

⁹ Section 21.

¹⁰ Sections 10, 13, 16.

¹¹ Waitangi Tribunal, above n 2, at 114, citing (9 October 1963) 337 NZPD 2337.

[13] However, following the Act, Māori Wardens felt unsupported by the Māori Committees in many areas. Many of the Māori Committees were defunct or had never been properly established. In 1966, there were renewed calls for a national organisation to provide better representation, support, and coordination for Wardens across the country. As a result, in 1967, a national meeting of Māori Wardens resolved to establish the New Zealand Māori Wardens Association (NZMWA).

[14] The Maori Purposes Act 1969 attempted to resolve the issue of ineffective or inactive Māori Committees by giving DMCs the exclusive power and authority to control and supervise the activities of Māori Wardens and assign them specified duties within their district. DMCs also had the ability to delegate this power and authority to control and supervise Māori Wardens to Māori Committees. However, the evidence of the third respondent is that many DMCs were inactive, ineffective and inoperative, resulting in amendments that made little practical difference. This resulted in a hiatus for the NZMWA.

[15] In 1979, the NZMWA was re-established as a national representative body for Māori Wardens. Māori Wardens also began organising themselves at the district and local levels by way of sub-associations.

[16] It is common ground that the Act is outdated and no longer reflects the contemporary realities of the role that Māori Wardens play and the structures through which they operate. These views have prompted discussion between the Minister, Te Puni Kōkiri (the Ministry of Māori Development (TPK)) and the NZMC about modernising the functions of Māori Wardens, particularly through legislative changes.

[17] In 2007, TPK established a joint-project with Police called the Māori Wardens Project (MWP) for training and funding to support the voluntary work of the Māori Wardens. The MWP was intended as an interim measure to mitigate the apparent dysfunction and lack of financial accountability within the NZMC and DMCs. The intention was to transfer responsibility of the scheme to the NZMC once future governance arrangements of Māori Wardens were resolved. Since 2007, Parliament has appropriated money to help build the capacity and capability of Māori Wardens.

[18] I return to the findings of the Waitangi Tribunal's report. The NZMC's concern was that the Crown's oversight over the review and administration of the MWP undermined self-government by Māori, and that transfer of responsibility for the scheme had not occurred despite a seven-year period since its establishment. The Tribunal relevantly found that:

- (a) The Crown's failure to adequately fund the NZMC to carry out its statutory functions under the Act has had serious flow-on effects for the entire council system in terms of the ability of its national body to effectively represent the views and interests of the Māori Committees. Greater willingness from successive Governments to deal directly with tribal authorities has led to a decreased reliance on Government programmes and resources. However, this has not led to a decline in Māori support for a national body, the NZMC, to represent pan-Māori or pan-tribal interests on the national scale.¹²
- (b) In many areas, local and district associations of Māori Wardens have, in the absence of an effective DMC structure, assumed significant operational responsibilities for Māori Wardens. These organisations now represent a significant proportion of Māori Wardens. Their existence has been crucial to the ability of the Māori Wardens to continue to operate in areas where the NZMC system has not functioned well. Many of these associations have now been in existence for decades. However, it has only really been for the past decade that the relationship between the NZMC and the NZMWA has been characterised by division more often than cooperation.¹³
- (c) The Crown used a MWP Advisory Group to bring together the NZMC and the NZMWA, which it saw as the two main stakeholders whose buy in was essential for developing a Māori entity for managing the MWP

¹² Waitangi Tribunal, above n 2, at 183.

¹³ At 225.

and Wardens. The Advisory Group had some success in designing updated functions for Wardens but had not reached agreement on the key issue – a Māori governance entity – by 2009. The Advisory Group was a promising partnership experiment, which was cut short when the Crown decided to proceed instead to a full review of the 1962 Act. But the Advisory Group could only ever have been a starting point for further consultation. TPK’s advice to the select committee set the parameters for its analysis. TPK’s advice to the committee casts doubt on its later claim to neutrality, but ultimately the committee’s primary recommendation (and impact) was further consultation with Māori.¹⁴

- (d) Although the representational landscape had changed since 1962, the appropriate response in Treaty terms was not for the Crown to manage the “multiple rangatiratanga interests” and lead the review instead of Māori.¹⁵ The Crown’s decision in 2013 to proceed with a Crown-led review, leading to unilateral Crown decisions about Māori self-government institutions, was not consistent with the rights affirmed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁶ Indigenous peoples must decide what changes they want to these institutions. Māori Wardens cannot stand on their own to lead a process to reform the 1962 Act – they must have a major say but it cannot be the lead or final say. NZMC is the appropriate body to lead the Māori side of the review.¹⁷
- (e) TPK obtained the agreement of the NZMC and the NZMWA that a funding and training programme should be established, while a partnership mechanism – the Advisory Group – guided its administration in the meantime and developed a national Māori entity to manage the project (and Māori Wardens). This was because the

¹⁴ At 386.

¹⁵ At 387.

¹⁶ At 388, citing United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007).

¹⁷ At 285.

council system was not capable of administering the project in 2007, and a temporary alternative was necessary.¹⁸

- (f) However, the continuance of the MWP after the Advisory Board folded in February 2011, in the absence of any partnership mechanism or Māori community oversight, was a breach of the Treaty principles of partnership and Māori autonomy. The temporary nature of the MWP was based on an agreement that there would be some mechanism for Māori community oversight in the meantime, while a new national entity was developed. Māori communities were prejudiced by the loss of this safeguard, which ought to have ensured that the project had no adverse or distorting effects on the kaupapa of Māori Wardens, and was administered in keeping with the wishes, aspirations, and self-government of the Māori communities it was supposed to serve.¹⁹ There is a particular risk that Wardens will become too close to the Police, or will be perceived by their communities as more accountable to Government and the Police than to the community.²⁰
- (g) The Crown's decision in 2013 to proceed with a Crown-led review, in which the Crown would consult Māori and then make decisions as to Māori self-government institutions, was inconsistent with the Treaty principle of partnership and options for managing and governing the funding.²¹
- (h) Although the provision of funding directly to Māori Wardens was not unlawful under the Act,²² the funding decisions relating to Māori Wardens completely excluded oversight by the Māori community and were made in isolation from the NZMC and DMCs. Māori communities are holders of rangatiratanga, and the Crown must recognise the NZMC as its Treaty partner in respect of the Act.²³ The

¹⁸ At 389.

¹⁹ At 325 and 389.

²⁰ At 326.

²¹ At 387.

²² At 391.

²³ At 44–45.

Act arose from a Māori-led process of self-determination, beginning long before the 19th century, in which Māori established their own self-government institutions and then sought recognition and statutory powers from the Crown. This makes the Act 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 at national, regional and local levels. This requires the Crown to honour the spirit and text of this agreement which is given the force of statute by the Act. It also requires that any change to the Act today similarly requires a genuine search for an agreed position.²⁴

- (i) The funding policies and decisions of the TPK-run MWP have interfered with the ability of DMCs and (ultimately) the NZMC to perform their statutory duties in respect of controlling and supervising Māori Wardens. In doing so, the Crown breached the treaty principles of partnership, active protection and Māori autonomy. Māori communities have no say in which projects are to be funded or how the overall funding is to be directed towards meeting their needs. This has prejudiced their already limited ability to exercise self-government and self-determination under the Act.²⁵
- (j) In an ideal world, the most Treaty compliant process is to separate out the operational arm of the Māori Wardens, as has been done by the establishment of the NZMWA. That should be replicated at the district and local levels. Thus, Māori Wardens' associations should continue to be promoted and encouraged. The NZMC or whatever organisation exists following the review and consultation process should continue to have a political link to any national or local Māori Wardens' associations.²⁶ The policy decisions regarding matters such as the MWP, the training of Wardens, and the prioritisation of their work,

²⁴ At 119.

²⁵ At 391.

²⁶ At 396.

however, should be set by the institution exercising rangatiratanga or acting as a conduit for it, and that should be the NZMC or the DMCs or other bodies approved by the Māori communities that they serve.²⁷

[19] The Tribunal recommended that any reform of the Act should be NZMC-led and negotiated with the Crown; with the Crown's role being to resource the review and support the process for amending the Act in line with the draft legislation produced by the NZMC.²⁸

Breakdown in relationships

[20] After the Tribunal's findings were released, the Crown engaged with the NZMC in a manner consistent with the Tribunal's recommendations.

[21] Following a national Māori Wardens conference in July 2019, Māori Wardens unanimously voted for broad modernisation of their functions and increased operational autonomy. The NZMWA then began establishing six regional entities.

[22] A paper published by TPK dated 27 February 2020 noted that a working group (comprising representatives from various Māori Warden districts, the NZMC, Police and TPK) had agreed for Māori Wardens to establish themselves as a confederation with autonomous regions. The paper also records that the working group's preference was for a Māori Wardens Act to be introduced and for the provisions vesting control of Māori Wardens in DMCs to be repealed. No such legislation was ultimately introduced, and the sections of the 1962 Act governing Māori Wardens remain in force.

[23] In 2021, the leadership of the NZMC changed following their triennial elections which resulted in the NZMC reasserting control over Māori Wardens.

[24] Simultaneously, from October 2021 onwards, TPK entered into funding agreements with the regional entities, without the involvement or consent of the NZMC or the relevant DMC. The funding would comprise most of the \$1.2 million baseline funding allocated for the MWP.

²⁷ At 397.

²⁸ At 396.

[25] On 20 May 2022, the NZMC wrote to TPK and expressed concern that it had ignored the NZMC's statutory authority to manage and administer Māori Wardens, and objected specifically to TPK's organisation of a KPMG workshop with the Wardens Interim National Entity Group without the NZMC. On the same day, TPK assured the NZMC that it would not act in contravention of the NZMC's statutory rights under the Act. In a letter dated 22 May 2022, the NZMC said that TPK was bypassing the NZMC contrary to the recommendations of the Waitangi Tribunal in its 2014 report.

[26] On 2 June 2022, the NZMC's lawyers wrote to the Minister and stated that TPK's direct funding of Māori Wardens groups, to the exclusion of the NZMC and the DMCs, breached the Act and the Regulations. It sought confirmation that the direct funding arrangements would cease, that all funding would flow through the NZMC and the DMCs. On the same date, the Minister responded to the letter, acknowledging the concerns raised and noting that the previous NZMC leadership had supported TPK's modernisation work. The Minister requested a meeting with the NZMC to discuss their concerns.

[27] On 11 July 2022, TPK stated that it had paused funding to the Māori Wardens pending a meeting to discuss the NZMC's objections. Following unsuccessful meetings and correspondence between the parties, substantive engagement between TPK and the NZMC on the issue of Māori Wardens ceased between late 2022 and 2025.

Funding agreement with the Ngā Wātene Māori o Aotearoa Charitable Trust

[28] The Trust was established on 2 July 2022 and registered as a charity on 3 September 2023 as a national entity for the regional Māori Wardens entities. The purpose of the Trust is to provide national-level advocacy, engagement, support and representation of Māori Wardens and to ensure the future sustainability of Māori Wardens. One of the express aims in the Trust deed is to achieve self-representation and autonomy for Māori Wardens. The NZMC says it was not given an opportunity to be involved in, or consulted about, the establishment of the Trust.

[29] Under the Trust, the Māori Wardens operate under a “confederation’ model” which includes integrated representation and organisation at the national, regional, district and local levels, namely:

- (a) the Trust as the lead entity at the national level;
- (b) six Māori Warden “Regional Entities”;
- (c) fifteen Māori Warden “District Groups”; and
- (d) over 90 Māori Warden “sub-associations” operating at the local level throughout the country.

[30] On 17 May 2025, the Government announced in the Budget 2025 that it would provide \$1.5 million per annum of new baseline funding for Māori Wardens, bringing total government funding for Māori Wardens to \$2.7 million per annum.

[31] On 1 August 2025, TPK signed a Funding Agreement with the Trust (varied on 6 August 2025) for a period ending on 30 June 2029. The purpose of the funding was to support the capability and capacity of Māori Wardens. Under the Funding Agreement, TPK agreed to provide \$2.7 million per annum over four years to June 2029, totalling \$10,877,744, subject to parliamentary appropriation.

[32] On 2 September 2025, the NZMC’s lawyer wrote to TPK as a final letter before action, advising that the direct funding of Māori Wardens was unlawful and asking TPK to confirm that it would cease directly funding Māori Wardens.

[33] On 16 September 2025, TPK responded, asserting that there was nothing in the Act that prevented it from funding Māori Wardens directly through the Trust.

[34] The NZMC proceeded to file the current proceedings on 29 September 2025 to challenge the Funding Agreement.

Summary of relevant legislative provisions

[35] Before I set out the parties' submissions, it is convenient to set out a summary of the provisions in the Act and the Regulations relating to the funding and control of Māori Wardens.

[36] A Māori Association may pay remuneration and allowances to a Warden out of its own funds under s 7(6) of the Act. Under s 25, the Crown may subsidise the expenditure of Māori Committees and Executive Committees, and pay an annual sum to the NZMC out of money appropriated by Parliament. Under s 16(5), DMCs have the exclusive power and authority to control and supervise Wardens carrying out duties within their district. Under s 7(5), every Warden must exercise their powers under the control and supervision and subject to the express directions of the DMC. Reg 11 of the Regulations require Wardens to work in close association with, and under the supervision and control of, the relevant Māori Committees and Executive Committees. Sections 31 to 35 of the Act give Māori Wardens specific powers to control alcohol consumption and related disorder. These powers were essentially reproduced from those contained in the 1945 Act, with minor adjustments.

[37] I will return to discuss these provisions in more detail below.

Submissions

The NZMC's submissions

[38] The NZMC says the Crown cannot provide funding to Māori Wardens in a manner that usurps the NZMC's exclusive authority to control and supervise Māori Wardens. The NZMC submits that the Act establishes a statutory scheme for the funding, control, and supervision of Māori Wardens. Funding reaches Wardens through the NZMC and Māori Associations (s 7(6) of the Act); the Crown subsidises that expenditure through those Associations (s 25); and the District Māori Councils (DMCs) hold the exclusive power to control and supervise Wardens (ss 16(5) and 7(5)), subject to the overall control of the NZMC (s 16(2)).

[39] The NZMC argues that the Funding Agreement is unlawful because it is inconsistent with the funding and control provisions of the Act, and the Regulations. Counsel for the NZMC relies on the principles established by *Attorney-General v De Keyser's Royal Hotel Ltd (De Keyser)*, namely that where Parliament has prescribed the manner in which the Crown is required to exercise its powers and the legislation covers the field of those powers, the Crown cannot use its prerogative or residual powers in contravention of the statute.²⁹ The NZMC also argues that the Funding Agreement is inconsistent with the principle in *Fitzgerald v Muldoon* that the executive cannot suspend laws without the consent of Parliament.³⁰ The NZMC says the Crown cannot use its prerogative or general executive powers to dispense with its obligations under the Act, prior to any legislative reform, by providing funding in breach of the Act.

[40] The NZMC submits that the Funding Agreement is in breach of the Act as it has the effect of exerting control and supervision of Māori Wardens, when the Act provides that the NZMC and DMCs have “exclusive” control and supervision of Māori Wardens. The purpose of the Act was to provide for an important form of Māori self-government and self-determination. The historical background and Treaty principles mean the Act should be interpreted to prevent the Crown from encroaching on these constitutionally significant Māori institutions. The Māori institutions created by the Act provide an important national, regional and local democratic system for Māori. The funding of Māori Wardens is part of an integrated statutory scheme that provides for the rights and obligations of the NZMC, Māori Associations and DMCs in relation to Māori Wardens. Until the Act is amended, these functions and rights remain with those bodies.

[41] The NZMC further argues that any previously accepted practice of the Crown providing funding directly to Māori Wardens to the exclusion of the NZMC does not make the funding arrangements lawful. The NZMC does not want funding to be removed from Māori Wardens. Instead, it wants funding to be provided through the constitutionally correct process of providing it through the Māori institutions who have the democratic mandate to exercise control and supervision of Māori Wardens.

²⁹ *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL).

³⁰ *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).

The effect of the Funding Agreement is that the NZMC and DMCs are unable to practically control and supervise Māori Wardens. This means that apart from continuing to exercise their statutory powers of recommending, appointing and reappointing Māori Wardens, the Crown funding model has the effect of removing the NZMC's ability to exercise its exclusive control and supervision function.

The Crown's submissions

[42] The Crown submits that the Funding Agreement is not unlawful because s 7(6) of the Act does not restrict the funding for Māori Wardens by requiring it to be provided through the NZMC, nor does it prevent the Crown from funding Māori Wardens directly. Thus, applying the *De Keyser* principles, the Act does not "cover the field" of funding Māori Wardens. The Crown says that the Act does not oust the Crown's residual or prerogative power to enter into contracts, as Parliament did not intend to bind the Crown in respect of the provision of funding. Section 7(6) provides Māori Associations with a discretion to pay Māori Wardens remuneration and allowances for the exercise of Māori Warden powers specifically provided for in the Act, rather than general capability and capacity building. The provision also does not limit the rights of any party to make or receive payments. Further, s 25 is not concerned with the type of funding contemplated by the Funding Agreement, such as funding for the delivery of future outcomes. The section provides discretion for payments to be made supplementary to the prerogative power to enter into contracts.

[43] The Crown argues that the Funding Agreement is consistent with the role of the DMCs. The funding of Māori Wardens does not interfere with the ability of the DMCs to control and supervise the activities of Māori Wardens. The Crown highlights that the Funding Agreement does not expressly or impliedly prevent the DMCs from directing or controlling wardens. The funding ensures that Māori Wardens are appropriately resourced by providing a means to access training, improve governance processes and effectively deliver their services to the community. The Crown submits that the Act is silent about the provision of funding for administration costs and other material support (such as uniforms and transport). Funding of this type has been previously provided and administered by TPK and distributed to Māori Wardens

through contracts with the regional entities. It is not contrary to the Act for TPK to provide this funding.

The Trust's submissions

[44] The Trust submits that the Act and Regulations do not constitute a comprehensive or exhaustive scheme for governing Māori Wardens, nor do they confer on DMCs, or the NZMC, exclusive control over the Māori Wardens. Sections 7(6) and 25(1) do not occupy the field of Crown funding, as those provisions are confined to how Māori Associations may use Crown funding to subsidise their expenses (including providing remuneration or allowances to a Māori Warden).

[45] The Trust argues that the Act and Regulations regulate certain statutory aspects of being a Māori Warden (such as their appointment and supervision over the exercise of specific statutory powers) while leaving substantial aspects of the broader Māori Wardens institution outside of the statutory scheme (such as the general functions of Māori Wardens and the broader organisation and association of Māori Wardens). The Trust emphasises that modern Māori Wardens support their communities in a wide range of ways unrelated to the exercise of their statutory powers, including assisting the community in times of crisis, connecting people with essential services, providing guidance and support, providing mentorship to rangatahi; and being present at marae events and major gatherings to help maintain order, support tikanga, and promote safety and respect. Wardens rely on “soft power” through using trust, relationships, and cultural understanding to de-escalate situations and support those who are struggling. This means that in practice, the specific statutory powers bestowed on Wardens are rarely, if ever, used.

[46] The Trust says that the reference in s 16(5) of the Act to the DMCs’ “exclusive power and authority to control and supervise the activities of Māori Wardens carrying out duties within its district”, indicates a qualified and specific supervisory role, rather than an overarching institutional control. That supervisory role is only in relation to the alcohol and disorder related enforcement powers of Māori Wardens under ss 31 to 35 of the Act. Section 16(5) does not purport to regulate the broader field of institutional funding, non-statutory functions and coordination or support for Māori

Wardens. Māori Wardens have largely had to organise themselves through the confederation structure over an extended period due to the NZMC's dysfunction, and it is not unlawful for the Crown to provide the Trust with funding that allows them to continue to do so.

The issues for determination

[47] This case is not about whether the Crown should provide funding to Māori Wardens. There is no dispute that it should. The issue in these proceedings is whether the manner in which the Crown has elected to provide that funding is lawful.

[48] Although I have received extensive evidence canvassing the history of the parties' relationships, the lawfulness of the Funding Agreement essentially raises questions of interpretation and application of the Act and Regulations. I acknowledge the deeply held concerns of the NZMC and the Trust that have led to a breakdown in their relationship, but it is not my role to generally adjudicate on those concerns in these proceedings. In determining whether the proper interpretation and application of the Act renders the Funding Agreement unlawful, I am required to consider:

- (a) The nature and extent of the NZMC and DMCs' "exclusive power and authority to control and supervise the activities of Māori Wardens carrying out duties in [a DMC's] district".³¹
- (b) Whether the Funding Agreement is contrary to the Act by usurping or encroaching on NZMC/DMCs' exclusive power and authority to control and supervise Māori Wardens.

[49] I will deal with each of those issues in turn.

³¹ Maori Community Development Act, s 16(5).

Issue (a): the nature and extent of the NZMC and DMCs’ “exclusive power and authority to control and supervise the activities of Māori Wardens carrying out duties within its district”

[50] I will first consider the functions of the NZMC and DMCs and the nature and extent of their exclusive power and authority to control and supervise Māori Wardens under the legislation. I remind myself that, in accordance with s 10 of the Legislation Act 2019, the meaning of legislation must be ascertained from its text and in the light of its purpose and its context.

[51] Section 16 of the Act sets out the functions of the DMCs. Subsections (1)–(4) provide that the DMCs are subject to the control of the NZMC and must act in accordance with the NZMC’s directions:

16 Functions of District Maori Councils

- (1) Each District Maori Council shall, in relation to the Maoris within its district, have the functions conferred on the New Zealand Maori Council by subsection (1) of section 18.
- (2) Each District Maori Council shall be subject in all things to the control of the New Zealand Maori Council and shall act in accordance with all directions, general or special, given to it by the New Zealand Maori Council.
- (3) Each District Maori Council shall advise, direct, and generally supervise each Maori Committee and Maori Executive Committee within its district and shall consider all representations and reports from each such committee.
- (4) Each District Maori Council shall submit an annual report of its activities to the New Zealand Maori Council.

...

[52] The DMCs are also largely responsible for the appointment of Māori Wardens. Māori Wardens are appointed by the Minister on the nomination or recommendation of the relevant DMC.³² A DMC may also recommend a Māori Warden to be reappointed after the expiry of their three year term.³³ Before a DMC recommends the cancellation of a Māori Warden’s appointment, the DMC must notify the person and give them an opportunity to oppose the recommendation.³⁴ A DMC may also

³² Section 7(2).

³³ Section 7(3).

³⁴ Section 7(4).

suspend a Māori Warden from “duty” where it intends to recommend to the Minister the cancellation of their appointment.

[53] Sections 16(5) and (6) set out DMCs’ power and authority to control Māori Wardens and to delegate that power as follows:

- (5) Subject to subsection (6), each District Maori Council shall have *exclusive power and authority to control and supervise the activities of Maori Wardens carrying out duties within its district, and may assign to any such warden any specified duties, consistent with this Act, within the district.*
- (6) Any District Maori Council may, by notice in writing to any Maori Committee or Maori Executive Committee within its district, delegate to the Committee in respect of any specified warden or wardens, the *power and authority to control and supervise and to assign duties* conferred on the Council by subsection (5).

(emphasis added)

[54] The DMCs’ control over Māori Wardens is also reflected in s 7(5) of the Act, which requires Māori Wardens to exercise their powers under the “control and supervision” and subject to the express directions of the DMC or a Māori Association:

- (5) Every Maori Warden shall have the *powers* conferred on him by this Act or by regulations made under this Act, and shall exercise those *powers* under the *control and supervision* and subject to any express directions of the District Maori Council or of any Maori Association to which the Council may delegate its powers pursuant to section 16(6).

(emphasis added)

[55] The respondents argue that s 7(5) of the Act only allows the DMCs to exercise “control and supervision” over the “statutory powers” conferred on a Māori Warden under ss 31 to 35 of the Act to manage disorder and alcohol consumption. Under the part of the Act that is titled “prevention of unruly behaviour”, ss 31 to 35 provides specific powers of the Māori Wardens to:

- (a) enter any licensed premises and warn the licensee to abstain from selling or providing liquor to any Māori who is intoxicated, violent, quarrelsome, or disorderly or likely to become so (s 31);

- (b) enter any licensed premises and order any Māori who is or appears to be intoxicated, violent, quarrelsome or disorderly to leave the premises, and if they fail to do so, request any constable to expel the person (s 32);
- (c) without warrant, enter a meeting place where Māori are gathered to search for and seize liquor for removal and forfeiture, where the Warden suspects a breach of s 33 (s 33(5));
- (d) forbid any Māori to drive a motor vehicle or require him to deliver up his keys or take steps to immobilise the vehicle, where the Warden is of the opinion that the Māori is incapable of exercising proper control of the vehicle by reason of physical or mental condition (s 35(1)); and
- (e) exercise the s 35(1) power on any other person in the vicinity of a gathering of Māori assembled for any lawful purpose (s 35(2)).

[56] The evidence indicates that Māori Wardens currently seldom exercise these long-held statutory powers, and they provide a much wider range of services to support their communities. Nonetheless, appointment under the Act continues to confer these powers on Māori Wardens.

[57] I do not accept that the extent of the DMCs' exclusive power and authority to control and supervise the activities of Māori Wardens is limited to the statutory powers contained in ss 31 to 35 of the Act. The Act does not only refer to Māori Wardens having "powers", but also to their "activities", "duties", and "functions". Section 7(1) provides that a Minister may appoint "in respect of any Maori Council District" a Māori Warden to carry out "duties" in that district. Section 7(6) provides that a Māori Association may pay remuneration or allowances to Māori Wardens "exercising functions in its area". Section 16(5) refers to a DMCs' control and supervision over Māori Wardens extending to their "activities" and "duties" in their district. Section 16(5) also empowers DMCs to assign Māori Wardens "any specified duties" that are "consistent with this Act".

[58] The plain language of these sections does not indicate an intention to limit exclusive control to the exercise of the specified powers in ss 31 to 35 of the Act. If that was the case it would have been simple to use language that clearly articulated such an intention. For example, s 16(5) could have provided “... each District Maori Council shall have the exclusive power and authority to control and supervise the *exercise of powers conferred on Māori Wardens under this Act*”. In fact, the ability to assign specified “duties consistent with the Act” indicates a clear intention that the DMCs’ exclusive control goes beyond the specific powers in ss 31 to 35. I do not accept the Crown’s submission that this simply allows the DMCs to direct Māori Wardens about where and when they should exercise their ss 31 to 35 powers, and provides no extended ability for the DMCs to assign them duties beyond those powers. Again, if that was the intention it would have been simple to clearly articulate it.

[59] In addition, I do not accept the Trust’s submission that the contrasting wording of the provisions that make each subordinate Māori Association “subject in all things to the control” of its superior Association,³⁵ means the duties referred to in s 16(5) were intended to be limited to the ss 31 to 35 statutory powers. I accept the NZMC’s submission that the different language is explained by the contrast between the subjects of the provisions. A Māori Association is a body corporate with no existence apart from the exercise of that statutory role. Where the Act makes one Association “subject in all things to the control” of another, the scope of “all things” is already confined to the Association’s functions under the Act. A Māori Warden, by contrast, is a natural person appointed to the role of a Māori Warden in accordance with the Act. As a natural person cannot sensibly be made subject to control “in all things”, s 16(5) is instead expressed as “exclusive power and authority to control and supervise” activities, along with a power to assign “specified duties, consistent with this Act”. I accept that the different wording reflects the nature of the subject controlled rather than a lesser degree of control over the activities as a Māori Warden.

[60] Section 7(5) provides that “[e]very Maori Warden shall have the powers conferred on him by this Act or by regulations made under this Act, and shall exercise those powers under the control and supervision and subject to any express directions

³⁵ Sections 10A(1), 13(2) and 16(2).

of the [DMC]...”. This section expressly refers to the exercise of “powers” rather than the undertaking “activities” and “carrying out of duties” set out in s 16(5). This demonstrates the type of language that could have been used to limit the DMCs exclusive control to the exercise of the powers conferred by the Act if that was the intention of s 16(5). However, Parliament chose not to use such language.

[61] This conclusion is reinforced by the Regulations. Regulation 11 provides:

- (1) Maori Wardens shall exercise in their respective areas the *powers and functions* laid down in the Act.
- (2) In carrying out their functions Maori Wardens *shall* work in *close association* with the Maori Committees and Maori Executive Committees and any subcommittees thereof having jurisdiction in their areas and *shall* assist any such Committees and their officers to the best of their ability.
- (3) Maori 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.
- (4) Maori Wardens shall endeavour to promote respect amongst Maori people for the standards of the community and to take appropriate steps where possible to prevent any threatened breach of law and order.

(emphasis added)

[62] Regulation 11(1) refers to a Māori Warden’s “powers” and “functions” under the Act. Regulation 11(2) requires a Māori Warden, “in carrying out their functions”, to work in “close association” with the Māori Committees and Māori Executive Committees and to assist them to the best of their ability. Regulation 11(3) requires them to maintain a close association with the Police. Regulation 11(4) requires them to promote respect amongst Māori people for the standards of the community and to take appropriate steps to prevent any threatened breach of law and order. Thus, reg 11, particularly reg 11(4), describes general functions and duties that go beyond the enforcement powers in ss 31 to 35 of the Act. These are the type of general duties to promote the welfare of Māori communities that the respondents say are outside the exclusive control of the DMCs, as they are undertaken outside the confines of the Act. That submission simply does not align with the plain words of the Act and Regulations. Further, the general duties and functions to promote the welfare of Māori in the community, aligns with the NZMC, DMCs, and their subordinate Māori

Associations' essential purpose of promoting Māori welfare under s 18 that I have already referred to at [11] above.

[63] Moreover, and importantly, that the DMCs have exclusive control over the activities of Māori Wardens in providing general community and welfare support is consistent with the Waitangi Tribunal's findings that Māori Wardens have been controlled by local Māori authorities since the 1860s.³⁶ Māori Wardens are not independent officers, or an independent organisation, providing services to their local communities. They are, and have traditionally been, respected members of the community who have been appointed and supervised by local leaders to enhance and protect their communities.³⁷ As Mr Geiringer, counsel for the NZMC, emphasised, they are an instrument of democratic, self-governing Māori entities who have the community mandate to make decisions about how their communities should be supported and protected.

[64] The affidavit evidence of the chair of the NZMC, Sir Edward Taihakurei Durie, explains that, as a result of the Act, the NZMC was the first effective national body contributing to Māori self-government that had official recognition.³⁸ His evidence describes the three-yearly election process, where communities at a grassroots level elect representatives (who form the pool of candidates to be elected to each higher level), as providing a significant measure of Māori self-government. This provides important recognition of the right to self-determination guaranteed by art 2 of the Treaty and the United Nations Declaration on the Rights of Indigenous People (UNDRIP).

[65] He explains that although the DMCs have exclusive control under the Act, the DMCs are in turn controlled by the NZMC and the directions it gives under s 16(2) of the Act. This means in practical terms the NZMC exercises control through its Māori

³⁶ Waitangi Tribunal, above n 2, at 194: "Māori Wardens today trace their historical antecedents back to the Kīngitanga Movement of the 1860s. In the rūnanga of the Kīngitanga of the mid-nineteenth century, wātene were given responsibility for policing law and order and controlling liquor consumption in their communities... Māori people have always liked to take responsibility for controlling their own communities and it was for this purpose that Wardens were first appointed".

³⁷ At 258–259 and 267.

³⁸ His evidence includes his affidavit evidence provided to the Waitangi Tribunal, exhibited to his affidavit evidence in these proceedings.

Wardens Committee. He notes that the DMCs are aware of the needs of their local community and can ensure that those needs are met with the assistance of Māori Wardens. He makes the point that communities provide the legitimacy for the Wardens' existence as well as ultimately determining the effectiveness of the Wardens and their activities. He says that a body exercising powers of control over a community must be accountable to the community. He considers that the NZMC is still the most significant organisation to develop pan-Māori policy on law and order in its communities, as it covers both traditional iwi-based communities and modern urban communities.

[66] As Mr Geiringer emphasised, the Treaty settlement process since 1962 has enhanced the leadership and resources of iwi-based communities, but that leadership cannot perform the democratic self-government function of the NZMC as a national body representing all Māori.

[67] This evidence supports the interpretation that the DMCs and Māori Committees have broader exclusive control over Māori Wardens than simply controlling and supervising the exercise of their enforcement powers under ss 31 to 35 of the Act.

[68] I therefore consider that the plain text of the relevant provisions, the scheme and purpose of the legislation, and the historical context, support the NZMC's position. I consider DMCs have exclusive power and authority to control and supervise all aspects of the activities of Māori Wardens in their districts undertaken for the purpose of supporting members of those communities and promoting their welfare. As a matter of practical reality, this covers almost the entirety of Māori Wardens' community activities.

[69] I accept, as counsel for the NZMC concedes, that Māori Wardens are free to organise themselves into a representative organisation, such as the Trust, for purposes unrelated to controlling and supervising their activities, functions, duties and powers under the Act. They may also receive funding for those purposes. But this cannot usurp or encroach on the DMCs' exclusive power and authority to control and supervise Māori Wardens carrying out their general duties under the Act.

[70] By way of analogy, police officers can become members of the Police Association, which advocates for fair pay, resources and safe working conditions for its members. But the Police Association has no power or authority over its member police officers in relation to their statutory duties, functions and powers. Nor would it be lawful for the Crown to provide funding to the Police Association in a manner that usurps or encroaches on the Commissioner of Police's statutory authority to exercise control over his officers.³⁹

[71] I will now turn to consider whether the Funding Agreement between the Crown and Trust usurps or encroaches on the NZMC/DMCs' exclusive power and authority.

Issue (b): whether the Funding Agreement is contrary to the Act by usurping or encroaching on NZMC/DMCs' exclusive power and authority to control and supervise Māori Wardens

[72] The purpose of the Funding Agreement is:

3. The Funds will be used for the following purpose:

To contribute to building the capability and capacity of Maori Wardens, the National Entity will receive the Funds and equitably distribute them among the Regional Māori Warden Entities (as listed in paragraph five), in accordance with established priorities and strategic goals, for the purpose of achieving the following outcomes:

- a. Ensure continued delivery of services and additional FTE to support the co-ordination of Māori Warden activities;
- b. Enable Māori Wardens to focus on providing front-line services and facilitate efficient and effective service provision; and
- c. Enable Māori Wardens to build capability to broaden the services they provide to address whānau and community needs;

(the Funding Purpose).

4. To achieve the Funding Purpose, you will undertake the deliverables detailed in **Schedules A, B and C** of this Agreement.

³⁹ Policing Act 2008, ss 16 and 30.

[73] To achieve the Funding Purpose in cl 3, cl 4 explicitly requires the Trust to undertake the deliverables set out in schedules A, B and C. Schedule A sets out a table comprising the outcomes, outputs and the corresponding success indicators:

SCHEDULE A

FUNDING PURPOSE

Outcomes	
To contribute to building the capability and capacity of Māori Wardens, the National Entity will receive the Funds and equitably distribute them among the Regional Māori Warden Entities, in accordance with established priorities and strategic goals, for the purpose of achieving the following outcomes: • Ensure continued delivery of services and additional FTE to support the co-ordination of Māori Warden activities; • Enable Māori Wardens to focus on providing front-line services and facilitate efficient and effective service provision; and • Enable Māori Wardens to build capability to broaden the services they provide to address whānau and community need.	
Output(s)	Success Indicators
Governance, Administrative and Operational support at a National and Regional level	• Additional 6 FTE to support coordination of activities • Decision making processes and structures implemented and improved • Clear reporting and information system established, • Efficient administrative processes & systems implemented, • Number of Governance hui • Resources provided to enhance Māori Wardens ability to deliver services i.e. vehicles and equipment

	• Increase in number of warranted Māori Wardens • Increase in number of trainee Māori Wardens
National, Regional and Local Events & Emergencies	• National Events (eg Waitangi) & Emergencies attended/supported • Regional Events & Emergencies attended/supported • Local Events attended/supported • Number of trainings offered or completed by Māori Wardens for National Events and Emergencies
Training & Uniform requirements as identified by the region	• Training programmes identified (or designed) and completed, e.g. crowd management • Appropriate Uniforms purchased.

[74] Clause 1.5 of the terms and conditions to the Funding Agreement states that the Trust has an obligation to “use the Funds only for the Funding Purpose and Deliverables”. Schedule A does not allow the Trust to use the funding for any other purposes, nor is it framed in broad terms to generally support the activities of Māori Wardens under the Act. It requires the Trust to use the funding to increase governance, administrative and operational support at the national and regional level, support events at a range of levels, and invest in training programmes, resources and uniforms. The success indicators require the Trust to deliver effective decision-making and administrative processes, hold a number of hui, and increase the number warranted Wardens and Wardens in training. They also include attending and supporting national, regional and local events, identifying, designing and completing training programmes, and purchasing appropriate uniforms. Notably, the very first success

indicator is a requirement for the Trust to employ six additional full-time equivalent (FTE) staff to support the coordination of Māori Wardens' work.

[75] In addition to directing how the funding is to be used in relation to the activities and duties of Māori Wardens, the funding is conditional upon "reporting and evaluation requirements". Schedule B is titled "deliverables and milestones" and outlines the "deliverables" as verbal and written progress reports, and sets out when they are due to TPK. The description of the schedule states:

While written reports are required approximately half-yearly, both Parties commit to having regular relationship management meetings in the quarters between the periods when written reports are required, to discuss progress against outputs, share information on sector developments, relevant initiatives and identify possible areas for collaboration. Te Puni Kōkiri will be responsible for setting up these meetings.

[76] Schedule C is titled "invoices and payments" and provides a list of dates of when the Trust must submit its progress reports to TPK to receive payment. The schedule states:

Payment will only be made to you ... on completion and delivery to Te Puni Kōkiri of the reports to the satisfaction of Te Puni Kōkiri and subject to parliamentary appropriation.

[77] Further clauses in the terms and conditions set out TPK's power to evaluate the Trust's progress in relation to achieving the funding purpose. Clause 4.1 allows TPK to evaluate the Trust's performance of the funding purpose and cl 4.3 requires the Trust to "co-operate fully and assist where required" in any evaluation. Clause 5.1 also states that TPK will monitor and assess performance and compliance with the Agreement. Clause 3.2 states that if the Trust fails to meet its obligations set out in the Agreement TPK may choose to withhold any payment until it fulfils its obligations.

[78] Importantly, the Funding Agreement does not include any reporting requirements to the NZMC or DMCs, nor does it otherwise provide for their involvement. Clauses 7 and 8 state that TPK will consult with the NZMC and seek its views about the ongoing provision of funding under the Funding Agreement. Under cl 9, TPK reserves the right to amend the agreement as a result of "consultation" with

the NZMC and provide an opportunity for the Trust to raise any concerns. However, any proposed amendments will be at the “sole discretion” of the TPK.

[79] I consider the Funding Agreement encroaches on the NZMC and DMCs’ exclusive power and authority to control and supervise the activities of Māori Wardens. Obviously, the starting point is my above finding that the DMCs’ exclusive control is not limited to controlling the use of the ss 31 to 35 powers and extends to control and supervision of Māori Wardens’ general community support and welfare promotion activities.

[80] The Funding Agreement goes well beyond providing a sum of money to the Trust for the usual purposes of a representative body with no power to control its members statutory activities, such as the Police Association. The funding is being provided for the Trust to build capability and capacity for its members to exercise the statutory activities over which the NZMC/DMCs have exclusive control. It provides for specific obligations, outcomes and reporting requirements that the Trust must achieve in order to secure, and continue to receive, the funding. This includes outcomes and deliverables in areas clearly relating to Māori Wardens activities under the Act, including attending and supporting public events, improving decision making processes and structures, improving reporting and information systems, improving resources to deliver services, delivery and design of training, and the employment of six FTE staff to assist with coordinating Wardens’ activities. It requires detailed and frequent reporting against these deliverables, empowers TPK to evaluate the Trust’s progress on achieving the funding purpose, and requires the Trust to co-operate with TPK for these purposes.

[81] In this context, I consider the terms of the Funding Agreement mean the Crown is exercising a degree of control over Māori Wardens carrying out their community support and welfare promotion duties under the Act and Regulations. The Trust itself is exercising control by governing, managing and delivering the statutory activities of its Māori Warden members without any involvement of the NZMC or the DMCs. The Crown, in turn, is exercising a degree of control over the Trust’s activities by providing the funding required to undertake them and imposing obligations on how they must be performed as a condition of that funding. It follows that this encroaches on the

ability of the DMCs, and by extension the NZMC, to control and supervise Māori Wardens in accordance with the Act and Regulations.

[82] The NZMC does not want the Crown to withdraw the money it is providing to fund Māori Wardens' statutory activities. However, such funding cannot be provided in a way that encroaches on the NZMC/DMC's exclusive control of those activities. This is both contrary to the Act and inconsistent with the important principles of Māori self-government and self-determination referred to above. Those principles require democratically elected Māori institutions to make decisions about, and have control over, matters relating to the support and protection of their communities.⁴⁰

[83] The Trust and its regional entities are not bodies recognised by the Act and are not subject to the control and oversight of elected members of their communities. Māori entities are accountable statutory bodies, but the Trust is a private entity with no statutory status. An issue that arose during the hearing demonstrates the dangers inherent in a lack of proper oversight. I was advised that there are Wardens, including trainees and those who have not completed the appointment process (and possibly others), wearing full Māori Warden uniforms without appointment under the Act.

[84] The NZMC submits that this has resulted in a large group of people who are improperly "holding themselves out" to be Māori Wardens without being appointed by the Minister or nominated by a DMC. The respondents submit this is appropriate because these Wardens are not operating under the Act, as they do not exercise any of the powers in ss 31 to 35; their general activities supporting their local communities are not the performance of any activity, duty or power under the Act. It was further submitted that, as only officially appointed Wardens wear an identity card displaying their warrant number, they are not holding themselves out as appointed Wardens under the Act.

[85] The NZMC submits that the "soft power" that the Wardens say they rely on to effectively operate comes from the real power bestowed on them by appointment under the Act. It is therefore inappropriate for unappointed people to hold themselves out as Māori Wardens.

⁴⁰ Waitangi Tribunal, above n 2, at 51.

[86] In the end, this issue is peripheral to the central issues in the case, but it does raise concern about the Trust's ability to provide appropriate oversight and supervision of its members. My above conclusions mean the respondents are simply mistaken that Māori Wardens exercising community support duties are not performing any duties or functions under the Act because they are not exercising their ss 31 to 35 powers. Further, s 7(1) provides that the Minister may appoint Māori Wardens to "carry out duties" in any Māori Council District. In these circumstances, I do not think it is appropriate for an unappointed person to wear a full Māori Warden's uniform while carrying out their community support duties under the Act.

The effect of the funding provisions in the Act

[87] I will turn to consider the effect of the funding provisions in the Act on my conclusions so far. It is important to draw a distinction between the Crown's powers under consideration. The Crown relies on its prerogative or residual power to enter contracts and fund community organisations. However, it does not assert that it has any prerogative power to control and supervise the activities of Māori Wardens carrying out duties under the Act. Indeed, the Crown submits that the funding it is providing is unrelated to those activities and therefore not contrary the Act. The Crown does not suggest it has a prerogative power to exercise the control that the statute exclusively bestows on DMCs and the NZMC. Rather, it says that it is not unlawful per se for it to provide funding to the Wardens because the Act does not "cover the field" of how such funding can be provided.⁴¹

[88] Therefore, if the Funding Agreement means the Crown is exercising control over Māori Wardens statutory duties, having a prerogative power to fund the Trust outside the Act does not assist the Crown. Whatever funding the Crown might be lawfully entitled to provide under its power to enter contracts, those powers do not include the power to act contrary to legislation. On the other hand, the NZMC says that the legislative funding structure and the Crown's circumvention of it through the Funding Agreement further supports the conclusion that the Crown is encroaching on its exclusive control.

⁴¹ *De Keyser*, above n 29, at 86–87 per Lord Dunedin.

[89] It is also difficult to see how the NZMC's reference to *Fitzgerald v Muldoon* adds much to the fundamental proposition that it is the NZMC/DMCs not the Crown that must exercise exclusive control over the activities of Wardens performing their duties under the Act. *Fitzgerald* held that prerogative powers cannot be used to suspend legislation prior to Parliament repealing it.⁴² Although the parties agree that legislative reform is required to reflect the contemporary role of the entities and officers provided for in the Act (including Māori Wardens), unlike *Fitzgerald* there has been no purported suspension of the Act pending the passing of urgent legislation. However, the case confirms the self-evident proposition that prerogative or residual powers do not allow the Crown to act contrary to statute.

[90] In this case, the provisions in the Act that cover funding are ss 7(6) and 25, which provide:

7 Appointment of Maori Wardens

- (6) Subject to any regulations made under this Act, a Maori Association *may in its discretion* pay out of its funds to any Maori Warden exercising *functions* in its area such remuneration or allowances for his services as it may determine.

(emphasis added)

25 Subsidies

- (1) Subject to any regulations under this Act, any expenditure by a Maori Committee or a Maori Executive Committee may, with the approval of the Minister, be subsidised out of money appropriated by Parliament for the purpose at a rate not exceeding 1 pound for 1 pound.
- (2) The provisions of subsection (1) may be extended to any association or body of persons whether incorporated or not, approved by the Minister in that behalf, and having for its principal object or one of its principal objects the promotion of the welfare of the Maori people or of any portion of the Maori people.
- (3) There shall be paid each year to the New Zealand Maori Council out of money appropriated by Parliament for the purpose such sum as is approved by the Minister.

[91] The respondents submit that ss 7(6) and 25 are framed in permissive rather than mandatory terms. The respondents say they provide statutory discretion for how

⁴² At 622–623.

the Crown may subsidise the NZMC and Māori Associations, and separately how Māori Wardens may be compensated for their work. They submit that there is no explicit link between ss 7 and 25 that means Māori Wardens may only be compensated for their services by DMCs through Parliamentary funding appropriated to the NZMC.

[92] I consider there is some merit in these submissions. On the other hand, however, s 7(6) is a legislative provision that appears to reinforce Māori Associations' exclusive control over Māori Wardens' performance of their duties under the Act. It seems clear that the intention was for Māori Associations to decide, at their discretion, what (if anything) Māori Wardens should be paid by way of remuneration and allowances "for their services" under the Act. No other entities or people have been vested with such a discretion. Taking into account my above conclusion that these services include general community support and welfare duties (in reality almost all the services Wardens provide), it is difficult to see how the Crown, or any other person or entity, could provide funding to compensate Wardens for these services without encroaching on Māori Associations' exclusive control. It would involve payment of remuneration or allowances for services without the involvement of the entity that has both exclusive control over those services, and a statutory discretion to decide how much a person should be paid for them. On its face, this would at least remove Māori Associations' ability to control how much its subordinates should be paid.

[93] There is a conceptual difference between an entity that is not a Māori Association paying Wardens' remuneration or allowances directly, and such an entity donating money to Māori Associations to augment their funds, which is specifically allowed under s 24 of the Act. It is one thing to make a donation to an organisation for it to spend as it sees fit, but quite another to provide funding to a third party for the purpose of compensating that organisation's subordinates without any reference to the controlling organisation.

[94] The respondents argue that s 7(6) cannot apply to prohibit the Funding Agreement because it only covers the field of remuneration and allowances and not the other types of general expenditure for which the Trust is receiving funding. In response, the NZMC submits that unlike the funding provided through the 2007 MWP – which was drafted to exclude the payment of wages, salaries or koha – the

Funding Agreement contains no such exclusion, and permits the funds to be applied to allowances. The NZMC's submission appears to be borne out by the terms of the Funding Agreement. For example, the Trust is required to employ six additional FTE staff to "support coordination of activities" and to meet the outcomes in the Funding Agreement. The Crown is providing the funding for this purpose and with a requirement that it occurs. It is not clear whether some of those staff will be Wardens or non-Warden staff. If they are Wardens, they will be getting paid remuneration for their services through an arrangement that excludes any Māori Association. But even having six additional paid non-Warden activity coordinators demonstrates the Trust's level of control over Wardens' statutory activities, which the Crown is both funding and making a condition of that funding.

[95] Similar reasoning applies to the ability of the Crown to provide subsidies and funding under s 25 of the Act. The Crown must directly fund the NZMC through annual appropriations under s 25(3) and can subsidise the expenditure of Māori Committees (or other nominated Māori welfare promotion organisations) under ss 25(1) and (2). I am prepared to assume (without deciding) that these provisions do not prohibit the Crown using its prerogative power to provide other forms of funding to the officers and entities covered by the Act such as Māori Wardens. An example may be by providing funding to the Trust to undertake advocacy work on behalf of Wardens unrelated to the control of their statutory activities. However, the provision of any such funding is still subject to compliance with the legislation. If, as here, the provision of the funding has the effect of encroaching on the NZMC/DMCs' exclusive control and supervision of Māori Wardens, it is contrary to the Act and unlawful.

[96] I also accept the NZMC's submission that the link between funding and control is part of the design of the Act. A Warden who is funded, resourced, and administered by the Trust and its regional entities, with no financial or operational connection to the NZMC or a DMC, has no practical reason to accept the Council's direction. The "exclusive" authority of s 16(5) is reduced to a dead letter by an arrangement that interposes a separate funding and administrative body between the Warden and the DMC. I also accept the submission that this is not a purely theoretical concern given the evidence in this case. Most Wardens are now centrally administered by the Trust. Their deployment and operation is decided through the Trust, and the Trust deals

directly with the Crown, without the involvement of the NZMC/DMCs, who have no visibility of how the funding is applied.

[97] Ultimately, I do not need to conclusively determine whether the Act “covers the field” of the Crown’s ability to fund Māori Wardens. Regardless of whether the Act covers the field, I consider the funding provisions of the Act reinforce the conclusion that the manner in which that funding is being provided is contrary to the Act because it encroaches on the NZMC/DMCs’ exclusive authority to control and supervise Māori Wardens.

Criticisms of the NZMC and its response

[98] Finally, I will deal briefly with the submission that the NZMC has effectively acquiesced its own marginalisation through its dysfunction and inaction.

[99] I accept the NZMC’s submission that this cannot affect whether the Funding Agreement is contrary to the Act. While there are clearly issues relating to the NZMC’s historical underfunding and its operational ability to properly support Māori Wardens activities, the Crown cannot overcome those issues by working with the Trust to effectively usurp the role of the NZMC and DMCs. If the Crown wants to fund Māori Wardens in the manner provided for in the Funding Agreement, legislative amendment is required. Otherwise, funding of this nature can only be provided with the involvement and consent of the NZMC/DMCs.

[100] It is not the Court’s role to comment on executive funding decisions that are irrelevant to the lawfulness of the Funding Agreement. Ultimately, it is for the executive to decide how it should fund the NZMC and its subordinate Māori Associations provided it does so lawfully. However, it is appropriate to record the NZMC’s response to the allegation that it has effectively acquiesced in its marginalisation through dysfunction and inaction.

[101] The NZMC says that the Crown has brought about the DMCs’ lack of active supervision of Wardens. The NZMC says the Crown has never funded the DMCs or the NZMC to carry out this work. The NZMC receives less than \$200,000 of guaranteed direct funding, which has reduced in real terms over the last quarter-

century, and the DMCs do not receive any administration funding. The NZMC notes that the Waitangi Tribunal found that the systemic failures in the Wardens' system have occurred "because the DMCs are under-resourced and hence have no administrative capacity", and the Crown was "at fault in Treaty terms for allowing this systemic dysfunction to continue".⁴³ The NZMC submits that the Crown cannot starve the statutory bodies of the means to perform their functions and then invoke the resulting inactivity as a reason to bypass them altogether.

[102] The NZMC also says that the terms of the Funding Agreement reinforce this point. It provides for \$2.7 million in funding per annum over four years, with total funding of \$10,877,744. The NZMC notes that the Crown has not provided the NZMC and the DMCs with any funding to support the activities of Wardens, let alone sufficient funding to engage the six FTE staff to provide activity coordination services provided for in the Funding Agreement.

Conclusion

[103] For the reasons summarised at the start of this judgment, I conclude that it was unlawful for the respondents to enter the Funding Agreement because it encroaches on the NZMC/DMCs' exclusive power and authority to control and supervise the activities of Māori Wardens carrying out their duties under the Act and Regulations.

Relief

[104] The NZMC seeks the following declarations:

- (a) that the funding of Māori Wardens by a means that circumvents the relevant District Māori Council, including by funding the third respondent, is unlawful; and
- (b) that the Crown's actions have undermined the ability of the NZMC and its Māori Associations to exercise control and supervision of Māori

⁴³ Waitangi Tribunal, above n 2, at 515: "... systemic failures have occurred because the [DMCs] are under-resourced and hence have no administrative capacity ... the Crown is at fault in Treaty terms for allowing this systemic dysfunction to continue".

Wardens in accordance with the Act and Regulations, and are therefore unlawful.

[105] It is inappropriate to make declarations in such broad terms given the narrower scope of my above conclusions. I simply make a declaration that reflects my overall conclusion at [103] above, namely:

- (a) I declare that the respondents' actions in entering the Funding Agreement were unlawful because they encroach on the NZMC/DMCs' exclusive power and authority to control and supervise the activities of Māori Wardens carrying out their duties under the Act and Regulations.

Costs

[106] If costs cannot be agreed, the parties should agree a timetable for the filing of brief costs memoranda for determination of costs on the papers. The parties can revert to me if a timetable cannot be agreed.

La Hood J

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