



Te Arawhiti

Takutai Moana Funding Review

Report on Scheme Administration and
Stakeholder Survey

September 2020

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1. Executive Summary

1.1. Objective

The Office for Māori Crown Relations – Te Arawhiti (Te Arawhiti)¹ requested Deloitte to review the Takutai Moana Financial Assistance Scheme (the scheme) to:

- Identify improvements to the scheme administration; and
- Provide input into funding policy matters.

The Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 was taken into consideration when completing this review. However, the primary focus of this report is to make improvements to the scheme under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).

Engagement with applicants and lawyers to seek their experiences with the scheme were planned. However, due to the COVID-19 lockdown, this engagement was temporarily suspended and resulted in planned hui with applicants and lawyers, as part of this mahi on policy matters with Te Arawhiti not proceeding.

Accordingly, the scope of this report and its recommendations address the specific themes and findings relating to:

- Deloitte’s review of the scheme administration in particular allocating the upper funding limits (UFLs) and processing reimbursements with a focus on internal controls and good practice; and
- External stakeholders survey responses on policy and scheme administration matters received by 30 June 2020.

The scheme administration covers the following:

- Complexity assessments to determine UFLs;
- Reassessment of UFLs;
- Requests for reimbursements; and
- Transfers between High Court and Crown engagement pathways.

1.2. Report Structure

The report has been structured accordingly:

- Section 2. Overview of the Marine and Coastal Area (Takutai Moana) Act 2011
- Section 3. Review Approach
- Section 4. Key Observations
- Section 5. Comparisons of the Scheme to Other Similar Schemes
- Section 6. Key Recommendations
- Section 7. Summary of Feedback from Survey Respondents

¹ Te Arawhiti was established in September 2018 to oversee the Government’s work with Māori in a post Treaty settlement era. Establishing Te Arawhiti brought together several government rōpū, including the Māori Crown Relations, Treaty Settlements, Takutai Moana, and Settlement Commitments. As well as administering the Act, Te Arawhiti:

- Works with Māori who have applied to engage directly with the Crown;
- Provides advice to the Minister of Treaty Waitangi Negotiations on issues relating to assessing applications under the Act;
- Delivers its historical research programme to support the High Court process and Crown Engagement; and
- Engages with the High Court process via the Crown Law Office.

1.3. Key strengths

Deloitte identified the following strengths:

1. Te Arawhiti has a dedicated team to administer the scheme. The Takutai Moana funding administrators' team is relatively stable, which provides continuity; however, the team may not be sufficiently resourced;
2. The milestones for each UFL for the High Court and Crown engagement pathways provide information to all applicant groups about the total amount of funding available and general purpose for its use;
3. Te Arawhiti regularly seeks feedback from applicant groups and lawyers to understand the strengths and weaknesses of the scheme; and
4. With applications received by 3 April 2017, this enabled Te Arawhiti to determine the number of applications and therefore, the potential total amount of funding payable under the scheme.

1.4. Key Improvement Opportunities

The report highlights a number of areas of focus to improve the scheme administration processes and practices. At an aggregate level, these include:

Scheme Administrative Improvements

1. Providing targeted information for applicant groups, including educating them about the scheme and assisting in progressing their application;
2. Working with the applicant groups to resolve overlapping interests and/or mandate issues. This could be in the form of Te Arawhiti facilitating hui themselves and/or providing additional funding for independent facilitators. If this is not feasible, consider the use of interlocutories or the continued use of Case Management Conferences;
3. Undertaking cost modelling on using different funding allocation scenarios for High Court and Crown engagement pathways to determine the potential long-term cost to the Crown;
4. Improving the technology that Te Arawhiti uses to track applications and monitor the reimbursements claimed to date. This will ensure information is held in one central repository rather than different spreadsheets currently used; and
5. Increasing Takutai Moana funding administrator resources to enable the processing of UFLs and claims for reimbursements to be completed in a more timely manner.

Policy Input Suggestions

1. Reviewing the UFL and introducing an hourly rate. This would provide guidance to the applicant groups and their lawyers on how many hours should be allocated for each task;
2. Considering potential different funding option approaches. This could involve incorporating management support elements of Legal Aid including the allocation of resources (lawyers, historians etc.) at a fixed rate; and
3. Refreshing the process for approving the complexity bands, UFL and reimbursements to enable a faster approval process.

1.5. Summary

The scheme's effectiveness and efficiency can be improved, we note:

- The process/scheme was not designed for receiving 589 applications, which has meant applications have not progressed as anticipated;
- Funding is considered insufficient and does not take into account that this is a new piece of legislation with no case law or precedents; and
- Applicant groups and their lawyers have spent time preparing parts of their applications and reimbursements for which funding is not available or is insufficient i.e. attendance at hui, travel time, accommodation for participants at hui and interlocutory hearings.

1.6. Lift and shift opportunities

Listed below are the five key "lift and shift" (significant potential actions) opportunities that Te Arawhiti should consider:

1. Te Arawhiti should take a more hands-on approach, by providing more guidance and support for the applicant groups. This increased support and engagement would assist in accelerating applications and/or optimising the use of available funds. For example:
 - a. Assist applicant groups to resolve overlapping interests and ensure an approved mandate has been obtained. This could be through hui, which Te Arawhiti directly facilitates or provides funding for an experienced independent facilitator to help resolve overlapping interests. However, with the former, we note that some applicant groups may see this as interference by the Crown;
 - b. Specify project and advisor roles and responsibilities including when to use a lawyer/project manager. This information should be provided in guidance notes; and
 - c. Provide some guidance on how to procure and manage costs within the UFL (i.e. the order of engaging with the expenditure type (lawyer, project manager, historian, and researcher) and managing budgets). This would assist the applicant groups to improve their use of the UFLs more effectively, as not all have the resources to do so.
2. Review the UFLs to determine whether they are fit for purpose and whether applicant groups with insufficient financial resources are disadvantaged. Currently, for each UFL there is a set amount for a task and expenditure type. This should be re-designed and the expenditure type be based on an hourly rate within a funding limit. The actual hourly rate would vary based on the experience of the expenditure type. In addition, Te Arawhiti should allow unused funding to be transferred between tasks. The benefit to Te Arawhiti and the applicant groups is that the hourly cost of services is identified/known and would align to other funding schemes.
3. Provide guidance and education to applicant groups about the reimbursement process. Currently, applicant groups do not understand the reimbursement process and are submitting claims, which are rejected due to costs not being reimbursable under the current policy (e.g. trial cases, costs of preparing reimbursements, research into the scheme/Act). This should occur before the applicant group incurs the expenditure, where possible including explaining what the funding can be used for. This should help reduce the number of reimbursements that are rejected/reduced.
4. Refine the process to speed up the reimbursement process. The process can be further refined through reducing the number of internal approvals for reimbursements and releasing guidance notes indicating what costs are/are not funded under the scheme. This would allow Takutai Moana funding administrators to dedicate more time towards processing applications rather than requesting additional information from applicant groups.
5. Consider adopting a grants model funding approach. Te Arawhiti could provide each applicant group a lump sum payment based on a pre-approved budget. This would require applicant groups to apply funds per the budget/plan and reduce their time spent on preparing reimbursement claims. To support transparency and accountability of public funds, applicant groups could require a Chartered Accountant to provide confirmation on the use of funds. This would allow Te Arawhiti to maintain oversight and assurance over fund use. This approach reduces the risk of the applicant group spending the funds without progressing their application and reduces time spent on claiming reimbursements. Te Arawhiti would be responsible for paying for these audits either directly or indirectly by increasing the UFLs.

If providing a lump sum payment is not an option, consider advancing funding once a quarter based on a pre-approved budget. This should be based on revised UFLs. The advantages to Te Arawhiti is that approving budgets in advance enables Te Arawhiti to understand the future expenditure for the next quarter and determine whether it is permissible or not. Also, this would allow applicant groups to progress their application and ensure the scheme is equitable, as some applicant groups are only able to progress their application after receiving their reimbursement.

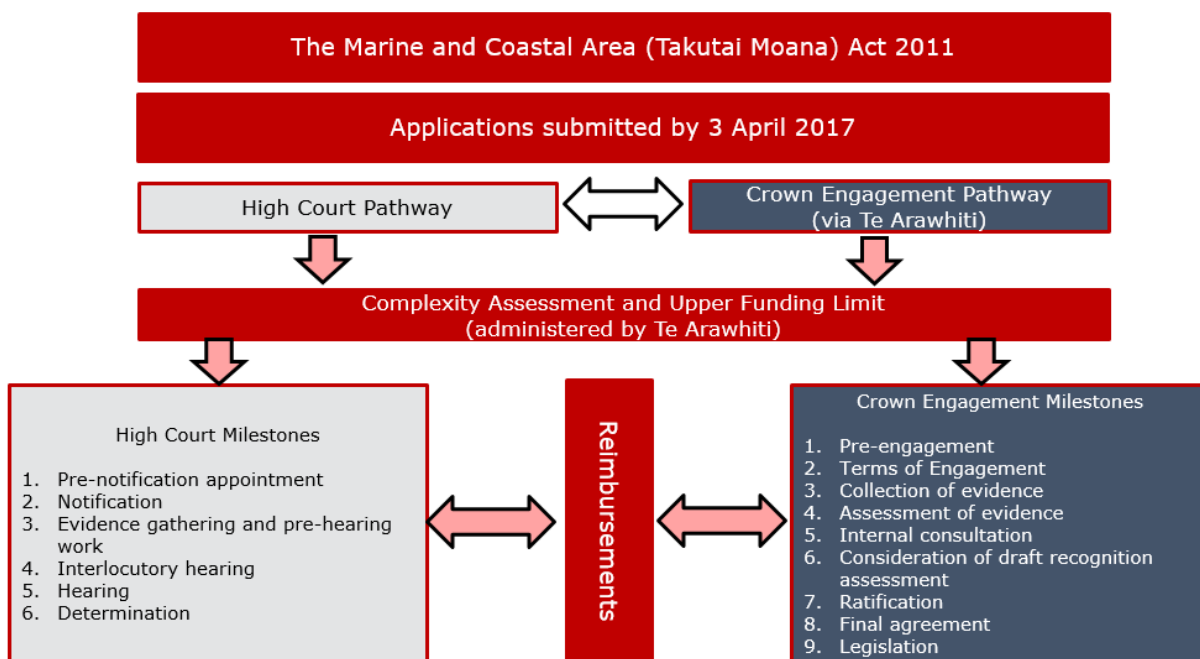
This will provide an expenditure pattern, which will enable Te Arawhiti to re-set the UFLs, if required. In addition, approving budgets upfront will assist the reimbursement process, as claims should be processed more quickly with fewer rejections. The key benefit for applicant groups is that they are able to better utilise funding, as additional funds are not expended submitting detailed requests for reimbursement. This will provide greater certainty to the applicant groups when seeking a reimbursement.

1.7. Acknowledgement

We take this opportunity to thank the Te Arawhiti team for their assistance during the course of the engagement. Additionally, we acknowledge the time both applicant groups and their lawyers took to complete the surveys and provide feedback on the scheme.

2. Overview of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act)

The diagram below outlines the component parts of the scheme administration, which are set out in more detail within the body of this report.



The Marine and Coastal Area (Takutai Moana) Act 2011 (the Act)

The Act came into force in April 2011 with the purpose of enabling iwi, hapū, and whānau to obtain recognition of their customary interests through customary marine title (CMT) or protected customary rights (PCR). This is via one of two pathways: High Court or direct engagement with the Crown.

CMT recognises the relationship of an iwi, hapū or whānau with a part of the common marine and coastal area. CMT cannot be sold and free public access, fishing and other recreational activities are allowed to continue in CMT areas.

If the applicant group has CMT recognised over an area, it will hold:

- A Resource Management Act permission right allowing the applicant group to permit or decline activities that need resource consents or permits in the area;
- A conservation permission right allowing the applicant group to permit or decline certain conservation activities in the area;
- The right to be notified and consulted when other applicant groups apply for marine mammal watching permits in the area;
- The right to be consulted about changes to Coastal Policy Statements;
- A wāhi tapu protection right, which lets the applicant group seek recognition of a wāhi tapu and restrict access to the area if this is needed to protect the wāhi tapu;

- The ownership right of minerals other than petroleum, gold, silver and uranium, which are found in the area;
- The interim ownership of taonga tūturu found in the area; and
- The ability to prepare a planning document, which sets out the applicant group's objectives and policies for the management of resources in the area.

Meeting the tests for customary marine title (CMT)

To have CMT recognised over an area, applicants must prove their group:

- Hold the specified area in accordance with tikanga; and
- Have exclusively used and occupied the specified area, without substantial interruption, either from:
 - 1840 to the present day; or
 - The time of a customary transfer until the present day.

When determining whether CMT exists, the Crown and High Court can consider:

- Who owns the land right behind the area (abutting land); and
- Non-commercial customary fishing rights in the area.

If other groups have used this area for fishing and navigation, this does not necessarily stop an applicant group from meeting the tests for CMT.

Meeting the tests for protected customary rights (PCR)

To have PCR recognised, the applicant group must prove it:

- Has exercised the activity in accordance with tikanga since 1840; and
- Continues to exercise the activity today, in one way or another.

PCR can be granted for a customary activity like collecting hāngi stones or launching waka in the common marine and coastal area. If an applicant group has a PCR recognised, no resource consent is required to carry out that activity. Also, local authorities cannot grant resource consents for other activities that would have an adverse effect on their PCR.

Takutai Moana financial assistance scheme

The scheme was set up to support applicant groups to progress their applications under the Act. Without the scheme, applicant groups may not have had the resources to process their application. Applicant groups must prove they meet the requirements of the Act to which Te Arawhiti provides funding to support their application through the various phases.

Te Arawhiti

Te Arawhiti administers the Act and has issued policy and guidelines, which provide an overview of the scheme and sets out the Crown's funding policy for applications. This information is available on Te Arawhiti's website. Additionally, Te Arawhiti has a separate team of funding administrators managing and applying the UFL and reimbursing claims.

Applicant groups/Applications

Applicant groups comprise of iwi, hapū, and whānau. The size of an applicant group varies with some having access to extensive resources (funding, infrastructure, lawyers, researchers, and historians) to assist with their application.

Lawyers generally complete the High Court and dual applications, whilst iwi, hapū, and whānau typically complete applications directly submitted to the Crown with lower levels of support from lawyers.

The Act required all applications to be submitted by 3 April 2017, and 589 were received of which:

- 387 applications were lodged for Crown engagement;
- 202 applications were for High Court recognition orders; and

- 175 of the High Court applicant groups also applied for Crown engagement (commonly known as dual applicant groups).

High Court and Crown Engagement Pathway

Applicant groups have two pathways to choose from: High Court or Crown engagement or both pathways. The High Court issues an order of the High Court; and the Crown makes a determination that is confirmed via Order in Council.

The stages to progress an application (as well as the funding stages) in each pathway are different. The Crown has three key stages: pre-engagement (including preliminary appraisal), engagement, and finalisation. The High Court also has three key stages: pre-hearing, hearing, and determination. Either pathway requires applicant groups to meet the same tests in order to obtain their CMT or PCR.

The pathway that an applicant group is in determines when they can access funding. If their application is progressing in the High Court, funding can be applied for once the application has been publicly notified. If their application is progressing in Crown engagement, the applicant group can apply for funding once the Minister has agreed to engage with them, and after the Terms of Engagement has been signed.

To apply for funding, applicant groups must complete and submit a complexity assessment form to Te Arawhiti. The form lists a set of indicators and measures, and assigns a weighting based on the complexity of the application and the level of resources required to progress the application through its chosen pathway. The higher the weighting score, the higher the complexity level and the related upper funding limit.

Complexity Assessment and Upper Funding Limit (UFL)

The Complexity Assessment determines the Upper Funding Limit (UFL). The Takutai Moana funding administrators determine the complexity assessment based on the following criteria:

- Size of application area;
- Size of customary group on behalf who the funding is sought;
- Number of groups with potential overlapping customary interests in the area;
- Nature of relations with customary interest neighbours on land adjoining the area;
- Current use of the application area;
- Number of PCR activities sought;
- Level of research evidence readily accessible to the applicant; and
- Historical treaty claims.

There are four complexity bands: low, medium, high, and very high and each has its own UFL. In addition, the funding pathway that is chosen impacts the funding received. The maximum amounts for a complexity band of "very high" is \$340,139, for High Court and \$432,078, for Crown engagement. UFLs are subject to an annual Consumer Price Index (CPI) adjustment.

Each pathway has its own milestones, which are capped and cannot be transferred to other milestones if underspent. Under each milestone, there is a high-level description of activities covered.

The funding is designed to ensure all applicants have the opportunity to have their customary interests recognised under the Act, while simultaneously ensuring an appropriate and transparent use of public funds. The scheme is not intended to cover all expenses that are likely to be incurred by the applicant. Instead, the scheme aims to provide an 85% contribution to the estimated costs of achieving each milestone.

Applicant groups have the right to transfer between pathways. However, funding is only made available for the active pathway. Once an applicant group transfers to the other pathway, that funding will become available but only from where the applicant enters the new pathway.

Reimbursements process

To receive a reimbursement, the applicant groups complete a budget template outlining costs to date and provide supporting documentation (invoices, timesheets, etc.)

This information is submitted to Te Arawhiti for processing, which involves checking the claim form and supporting documentation for accuracy and completeness. Further information is requested where Te Arawhiti queries the reimbursement claim. Where Te Arawhiti is not satisfied the reimbursement meets policy, the claim is rejected or reduced. Once the Takutai Moana funding administrators determine the reimbursement amount, this is subject to an internal approval process before the reimbursement is processed.

Reimbursements are paid directly to the named bank account on the application. To close off this process, claimants receive a letter summarising the reimbursement including a statement and rationale, if their claim has been rejected or reduced.

3. Review Approach

The Deloitte work comprised three stages:

1. Assess the financial assistance scheme administration processes

Hui were held with key Te Arawhiti staff to understand:

- Governance arrangements;
- High-level end-to-end process (from application approval through to reimbursement payments);
- Roles and responsibilities;
- Risk management and internal controls;
- Supporting guidance; and
- Tools and systems.

This allowed Deloitte to understand process objectives, challenges, and benefits of current processes and assessments. This included comparing the scheme to other similar schemes.

The scheme administration end-to-end processes were flowcharted from when the applicant group submits their application to the High Court and/or Crown through to the payment of reimbursements.

A total of 15 samples of applicant groups' UFLs and reimbursements were selected for assessment in terms of the scheme administration. Deloitte selected ten applications and Te Arawhiti five applications; and Deloitte subsequently assessed the effectiveness and controls over the end-to-end administration process and monitoring controls.

We examined the processes for rejected, reduced, and untimely reimbursements. Reimbursements rejected/reduced were scrutinised to assess whether appropriate and relevant documentation had been provided to support the reimbursement and milestone limits had been met. Following the review of the 15 applications, findings were discussed and validated with the Takutai Moana Funding administrators. They verified any issues or risks identified and provided explanation on the timeliness of reimbursements and completeness of documentation.

The review did not assess or provide a view on the content of information provided by applicants to the Takutai Moana funding administrators.

2. Policy analysis

Deloitte reviewed the publicly available policies, in-house process documentation, and financial information reports, including documents for approval and monitoring information. Information reviewed included:

- Funding matrices (High Court and Crown engagement);
- Outcomes of Stage One of Waitangi Tribunal kaupapa; and
- Marine and Coastal Area Act applicant funding policies and guidelines.

Some comparative analysis was undertaken against other funding schemes and matters arising from the lawyer interviews and surveys were considered.

3. Policy and Administration matters

An e-survey and paper-based survey was developed and issued, seeking feedback from applicants and their lawyers. The survey was independently administered; however, Deloitte worked in conjunction with Te Arawhiti to develop the questions. The survey was released in March 2020 and closed on 30 June 2020. In addition, Te Arawhiti referenced the survey on their website and directly contacted applicants to encourage participation.

The survey was designed to understand applicants' experience with both the scheme and Te Arawhiti. The following areas were explored:

- Time applicants have spent on their application;
- Applicants relationship with their lawyers;
- Support Te Arawhiti provides applicants;
- Challenges and costs incurred in the evidence gathering phase;
- Funding levels and contribution to costs;
- Pain points associated with the reimbursement process;
- Dual applications; and
- Applications with overlapping interests.

All survey responses were summarised into common themes with responses explored through the report.

Deloitte also conducted interviews with a range of lawyers to understand the challenges and strengths they have experienced under the scheme. Questions were focused on understanding what works well within the scheme and how Te Arawhiti can provide additional support/resources to aid applicant groups.

4. Key Observations

Te Arawhiti provides an overview of the scheme on its website and in various documentation. This content should be reviewed and updated. Lawyers commented on the need to spend time educating applicants about the Act. There is an opportunity for Te Arawhiti to play a greater role in this area by actively promoting/sharing information via standard and social platforms to address this gap (**refer to recommendation #1**).

4.1. Applications to be submitted by 3 April 2017

Requiring all applicant groups to submit applications by 3 April 2017 provided Te Arawhiti with knowledge of the total population seeking CMT or PCR recognition. This resulted in over 500 applications submitted with a number of overlapping interests. Te Arawhiti did not anticipate this number of applications, especially the number of applicant groups with overlapping interests. This volume has placed pressure on the Takutai Moana funding administrators, who have been unable to consistently process reimbursements in a timely manner.

The outcome of the 3 April 2017 deadline is that:

1. There are a significant number of applications with overlapping claims; and
2. It is not known whether each applicant group has the mandate to represent the iwi, hapū, or whānau supporting its application.

These are discussed below and are issues that need to be addressed but are not easily resolvable. These issues potentially increase the costs to the applicant groups in resolving them, which may not be resolvable within the current funding amounts.

For the Crown engagement applications, Te Arawhiti has made contact with the applicant groups acknowledging receipt. However, some applicant groups claim not to have heard from Te Arawhiti on how to advance their application. To address this, Te Arawhiti should provide information to each applicant group when its application will progress and make this information publicly available. This will enable applicant groups to identify the status of their application, enabling them to budget and better plan when costs will be incurred.

4.2. Overlapping interests

An overlapping interest is where one applicant is seeking CMT or PCR in the same area as another applicant. Addressing overlapping interests is time consuming and complicated. Currently Te Arawhiti has no process for tracking overlapping claims that overlap with competing applicant groups. All of the samples tested had overlapping claims with 40% having more than six overlaps (based on Te Arawhiti's determination).

Many applications submitted had multiple overlapping interests that could not be resolved before submission. This is because a number of the overlapping interests involve historical matters that require time and effort to reach an agreement that is acceptable to all interested parties. In addition, overlapping interests may not have been known at the time of submission.

The result of the overlapping interests means there are often multiple interested parties for each application. The overlapping parties are either other High Court and/or Crown engagement applicants. With the latter, applicant groups are required to maintain a watch over High Court cases with the possibility of becoming a defendant if they decide to challenge the applicant group bringing the case. There is no funding available for this. In cases where the Crown applicant group does not have the resources, the High Court case could proceed without being challenged.

This has placed a potential cost burden on applicant groups, as they are unable to anticipate the extent of proceedings they may need to participate in to defend their customary interests. This is a "pain point" identified by applicant groups with multiple overlapping claims.

The process for resolving overlapping interests include:

- Entering into a Case Management Conference;
- Holding an interlocutory;
- Allowing the High Court to apply a ruling; and
- Holding hui with interested parties to negotiate an agreement (**refer to recommendation #2**).

Applicant groups with overlapping interests are being encouraged to attend a Case Management Conference to resolve these issues. Te Arawhiti, applicant groups, and their lawyers did not anticipate the wide use of these conferences.

Applicant groups commented that there is insufficient funding to cover the costs of attending these sessions. Costs incurred include travel, accommodation, and lawyer fees. Consequently, this has resulted in applicant groups attending Case Management Conferences without their lawyers or not attending at all.

Lawyers commented that funding to attend Case Management Conferences was not sufficient, meaning attendance by lawyers could be variable (e.g. attending for one applicant group, but not for another). Te Arawhiti has made additional funding available for conferences, but we recommend understanding whether this is deemed sufficient (**refer to recommendation #3**).

Te Arawhiti recently issued a Draft Crown Engagement Strategy (Draft Strategy) proposing an efficient and effective way to move forward and process applications in clusters. This will be along sections of the coastline sequencing engagement with applicant groups based on a number of factors, including the number of overlapping applications. The Draft Strategy notes that areas of coastline with fewer overlapping applications may be easier to resolve and proceed at the expense of more complex ones.

Applicant groups and lawyers have expressed concern at the length of time allocated to address overlaps as outlined in the Draft Strategy. For example, Te Arawhiti has created four initial areas for engagement, with Area 4 having the longest timeframe for engaging with applicant groups of sometime between 2035 and 2045. Applicant groups are concerned with the length of time to address overlaps and the length of time before their application is proposed to be addressed that current funding may not support this due to rising costs and duplication of work.

4.3. Te Arawhiti – Takutai Moana funding administrators

Feedback in the survey and from applicant groups and lawyers about staff at Te Arawhiti was positive overall. This included the on-going process improvements such as being more consistent with information provided to applicant groups and lawyers. Based on our review, the main areas for further improvement include:

- Providing more upfront information (education) about the scheme, including what the funding can be spent on;
- Providing templates to support the reimbursement process;
- Improving the speed of communication with applicant groups;
- Providing guidance/training on the reimbursement process;
- Continuing to improve the consistency in processing reimbursements;
- Addressing the slowness in processing reimbursements; and
- Reviewing the resourcing levels to handle the number of reimbursements.

The large volume of applications has resulted in inefficient processes for applying for a UFL, approving reimbursements, and seeking decisions from the Minister for Treaty of Waitangi Negotiations to engage with applicants (Crown engagement pathway). This is an ongoing issue for Te Arawhiti with difficulties faced in managing the status of all applications and responding to applicant groups in a timely manner. Takutai Moana funding administrators reported encountering challenges with applicant groups not receiving their reimbursement in a timely manner. Therefore, Te Arawhiti should develop further key performance indicators for the Takutai Moana funding administrators (**refer to recommendation #4**).

4.4. High Court and Crown Engagement pathway

Notification - Public Notice

S103 of the Act requires applicant groups to issue a public notice no later than 20 working days after applying for a recognition order in the High Court. Once issued, other iwi, hapū, or whānau have 20 working days to file a notice of appearance.

Issuing this notice is important, as funding only becomes available to High Court applicant groups once the public notice has been issued, and an application for funding has been completed.

Appealing a High Court decision

Only High Court applicant groups can appeal a High Court decision on an application for a recognition order under the Act. This can only occur after the High Court has released its decision on the application. Funding is available to support appeals to the Court of Appeal and Supreme Court or where there is a secondary consideration by the High Court.

4.5. Crown Engagement pathway

Whilst unproven, some lawyers have a perception that some applicant groups only submitted their applications through the Crown engagement pathway, as the potential cheaper option of the two pathways. One reason suggested was that applicant groups could not afford the upfront lawyer fees.

To support applicant groups there is up to \$3,146 (under the Pre-engagement milestone) available. However, applicant groups have to absorb all other costs until the Minister enters into a Terms of Engagement, which then allows access to funding.

Appealing a Crown Engagement decision

If the Minister does not engage with an applicant group, there is no funding available for the applicant to seek a judicial review of the Minister's decision. This should change so that funding is made available (**refer to recommendation #5**). Instead, the applicant has the option to obtain recognition via the High Court pathway but only if they applied under the High Court pathway before 3 April 2017. This has led to some applicant groups believing that applications in the High Court pathway are at an advantage, as they receive funding following public notification. In contrast, applications in the Crown engagement pathway consider they are disadvantaged because they are unable to access funding until the Minister has signed a Terms of Engagement, even though some applicant groups have already incurred substantial costs beforehand.

4.6. Dual pathways

Applicant groups were permitted to submit an application either directly with the Crown and/or via the High Court. This dual pathway approach was designed to restore the rights for iwi, hapū and whānau to access the High Court and engage with the Crown in a pathway of their choosing.

4.7. Switching pathways

Applicant groups are able to switch their application between the Crown engagement and High Court pathways. However, noting that if the Minister does not agree to engage with an applicant group, the Crown engagement pathway is no longer an option.

It is not permissible for applicant groups to progress an application through both pathways at the same time. Our review sample did not include any applications that switched pathways, however, there are no clear guidelines on how many times this can happen and how the funding is applied. Allowing applicant groups unlimited opportunities to switch is not an efficient use of resources. It requires all parties to spend time bringing themselves up to speed with the new pathway, which means potential additional costs without necessarily advancing the application. Also, switching pathways means that different UFLs will apply, creating additional requirements on the Takutai Moana funding administrators in tracking this information. This is a "pain point" identified by lawyers, who reported spending additional time on applicant groups who switched between pathways. To address this issue, Te Arawhiti should consider introducing a new UFL for dual pathways to assist applicant groups manage their costs (**refer to recommendation #6**).

4.8. Complexity and Upper Funding Limits

Upper Funding Limits

The UFL is capped at \$340,139, for High Court and \$432,078, for Crown engagement for “very high” complexity applicants. The UFL is subject to CPI.

The UFL supports the applicant group progressing their application and is designed to cover 85% of their total costs. Te Arawhiti should maintain this business rule or determine whether funding is more “means-tested”, such as taking into account whether a group has entered into a Treaty settlement.

Determining the UFL

The funding matrices were designed using historical and actual costs for the period 2011 to 2016 and based on real data available at the time. All actual transactions reimbursed for each applicant group were summarised under a set of logical expenditure items: project management, legal advice, historian services, traditional evidence gathering, and related disbursements for each. The costs in the matrices were the maximum costs the applicant groups incurred, which were then sized using the logical headings that are now in place on the complexity form.

These total costs were reduced by 15% to ensure the applicant group contributes towards costs. However, the rationale for reducing the funding by 15% is not clear to the applicant groups. Applicants groups that do not have the resources believe they are unfairly treated and that this may prevent them from receiving natural justice (**refer to recommendation #7**).

The UFLs for Crown engagement applicant groups are higher than the High Court because the data at the time demonstrated Crown engagement involved higher costs. In addition, anecdotal information for the Crown engagement pathway suggested that:

- Lawyer hours were higher because they spent a lot of time discussing issues with analysts, Crown Law Office, and the Minister;
- There was significant on-site engagement between the applicant group and officials; and
- Higher lawyer costs mean higher project management costs and higher related disbursements, as some lawyers perform the role of project manager, as well.

Furthermore, the costs associated with the *Tipene* case and three other incomplete ones identified that:

- The *Tipene* hearing lasted two weeks;
- Te Arawhiti was able to limit the charge-out rate of suppliers; and
- There were fewer overlapping interests.

Therefore, it is timely to review the UFLs, especially if the Draft Crown Engagement Strategy is adopted, as applications within the proposed Areas 3 and 4 may take 25 years for a determination. Therefore, additional funding may be sought, as the length of time for a determination may mean applicant groups do not have sufficient funding (**refer recommendation #8**).

In addition, if the UFLs are changed Te Arawhiti should undertake a modelling exercise to determine the total cost of funding the scheme if adjustments were made to:

- Both pathways;
- Introduce a new UFL for applicants, who have submitted to both pathways;
- Introduce hourly rates for each role; and
- Te Arawhiti contracts/engages with certain roles directly instead of the applicant groups (**refer recommendation #9**).

Milestone limits

The funding matrix for High Court and Crown engagement includes milestones with the tasks for that milestone and the expenditure type (e.g. project manager, lawyer, historian, and researcher). The purpose of the milestone is to guide the applicant groups through the different phases and to provide a maximum

funding limit for each task. This is to encourage the applicant groups to operate within a pre-defined fiscal envelope. Unlike some other funding schemes, it does not provide an hourly rate, therefore, making it difficult for applicant groups to know whether the expenditure type is cost effective. In addition, there are no guidelines outlining the roles, responsibilities, and tasks for each expenditure type (**refer recommendation #10**).

Determining the complexity band based on an assessment

The complexity assessment comprises of two indicator groups: main and supplementary, which are supported by eight measures. Having two indicator groups provides little value, as both groups determine the complexity band and the measures are not weighted. We would not recommend this, as it would add unnecessary complexity. Each measure has four complexity bands (low, medium, high, and very high) with criteria supporting each one. The answers determine the overall complexity band.

Te Arawhiti undertakes a complexity assessment of an application to allocate a complexity band, which subsequently determines the applicant groups' UFL. The applicant group is required to complete their own self-assessment, which provides them with an insight into the complexity band they expect to receive. Te Arawhiti allocates the majority of applicant groups a high or very high complexity band. As this is the case, consider removing the low and medium complexity bands. This will help reduce the time in determining, which complexity band should be applied.

One indicator that should be considered is whether the applicant group has the mandate. This will assist Te Arawhiti knowing whether the applicant group has the authority, otherwise, other applicant groups may challenge the validity of the application (**refer recommendation #11**).

Determining and confirming Upper Funding Limit (UFL)

Once the complexity band is determined, the UFL is allocated. The Chief Executive (CE) approves the UFL in the form of a memorandum, which is subject to a number of internal reviews before the CE's approval. This can cause delays in obtaining approvals. All required steps were only completed in two of the samples reviewed. Therefore, there is an opportunity to streamline the process by reducing the amount of internal reviews (**refer recommendation #12**).

Once approved, Te Arawhiti issues a letter informing the applicant of their UFL limit, including the rationale for the complexity rating and a comparison to their complexity assessment.

Applicant groups who disagree with Te Arawhiti's assessment are able to appeal, which is outlined in the letter. However, there is no timeframe for them to lodge the appeal with Te Arawhiti including the process for appealing (**refer recommendation #13**). There were no appeals.

From the samples of applications reviewed, there was one instance where:

- No funding memorandum was available to confirm the UFL. The applicant received the maximum amount. This only becomes an issue if the UFL is over stated and Te Arawhiti identifies the issue after the applicant group has been reimbursed; and
- An incorrect UFL was approved, which was corrected after Te Arawhiti was notified. The error occurred due to an incorrect UFL being assigned. This was part of Deloitte's testing sample and further investigation within the batch identified three other applications with similar issues, which were subsequently corrected. Automated controls, which assign complexity ratings based on the UFLs weighted score should be implemented to reduce the risk of human error (**refer recommendation #14**).

Some applicant groups have not applied for an UFL

Currently, 34 of the 202 applicants in the High Court funding pathway have not applied for an UFL. There is no deadline for applicants to obtain their UFL (**refer recommendation #15**).

Transferring between milestones

Where an applicant undertakes tasks in an efficient manner, they are not able to transfer any underspend between the milestones. Under the scheme's existing settings transferring underspends from a previous

milestone must be approved by Ministers. This process does not incentivise effective budgeting and instead encourages applicants to spend to the maximum amount to receive full funding for that milestone.

There have been instances of applicants overspending on a milestone and unable to be reimbursed despite funding remaining from previously completed milestones. Applicant groups see this as a pain point. Deloitte was informed that if an applicant group approaches Te Arawhiti requesting unspent funding to be applied to their reimbursement this may be approved by the Minister of Finance and Minister for Treaty of Waitangi Negotiations. Such requests have been approved in the past. However, applicant groups may not be aware this is an option (**refer to recommendation #16**).

The main areas that applicant groups and lawyers believe the milestone limits were insufficient are:

- Interlocutory where the time spent preparing for an interlocutory did not reflect the amount of funding available; and
- Pre-hearing where time and effort was spent preparing for activities that are not covered by this milestone.

No indicative hourly rates provided for the expenditure type

Te Arawhiti provides no indication of hourly rates. Therefore, it is difficult to know the effectiveness of applicant groups in procuring services. In our testing:

- Lawyers' hourly rates varied from \$100 to \$450 per hour. Two provided a total fee but with no hours, therefore, it was not possible to calculate the hourly rate;
- Project managers' hourly rate varied from \$55 to \$300 per hour. Again, three provided a fixed fee but with no hours making it not possible to calculate the hourly rate. Also, one lawyer acted as the project manager;
- Researcher fees varied from \$60 to \$150 per hour. Two provided a fixed fee;
- One historian had an hourly rate. Others provided a flat fee for completing the work; and
- Historians and researchers were more likely to agree to a fixed fee.

In addition, engaging with historians and researchers can be difficult. This is because the pool is small and many cannot afford to take on this type of engagement, as there is no upfront payment to cover initial costs and timing of reimbursements are not known. Upfront payments should ease this issue. It would be beneficial for Te Arawhiti to identify a list of historians/researchers with proven experience operating under the scheme and negotiate fixed/rates. If Te Arawhiti contracts this group directly, this could reduce the UFLs. However, its operating costs will increase, as Te Arawhiti will be validating and paying the invoices directly.

No third party reviews of applicants' reimbursements

There are no third-party reviews to check whether funding was used for intended purposes. Applicant groups may be completing activities, which may not progress their application or align with the purpose of the funding. Other schemes undertake regular third-party reviews. The purpose of these reviews is to validate expenditure back to source documentation, as well as, providing advice to applicant groups on enhancing their internal processes (**refer to recommendation #17**).

Resource consents

Funding does not cover Resource Consents, as per the Resource Management Act. We are not aware of other schemes that fund for RMA requirements. If Te Arawhiti wishes to fund applicant groups, this should be as a separate activity. CMT gives applicant groups the ability, with some exceptions, to accept or reject activities that need resource consents or permits in the customary title area. Also, local authorities cannot issue resource consents that would have adverse effects that are more than minor on a protected activity, unless the applicant group agrees. However, these activities are not funded under the scheme (**refer to recommendation #18**).

4.9. Reimbursements

Processing reimbursements

As at 19 December 2019, there have been over 566 requests for reimbursements. The majority of which relate to High Court claims and 409 reimbursement requests have received the full amount requested.

The time spent preparing reimbursements is not reimbursed under the scheme resulting in applicant groups being directly billed the full administration cost lawyers incur.

Policy specifies applicants are reimbursed in tranches between \$3,000 and \$50,000. In reality, applicant groups have received reimbursements ranging between \$300 and \$96,000.

To receive the full reimbursement, applicants should complete a summary of costs form and provide supporting documentation including timesheets, invoices, and milestone documentation.

Of the 37 individual reimbursements reviewed, 14 had their initial reimbursement reduced. Reasons for part of the claim being rejected included applicant groups having:

- Provided insufficient information;
- Incorrectly totalled costs (including GST);
- Claimed costs not reimbursable under the scheme; and
- Submitted duplicated claims.

When the Takutai Moana funding administrators identify issues, the applicant group is requested to resubmit their reimbursement. This can delay reimbursements, as applicant groups can be slow at resubmitting the correct information. From Deloitte's testing, the quickest time for processing a reimbursement was 11 days, while the median amount of time to process an application was 42 days. Reimbursements, which took longer than 14 days occurred due to Takutai Moana funding administrators requiring additional information (timesheets and invoices of lawyers, historians, etc.) from applicant groups and reimbursements being pooled together. For example, lawyers have claimed identical travel costs from multiple applicants (e.g. claiming the same mileage costs for multiple clients when travelling and representing different clients at the same hearing). To detect this, Takutai Moana funding administrators must identify the duplicated claims and manually re-apportion costs across all the lawyer's clients. The detective control is susceptible to human error and reliant on funding administrators' knowledge of previous claims and is a time-consuming exercise.

There have been instances where an applicant group has understated costs and Takutai Moana funding administrators have corrected the error and reimbursed the correct amount. In our testing, there was one example of this.

Over 70% of funding memos tested took over seven days to be completed. The memo provides approval for paying the reimbursements. Some sections of the memo, including providing background to each funding decision, do not add great value to the payment of reimbursements but instead expends resources to be completed **(refer to reimbursement #19)**.

The Programme Director is required to review all reimbursement payments. If there is a conflict of interest, an equivalent to the programme director approves the reimbursement payment.

Delays are primarily due to applicant groups providing insufficient information to the Takutai Moana funding administrators. This is often because the applicant groups do not understand the reimbursement process.

Tracking UFLs and Reimbursements

To manage applications, Te Arawhiti employs a low technology approach with all UFLs tracked via Excel spreadsheets including transfers. Takutai Moana funding administrators advised this has resulted in information being fragmented with funding memos, self-assessments, and reimbursements being stored in different files and spreadsheets **(refer to recommendation #20)**.

Budget template not widely used

Before receiving their reimbursement, applicant groups must complete a budget along with their first request for reimbursement. Many budgets were identical to costs outlined in the UFL. In addition to preparing a budget, applicant groups must also complete a summary of costs form for each reimbursement requested under the scheme. The summary of costs form is rarely reviewed against the budget and it often mirrors the UFL. This implies applicants do not understand the budget template or believe that by mirroring the UFL their budget and subsequently their reimbursement will be approved (**refer to recommendation #21**).

Third-party payment approval

Applicant groups are able to elect to have reimbursements directly paid to a third party. For this to occur, applicant groups must provide a signed letter authorising direct payment to the third party.

Outputs not reviewed

Takutai Moana funding administrators do not review outputs of work completed such as, research and evidence gathered. This is due to capacity constraints and sometimes lack of documentation applicant groups provide. Additionally, the Takutai Moana funding administrators do not have the specialisation to review whether the documentation/research is appropriate for the scheme. Other schemes ensure this happens and is recommended for this scheme (**refer to recommendation #22**).

4.10. Information

The following information is available on the internet to support an applicant through their application process and seeking reimbursements for costs from Te Arawhiti. This is in addition to any one-on-one communication or other advice provided directly to an applicant:

Document name	Purpose
High Court funding matrix	Summarises the milestones with tasks and expenditure type and the funding limits for the four complexity bands for the High Court pathway.
Crown engagement matrix	Summarises the milestones with tasks and expenditure type and the funding limits for the four complexity bands for the Crown engagement pathway.
MACA Applicant Funding Policy and Guidelines	
Part 1	Describes the overarching funding policy.
Part 2	Describes the funding for groups in the Crown engagement application pathway.
Part 3 FINAL - UFL reassessment	Describes the funding for groups in the High Court application pathway.
Part 4A FINAL - appeals	Describes the funding for appeals.
Part 4B FINAL - overlaps	Describes the funding for overlapping customary interest groups.
Proposed summary of costs example for High Court reimbursements	Provides an example sheet of Summary of Costs – information requests include milestone, tasks, expenditure type, amount requested, and description.
Proposed timesheet examples for High Court reimbursements	Provides an example of a timesheet and itemised invoices.
Budget template for Crown engagement applicants	An example of a budget template to support a Crown engagement applicant.
Budget template for High Court applicants	An example of a budget template to support a High Court engagement applicant.

To further improve the applicant groups' experience, the following information should be provided:

- Guidance to support applicant groups with their reimbursement claims, as to not knowing what costs will be reimbursed has resulted in:
 - Costs incurred they thought were reimbursable but were subsequently rejected; or
 - Not claiming costs, as they thought they were not reimbursable.
- The order for completing the application. Determining whether applicants should engage with a lawyer or Te Arawhiti first;
- Provide exemplars/guidelines of best practice for project management, procurement of researchers, legal management, and comparative analysis;
- Provide a recommended list of suppliers (lawyers, project managers, historians, researchers) who have experience with the scheme. Applicant groups do not need to use the suppliers on this list however are able to refer to it to identify specialists with experience operating under the scheme;
- Provide detailed guidelines explaining which costs will, and will not, be reimbursed; and
- Update/include the links to the referenced appendices on Te Arawhiti's website.

In addition to the above, there are no formal guidelines and procedures for the Takutai Moana funding administrators to follow for reimbursements. As a result, applications are processed in an inconsistent manner (e.g. reconciling timesheets to the summary of costs is not consistent). This means not all applicant groups are treated equally with some reimbursements being scrutinised more than others (**refer to recommendation #23**).

5. Comparisons of the Scheme to Other Similar Schemes

We reviewed the scheme against the following similar schemes:

- Crown Forestry Rental Trust;
- Legal Aid; and
- Māori Land Court.

The key points of differences are:

1. Te Arawhiti funding is open to anyone irrespective of whether they have the financial means to support the application. Other schemes apply financial eligibility criteria or consider whether the applicant could fund legal representation themselves;
2. More research is required before Te Arawhiti considers the application compared to other schemes where only an initial amount of research is required;
3. Other schemes provide more publicly available information compared to Te Arawhiti, this includes what costs will be covered under the scheme and additional guidance on the type of information applicants must provide;
4. Other schemes offer more assistance to applicants before submitting an application. Te Arawhiti's is more limited due to resourcing constraints;
5. There is no timeline for approval of funding whilst other schemes have timelines; and
6. Te Arawhiti applies an UFL limit whilst others have a maximum grant with prescribed hourly rates.

Based on Deloitte's analysis, we suggest Te Arawhiti consider the following:

1. Review UFL for both pathways;
2. Allow funding to be transferred between milestones;
3. Further increase funding for Case Management Conferences;
4. Provide information on what is reimbursable;
5. Introduce hourly rates, which provides clarity over the number of hours estimated under each milestone;
6. Undertake third party periodic review of applicant grants to ensure funding is spent appropriately and milestones are achieved; and
7. Consider removing the UFL and allow applicant groups to apply for funding once a quarter or provide a one-off lump sum. This would be subject to a high-level whole-of-life budget supported by quarterly budget forecasting.

Refer to recommendation #24.

6. Key Recommendations

	Ease of Implementation	Recommendation	Te Arawhiti benefit	Applicant group benefit
1.		<p>Promoting the scheme</p> <p>i. Review and update the content of the information about the scheme.</p> <p>ii. Promote the scheme via standard and social platforms. This will enable Te Arawhiti to educate applicant groups about the scheme including how to manage costs and resources. This will act as a cost saver for Te Arawhiti and lawyers in explaining how the scheme operates.</p>	✓	✓
2.		<p>Overlapping interests</p> <p>Provide funding that would enable experienced independent facilitators to facilitate hui with interested parties to resolve the multiple overlapping interests for many of the applications. This will not necessarily speed up the process, but will provide interested parties the opportunity to resolve any issues before appearing in the High Court. This will assist applicant groups address issues in a more traditional and equitable setting.</p>		✓
3.		<p>Case Management Conferences</p> <p>Determine whether the additional funding available for conferences is sufficient.</p>		✓
4.		<p>Te Arawhiti – Takutai Moana funding administrators</p> <p>Develop further key performance indicators for the Takutai Moana funding administrators. This would assist in understanding and managing the level of performance and could be used in the Te Arawhiti’s management and annual report; for example, “peer review completed within 48 hours” and the “number of reimbursements claims processed without deductions is greater than 95%”.</p>	✓	
5.		<p>Appealing a Crown Engagement decision</p> <p>Provide funding for an applicant group to seek a judicial review of the Minister’s decision. This will allow access to natural justice.</p>		✓

	Ease of Implementation	Recommendation	Te Arawhiti benefit	Applicant group benefit
6.		<p>Switching Pathways</p> <p>i. Develop guidelines to explain the process for how funding will be applied for applicant groups, which switch between the High Court and Crown engagement pathways.</p> <p>ii. Limit the number of times applicants can switch pathways to no more than three times. (Noting that if the Minister does not agree to engage with an applicant – the Crown engagement pathway is no longer an option). This would ensure funds are not depleted by re-performing activities under the scheme to bring parties up to speed. To assist with this Te Arawhiti should consider introducing a dual pathway UFL.</p> <p>iii. Consider introducing a new UFL for dual pathways to assist applicant groups manage costs. This could be a new UFL or replace the current two, which would introduce process efficiencies.</p>	✓	✓
7.		<p>Upper Funding Limits</p> <p>i. Consider whether to maintain this business rule of 15% contribution or determine whether funding is more “means-tested,” taking into account whether they have completed a Treaty settlement.</p> <p>ii. Revisit the rationale for applying the 15% contribution for applicant groups, as there are some applicant groups that do not have the resources and believe this policy is disadvantaging them.</p>		✓
8.		<p>Review the UFLs to ensure they are representative of the time and effort required for each milestone, as the length of time to reach a determination may vary between applications and some applicant groups may not have sufficient funding.</p>		✓
9.		<p>Undertake a modelling exercise to determine the total cost of funding the scheme if adjustments were made to, for example:</p> <ul style="list-style-type: none"> • Both pathways; • Introduce a new UFL for applicants, who have submitted to both pathways; • Introduce hourly rates for each role; and • Te Arawhiti contracts/engages with certain roles directly instead of the applicants. 	✓	✓

	Ease of Implementation	Recommendation	Te Arawhiti benefit	Applicant group benefit
10.		<p>Milestone limits</p> <p>For the expenditure type (e.g. project manager, lawyer, historian, and researcher) develop guidelines outlining the roles, responsibilities, and tasks for each expenditure type. The guidelines should outline what expenses will, and will not, be reimbursed under each milestone of the scheme. This includes providing examples of the types of tasks lawyers, historians, project managers etc. should complete under each milestone. This should be communicated in person when the applicant submits a reimbursement claim and before the funding is used.</p>		✓
11.		<p>Determining the complexity band based on an assessment</p> <ul style="list-style-type: none"> i. Merge the two indicator groups because having two separate ones provides little value, as both groups determine the complexity band. ii. As the majority of the ratings are high or very high, consider removing the low and medium complex bands. This will help reduce the time in determining, which complexity band should be applied. iii. Introduce a new indicator to ascertain whether the applicant group has the mandate from the appropriate iwi, hapū, and whānau. This will assist Te Arawhiti to know whether the applicant group has the appropriate authority. 	✓	✓
12.		<p>Determining and confirming Upper Funding Limit</p> <p>Refresh the approval process for approving the UFL memorandum. Determine whether having only the Operations Support Manager and Director, Te Kāhui Takutai Moana approve the memorandum before the Chief Executive's approval is sufficient and does not increase the risk profile. If this process is sufficient, fewer approvals for UFLs should be sought.</p>	✓	✓
13.		<p>Agree a timeframe (e.g. three months) for when an applicant group must lodge an appeal with Te Arawhiti including the process for appealing if there is a disagreement with Te Arawhiti's assessment. This should be communicated with applicant groups to provide certainty when Te Arawhiti expects to receive an appeal by.</p>	✓	

	Ease of Implementation	Recommendation	Te Arawhiti benefit	Applicant group benefit
14.		Implement automated controls, which assign complexity ratings based on the UFLs weighted score to reduce the risk of human error.	✓	
15.		Some applications have not applied for an UFL Contact the 34 group applicants in the High Court pathway that have not applied for an UFL and agree a timeframe for them to submit their application or determine whether they still intend to submit an application for a UFL. This will allow Te Arawhiti to understand their future funding obligations.	✓	✓
16.		Transferring between milestones Allow applicant groups to transfer between completed milestones where funding has not been fully exhausted.	✓	✓
17.		No third-party reviews of applicants' reimbursements Develop an audit programme to start auditing applicant groups to confirm that funding received has been appropriately used. This will allow Te Arawhiti to audit a selection of applicant groups to provide assurance over expenditure use, milestones completed and documentation as well as providing advice to applicant groups on enhancing their internal processes.	✓	
18.		Resource consents Consider introducing a new funding category to fund activities that require an applicant group to accept or reject activities that need resource consents or permits in their customary title area. This should be a separate activity not linked to UFLs.		✓
19.		Processing reimbursements Review the reimbursements memo and remove sections that provide little value but instead expend resources to be completed. This will assist in speeding up the process.	✓	
20.		Tracking UFLs and Reimbursements i. Introduce a system for tracking applications. Consider whether project/activity codes within Te Arawhiti's finance systems can be used to track UFLs and reimbursements. This would mean the UFL and reimbursements for each applicant group is recorded within one location.	✓	

	Ease of Implementation	Recommendation	Te Arawhiti benefit	Applicant group benefit
		ii. Store all information in a central repository aligned to the project/activity code. This would ensure all approvals, funding memos, and costs are recorded in a single location, which would remove the requirement to maintain the information on Excel spreadsheets.		
21.		<p>Budget template not widely used</p> <p>Provide training to applicant groups on the purpose of completing the budget template and make this mandatory. This should include explaining to applicant groups what the funding can be spent on. This will help improve the understanding of the budget process and what the funds can be used for and therefore improve the reimbursement process.</p>	✓	✓
22.		<p>Outputs not reviewed</p> <p>Develop a process for reviewing the outputs to ensure the documentation/research received meets the purpose/objectives of the scheme. This could include developing a standard/summary checklist outlining the elements that documents should contain for the report to withstand High Court and Ministerial scrutiny. This review would be separately undertaken from the Takutai Moana funding administrators and be completed by people with policy and/or research experience.</p>	✓	
23.		<p>Information</p> <p>i. Update the documentation to further improve the applicant groups' knowledge and experience by providing the following information:</p> <ul style="list-style-type: none"> • Guidance to support applicant groups with their reimbursement claims, as poor information has resulted in: <ul style="list-style-type: none"> ○ Costs incurred being rejected as they are not within scope; or ○ Some costs not being claimed, as they are thought not to be within scope; • The order for completing the application. Determining whether applicants should engage with a lawyer or Te Arawhiti first; • Provide exemplars/guidelines of best practice for project management, procurement of researchers, legal management, and comparative analysis; • Provide a recommended list of suppliers (lawyers, project managers, historians, 	✓	✓

	Ease of Implementation	Recommendation	Te Arawhiti benefit	Applicant group benefit
		<p>researchers) who have experience with the scheme. Applicant groups do not need to use the suppliers on this list however are able to refer to it to identify specialists with experience operating under the scheme; and</p> <ul style="list-style-type: none"> Update/include the links to the referenced appendices on Te Arawhiti’s website. <p>ii. Develop formal guidelines and procedures for the Takutai Moana funding administrators to follow for reimbursements. For example:</p> <ul style="list-style-type: none"> The guidelines should include what costs are/are not reimbursed (eligibility) under the scheme; The appropriate level of scrutiny to apply when reviewing reimbursements and UFLs; List of required documents for the review; and Timeframes for completing reimbursements. 		
24.		<p>Refresh and Review elements of the scheme</p> <ul style="list-style-type: none"> Review UFL for both pathways; Allow funding to be transferred between milestones; Further increase funding for Case Management Conferences; Provide information on what is reimbursable; Introduce hourly rates, which provides clarity over the number of hours estimated under each milestone; Undertake third party periodic review of applicant grants to ensure funding spent appropriately and milestones achieved; and Consider removing the UFL and allow applicant groups to apply for funding once a quarter. This would be subject to a high-level whole-of-life budget supported by quarterly budget forecasting or provide a one-off lump sum. 	✓	✓

Ease of Implementation Ratings (as used in the detailed improvement opportunities section):

Ease of Implementation Rating	Definition
Level 1	This improvement opportunity is able to be actioned through current resource capability and does not require significant resource planning or effort.
Level 2	This improvement opportunity requires designated resources and effort to implement
Level 3	This improvement opportunity requires significant resources and effort to implement.

7. Summary of Feedback from Survey Respondents

Who has responded?

The external stakeholder survey response rate of 7.2% has been lower than anticipated. Based on a population size of 305, as of 30 June 2020, 22 responses have been received – 18 electronic and four postal, as outlined in the table below:

Respondents/Type of survey	E-survey	Postal surveys	Total
Applicants	13	2	15
Lawyers	5	2	7
Total	18	4	22

The survey respondents mainly represented iwi and hapū or both. Only one represented a whānau.

In the section below, Deloitte has summarised the feedback from the surveys:

1. Funding is considered insufficient. Observations were made about completing tasks for free, or lawyers funding applicant groups (until reimbursements have been processed). However, no respondents provided actual dollar amounts of how much they have funded an applicant group or paid for services themselves nor how much Te Arawhiti should be funding each application;
2. To address overlapping interests, there is an expectation that applicant groups have been consulted alongside other applicant groups to resolve overlapping claims. Some applicant groups stated they cannot participate unless Te Arawhiti funds the process. In contrast, other applicant groups believe that Te Arawhiti has indicated that consultation costs are not covered, but their view is that it will have to be managed as wananga. Applicant groups responses varied regarding Te Arawhiti's involvement in the management of overlapping claims. Some applicants considered Te Arawhiti's input as "unneeded and unwanted interference" with the work they need to do to prosecute the claims, while other respondents wanted additional support from Te Arawhiti;
3. Applicant groups who are only in the Crown engagement pathway still have to monitor overlapping claims in the High Court, even though this is not funded;
4. There is concern that some applicant groups prioritise funding for legal services and exhaust funding at the evidence gathering stage even when more evidence gathering and pre-hearings are required;
5. Funding assumes that infrastructure is already in place, such as start-up costs, general administration, hui, transport, and technology support;
6. Many applicant groups do not understand the reimbursement process and thought that Te Arawhiti takes too long to process reimbursements. Also, the process is not clear or consistently applied;
7. Applicant groups believed there should be some up-front funding to cover initial costs and funding paid on completion of milestones;
8. There was mixed support for Te Arawhiti providing access to a pool of resources such as, project manager, historians, and researchers. Some believe it implies that the Crown wishes to impose its mana on the applicant groups; whilst others do not consider this to be the case;

9. Legal Counsel advised an applicant group that the High Court pathway was the preferred preference over the Crown engagement pathway;
10. One respondent applied through both pathways so not to be disadvantaged by only selecting one; and
11. One respondent applied for the Crown engagement pathway only, as this reduced their exposure to debt and cost.

Feedback from Interviews with Lawyers include:

1. There is a strong belief that failure to fund judicial reviews and appeals could be breach of the Treaty of Waitangi;
2. Lawyers are acting in a broader capacity (i.e. educator of the scheme/Act; funding activities until applicant groups are reimbursed);
3. A strong suggestion is for Te Arawhiti to fund independent mediators/facilitators to assist with resolving overlapping claims and mandate issues;
4. Additional funding is required for attending overlapping claims hearings with their applicant group especially in a pathway they are not seeking recognition;
5. Applicants that have not entered into a Treaty Settlement with the Crown should be treated as a priority compared to those that have;
6. The Case Management Conferences are considered important but insufficient time has been allocated;
7. Only through communications with Takutai Moana funding administrators have applicant groups and their lawyers been able to identify the costs that are funded or not under the scheme. A guide of costs funded under the scheme should be publicly available;
8. Lawyers believe they have submitted reimbursements in a consistent manner with various amounts of supporting documentation. Their perception is that by providing less, instead of more, means the reimbursement will be accepted. This has hindered the advice lawyers are able to provide applicant groups as costs for an activity may be reimbursed under one claim and denied under another;
9. To ensure consistency in reimbursements, Te Arawhiti should refresh the reimbursement templates;
10. Funding is considered insufficient, particularly for the interlocutory hearing and evidence gathering/pre-hearing milestones;
11. There is a limited pool of historians to complete research for applicants. With the high number of overlapping claims, some historians are unable to complete work for applicants due to conflicts of interest;
12. Te Arawhiti only deals with the named person on the application, which has resulted in additional administration and processing costs for applicant groups;
13. Reimbursements take too long to be approved resulting in the updated reimbursement table sent to applicant groups not reflecting their current funding balance; and
14. The funding allocations are insufficient to cover the costs of lawyers/applicant groups attending hui to resolve overlapping claims. Often costs not claimed for include flights, accommodation, and the lawyer's time.

Statement of Responsibility

The procedures that we performed did not constitute an assurance engagement in accordance with New Zealand Standards for Assurance engagements, nor did it represent any form of audit under New Zealand Standards on Auditing, and consequently, no assurance conclusion or audit opinion is provided. The work was performed subject to the following limitations:

- Our assessments are based on observations from our review and sample testing undertaken in the time allocated. Assessments made by our team are matched against our expectations and best practice guidelines. This includes comparison with other similar processes we have assessed. This report offers recommendations for improvements and has taken into account the views of management, with whom these matters have been discussed.
- Because of the inherent limitations of any internal control structure, it is possible that errors or irregularities may occur and not be detected. The procedures were not designed to detect all weaknesses in control procedures as they were not performed continuously throughout the period and the tests performed are on a sample basis.
- Any projection of the evaluation of the control procedures to future periods is subject to the risk that the systems may become inadequate because of changes in conditions, or that the degree of compliance with them may deteriorate.
- The matters raised in the deliverable are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. We cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud. Accordingly, management should not rely on our deliverable to identify all weaknesses that may exist in the systems and procedures under examination, or potential instances of non-compliance that may exist.

We have prepared this report solely for the use of Te Arawhiti. The report contains constructive suggestions to improve some practices, which we identified in the course of our review procedures. These procedures are designed to identify control weaknesses but cannot be relied upon to identify all weaknesses. We would be pleased to discuss any items mentioned in this report and to review the corrective action implemented by management.



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